

**Reinventing Conservation Easements:
A Critical Examination and Ideas for Reform**

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Abstract

“The goods of nature and fortune... are only lent. We think ourselves masters, when we are only stewards, and forget that to each of us it will one day be said, ‘Give an account of thy stewardship.’” Joseph Horne, as quoted in Richard Brewer, Conservancy, p.77. Hanover: University Press of New England (2003).

“The continued success of land trusts depends both on public confidence in, and support of, the conservation efforts of these organizations, and on building conservation programs that stand the test of time. It is every land trust’s responsibility to uphold this public trust and to ensure the permanence of its conservation efforts.” Land Trust Alliance, Standards and Practices (2004)

“The whole process is going to fall apart unless we solve these problems.” Senior official of a major land trust.

No recent happening in land conservation rivals the deployment from coast-to-coast of conservation easements. Beyond tax and other public subsidies, one of the driving forces favoring this phenomenon is that conservation easements are perceived as a win-win strategy in land protection, by which willing landowners work with private land trusts or government agencies to provide lasting protection of portions of the American landscape. In short, conservation easements often accomplish something that comes easily and makes people feel good, which is certainly no vice but which, together with their tax and other public subsidies, explain their extraordinarily rising popularity. The question, that this report will explore, is whether they may also present something of a time bomb that requires preventive action, and if so, what can be done to minimize the potential damage while realizing the benefit.

Part One of this report provides an introduction to some of the issues arising from conservation easements, as foretold at the time of the enactment of the federal laws that granted them tax subsidies. Part One also describes the reasons why the public has a stake in conservation easements and in their content and governance.

Part Two provides a Primer on Land Trusts and Conservation Easements, including defining terms, providing historical context and reporting current trends and a preview of the future problems that they present.

Part Three specifically discusses issues emanating from conservation easements and evaluates a number of alternative ways to resolve them. The broad categories of issues include (i) the content and uniformity of easements, (ii) conservation easement tracking for the future, (iii) public benefit, accountability and transparency with respect to conservation easement creation, (iv) conservation easement holder stewardship, institutional capacity and accountability, (v) conservation easement durability, amendment and termination, (vi) conservation easement appraisal and tax issues, (vii) the implications of conservation easements on government regulatory, public land acquisition and land taxation programs and (viii) equity and environmental justice issues related to conservation easements.

The laws and conventions of conservation easements, as new inventions of real estate law, were created at a time when no one could have foreseen their explosive growth and complexity. It is the general thesis of this report that these laws and conventions require well-considered approaches to reform in order to be able to more assuredly realize their long-term public benefits. While this report takes the view that reform is necessary, it tries to do justice to different approaches that have been advanced as well as some of the pros and cons of each.

Conservation easements should be evaluated and governed with a view to the context of conservation-easement-time, which is not the present nor the near-term but the indefinite future. Otherwise, we may simply leave to future generations a legal morass of many tens or hundreds of thousands of different conservation easements, the terms, holders, and even locations of which may ultimately be difficult to discern, and the public benefits of which could be ultimately lost.

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Except for the period of my visiting fellowship at the Lincoln Institute beginning in September 2004, I have served as chief of the Natural Resources Division of the Maine Attorney General's Office since 1990, from which I am on a leave of absence. In both my career as a public lawyer in Maine specializing in natural resources, land use and environmental issues, and in connection with my volunteer work with land trusts there, I have had considerable practical experience with conservation easements, having participated in the creation of many -- large and small, good and bad -- each of which has been a learning experience.

This report is written in an effort to constructively explore issues emanating from the explosive and largely unregulated growth of conservation easements around the nation. In recent years, the relationship of this increase in conservation easements to the reduction in new acquisitions of public lands, particularly by the federal government and many states, must be seen as highly related. The exponential growth of conservation easements, in some measure, appears to be an outgrowth of increased political pressure in recent years to avoid outright public acquisitions of land as well as currently prevailing, negative public attitudes concerning land use regulation in many communities. To some, this is a crying shame, while to others it is a cause for celebration; regardless, it is a reality to which we as a society must acclimate ourselves, including in our laws and conventions that were created at a time when no one could have foreseen the exploding deployment of conservation easements.

Conservation easements leave land in private ownership, while allowing the easement holder (a private land trust or government entity) to enforce contracted-for, voluntary, often donated but increasingly paid-for restrictions on future uses of the easement-encumbered property.

Conservation easements are often welcomed as achieving the goals of land protection without regulation, without adversity and even often without government. My perspective, as a believer in conservation easements, is that they are a valuable tool, complementing regulation and land acquisition when appropriate, but that the systems by which they are designed and governed need reform, lest we ultimately risk losing the public benefits that we thought conservation easements would secure in the future.

I was invited to the Lincoln Institute of Land Policy as a Visiting Fellow to explore these issues fully and to consider and articulate approaches to possible reforms, both in conservation easements and in the laws that govern them, that might enable these relatively new and rapidly escalating inventions of real estate law to more assuredly keep the promises that they make to future generations.

I wish to express my thanks to Joan Youngman, Senior Fellow at the Lincoln Institute, and Steven Rowe, Maine's Attorney General, for allowing me this opportunity. From the Lincoln Institute, I also wish to thank President Jim Brown, Armando Carbonell, Ann LeRoy, Jane Malme, Yu-Hung Hong, and Semida Munteanu for their help in critiquing, editing and otherwise making this project possible. I also wish to express my gratitude to John Echeverria and Georgetown Law Center's Environmental Law and Policy Institute for nurturing my interest and involvement in these issues over the last two years. In addition, I wish to give special acknowledgement and thanks to the following people (in alphabetical order): Scott Abrahamson, Ole Amundsen III, John Bernstein, Greg Bialecki, Ron Blake, Darby Bradley, Richard Brewer, Tim Burpoe, Todd Burrowes, Meg Caldwell, Jim Celano, Buzz Constable, Michael Contino, Billy Coster, Larry Dennis, Betty Deakin, Mike DiNunzio, Tim Duane, Todd Dunham, John Echeverria, Robert Ellickson, Richard England, Sally Fairfax, Daniel Farber, Charles Fausold, William Fischel, David Gibson, Bill Ginn, Jennifer Giambattista, Tim Glidden, Andrew Goldberg, Max Green, Darla Guenzler, Julie Ann Gustanski, Dan Halperin, Caryl Hart, Jean Hocker, Cathy Johnson, Jason Kibbey, Mary Ann King, Ralph Knoll, Gerald Korngold, Mitch Lansky, Don Lee, Joel Lerner, Jim Levitt, Jim Libby, Ted Lorensen, Bonnie Lounsbury, Dan Luciano, Julia Mahoney, Joe Martens, Tom Martin, Bernie McHugh, Jim McLaughlin, Nancy McLaughlin, Mark Megalos, Ralph Monticello, Peter Morgan, Larry Nashett, Mario Navarro, Rupert Neily, Mary Nichols, Sean Ocieпка, Jessica Owley, Halton Peters, Andrea Peterson, Mason Phelps, Justin Pidot, Karin Marchetti Ponte, Leslie Ratley-Beach, Keith Ross, Kathryn Rowen, Bill Rudge, Jym St. Pierre, Jamie Sayen, Doug Scott, Fran Sheehan, Debbie Sivas, Peter Sly, Stephen Small, Jim Snow, David Soucy, Peter Stein, Chris Sturm, Fred Todd, Tammara Van Ryn, John Vandlik, Larry Walters, Wes Ward, Rand Wentworth and Martin Wilk. Having interviewed and/or received comments from all of these people, it is safe to say that no two of them think identically on the issues discussed in this report, and some would disagree vigorously with each other on at least some of these issues or what should be done about them. However, all of their views, as well as my own professional and personal experiences and research, have helped frame the ideas expressed here, which are exclusively my own. Last but not most of all, I thank my wife Ginny for her patience and help in seeing this project through with me.

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Reinventing Conservation Easements: A Critical Examination and Ideals for Reform

Introduction

The Policy Context of this Report

“Finally, as the land trust movement and use of easements matures, we are faced with questions born of our success....” Jean Hocker, former president of the Land Trust Alliance.

A quarter of a century ago, when the vast majority of us had never even heard of a conservation easement, Daniel Halperin, then Deputy Assistant Secretary at the U.S. Department of the Treasury, and today a Professor at Harvard Law School, testified before Congress to express his concerns about pending legislation that would make permanent what were then temporary laws that experimentally granted income tax deductions for the donation by landowners of conservation easements. In his testimony, the concerns raised by Professor Halperin about the future were nothing less than prescient.

He spoke about the difficulty of determining whether there would be a public benefit of donated but privately held conservation easements commensurate with the public subsidy conferred by their income tax deductibility and other tax benefits.¹ He spoke about the difficulty of appraising the value of donated conservation easements for tax purposes, and the parallel difficulty for the IRS in evaluating whether these appraisals were fair. He spoke about the uncertainty of whether conservation easement holders would have the resolve and resources to forever monitor and enforce the easements held by them, in the absence of which the public would receive no meaningful or lasting benefit at all. He spoke about the vagueness of the concept of a conservation easement and its conservation purposes, as then expressed in the law, which is essentially unchanged to this day. He advocated for at least some public involvement in conservation easement creation, so that the public would have a say in what otherwise would be exclusively a private, albeit publicly underwritten, transaction. He spoke about the risk of conservation easements that would conserve nothing of public value at all, as well as those that would protect nothing that was at risk in the first place. He spoke about the potential abuse by taxpayers who would donate conservation easements that would benefit themselves more than the public subsidizing the easement. In short, he spoke about whether conservation easements, as then and still now devised under the law, would ultimately deliver the promise of permanent and meaningful land conservation of publicly valuable landscapes, as the public believed and hoped that they represented.

¹ Today, there are three significant federal tax incentives for conservation easement donation: first, an income tax donation for the appraised value of the easement; second, the exclusion of the value of the easement from the property as appraised for estate tax purposes upon the death of the easement’s donor; and third, an additional exclusion for estate tax purposes of up to 40% of the value of the easement. There are also potential real estate tax benefits and other financial incentives under state laws, which in some cases can be considerable. These tax and other incentives are discussed later in this report.

A quarter of a century later, we can now see, if we are willing, that Professor Halperin foretold many important issues presented by conservation easements, although he could not have predicted their forthcoming numbers and complexity.

Does this mean that conservation easements are bad public policy? The premise of this report is to the opposite effect: in a properly designed system, conservation easements comprise a useful method of preserving important portions of the American landscape with minimum cost and maximum effect, where doing so confers a meaningful public benefit, and when established with sufficient and permanent oversight. A well-crafted conservation easement may be worth the public subsidy if it meaningfully protects a property having publicly beneficial conservation values, provides durable land protection that cannot be accomplished through regulatory means, and is held by an entity having the resolve, durability and resources to permanently monitor and uphold it. Conservation easements may be of particular usefulness where publicly valuable portions of our landscape can be protected by this device, while keeping the land in private ownership when that is considered to be its best use. *However, in few places in this nation are there any legal or other conventions by which these important values and benefits of conservation easements are meaningfully scrutinized and secured from a public perspective.*

Why Does the Public Have a Stake in Conservation Easements?

Why should the public, and therefore its government at all levels, care about how conservation easements are created and managed? After all, like most other easements, conservation easements are usually private transactions, so why should this be a *public* concern unless the government is directly involved as the easement holder? One important answer is that, with virtually every conservation easement, there is a significant public subsidy. The public *should* care about how its money is being spent, whether it is being spent for something of long-term public benefit, and whether it is being spent efficiently; that is, the public should be interested in whether it is getting a fair public bang for its buck.

What is the basis for the assertion that virtually all conservation easements are publicly subsidized? First, increasingly, these easements are being purchased with public money, the most obvious form of public subsidy, and sometimes on a grand scale involving many millions of dollars. But even while most conservation easements are still donated by private landowners to private land trusts, they almost always result in an income tax deduction to the donor, as well as, in many cases, reduced real property and estate taxes for the landowner in the future and, in some cases, other substantial public subsidies as well.

Even where a private land trust purchases for fair market value a conservation easement from a private landowner, as is true for the largest conservation easement acquisition in history (a 760,000-acre easement, that forbids most forms of development on working forests in Maine, purchased by a private land trust for its appraised value of \$28 million), nonetheless the public's money is at work, since virtually every dollar paid for such an easement was donated to the cause, resulting in charitable income tax deductions for the donor. Many conservation easements also result in reduced estate and real estate taxes for the landowner in the future.

A fair question is why should there be any greater public interest in donated conservation easements than in the donation of money or other financially valuable assets to a charity? The answer to this question lies in the fact that conservation easements are about promises made and to be kept in the *future*. Conservation easements provide nothing of value to the public, nor even to the charity that accepts them, if they are not well-crafted, permanently encumbering land that has publicly-valuable conservation values, and held by an enterprise that has the capacity and resolve to permanently monitor, enforce and defend them perpetually. To put it differently, would Congress have provided significant tax incentives for the donation of conservation easements, if the understanding was that the promises made by these new inventions of real estate law might not be kept?

Beyond the public's financial investment, there is also a public interest in conservation easements as a form of charitable trust, the premise of which is that the public has an interest that transcends that of the private parties to the transaction. Further, some conservation easements guarantee public access to the property, such as for hiking or scenic enjoyment, giving the public an added stake in the long-term security of the easement. Further still, in the case of conservation easements granted by developers as a quid-pro-quo for regulatory permits, these easements also comprise a public investment because they are part of the consideration given to the public in exchange for the right to proceed with a project that may cause environmental harm. Finally, and not least importantly, the public has an abiding interest in the orderly future of legal understandings and stability of interests in real estate. There is no less of a public interest in the long term, legal meaning and durability of conservation easements than there is in that of fee simple deeds to property.

For these reasons, it is the premise of this report that there is an essential *public* interest in conservation easements. However, even those in the private land trust community who would contend otherwise² should still be concerned about the long term capacity and resolve of their organizations, as well as of the underlying legal institutions that enable conservation easements to exist, which are necessary to assure that these modern inventions of real estate law can live up to the responsibilities entrusted to land trusts by their donors.

In sum, when a conservation easement is created, there is a legitimate interest public concern that the easement will be honored and that the easement holder (or some entity) will be able to monitor, enforce and defend the easement *forever*, as conservation easements promise. Indeed, the very purpose of state and federal laws that support and subsidize the creation of conservation easements is that the public interest is intended to permanently benefit from them.

² Some land trust officials see no public interest or need for public involvement in the creation or management of conservation easements held by private land trusts. While this view is not prevalent among the land trust representatives interviewed in the course of preparing this report, nor is this view shared by the Land Trust Alliance, its existence in some parts of the land trust community must be acknowledged, and thus the need for the discussion in this paragraph.

A Primer on Conservation Easements and Land Trusts

What is a Conservation Easement?

A conservation easement (in some states referred to as a conservation restriction or similar term) is a set of permanently enforceable rights in real property, held by a private non-profit corporation (typically a land trust) or a government agency authorized to hold interests in real estate. These rights impose a negative servitude (in other words, a set of promises *not* to do certain things) upon the encumbered land, with these promises permanently enforceable by the easement holder.

In this, a conservation easement is something of a misnomer, because, in legal parlance, an easement is generally considered to be an interest in land that enables the easement holder to have rights of access or other active use of another person's property (think of a utility or road easement). By contrast, a conservation easement is designed to *prevent* uses of the encumbered land that are inconsistent with the terms of the easement.³ Although some conservation easements provide for public access to the property, most provide only the holder with access to monitor easement compliance.

When a conservation easement is held by a private land trust or government entity, the underlying fee ownership remains in the landowner, and may be bequeathed, sold or otherwise conveyed just as with any other interest in real estate, subject always to the restrictions on future use of the property as stated in the easement.

The scale and meaningfulness of conservation easements can vary dramatically. At one end of the spectrum, there are conservation easements that do little more than “conserve” a landowner's residential backyard. At the other end of the spectrum, some conservation easements significantly protect pristine lands having natural and/or recreational resources of extremely high public value. Where such a conservation easement also provides significant rights of public access, there may be little practical difference between it and a grant to the easement holder of fee simple (or outright title) to the property; although with a conservation easement the landowner continues to own the land and can dispose of it at will, subject to the easement.

³ Some federal agencies have employed a variation of the conservation easement, called a “reserved interest deed.” By this instrument, the property is conveyed to the grantee, with the grantor reserving specified rights to continue to use the property for particular purposes and none other. The advantage of this mechanism over a conservation easement is that it tends to eliminate legal ambiguities about future, but unforeseen, uses of the property, resolving such disputes in favor of the grantee. By way of example, which is not theoretical, a conservation easement that prevents a landowner from removing vegetation other than that which is dead or dying might not legally prevent the landowner from poisoning trees in order to remove them. By contrast, a reserved interest deed that vests all rights in the property in the grantee, except for the right to remove dead or dying vegetation, would more clearly be violated in such circumstances. The downside of the reserved interest deed, and perhaps one of the reasons why the land trust community has tended to reject it, is that the grantee becomes the owner of the property for all purposes not specified as reserved to the grantor, a fact that might have potentially adverse liability and tax consequences for the grantee.

Although similar on paper, a qualitatively different kind of conservation easement is often referred to as a “working landscape” easement. This type of easement allows continuation of certain beneficial uses of the property for forestry, ranching or farming, but eliminates development uses that are considered by the easement’s parties to be incompatible with such objectives. These conservation easements may be motivated by an interest in keeping the land in timber or agricultural production in order to attempt to maintain a local economic base or community way of life.

Although likewise similar on paper, still another kind of conservation easement is one that is negotiated or extracted by a local, state or federal regulatory authority as a quid-pro-quo in mitigation for a development permit. Some interviewed for this report stated the view that these types of conservation easements should not be distinguished from other types of permit conditions imposed by regulatory authorities. However, the reality is that a conservation easement, unlike a standard regulatory permit condition, is a stand-alone interest in real estate, is legally permanent and places upon the easement holder (which is often not the permitting agency) an ongoing responsibility to monitor and enforce the easement.

While many conservation easements have been charitably donated by conservation-minded landowners, who also receive tax benefits, in recent years there has been an increasing trend toward purchasing conservation easements, sometimes for their full appraised value. In some cases, this may cost tens of millions of federal, state, local and/or private charitable dollars.

What is a Land Trust?

A land trust is a loosely defined concept that usually includes at least the following basic elements: (1) it is a private, non-profit charitable corporation, incorporated under the laws of a state and qualified as tax-exempt and entitled to receive tax-deductible donations under section 501(c)(3) of the Internal Revenue Code; and (2) it has as a mission, but not necessarily its exclusive or even primary one, the conservation of land. Typically, we think of land trusts as the types of private organizations that are legally qualified to hold conservation easements, but the precise qualifications necessary for an entity to do so vary under the laws of each state. In most cases, land trusts avoid political advocacy or other controversial issues, preferring to work quietly with willing landowners and charitable donors.

Land trusts range in size and sophistication greatly, from very small, all-volunteer, community-based organizations with no office or significant funding, to very large, non-profit but wealthy organizations that work at a national and even international level. By far, the largest and most well-endowed land trust in the world is The Nature Conservancy (TNC), with chapters in all 50 states. TNC owns thousands of properties and conservation easements all over the globe and supports a staff also of thousands. Other national land trusts involved with conservation easements include the Trust for Public Land, the American Lands Conservancy, the American Farmland Trust, the Rails-to-Trails Conservancy and The Conservation Fund.

There are also land trusts that focus on a statewide basis. Examples include the Vermont Land Trust, the Society for the Protection of New Hampshire Forests, the Virginia Outdoors Foundation, the Montana Land Reliance, the Maryland Land Trust and the Massachusetts

Trustees of Reservations. Further, there are land trusts that have a broad regional focus, such as the Maine Coast Heritage Trust, the Forest Society of Maine, the New England Forestry Foundation and the Open Space Institute.

The majority of land trusts have come into existence in just the past 15 years and operate at a local level. Today, there is at least one land trust in every state, while a number of states have well over 100, with California and Massachusetts leading in numbers and Maine being the most prominent on a per capita basis. While land trust creation continues to rapidly increase, a policy question that this report will explore is whether the ever expanding numbers of small land trusts throughout the nation is something that is good for our (and their) future.

In both their conservation easement and other property holdings, and in their memberships and finances, land trusts have become a *big* business in America. Although their historical focus has been in the Northeast and the West, the greatest increase in numbers of new land trusts today has spread to the Southeast and Southwest.

Many local and regional land trusts are members of the Land Trust Alliance (LTA),⁴ whose purpose is to provide assistance to and networking among land trusts. The LTA actively promotes to its member land trusts high quality, albeit voluntary, standards and practices, which were recently updated in 2004. In addition, in some places where land trusts proliferate, there are regional and statewide networks that coordinate and educate land trust volunteers and staffs.

A Short History of Conservation Easements and Land Trusts

As permanent interests in real estate, conservation easements, as we know them today, could not exist at common law, primarily because of the lack of any benefited parcel of land owned by the easement holder, as well as the common law's anathematic view of permanent restraints on the use of property. Accordingly, conservation easements are a relatively recent invention of real estate law enabled by statute in virtually every state. The modern concept and vision of conservation easements were introduced by William Whyte, Jr. in 1959. The earliest conservation easement enabling laws were sporadically enacted by a few states in the 1960's, but most of these laws were enacted after 1980.

Accordingly, most conservation easements have been created in just the last decade or two and have been exponentially rising in numbers, as discussed in the next section. Particularly when compared to other interests in real estate, the novelty of conservation easements is a powerful statement about their lack of historical context, opportunity for judicial interpretation or long term management track record. This youthfulness contrasts with the fact that virtually all conservation easements purport to bind future uses and owners of the encumbered lands *forever*.

⁴ The Land Trust Alliance was originally the outgrowth of a conference held by the Lincoln Institute in 1981.

Until relatively late in the 20th century, there were only a modest number of land trusts throughout the country,⁵ with a relatively small number of conservation easements among their land holdings. However, following the enactment by Congress in 1980 of permanent tax subsidies for the donation to land trusts of conservation easements, and the virtually simultaneous adoption of the Uniform Conservation Easement Act, the slowly emerging evolution of land trusts and conservation easements began to multiply.

Recent Conservation Easement Trends and a Preview of Some of the Problems We Face

The extraordinary attractiveness of conservation easements is demonstrated by their explosive growth in recent years. *When calculating the numbers, however, perhaps the most important point is that no one knows, even approximately, how many there are.* In the five years from 1998 to 2003, the Land Trust Alliance estimates an increase in the number of local and regional land trusts from 1200 to nearly 1600, an increase in the number of conservation easements held by these land trusts from 7400 to nearly 18,000 and an increase in the area covered by these easements from nearly 1.4 million to over 5 million acres. New land trusts are born at the rate of about two per week. LTA President Rand Wentworth has estimated a doubling every four years of the number of acres under conservation easement held by local and regional land trusts alone.

There are many other organizations, such as national organizations like The Nature Conservancy and American Farmland Trust, which hold additional thousands of conservation easements. There are also untold thousands held by federal, state and local governments.

While the U.S. Department of Interior alone holds an estimated 12 million acres of conservation easements, there are no reliable estimates of all of the conservation easements held by the federal government. Under the current system, it would be an even more unimaginable task to calculate, no less locate, all of those held by state and local governments.

Often land trusts and government agencies alike focus on, publicize and celebrate the accumulating numbers of conservation easements in their portfolios, as well as the numbers of acres they cover, sometimes without equivalent regard for the quality of the easements or of the lands that they cover. In an interview for his report, one expert observer called this an “acres mentality,” and expressed concern that easement holders may be too focused on doing what comes easily (that is, opportunistic acquisitions of easements with inadequate regard to what they actually accomplish or what they will cost in the future). Another expressed the problem this way: “The deal’s the thing, not the future delivery.” Since conservation easements bring with

⁵ While most land trusts came into existence in recent years, perhaps the earliest is the Trustees of Reservations in Massachusetts, which was formed in 1891 as the brainchild of conservationist Charles Eliot. The Trustees remains a thriving organization to this day and among the nation’s most sophisticated land trusts, holding about 90 properties outright as well as about 200 conservation easements.

Following in his son’s footsteps, Charles Eliot’s father, then President of Harvard, spearheaded the creation of the Hancock County Trustees of Reservations in 1901. That organization began to acquire properties on Mount Desert Island in Maine, which, with the later assistance of John D. Rockefeller, Jr. and other wealthy conservationists in the area, would ultimately become Acadia National Park.

them long term and costly responsibilities for the holder in monitoring, stewardship, enforcement and defense, this can be short term thinking that can lead to long term problems, all as will be discussed in this report.

Conservation easements are infinitely variable. Calling something a conservation easement tells one nothing about what protections it affords or even what legal boilerplate it includes. Many conservation easement advocates extol the virtues of this nearly infinite flexibility, since it allows the landowner and easement holder to tailor each easement to their mutual interests. However, the increasing variability of the multiplying numbers of conservation inevitably will result in increasing difficulty over time for both easement holders and future successions of landowners in understanding, undertaking, monitoring and upholding all of their legal rights and responsibilities with respect to each easement. Heightening this effect is the fact that many conservation easements are increasingly negotiated, nuanced and complex, leaving even legal experts challenged in easement preparation, interpretation, oversight and enforcement.⁶

Also of increasing concern is the valuation of conservation easements. The valuation problem arises in two forms: the opportunity for excessive claims of income, estate and property tax deductions or reductions; and uncertainty as to the societal, cost-benefit calculus of each easement. Lately, the valuation of donated conservation easements has become a major cause for alarm by the Internal Revenue Service, which says that it will be applying an increasingly watchful eye on the deductions taken for these donations. However, as discussed later in this report, part of the problem may not be so much due to irresponsible easement appraisers and greedy taxpayers as that the IRS has not been precise enough in stating how conservation easement appraisals should be undertaken.

Even if the IRS adopts a more rigorous approach to easement appraisal in the future, it will never be in a good position to determine whether each easement, for which a charitable deduction is taken, is worthy in terms of conferring a public benefit commensurate with the public subsidy. As explored later in this report, that task must be undertaken by others, starting with the land trust or other easement holder and embracing some degree of public participation.

⁶ By all accounts, conservation easements are becoming increasingly legally dense and intricate instruments. Although not universally true, it is my own experience that the most difficult conservation easements to negotiate, and the ones that result in the most nuanced and challenging terms to interpret and apply, are often easements that are purchased, especially for their full appraised value. This is, at the same time, both counter-intuitive and predictable. Unlike where an easement is donated by a conservation-minded landowner, in the case of a landowner who is selling the easement for its full value (sometimes amounting to millions of dollars), the motivation is purely economic, and the landowner is understandably going to drive the hardest bargain both by trying to drive up the price and by trying to drive down the rights that it gives up in the easement. Ironically, the result can be that the terms of a conservation easement may be more compromised when it is *purchased* than when it is *donated*, especially when there is political pressure to make the easement “happen.” By comparison, consider the public acquisition of a highway easement. While often such an acquisition involves negotiation as to price, it would be unthinkable for the government to negotiate highly nuanced terms as to the rights acquired and the legal boilerplate of such an easement. Of course, it may be fair to say that these are different paradigms, but the question, when the public is *buying* a conservation easement for its full value, is whether they necessarily should be.

While conservation easements are almost always intended to be permanent servitudes on privately held property, the vast majority of states have no public registry for conservation easements, no consistent legal structure and no public review, transparency or accountability with respect to their design, monitoring, enforcement, defense or stewardship. Accordingly, there may be a growing disconnect, or perhaps it is a correlation, between the massive deployment of these new interests in real estate, their nearly infinite variability and the multitude of often new-born land trusts that hold them, on the one hand, and the largely undisciplined laws and conventions that govern them, on the other.

Although the nearly exponential trends in the deployment of conservation easements may be heartening to many in the land conservation community, they also pose equivalent challenges that require critical examination and consideration of reform, as this report will explore. However, meaningful change may be no easy task among the conservation easement community, since, as with all successful ventures, a large industry has grown up that is based upon the status quo. If there is any hope of having the conservation easement community support reform, it is necessary to persuade its participants of the precariousness of their long-term situation.

The evident solution is to create standards for conservation easements and their holders that are more uniform, explicit, publicly transparent and rigorous. Doing so would be in the long term best interests of those in the conservation easement community and the public at large.

Selected Issues and Responsive Reforms to Consider

This section presents a comprehensive discussion of particular problems that we face with the explosive growth of conservation easements, and remedies and reforms that might address these problems. Among the general approaches to reform are:

- changes to federal tax laws and/or regulations;
- greater state oversight of conservation easements and their holders;
- increased self-regulation by the land trust community;
- consolidation and networking of land trusts;
- and greater supervision of conservation easements and their holders by funding sources.

The purpose of advancing these reform ideas is to create more predictability and stability in the design and long term management of conservation easements, so that there can be a greater degree of assurance that these new inventions of real estate law will deliver on the promises that they make to future generations.

Conservation Easement Design and Uniformity

The Issues:

In the context of the history of property law, it may be considered that conservation easements today are at the same state of immaturity as was the fee simple deed during the decades when land was first conveyed by the King. With successions of deeds using varying formulations of words, the courts of England were given the opportunity to engage in a few hundred years of case law, parsing the precise meaning of these distinctions. Ultimately, with fee simple deeds,

there emerged legal boilerplate language to denote a finite set of real estate interests and reservations, and these have been further simplified and distilled by today's statutory deed forms enacted in many states.

What should make the conservation easement community anxious is the fact that, after just a few decades, there is more and increasing complexity and variability in conservation easements than historically existed with fee simple deeds.⁷ It is often said that each conservation easement *should* be unique, negotiated to the parties' mutual and particularized specifications. Indeed, the intention of the framers of the Uniform Conservation Easement Act was to provide a loose legal framework to allow great latitude to the parties to arrange their relationships as they saw fit. The framers of the Uniform Act expressed great faith in the rigor of the federal Tax Code as well as in the publicly-spirited intentions of the parties to conservation easements. However, these laws were written at a time when no one could have envisioned the explosion of conservation easements and their enormous and nuanced variability.

There are relatively few reported court cases around the nation testing conservation easements and explicating their terms. To their proponents, this denotes legal strength and impregnability. However, most conservation easement violations are settled without conclusive litigation or reported decisions, and not always to the end of upholding the easement's terms. Moreover, as interests in real estate, conservation easements are such a new phenomenon that not enough time has elapsed, since the creation of the vast majority of them, for us to experience the legal disagreements and testing that will inevitably occur over the indefinite future, which is the relevant time by which conservation easements should be evaluated. In sum, the relative scarcity so far of reported court cases involving conservation easements is due more to their novelty than to the fortitude and clarity of their design.

The conservation easement enabling laws of each state are different, sometimes markedly so. While virtually every state has a conservation easement enabling statute, a majority of those that do are not modeled on the Uniform Conservation Easement Act, and even many of the states that used the Uniform Act as a model departed from it in material ways.

This state of affairs, with what are already many tens of thousands, and will likely be hundreds of thousands of conservation easements, cannot serve future generations well. Under the present laws and conventions, how can we expect holders of these easements, no less a multitude of succeeding generations of landowners, to understand and attend to the often subtle differences in their terms?

Some of those who minimize the issue of lack of conservation easement standardization say that leases, by way of example, often are heavily negotiated and nuanced agreements, so why should conservation easements be different? The answer is that leases, like other contracts, are purely private transactions between their parties, of limited duration, easily amended by the parties, and

⁷ A 1999 study by the Bay Area Open Space Council showed that roughly half of the conservation easement holders surveyed did not use a model easement, with the worst offenders tending to be government holders.

without public subsidy. By contrast, conservation easements are of unlimited duration, involve public subsidies and substantial public interest, and are not easily amended by the parties.

The *quality* of conservation easements, which determines how well they will be able to deliver their promises over time, also differs markedly, and often depends upon the degree of legal expertise, negotiating skills and individual agendas of the parties to the transaction and their representatives.⁸ Remember that, under most state laws, calling something a conservation easement reveals little, if anything, about the degree to which it will actually conserve the land that it encumbers or virtually any of the other provisions that it contains. *By way of comparison, can one imagine such variability of quality and design in connection with the deed to one's home?*

The upshot of this piecemeal process of individualized conservation easement design is that landowners and holders alike will doubtlessly experience difficulties in the future, mounting with the passage of time, in understanding and monitoring easements so as to assure compliance with their often complex and differentiated requirements, a problem that is heightened by the fact that these interests in property are designed to last in perpetuity.⁹

Potential Solutions:

Most experts interviewed for this report conclude that efforts should be made to stabilize this situation, so that there are a legally sustainable number of basic conservation easement formulations for the different types of protections that they typically afford. In each case, the emphasis should be on simplification and standardization wherever possible, so that easement monitoring and compliance are reasonably achievable and efficient. Likewise, there should be greater efforts to tighten the relationship of conservation easement purposes and restrictions, so as to minimize the opportunity for future confusion and disagreement about the intent of the parties to the easement. Purpose clauses in conservation easements are not window dressing; they will be relied upon by future generations to deal with unforeseen land uses and events; and they will be of equivalent importance in determining the outcome of future efforts to terminate, amend, enforce or challenge the easement.

Conservation easement drafters must always be mindful that the words of the easement must have clear and precise meaning, including to non-lawyers who will be among the generations of landowners and holders to come. Drafters should also bear in mind the perpetual monitoring and management costs of each of the terms of the easement. Likewise, easement drafters should stick

⁸ In its survey of land trusts released in 2005, LTA reported that one of the concerns expressed about the future of conservation easements was their variable quality and resulting, potential failure to live up to the tests of time.

⁹ A comprehensive, graduate student study of large, "working forest" conservation easements around the country, many of which were financed by the federal Forest Legacy Program, found little uniformity in the terms of the easements surveyed, both among different holders and even within the portfolio of easements of each holder. The study's authors stated the view that the individualized ways in which easement terms are expressed inevitably will lead to difficulties in monitoring, compliance and enforcement, and it admonished that drafters of easements should pay careful attention to this problem. A Congressional study of the Forest Legacy Program noted the same effect, as have other observers of the program.

to standard, widely accepted, legal boilerplate (i.e., provisions dealing with easement enforcement, liability, assignability, notices and the like), based upon the best “state-of-the-art” model available in the conservation easement legal community. One legal expert states the point starkly: “Conservation easements should be simple, straightforward, readily understandable without resort to a lawyer, and their requirements should be measurable.”

Even while standardization of conservation easement terms is desirable wherever possible, certain substantive provisions of a farmland easement will necessarily differ from those designed to protect pristine oceanfront or rare wildlife habitat, but there is especially no reason that the *boilerplate* and other essential terms of conservation easements should be variable and negotiated. Likewise, while conservation easements continue to evolve in sophistication, drafters should think carefully before planting a new term or change in terms in the next generation of easements if there is not a very good reason to do so. If conservation easements are to withstand the tests of time, they should be simplified and standardized as much as possible, so that there is an implicit understanding of the basic legal terms and framework of each type of easement.

The Land Trust Alliance has been working for years trying to tackle this problem by refining its exemplary Conservation Easement Handbook, the latest version of which is about to become available. This encourages land trusts to devise and stick to a widely accepted easement template and provides model language for different types of easements. In Maine and some other jurisdictions, there is growing recognition among experienced legal practitioners that at least the basic boilerplate and other essential provisions of a conservation easement ought not vary from one to the next. However, all of these efforts to develop templates and standardized and simplified terms for conservation easements will come to naught, and indeed so far have yielded little, if the conservation easement community fails to adhere to them. Indeed, by every account in recent years, conservation easements have become increasingly complex, negotiated, nuanced and lacking in uniformity, even in the portfolios of the same holders.

More than this, there is nothing to prevent the IRS (which can act on a national level) and/or states from adopting, or authorizing the adoption, of a model conservation easement form, the basic terms of which should not be varied if the parties desire the tax and other benefits of conservation easements. Many states, for example, use a standardized, statutory deed form that gives broad legal meaning to the use of simple descriptive terms in deeds. Thus, use of the term “warranty deed” has a specific legal meaning which, prior to the enactment of the statutory form, required many arcane and legalistic words to recite in each deed, with failure to include all the “magic words” resulting in possible misinterpretation, litigation or title problems in the future.

A possible downside to having the government become involved in creation of standard forms, however, is that this may bureaucratize or even politicize the process, with the adopted form conceivably being lower in quality than is desirable. In interviews with some land trust officials, particular consternation was expressed about the IRS taking a commandeering role in this area, but one might consider the idea of the IRS requiring adherence to state-authorized, minimum guidelines in order to permit the landowner to take a tax deduction.

A different, although less universal, approach to tackling this problem is through conservation easement funding sources. For example, the Land for Maine’s Future Program, the public agency

in that state which distributes bond moneys for land conservation projects, has adopted a guidelines form for forest land conservation easements, that is adaptable to other types of state-acquired or financed easements. Under the protocol administered by that agency, departures from the guidelines are supposed to be precisely noted and an explanation given for the reason for the departure. Normally, at least two state lawyers, including one in the Attorney General's Office, as well as agency administrators, closely examine every proposed easement that the state will hold or finance. Nonetheless, even under the best of circumstances, it is often very difficult to make easements uniform and consistent in the absence of great fortitude.

The Vermont Housing and Conservation Board,¹⁰ which has financed over \$100 million in conservation projects working closely with the statewide Vermont Land Trust, likewise has developed a model easement that it will not depart from (without good reason) if public financing is solicited. Likewise, the Vermont Land Trust itself, a highly sophisticated organization involved in most conservation easement acquisitions in that state (either as holder or co-holder of the easement, back-up enforcer or holder of an executory interest) insists on use of its easement forms for projects with which it is involved. Other major funders of conservation easements, including private foundations, would be wise to pay more attention to requiring the standardization of the easements that they finance, and insisting on the finest quality terms. Other state and federal agencies should also adopt and reasonably adhere to standardized easement forms, both for those that they buy as well as those that they finance, and to provide for careful policy and legal review of these instruments.

In Massachusetts, pursuant to laws enabling conservation easements that were among the earliest enacted in the nation, state agency review and approval is required of *all* conservation easements. The agency long ago adopted a model of essential easement terms and requires conformity in the absence of a demonstrated reason otherwise.¹¹ By virtually all accounts reported in interviews for this report,¹² the Massachusetts system for public conservation easement review and approval

¹⁰ The Vermont Housing and Conservation Board is perhaps unique in the nation as a legislatively-created agency, financed in large part by a share of that state's real estate transfer tax. It is involved both in community and other land conservation, as well as affordable housing, projects.

¹¹ In Massachusetts, in order to be legally durable, all conservation restrictions (that state's term for the generic conservation easement) held by private land trusts or local governments must be reviewed and approved by the state's Secretary of Environmental Affairs. That agency has adopted Guidelines that broadly set out both the process and the substantive criteria of review, and has developed an annotated, sample restriction (easement) form, significant departures from which have to be explained to the Secretary's satisfaction. In each case, in order to earn the Secretary's approval, the easement must be shown to be of public benefit. Similarly, all agricultural preservation restrictions must be reviewed and approved by the state's Commissioner of Food and Agriculture, and all historic preservation restrictions must be reviewed and approved by the state's Historic Preservation Commission. In addition to requiring state approval, easements held by private land trusts also must receive the approval of the local government where the land is situated. Likewise, for an easement to be released (in whole or in part), all of the same approvals are required and a hearing must first be held by the municipality. Mass. Gen. Laws Ch. 184 sec. 32.

¹² To be sure, several of those interviewed for this report, who have experienced the Massachusetts state approval system for conservation easements, noted that its success has depended in large part upon the recently retired person who has run it since its onset. While that is a great compliment to this individual, the system, after nearly 40 years, is so well-established, as is the large land trust community in that state, that it seems very unlikely to deteriorate when a successor is appointed.

has benefited the land trust community there, because that state's many land trusts receive review and input from one source that has considerable experience with easements across the state. Land trusts also benefit from this system by being able to use the public review agency for support in negotiating with landowners who otherwise may want to depart from the norm.

While the state conservation easement approval system in Massachusetts receives nearly universal praise among the land trust community there, more mixed feelings are reported about the added process of local government review and approval. Some report dissatisfaction with this system where local parochial politics or demands can get in the way of reasonable conservation easement approval, and they wish for at least an appeal process to a state agency of a local denial. However, others in the Massachusetts' land trust community look favorably upon the local review process, because it subjects each easement to local input through a public hearing, and it helps to assure that the easement is consistent with local land use plans.

Regardless of the merits of the Massachusetts model, it is doubtless that in some states the idea of government review of land trust-held conservation easements, despite the public interest in them, may be politically impossible at present. However, before rejecting such a system as being too slow or bureaucratic, it is noteworthy that Massachusetts has reviewed and approved an estimated (and astronomical) 3000 conservation easements held by private land trusts and municipalities (this number does not include easements held by state government). It is reported that many of these have benefited, sometimes substantially, from the public agency comments received during the review process. Indeed, while its system has room for improvements that will be discussed later in this report, Massachusetts possesses the most time-tested, unassailable and one of the most prolific conservation easement programs in the nation.

In short, whatever remedy is selected to solve the problems of conservation easement uniformity and quality, there is no good reason for the legally unbridled degree of variability and lack of public accountability that has become the hallmark, and is sure to become the troubled legacy, of conservation easements today.

Conservation Easement Tracking for the Future

The Issue:

Especially with the gathering of time after a conservation easement has been established, its location, terms and even its existence may become unknown beyond (and sometimes even to) the parties to the transaction. Although conservation easements are typically recorded in the local registry of deeds as with all other interests in real estate, in the vast majority of states there is no separate registry of conservation easements and no map or system that shows where they are located, who holds them, what restrictions they impose, or even that they exist. Both government agencies and land trusts that hold conservation easements sometimes have difficulty keeping track of their own holdings.¹³ As easement acquisition continues to accelerate, so will this problem.

¹³ The 1999 study by the Bay Area Open Space Council strikingly showed that nearly one third of the land trusts surveyed had not even compiled a list of their easements.

The long term significance of this concern cannot be overstated. The public benefits of conservation easements depend upon being able to know what they are and where they are. Just as there is a powerful public interest in conservation easements, there is an equivalent need to be able to keep public track of them. Recordation at the local registry of deeds is sufficient to put future owners of the easement-encumbered property on notice of the existence of the easement (assuming that they have a title search performed before acquiring the property), but this system is woefully ineffective at public tracking of conservation easements, since in most states they are recorded with all other interests in property and, accordingly, are simply buried from public view. Moreover, many states require title searches back only a finite number of years (usually 50) and/or require periodic re-recordation if easements are to remain effective, so that with the passage of time what was intended as a permanent conservation easement could become unknown or ineffective.

The Solution:

Every state should have an easily accessible, legally required, public registry of conservation easements. Such a registry would enable their long-term monitoring and scrutiny, which is especially important if the holder goes out of business or otherwise fails to carry out its responsibilities. A central registry of conservation easements might also include other conservation land holdings of government and non-profit organizations, enabling better coordination and planning for future acquisitions. A public registry could also easily lead to computerized mapping of conservation easements and other conservation lands.

Currently, there are a few states that are known to have laws establishing some sort of public registration program for conservation easements: New York, Mississippi, California, Illinois, Virginia and Massachusetts. The New York program is apparently honored largely in the breach, with not even some of the most sophisticated land trusts there paying it much heed and state officials reporting that they do not attempt to enforce this law and have no capacity to create a meaningful data base. California enacted a mandatory registration statute in 2002, but it applies only prospectively. Virginia law also creates a de facto registry by requiring notice to the Attorney General and to certain other public agencies of the creation of any conservation easement, although it is not known whether the Virginia law results in an effective tracking system.

Here again, the Massachusetts model, while not perfect, seems to come closest to the ideal. Since all conservation easements held by land trusts and municipalities must be approved by a state agency, there is an automatic registration system in place since the state enacted its conservation easement enabling law in the 1960's. Massachusetts is making further efforts to employ geographic information systems and other techniques to map easements and other conservation lands on computer-generated maps. However, Massachusetts might do well to integrate into its registry all easements held by state agencies, and might consider, for uniformity, requiring those easements to be reviewed by the same agency that must approve easements held by land trusts and municipalities.

In some states, such as Maine under the leadership of the Maine Coast Heritage Trust, a voluntary system is being devised for registering conservation easements. However, that is not a substitute for a legally required, public repository. It would be particularly useful if each registered easement included a map of the easement area on a standardized form.

In interviews with those in the conservation easement community, no dissent was expressed as to the need for this measure, other than to question how it will be funded. A basic conservation easement registration system would have a small cost which could be underwritten by a modest filing fee. The most simple system might involve no more than requiring each conservation easement, together with a standardized map of the easement area, to be separately recorded and indexed in the registry of deeds. Even such a basic system would create a readily accessible repository, where the terms and locations of easements and the identity of their holders could be found.

Public Benefit, Accountability and Transparency

The Issues:

Public Process Transparency. Since virtually every conservation easement has a public investment and attribute as a public trust, it is reasonable to assert that the public should be afforded an opportunity for input into the process of conservation easement design, even when the easement will be held by a private land trust. As Professor Halperin foresaw a quarter of a century ago, in the absence of an opportunity for public review, questions arise as to whether there is a public benefit commensurate with the public subsidy that is conferred by tax and other subsidies.

Concerns about public benefits of certain conservation easements have been the focus of a series of investigative reports in the *Washington Post* and *Philadelphia Inquirer* and are currently the subject of both Congressional and IRS investigations. The primary focus of these controversies arises from allegedly bloated appraisals and income tax deductions taken by land trust insiders involving easements of dubious public benefit. However, even if the IRS adopts and/or enforces a more rigorous approach to easement appraisal, it is unlikely to be in a good position to determine whether a conservation easement, for which a charitable deduction is taken, is worthy in terms of conferring a reasonable public benefit.

Under the laws of most states, because land trusts are private corporations, the terms of their conservation easements are the product of exclusively private arrangements between them and private landowners, subject only to minimal statutory standards. Under the legal systems extant in the vast majority of states, the public has no meaningful opportunity to even know that a conservation easement exists on a particular property or what terms it imposes, including whether it allows public access to the property.

Even when government is acquiring or directly financing the acquisition of a conservation easement, negotiation of its terms is usually conducted in secret, with little or no opportunity for public review or comment before the easement has been announced and the die is cast. As described by several officials in interviews for this report, often there is great political pressure on agencies to get the next easement done, sometimes without sufficient internal review and

reflection, so that “the latest conservation deal” can be announced at the next available press opportunity.

Exacerbating this lack of public transparency, even publicly acquired and purchased easements are sometimes “brokered” by private organizations that negotiate all the terms with the landowner and then sell the easement to the government. By this means, public money is spent, and public resources in (hopefully) stewarding a conservation easement are committed, with little or no opportunity for public involvement regarding the easement’s terms. While the obvious benefit of this method is that the deal gets done more quickly when out of the public eye, on the same grounds it is reasonable to question whether the public is best served in this way.¹⁴

Public Access. As contemplated by the federal Tax Code, public benefit need not equate to public access to the easement property. Indeed, in many places, there may be public benefits in using conservation easements to protect wildlife habitat, ecological reserves, viewsheds or farmlands without the need for public access. Some express the view that land of any or even no particular conservation value that is protected from development is categorically of public benefit by creating open space for future generations. To others, including presumably Congress in providing tax subsidies for the donation of conservation easements, the protected land is supposed to possess some demonstrable, publicly beneficial, conservation value.

Some (but not all) state conservation easement financing programs routinely require the inclusion of at least pedestrian public access rights. On the other hand, the recently announced easement covering the Hearst Ranch in California, whatever its public benefits, allows the landowner to proceed with a number of development projects, while the public will have no access to the property, and the government will have no direct right of enforcement of the easement, which will be held by a private land trust. This, despite the \$80 million in public financing spent toward purchasing this easement. Some have been critical of this proposal, while others believe that, especially in fast-growing states like California, any conservation easements that restrict development are categorically good.

A fair question is whether public access rights ought to be more routinely considered with at least certain types of conservation easements, in order to be worthy of public tax and other subsidies.¹⁵ In some situations, in the absence of at least non-intensive, pedestrian public access necessary for the public to enjoy the scenic and natural values of a conservation easement property, the easement may have little, meaningful public benefit unless there is some other demonstrable, publicly valuable, conservation purpose to be achieved.

¹⁴ By way of example, even major land trusts, whose financial credentials and stewardship capabilities might be described as close to impeccable, are often involved in negotiating and buying conservation easements that are then sold to government agencies that sometimes are ill-equipped and under-staffed to monitor or steward them.

¹⁵ The 1999 Bay Area Open Space Council study showed that most of the easements surveyed allowed for no public access. Likewise, some government funding programs that support conservation easement acquisition, such as the federal Forest Legacy Program, do not require public access as an easement right.

Even where conservation easements do allow for public access, that right is meaningful and of public benefit only if there is a reasonable way for the public to know about the existence of the easement and of its access rights. Too often, conservation easements containing public access rights are acquired with little or no effort to inform the public of their rights of access or the location of the easement. Indeed, easements holders often actively avoid providing this information to the public, citing concerns that they lack sufficient resources to manage public access should it occur beyond the small audience that is in the know about the easement. While it is clearly appropriate for easement holders and landowners to impose reasonable restrictions on public access to assure responsible public use, a land trust or government agency that uses concerns about public access management to avoid meaningful public knowledge about the easement is in fact significantly diminishing the value and public benefit of an easement containing public access rights, for which the public is paying a subsidy.

Strategic Planning. One of the attributes of conservation easements, especially as deployed by the multitude of land trusts that exist today, is that they possess the benefits as well as the problems of being driven largely by forces of ad hoc opportunism. There is little reason to believe that tax incentives, or in some cases even government-financed acquisition programs, result in targeting the most appropriate or publicly beneficial lands for conservation. This means that the acquisition of conservation easements does not need to follow any plan (except in those few states whose laws require easement acquisition to conform with a local comprehensive plan), and easements can cover land that is relatively undistinguished in its natural values and be geographically scattered in a manner that might be described as a “green sprawl.”

In a small number of states, there are legal requirements that the easement be subject to a public hearing or presented for review by local officials. However, only in Massachusetts is there a system, at both the state and local government levels, for determining that the easement will convey public benefits. As described earlier in this report, in Massachusetts, all conservation easements must be approved by a state agency, and, in the case of easements held by private land trusts, approval must also be sought, after a public hearing, from the municipal government.

Conservation Purpose. Many observers (including the Land Trust Alliance, as stated in its Standards and Practices) believe that the primary, if not exclusive, purpose of a conservation easement should be conservation-oriented, at least in the broadest sense of preserving publicly beneficial conservation values in the land. While all conservation easements reserve to the landowner certain uses of the property, these retained uses should be consistent with the property’s primary conservation values and the easement’s overarching conservation purposes. However, here again, in most states there is no current system for making sure that this happens.

Some substantially unrestricted, “working landscape” easements have been proposed, and a few executed, that, although called “conservation easements,” contain purpose clauses or other terms that strongly suggest or even mandate a primary rationale of continuing natural resource extractive and economic uses. Critics describe some of these conservation easements as creating a financial and marketing opportunity for landowner investors, who, with the assistance of middleman brokers, sell them to provide a quick and easy return on investment without depriving these properties of long term uses for commercial forestry or their other traditional economic purposes. This criticism is rarely leveled at working farmland easements, say in

Vermont, where farms are an important part of the visual landscape and culture of the community; but the controversy is more commonplace with working forest or ranch easements, especially where the property has no special conservation values, and particularly where there are no meaningful restrictions on natural resource extractive uses and no public access is provided under the easement.

While this report raises these concerns about the evaluation of public benefits of conservation easements, the more fundamental issue is that, under currently prevailing laws in most states, there is no meaningful forum for public input or review of the conservation values or public benefits of an easement before it (and its public subsidy) are set in stone.

Potential Solutions:

Given the public subsidy as well as the permanence of conservation easements, there should be an efficient yet effective process by which the public can have meaningful input into their design, including on the question of whether a proposed easement confers a meaningful public benefit. A 2005 Congressional staff report proposes significant restrictions on the tax deductibility of donated easements, including that they exclude residential properties and further a specific government conservation policy, but it remains to be seen whether this proposal will be enacted, or even if so whether it would be effective in assuring a public benefit from conservation easements.

The Massachusetts model provides an opportunity for the public to know of a proposed conservation easement and to provide comment, especially at the local level. If there were a public agency review process, an inexpensive approach to obtain public input would be to post on-line each proposed conservation easement for public comment before approval is given. By this low cost means, the public would become enfranchised in the conservation easement design process, and all parties to the easement, including the state reviewing agency, could only benefit from the public input received.

The Massachusetts model's purpose of ferreting out proposed conservation easements that have no discernible public benefit also insulates the parties from later having the easement challenged by the IRS. This makes the system of conservation easement formation in Massachusetts virtually unassailable from a later adverse ruling by the IRS concerning lack of public benefit, something that cannot be said of any other state.

Though the Massachusetts model has drawn what appears to be nearly universal support among the land trust community in that state, some might think that it would not work, at least politically, in other states. Some may question the costs and potential inefficiencies of the Massachusetts model, although again no one interviewed from the land trust community in that state complained about either, and the costs of operating this system are relatively modest. Indeed, most of those interviewed among the land trust community agree that some process of public review and input would be worthwhile.

In instances where the Massachusetts approach is not politically feasible, there may be less formal models that can be applied, with less effectiveness, in an effort to achieve similar ends. Just providing an opportunity for public comment concerning proposed conservation easements

would provide the significant benefit of creating transparency and allowing for an airing of issues concerning public benefits of proposed easements. These issues could include, among others, concerns about lack of public access to the property provided by a proposed easement that has no other discernible public benefit, as well as whether the easement serves a sufficient conservation purpose.

Every land trust or government holder of conservation easements should adopt a strategic plan for the types and locations of properties on which it wishes to focus its resources, lest it waste these on lands that are of little public benefit or conservation value. An effective land trust credentialing and easement standards process, as discussed in the next section of this report, would also help alleviate public concerns that conservation easements are being created that provide no public benefit.

There remain those who express the view that *any* public process will chill the creation of conservation easements. While there is no empirical evidence that exists on this point, it has certainly not been the case in Massachusetts, where the process is both transparent and publicly regulated. Stated in a different way, one might legitimately question the public benefits of conservation easements that cannot withstand any public scrutiny.

Conservation Easement Stewardship and Holder Institutional Capacity

The Issues:

The real work involved with conservation easements begins only after the signature ink is dry. Even the best-written conservation easements are only as good as the holder's resolve and capacity, over the very long term, to monitor, enforce and defend them. Many land trusts are newly created and may be in a weak position to commit to the kind of monitoring, compliance and defense work that is required, *perpetually*, for maintenance of conservation easements.¹⁶ While community-based, conservation initiatives are useful in dealing with local landowners, one must worry about the long-term future of many of these small organizations and the conservation easements that they hold.

The ability of a land trust or other holder to enforce a conservation easement can become seriously compromised, or could even be construed as legally abandoned, if there is a failure to maintain well-documented monitoring reports on a regular basis,¹⁷ or there isn't sufficiently

¹⁶ An astonishing result of the LTA land trust survey released in 2005 is that more than 80% of the respondents considered it at least likely that some of the land that they protect may not continue to be conserved in 100 years, in part because of a lack of capacity to monitor, enforce and defend the easement.

¹⁷ The 1999 study by the Bay Area Open Space Council showed disturbingly low rates of monitoring (51%), with the worst offenders being government holders. Even with the low rate of monitoring, relatively high rates of violation (14%) were found. The survey further showed that 40% of the easements had no meaningful baseline documentation, which is vital to future enforcement, and here too the government holders were the worst offenders. A similar study released by the Land Trust Alliance in 2000 of a sample of conservation easements in northern New England showed that one third of the easement holders performed no documented monitoring. The author of the Bay Area study, Darla Guenzler, expressed the view in an interview for this report that, in the 5 years since her study, there has been a significant improvement, among the land trusts in California covered by her survey, in developing a greater understanding of conservation easement stewardship responsibilities.

thorough baseline documentation that describes in words and pictures the condition of the property at the time of the easement's acquisition, or there isn't a continuous program to maintain communications with current and future successions of landowners,¹⁸ or the easement holder doesn't have the resources and resolve to deal effectively with easement violations that will inevitably occur with the passage of time.¹⁹

Conservation easement monitoring may be a particularly costly task where the property is large, difficult to access, or becomes divided in the future so that the number of landowners and monitoring efforts multiply.²⁰ In some cases, endowments and other financial resources are set aside by the holder for easement monitoring and stewardship purposes, and a monitoring protocol is adopted and implemented, but there are no legal requirements to do so and many holders make modest or no such provision. This work, so essential to conservation easement maintenance, has none of the fundraising or political glamour associated with acquisition. Particularly government agencies, in the absence of having money set aside for easement monitoring that cannot be diverted by legislative appropriations committees, will be and already are hard pressed to come up with funding for conservation easement monitoring when other vital public services are being cut.

Understandably, both land trust and government land management agencies alike promote, as their measure of success, the number and size of their newly acquired conservation easements. Often, there is significant pressure on their staffs to get the deals done and consider the issues and costs of long term stewardship later. It remains an under-appreciated fact among most holders of conservation easements that these should be considered liabilities, and not financial assets, and that their real costs lie in future monitoring, enforcement, defense and other potentially expensive stewardship responsibilities.

The Land Trust Alliance is working to change this culture on a voluntary basis. The need for conservation easement monitoring and stewardship has become thematic at LTA's increasingly popular annual Rally (perhaps a misnomer in light of this sobering message), attended by thousands of land trust supporters from all over the nation. The LTA message is simple but hard

¹⁸ Maintaining good landowner relations is considered to be one of the most effective means of achieving compliance with conservation easement terms. However, this task is daunting even among the most sophisticated of land trusts, especially where rapid turnovers of landowners occur amidst a large portfolio of conservation easements. In some cases, easement holders have no meaningful way of knowing that a new landowner occupies the property.

¹⁹ A thematic concern expressed by respondents to the LTA survey of land trusts released in 2005 was that many trusts lack the capacity to monitor, steward, enforce and defend their portfolio of conservation easements.

²⁰ Many conservation easements allow the encumbered ownership to be divided, with each of the divisions to be subject to the terms of the easement. What happens when a sizable property subject to a conservation easement is split, say, into just two parcels every 10 years? What's the mathematical result over just a century? The 760,000-acre conservation easement in Maine, that is the largest in the nation, allows for divisions into any number of 1,000 acre lots, meaning, theoretically at least, that there could be as many as 760 separately held ownerships over time, all subject to the terms of the easement. If this were to occur, it would result in a potentially serious conservation easement stewardship dilemma for the easement holder, especially in trying to maintain relationships with each of the landowners subject to the easement..

for many, in both private and public sectors, to adhere to: *don't* take a conservation easement if your land trust is not fully prepared, financially and otherwise, to permanently monitor, defend and enforce it. Unfortunately, as acknowledge by LTA, there remain many land trusts and government holders of conservation easements that lack proper baseline documentation or other monitoring protocols and, in some cases, there is little prospect for change in the future.²¹

Conservation easement legal enforcement and defense, when it becomes necessary, is even more costly than monitoring. As the Nature Conservancy's Conservation Easement Working Group wrote in 2004, "Enforcement should never be the costly consequence of ineffective monitoring." Legally enforcing or defending just one conservation easement can cost well into six figures. Even a modest portfolio of easements will inevitably incur these types of expenses in the long-term future. Particularly when new successions of landowners lack the same conservation-minded motivation as the original easement grantor, or where the conservation easement's neighborhood becomes significantly more valuable for development than at the time of the easement's creation, the predictable result is that a well-financed landowner may look for ways to legally challenge or even outright violate the easement. One expert interviewed for this report predicts "a tidal wave of lawsuits to come."²² Even the Nature Conservancy's Conservation Easement Working Group reported in 2004 that many of its chapters have not set aside sufficient funds for enforcement and other stewardship needs.

At this time, there are no legal requirements in existence anywhere in the nation that land trusts or government holders meet financial, track record or other standards before taking on the responsibility of holding, monitoring and otherwise stewarding their conservation easements ostensibly forever.²³

Potential Solutions:

This body of issues also could be resolved by legal requirements, imposed by IRS and/or states, creating minimum standards for the financial resources, credentials and track records of land

²¹ Officials of one state openly report significant pressure to acquire large "working landscape" easements, using state and federal money to do so, even while budget cuts have resulted in no meaningful easement monitoring whatsoever. Moreover, this state, as no doubt with a number of others, has a policy of preferring to use its financial resources for land acquisition to acquire conservation easements rather than fee ownership of conservation lands. At the same time, many government holders of conservation easements are the worst offenders when it comes to responsible conservation easement stewardship.

²² A survey conducted by the Land Trust Alliance in the late 1990's of some 7400 conservation easements showed land trust-reported violations on about 500 or about 7%. This figure is undoubtedly an underestimate, since many land trusts don't perform the kind of monitoring that would reveal violations, and many of the easements involved were relatively recent in vintage. If proper monitoring occurs in the future, violations will inevitably mount with time.

²³ While the IRS vaguely requires that holders of donated conservation easements, for which a tax deduction will be taken, have a commitment and resources to enforce their restrictions, they also state that the holder need not set aside funds to enforce the restrictions. Of course, the IRS has no means by which it can follow up to see that easements are properly monitored and enforced.

trusts that can qualify to hold conservation easements.²⁴ This would entail a process of certification, or setting minimum credentials, for land trusts before they are qualified to hold conservation easements. Of course, IRS standards would apply only to donated easements for which a tax deduction is to be taken, but this remains the majority of easements in the country. Working on this issue at a national level, the IRS would be a far more efficient (if in some cases less popular)²⁵ agent of change than trying to work with 50 state legislatures or voluntarily with 1600 land trusts and thousands of other conservation easement holders.

Since the same issues arise, and in some cases are even more severe, with respect to easement monitoring by government holders, similar standards should be expected of them as well. Although there will be understandable reluctance of state legislatures and government officials to require their agencies to meet minimum standards of conservation easement stewardship, government holders should be held to the same principled standards as land trusts. Land trusts and government agencies that fail to meet standards would still be able to hold a conservation easement but *only* if there is a back-up easement holder that does meet the standards and is committed to step in to monitor and enforce the easement if the primary holder fails to do so.

The Land Trust Alliance's Standards and Practices (2004)²⁶ contain a number of provisions calling upon land trusts to properly fund stewardship responsibilities, to maintain proper baseline and monitoring records, to develop relationships with landowners, to establish written policies for stewardship programs and to undertake sufficient enforcement steps when violations occur. In the Background Report to its most recent revision of its Standards and Practices, LTA acknowledges that not all land trusts have the capacity or resolve to undertake the perpetual monitoring, enforcement and defense responsibilities of holding conservation easements and should instead look to partnering with another qualified holder that does.

As of this writing, the Land Trust Alliance, which opposes government-run accreditation of land trusts, has composed a committee that is working to devise an internal credentialing system for land trusts in order to hold conservation easements. However, the intention is that this system will be, in LTA's own words, "positive, voluntary and incentive driven," and designed not to exclude land trusts from being able to hold easements. Accordingly, it is uncertain whether a

²⁴ Many of those interviewed for this report from the land trust community, as well as one who represents a large landowner whose lands are encumbered by conservation easements, expressed support for legally mandatory accreditation standards for land trusts that hold conservation easements. Of course, if the forthcoming LTA accreditation standards for land trusts are sufficiently rigorous, there is no reason for states and the IRS not to use them, or simply the fact of LTA accreditation, as meeting legally required standards.

²⁵ Surprisingly, a landowner (whose lands are placed under conservation easement) interviewed for this report, as well as a few land trust representatives, expressed the preference that conservation easement reforms come from the IRS, so that they would be implemented nationally and uniformly. However, this is not a view widely shared by the land trust community at large.

²⁶ LTA reports that its prior version of Standards and Practices were formally adopted by over 1000 of its member land trusts, and there is every reason to believe that many of the same land trusts will adopt its newest version. However, since these are entirely voluntary, it is widely known that many land trusts do not pay close heed to them, and that even some prominent land trusts fail to measure up to them.

voluntary system, no matter how well designed, will be able to comprehensively respond to the issues raised here. However, if LTA devises a sufficiently rigorous accreditation system, compliance with which is either required by law for conservation easement holders or is required by conservation easement funding sources and donors, then this would be a significant step in the right direction.

On the subject of monitoring and other stewardship responsibilities, the Vermont model seems exemplary.²⁷ The state agency that funds many conservation easement acquisitions provides stewardship moneys and insists on stewardship accountability, while the highly respected, statewide Vermont Land Trust (VLT) implements a sophisticated program of annually monitoring each of its more than 1200 easements, a remarkable achievement to which all land trusts and government holders should aspire. VLT also works with smaller land trusts in the state to provide monitoring and enforcement back-up.

There are efforts in some parts of the country to create land trust networks to provide for enhanced conservation easement enforcement and defense capabilities, in situations where no one land trust has the resources to engage in a legal confrontation with a well-financed landowner. While such networks are still in the conceptual stage, they are motivated by the increasing understanding that inadequate legal defense of one conservation easement by an under-funded land trust can yield legal precedent that will haunt the entire community of conservation easement holders.

In the long run, perhaps an even harder problem to solve than the financial capacity of holders to enforce conservation easements, will be their difficulty in doing so if they have failed to create and maintain necessary baseline documentation and regular monitoring reports.²⁸ Also challenging may be a land trust's resolve to enforce a conservation easement when the landowner is a benefactor of the trust. Similarly, with government-held conservation easements, costs of enforcement, other legal work of government agencies, political considerations and other factors may stand in the way of enforcement efforts. A mandatory credentialing and oversight system would help to overcome these problems. One approach would be to set up a statewide land trust or similar oversight organization, like the Vermont Land Trust, which takes a role in backing up smaller land trusts throughout the state that hold conservation easements.

Foundations and others significantly involved in funding conservation easements also have an important, but sometimes neglected, role to play in assuring that conservation easement holders have the capacity and track record to perpetually monitor and enforce the easements they hold; or to require a clearly defined system of back-up holders so that these responsibilities are assuredly undertaken by someone else. Layering of back-up, third party enforcers may be one

²⁷ On the issue of stewardship, the Massachusetts model is *not* useful. The state oversight agency with respect to conservation easement creation has no authority to follow up to ascertain whether holders are undertaking these responsibilities.

²⁸ An excellent idea suggested by a person interviewed for this report would be to require in the easement document that, every time an owner proposes to sell or convey the property, an inspection and certificate of compliance by the easement holder be required as a condition to the conveyance.

way to solve this problem, but so also is the need for clarity in the law empowering state attorneys general, when all else fails, to enforce conservation easements as a charitable trust, as discussed in the next section of this report.

In sum, *before* any conservation easement is created, land trusts, government holders, easement donors and easement funders, all should assure that the holder is financially and otherwise prepared to undertake the perpetual responsibilities of conservation easement stewardship. Probably the most efficient approach, leading to uniform standards for easement holders, is for IRS regulations to require that, in order to qualify for a tax deduction, the donation of a conservation easement must be to a holder that meets certain certification standards, perhaps as specifically devised by each state or the LTA. Likewise, state laws enabling conservation easements should require minimum standards for or certification of holders, that would help to assure that they are ready, willing and able to carry out the long term monitoring and enforcement responsibilities that their easements contemplate.

Conservation Easement Durability, Termination and Amendment

The Issues:

As circumstances affecting a particular conservation easement change in the future, there is the prospect that termination or amendment of the easement may be considered. Indeed, some believe that, despite their seemingly perpetual character, conservation easements should be amenable to change with prevailing public needs over time, and that the present generation is in no position to dictate what the future should require for the use of land. Nonetheless, while most easement donors and holders believe that both the standards and procedures for amendment or termination should be rigorous, under the laws of many states these are not well understood or established.

The Uniform Conservation Easement Act leaves this issue to whatever laws apply to the similar disposition of other easements under state law. But conservation easements are interests in real estate that are supposed to endure, and with respect to which there is a substantial public investment and interest. This suggests that termination of conservation easements, as well as amendments that diminish an easement's conservation purposes or public benefits, should involve more than just the immediate interests of the private parties to the easement or their successors, as would be the case with ordinary, privately held easements (as for a right of way or utility line).

Under some state laws, the termination of an easement requires a court order, with the court determining whether there has been a change of conditions that makes the easement no longer in the public interest or otherwise worthwhile. In New Jersey and Massachusetts, termination of a conservation easement requires state approval and a local hearing. In Maine, the law is explicit that a change in conditions resulting in easement termination cannot include economic considerations, such as the increased value of the property for development. However, under the laws of most states, the standards and procedures for easement termination and amendment are unclear. Likewise, the Land Trust Alliance reports that the majority of land trusts lack a policy dealing with these issues.

Similarly, under the laws applicable in most states, it is uncertain what happens when the holder of a conservation easement ceases to exist or just quietly goes out of business.²⁹ Recognizing that most land trusts are a recent phenomenon, and that many of them that are here today were not in existence just a decade ago, it is inevitable that many, just like other young corporations, will go out of business in the future. One must anticipate that the small group of passionate citizens that created a community land trust may not be able to perpetuate themselves, and the trust may simply become inoperative. If a land trust winds up its affairs in a legally responsible fashion, it will first assign all of its conservation easements to another qualified holder.

Yet, it is important to remember that a conservation easement, unlike outright ownership of land, is not an *asset* but a *liability*, permanently imposing (one hopes) responsibilities on the holder of easement in monitoring, enforcement and defense, all as described above. The upshot is that, unless the easement covers property of great significance, it may be difficult or impossible for a land trust to find another willing and qualified holder to take over the easement.³⁰ What happens then? While legal theories abound, the truth is that, in most states, we just don't legally *know*.

Another way that conservation easements can become orphaned is simply by the inattention of the holder. A land trust may remain in existence but become disinterested in some or all of the easements it holds. This may be because of lack of resources and staff, change in priorities and attitudes or even lack of institutional memory. Depending upon the laws of each state, it may be possible for the protections afforded by a conservation easement to be deemed legally abandoned by the holder's simply not enforcing them for a sufficient period of time.

Likewise, in many states, the law leaves uncertain what happens to a conservation easement when the holder acquires the remaining fee interest in the property. Unless otherwise specified in state law, under prevailing theories of common law, an easement might become extinguished by reason of its merger with the fee, if the easement holder acquires the landowner's interest or vice versa.

²⁹ The Land Trust Alliance's survey released in 2005 indicates that, among the biggest challenges to land trusts in the future, will be their inability to defend easements or their land simply going out of business.

³⁰ One commenter expressed the thought that, should an easement have no legally qualified takers who are willing to step forward to receive its assignment if the original land trust holder goes out of business, the easement might be considered to be no longer of public value and therefore its abandonment of no public consequence. While this idea may be true in some cases, as a broad policy it potentially allows the abandonment of an easement that may still have significant community benefits simply because the land trust has experienced potentially costly problems in monitoring or enforcing it and there is no one willing to step forward to inherit these problems. Moreover, if this policy were to carry the day, the net effect would be to undermine the need, expressed above, for land trusts to prepare themselves for the long term costs of easement stewardship, since they would be able to simply abandon conservation easements when they become troublesome, as many inevitably will with the passage of time. Likewise, a landowner that wants to rid itself of a troublesome easement would have an incentive to try to make the holder abandon the easement. Under all these circumstances, unless termination of the easement requires the landowner to pay a substantial sum to the land trust holder or another charitable enterprise (see later discussion in this report of the *cy pres* doctrine), termination could result in a substantial windfall to the landowner.

So, who steps into the breach to enforce and defend a conservation easement in these situations? There are three problems here: first, stepping into the breach means the expenditure of potentially large sums of money; second, in the absence of a public registry, no one may even know that the easement exists or that it has been orphaned; and third, in many states it is legally unclear whether *anyone* may enforce a conservation easement beyond the particular parties to it. Absent a statutory provision to the contrary, it is reasonably clear under the common law in most states that private persons who are not parties to a conservation easement, including even neighbors of the conserved property who benefit from it, lack standing to enforce the easement's restrictions. Those who participated in the creation of the Uniform Conservation Easement Act considered some of these issues but decided not to expressly deal with them, leaving the legal outcome to other state laws.

Under the common law in most states, and under statutory law in some, the state Attorney General has the general power to enforce charitable trusts, which, it is at least arguable, include conservation easements as well as the land trusts that hold them. But there are problems here as well. First, the Uniform Act, as well as the conservation easement enabling laws in many states, fail to address this issue, or at best do so ambiguously, or even in a few cases expressly abdicate the Attorney General's enforcement authority. Second, in order for the Attorney General to step into the breach, there has to be a system for publicly tracking conservation easements, an issue discussed above. Third, even if she becomes aware of the abandonment or lack of enforcement of a conservation easement, the Attorney General may find that enforcing private, land trust-held easements is unworthy, especially if the public had no involvement in the creation of the easement.

Potential Solutions:

In state laws and/or IRS requirements (the latter applicable where a conservation easement is donated), there could be explicitly stated mandates for the state Attorney General to have the authority to initiate enforcement actions with respect to conservation easements that have been orphaned or unenforced. There is a public subsidy and a public trust attached to each easement, so the ability of some public authority to enforce them seems reasonable, if all else fails.

There are a few states that have explicitly dealt with this issue. For example, under Delaware and Mississippi law, the Attorney General is given the authority to enforce conservation easements. In Illinois, conservation easements may be enforced by state or local governments as well as abutting neighbors. While none of these states has developed what can be described as the legally best "answer" to the problem, every state should develop *an* answer.

Another, perhaps more effective, mechanism to the same end would be to statutorily require that a designated government agency be specified as co-holder or back-up enforcer of all conservation easements in the state. This could have the double benefit of involving that public agency in reviewing the easement at the outset. The Maryland Environmental Trust, which is represented by the Maryland Attorney General, holds or co-holds many, if not all, of the conservation easements in that state. Likewise, although a private entity, the Vermont Land Trust has an interest in most conservation easements held in that state, while those financed by Vermont's innovative Housing and Conservation Board virtually always involve back-up holders, including often the Board. Using a different model, under Virginia law, when a

conservation easement holder goes out of existence and there is no designated back-up holder, the easement defaults to the Virginia Outdoors Foundation, a state agency.

However, if there is a public expectation that the state will step into the breach when a land trust defaults in its enforcement responsibilities, not only should this be explicit in the law but conservation easements should be subject to a process of public registration and public review, as suggested above, so that the state, as a participant in the process, has determined that the easement is publicly beneficial and worthy of enforcement and defense.

Easement donors, land trusts and easement funders all have an interest in seeing to it that the easement is not lost through holder inattention or abandonment, and should consider always requiring a back-up holder of each easement, especially where the principal holder lacks a strong and long-term track record.

Likewise, everyone involved would benefit from clarified legal standards with regard to the process and substantive standards for conservation easement termination or amendment. Termination is best effected by an order of the court, in an action in which the state Attorney General is made a party, and should be guided by clear statutory standards. Likewise, amendment of a conservation easement, that will not negatively impact the conservation purposes of the easement or its public benefits, may be appropriately accomplished by the parties to the easement; however, an amendment that does compromise the conservation purposes or public benefits of the easement should require either permission of a court and notice to the Attorney General. Likewise, while there are IRS regulations that deal with the disposition of proceeds in the case of conservation easement termination, it would seem reasonable for the IRS to require that it receive a notice of easement termination where a tax deduction is taken, including where any resulting proceeds will be directed.

Law professor Nancy McLaughlin, among others, argues that, applying the principles of charitable trusts, when a conservation easement is to be terminated or significantly amended because it can no longer accomplish its original public purpose, *cy pres* or similar common law doctrine³¹ should be used by the courts in considering whether an easement may be terminated or substantially amended. She asserts that this doctrine should be applied narrowly in a principled way, looking to whether, under the circumstances prevailing at the time of the attempted termination or alteration, it has become impossible or impracticable for the easement to accomplish its purposes, and that this analysis should focus on the public benefits that the easement provides, and not on the benefits to the landowner. While these legal principles may be applicable to conservation easements, the law should be clarified in every state to prescribe the principles and procedures applicable to easement termination and amendment.

³¹ Generally speaking, under the doctrine of *cy pres* (or under the closely aligned doctrine of administrative deviation), if the purpose of a charitable trust becomes impossible or impracticable to effect because of a change of conditions that could not have been foreseen at the time the trust was established, a court may allow deviation from the trust to effect its charitable purposes as nearly as possible.

Again using the principles of the *cy pres* doctrine, Professor McLaughlin argues that, if a conservation easement is terminated, the holder should be entitled to payment by the landowner in an amount determined by the proportional value of the easement (being the development rights given up under it) to the value of the underlying fee, *as calculated at the time of termination*. Although the rationale for this idea seems self-evident, it is a significant departure from the calculation of the value of the easement upon termination, as reflected in the terms of many conservation easements, and as contemplated by the minimum requirements of current IRS regulations.³² By contrast, the conventional calculation in most easements is based upon the proportional value of the conservation easement to the value of the underlying fee ownership, *as determined at the time the easement was granted*. Professor McLaughlin argues that this latter amount will nearly always result in an unfair windfall to the landowner at the expense of the public interest and charitable intent of the original easement donor, because almost inevitably the value of the development rights that the easement restricts will rise over time. By contrast, if the calculation of the easement's value is made at the time of its termination, this will almost always result in a greater amount of proceeds being devoted to the charitable intent of the easement, and the landowner will receive no windfall caused by the increased value over time of the development rights that were conveyed to the easement holder.³³ However, as with several of the reforms mentioned here, implementation of this idea would require reform in current laws and/or conventions governing conservation easements.

Tax and Related Valuation Issues

The Issues:

As predicted by Professor Halperin 25 years ago, one of the thorniest aspects of conservation easements lies in their valuation appraisal, which must be undertaken in virtually all cases. An appraisal is required whether the easement is being purchased, where the appraisal sets the price, or it is being donated, where the appraisal determines the tax deduction (and other tax benefits) for the donor.

As with so many issues with conservation easements, much of the uncertainty that attends their appraisal derives from the generalized way that the applicable laws were enacted, at a time when no one could have foreseen the number and complexity of easements that would follow.³⁴ The manner in which conservation easements are appraised has never been precisely specified in the

³² “For a deduction to be allowed..., the donor must agree that the donation of the [easement] gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the [easement] at the time of the gift bears to the value of the property as a whole at the time....” Treas. Reg. Sec. 1.170A-14(g)(6)(ii)

³³ Professor McLaughlin's principled idea in this regard is consistent with property law. That is, if the easement's value (being the development rights that it comprises) rises from the time of its grant until it is ultimately terminated, that increased value should rightfully belong to the holder of the easement, not to the landowner who has no ownership of the development rights conveyed by the easement.

³⁴ The Congressional reports on the 1980 legislation permanently enacting the income tax deductibility of conservation easement donations estimated an annual revenue loss to the U.S. Treasury of \$5 million, a number that can be eclipsed by the donation of just one easement today.

law, leading to understandably widespread differences in these practices. However, unlike property appraisals that involve purely private property transactions, appraisals of conservation easements are matters in which the public has a legitimate concern about whether the appraisal, that determines the public subsidy, is fair.

This concern is heightened by the fact that conservation easement appraisals are, in the case of donated easements, arranged and paid for by the landowner who is donating the easement, a person who understandably wants the highest possible value ascribed to the easement in order to maximize the tax and other financial incentives available. While this is not to question the integrity of an independent appraiser, any more than questioning the integrity of a professional in this writer's field of the law in devising legal opinions for one's client. However, the reality is that no one, especially in the context of the often highly subjective judgments that attend conservation easement appraisals (as well as legal opinions), can be oblivious to the interests of the client who is paying the bill.

One must also recognize the important fact that, in the case of conservation easement appraisal for a donated easement, there is no negotiating force on the other side of the table trying to drive down the valuation, since the donee usually takes little or no interest in, and may never even know, the appraisal results. In other words, there is no willing buyer and seller setting the valuation.

This report will touch upon just a few of the ways in which current laws make many conservation easement appraisal practices, as undertaken by even the most scrupulous of appraisers, fraught with questions, at least from a public accountability perspective.³⁵

IRS regulations tell us that the best way to appraise a conservation easement is by looking at the price of comparable easements. But this typically is an unavailing technique, since there rarely are meaningful comparable transactions, not only because there may be no similar, easement-encumbered lands in the area, but also because most conservation easements are donated and their appraised values are not publicly known and have not been subject to negotiation between a willing buyer and seller.

This generally means that appraisal of conservation easements almost always defaults to the "before and after" appraisal technique,³⁶ but that also can be fraught with uncertainties and

³⁵ The question arises as to why conservation easements should be held to a different standard than other tax-deductible, charitable donations. After all, the law allows other charitable gifts on a largely unsupervised basis. The difference is that conservation easements are intended (and valued, including for purposes of their tax-deductibility) as *permanent* restraints on the use of lands having significant public conservation values. As stated earlier, the value of conservation easements lies in their promises to be kept in the future, not their undertakings in the present. These future promises can be realized only if conservation easements are subject to some of the kinds of scrutiny and on-going supervision suggested in this report.

³⁶ By this technique, the value of the deduction is determined by first appraising the value of the property as unencumbered by the easement and then appraising the value of the property as encumbered by the easement, the difference between the two being the fair market value for purchase or tax deductible donation.

subjectivity.³⁷ Conservation easement appraisal may be seen as particularly difficult when applied in remote areas, where there is little or no development marketplace, and even more so when the property involved will continue to be managed without restriction for natural resource extractive industries, where these have historically been the economic uses of the property.

These uncertainties become compounded if zoning or other laws already significantly restrict or prohibit development in a fashion that the conservation easement largely mirrors. The appraiser in this situation may have to speculate about whether regulations or zoning applicable to the property might change in the future, or regulatory permits might be issued, in order to accommodate developments that are legally foreclosed or subject to the risk that permits will not be forthcoming. Sometimes, appraisers of conservation easements ask staffs of regulatory agencies to make informed (one hopes) guesses about the prospect of zoning being changed or permits being issued to accommodate different development scenarios.³⁸ While current law is unclear as to the legitimacy of this practice, one might question whether such speculations by agency staffs are sufficiently reliable, particularly when millions of dollars may be held in the balance. One may also ask whether there is any public value, in terms of benefits or tax deductions, in a landowner committing in a conservation easement not to do that which it is currently legally unable to do.³⁹

Consider also the difficulties of valuing a conservation easement when the landowner has withheld from the easement's coverage those portions of its ownership that are most likely to have development value in the future. In this situation, how should a conservation easement be

³⁷ Depending on appraisal methodology, the manner in which the "before" value of land subject to a conservation easement is determined may tend to be higher than its actual market value. This valuation is usually based upon the "highest and best use" of the property, a misnomer taken to mean the most profitable use to which the property could be realistically put without the restrictions of the easement. However, theoretical subdivision and maximum development of a property, that might result in its greatest profitability, may have little to do with its actual market value to a willing buyer in the real marketplace. If the subdivision and development value of the property is used to determine the before value in this fashion, that assumes that, if the property were placed on the market, it would be of interest to developers in the subdivision and development market. But often the likely buyer of a property will be someone who wants to use it for the single family residence that may already be there. In sum, depending upon methodology, the way in which the "before" value of a conservation easement is computed may overstate its actual value if placed on the market and evaluated by willing buyers. While one might level the same criticism at certain appraisal practices of fee ownerships, the latter is based upon comparable properties that have actually been sold to willing buyers, not theoretical computations of possible valuations of properties if put to their "highest and best use."

³⁸ One person interviewed for this report, who works for a zoning agency, expressed amazement at the significance placed upon his predictions in this regard. He also described the way in which representatives of appraisers offer different development scenarios in order to arrive at a sufficient prospect of success to justify the appraisal. Overall, he felt that the landowner's expectations regarding development potential of a given property were often inflated.

³⁹ It may be reasonable to assert that there should be no value attached to an easement's promise to avoid undertaking a development that current zoning would not allow (although experts vary in opinion on this issue), but it may be unreasonable to assert that, in order to be able to attach a value to a conservation easement barring certain types of development, the landowner must first have all the necessary permits in hand to proceed with the development. This helps explain why appraisal experts attach different, subjective, evaluative factors to these imprecise distinctions.

appraised where it covers an area that has only marginal development value, since one can expect that whatever development potential exists in that area would focus on the retained lands that have been excluded from the easement?

The IRS requires that the potential increase in value of other properties held by the landowner and related persons be considered in appraising a conservation easement, but a common understanding among conservation easement tax experts is that the IRS will nearly always allow some amount of deduction for the donation of a conservation easement, even when, in selected markets, the existence of a conservation easement might actually *add* value to the property of the donor.

Further, one wonders how precise and defensible computations can be made of the appraised value of adding public access to the bundle of rights granted by a conservation easement, particularly in a remote area where this type of access may have little impact on the retained uses of the landowner. And what if pedestrian public access has long been a tradition in the area, so that there will be no meaningful change in the future use of the property?

And then there are the multitude of issues that attend the sometimes nuanced complexity and unique terminology that may lie in each conservation easement. In evaluating any conservation easement, sometimes difficult-to-decipher differences in legal terminology can have substantial meaning, with what can be large potential impacts on the property's future protection and economic value.

Because each of these necessarily speculative factors multiplies the others, the mathematical result is that even small changes in assumptive inputs can yield large differences in appraisal outputs.

Many of the tests for the deductibility of conservation easements, enacted at a time when no one could have foreseen the exponential growth and potential complexity of these new property interests, are subjective. The tax laws provide some degree of specificity in the following limited ways: in order to be deductible, a conservation easement must be permanent, recorded in the local registry of deeds, not subject to a mortgage, appraised by a "qualified appraiser," accompanied by some sort of baseline documentation that describes the property's condition, and held by a legally authorized government or non-profit organization that is vested with the right to inspect the property and enforce the easement's restrictions.

Except for these legal requirements, there are few others that have specificity in the tax laws dealing with conservation easements. For instance, the Tax Code and regulations provide that a conservation easement must have a conservation purpose. While the law provides several ways in which an easement's conservation purpose may be determined,⁴⁰ all of them are largely

⁴⁰ Permissible purposes for tax deductible easements are the following: (1) where the property is for outdoor recreation or education of the general public; (2) where the property is for the protection of a *relatively natural* habitat of fish or wildlife; (3) where the property is for preservation of open space providing scenic enjoyment for the public or otherwise pursuant to a government conservation policy and yielding a significant public benefit; or (4) where the property is of an historically important area or structure. Since the second of these tests has the fewest specific criteria, in my experience it is the criterion referred to in most tax-deductible easements.

subjective. With similar lack of clarity, IRS regulations forbid a tax deduction for a conservation easement that, even while meeting one of the abstract conservation purpose tests under the Code, would permit the destruction of other important conservation values. Yet, most conservation easements reserve to the owner some development or other uses of the property that *might* be characterized in this way.

The consequence is that no one can really know how to precisely interpret and apply these requirements except in the most obvious of cases.

For all of these reasons, conservation easement appraisal methodologies are often described as part art and part science, with appraisal results varying, potentially significantly, with the appraiser and his or her chosen methodology. However, now that the IRS and Congress have announced that they are going to closely scrutinize conservation easement donations and appraisals, with the IRS threatening to penalize anyone involved in what it considers to be abusive practices,⁴¹ we have to look at these subjective tests with renewed caution. The land trust community, the appraisers who are involved with conservation easements, and the public at large would all benefit from clearer legal standards from the IRS for conservation easements, their holders and appraisers.

Next, we consider the policy ramifications of certain state programs that result in even greater tax benefits to landowners of donating conservation easements. In this regard, states like Virginia have gone to great lengths, by allowing an income tax *credit* of 50% of the value of the easement, aggregating up to \$600,000, distributed over a period of years, and enabling the easement donor to sell this tax credit to a wealthier taxpayer for whom it would have greater financial benefit. Under similar legislation in Colorado, it is possible for the credit to result in a *refund* by the government to the taxpayer.⁴² Using all available tax breaks and government incentives, it may be more than just theoretically conceivable in selected states and situations, for a landowner to actually make a *profit* out of *donating* a conservation easement.

It is no surprise that, since these programs went into effect, both Virginia and Colorado, among other states, have experienced vast increases in the numbers of conservation easements created, many of them donated by those in the real estate industry. Serious questions arise as to whether the substantial subsidies involved are wise public investments,⁴³ including whether these

⁴¹ Even if the IRS makes good on its recently threatened crack-down on conservation easement donation abuses, this may have little ultimate impact. Some of the abuses on which the IRS is focusing may in fact turn out not to be illegal but simply an outgrowth of the imprecise ways in which the tax laws are written. This may help to explain the generally poor track record of the IRS in the reported case law concerning its efforts to challenge conservation easement valuations in the past. Even where easement valuations are found to be overstated, fines are not imposed except in the most egregious of circumstances.

⁴² Other states that have enacted special tax incentives for conservation easements include Arizona, California, Connecticut, Delaware, Maryland, North Carolina and South Carolina. All of these state subsidy programs are in addition to the federal tax benefits bestowed on donors of conservation easements.

⁴³ As of 2004, the Virginia program alone has cost taxpayers in that state almost \$100 million in the 5 years since its enactment, and continues to rapidly accelerate.

programs are efficient, effective and/or subject to widespread exploitation in using public money to create private conservation easements on a publicly unsupervised basis.

Meanwhile, the Bush administration has proposed additional federal incentives for selling conservation easements, by further reducing the capital gains tax that would otherwise be realized. To like effect, even while emphasizing the stewardship and other responsibilities of land trusts in its latest Standards and Practices, the Land Trust Alliance has stated that its “top priority” is to pass new federal tax incentives for conservation easements. One wonders if increasing public subsidization of conservation easement donations, especially under the largely ad hoc and unsupervised system that prevails in most of the nation, is an efficient use of public funds for publicly beneficial, land conservation purposes.

Let us finally turn to the often very different subject of *assessing* properties subject to conservation easements for real estate tax purposes. In some states, as one might expect, the appraised value of the easement (as determined for income tax purposes) is deducted from the value of the fee unencumbered by the easement, and the result is the assessed value for real estate taxation purposes. But unfortunately, here too we have uncertainties, that mount over time.

First, even when an income tax deduction is not disallowed by the IRS for the donation of a conservation easement, that agency may never have examined the appraisal, and the value of the easement may still be open to legitimate question by the local tax assessor. Moreover, even if the real estate tax assessor accepts the landowner’s appraisal as determining the value of the conservation easement, unlike appraisal of the value of the easement for purposes of income tax deduction, property tax assessment is a dynamic process over time, and the value of the fee, subject to the easement, will inevitably change in ways that are not easily predicted or determined.

It is important to also know that in many states, the reduced assessment for real estate tax purposes due to a conservation easement may depend, not upon the appraised value of the easement, but upon special statutory standards and formulae. Especially, in cases where the property is already receiving current use tax assessment status, a conservation easement may result in no additional reduction in assessed value.

All of these factors, including often the attitudes of local assessors in valuing conservation easement lands, may vary widely. The important lesson here is that one must carefully look to state, and in many cases local, standards and customs before making predictions about the effect of a conservation easement on real estate tax assessment. A large policy question is whether this is fair to the taxpayer as well as to the public.

Potential Solutions:

It may be far more reassuring and helpful, to both appraisers and others associated with conservation easements, to have a more precise set of rules from the IRS and a public certification process for appraisers and appraisals alike. IRS rules should be more tightly drawn to deal both with issues of appraisal methodology and with the types of public benefits and

conservation values that donated easements must possess in order to qualify for a tax deduction. A Congressional staff report, issued in January 2005, would significantly restrict conservation easement donations, including eliminating them for residential properties and requiring appraisers to meet higher standards, but, as of this writing, it remains to be seen if this proposal, or elements of it, may be enacted, or even if so, if it will meaningfully restrict the manner in which appraisals are undertaken.

Although not a substitute for greater precision in IRS regulations affecting conservation easement deductibility, one idea is for the IRS to duplicate for conservation easements its system of relying upon an independent advisory panel of experts in reviewing selected appraisals of likewise potentially subjective, charitable donations of works of art. A similar panel of experts could be used in connection with selected conservation easement appraisals.⁴⁴ At minimum, the IRS should require state-certified appraisers, working in conformity with the most rigorous standards, perhaps employing those used by the federal government when it is buying a conservation easement. For large donations, it also makes sense for the IRS to routinely require an independent review appraisal.

Certainly, appraisals of conservation easements, whether for purposes of determining their purchase price or tax deduction, should be significantly discounted, perhaps to zero, where the property is already subject to regulations that impose the same restrictions as the easement. The valuation of such an easement requires a speculation that applicable regulations will be repealed in the future. For this reason, the IRS, perhaps representing widespread public sentiment, has become critical of tax deductions taken for the donation of so-called building façade easements in communities that are already protected by historic preservation laws. However, it isn't enough to express criticism; the IRS should change its rules to make its intentions clear.

But even more basic than this is imposing a requirement that any tax deduction taken for donation of a conservation easement include a filing with the IRS of the full appraisal report upon which the deduction is dependent, something that has not been required until very recently, and then only for large claimed deductions.

For their part, land trusts should resist taking donations of easements where it is apparent that the appraised value for tax deduction purposes is unrealistic. While it is not for a land trust to have the technical expertise to police appraisals, it may not be too strident to say that a land trust that takes a donated conservation easement, knowing that the appraisal for tax purposes is unrealistically high, should be viewed as participating in a tax fraud.

Finally, one should consider the idea that conservation easement appraisals be made public documents, subject to safeguards necessary to protect proprietary or personal information. After all, these appraisals determine the public investment in the easement. Even if nothing else were changed in the laws dealing with these appraisals, subjecting them to scrutiny of the public as

⁴⁴ This idea is advanced by Law Professor Nancy McLaughlin in "Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach," 31 Ecology Law Quarterly 1 at 86 (2004). The same concept has been informally advanced in discussions with Professor Halperin.

well as of other appraisers would undoubtedly have a significant effect in curtailing abuses before they happen, since all appraisers would be on notice that their work product would be subject to public and peer review. Further, a public record of each conservation easement appraisal should result in better appraisals in the future, since all appraisers would have access to past appraisals relevant to similar donations.

To be sure, the idea of making these appraisals public, like that of making conservation easement creation a more publicly transparent and accountable process, has detractors in the conservation easement community, who foretell that making these transactions subject to public scrutiny will chill the willingness of landowners to donate easements. While this might be true among some easement donors, the question is what other reforms can we so efficiently undertake to solve the appraisal problems that are so widely acknowledged? A related question is what do a scrupulous appraiser and landowner have to fear if the transaction is more publicly transparent?

Regarding the additional, and very financially attractive, conservation easement tax incentives in states like Virginia and Colorado, one must consider whether these subsidies are worth the costs, especially where the conserved property may be of relatively low quality and the tax subsidy may make donation of an easement a nearly economically advantageous enterprise. These programs have the capacity, in the name of land conservation at any cost anywhere, of so skewing the marketplace that conservation easement donation can become a landowner investment even as they represent a holder liability.

Turning to real estate tax assessment issues, it is much the same answer: where not already precise, state laws involved should be clarified. In order to be fair, issues concerning real estate tax implications of conservation easements should be resolved definitively by legislative bodies, or those vested with rulemaking authority, not by the sometimes parochial interests of local tax assessors. Where states already provide current use real estate tax assessment for farms, forests or open space properties, the existence of a conservation easement should not result in any further reduction in real estate taxes, since it has already been reflected in the current use taxation assessment.

Potential Impacts on Regulatory, Public Land Acquisition and Land Taxation Policies

The Issues:

One result of the increasing focus on land protection through the deployment of conservation easements is that it may negatively affect the role of government in regulating private or acquiring public lands as well as have implications for land taxation policies.

John Echeverria, director of Georgetown Law Center's Environmental Law and Policy Institute, is an outspoken critic of conservation easements. His views are based upon the belief that easements are both an expensive and haphazard approach toward achieving land protection that could be more uniformly and inexpensively attained by regulation, while at the same time siphoning off both public and charitable money that would be better spent in acquiring outright ownership of lands with valuable conservation and/or recreational values to the public. Echeverria further reasons, as Halperin forewarned 25 years ago, that conservation easements

remain an untested, sometimes abused and extravagant experiment that may fail to yield the public benefits that Congress intended.

On the other hand, many supporters of conservation easements do not oppose land use regulation, public land acquisition, nor “current use” land taxation policies, but believe that easements provide an *additional* (not a substitute) instrument in the toolbox of strategies aimed at land conservation. Some observers also believe that conservation easements, in the context of prevailing public view, are more politically palatable than traditional regulation or public land acquisition. In this, it is the belief of most of their adherents that conservation easements, even if imperfect and untested, are better than the alternative, if the alternative is little more than uncontrolled development and sprawl.

Whatever their general merits, conservation easements that just mirror current or reasonably foreseeable regulations raise serious questions about what public benefit they accomplish as well as what appraised value to ascribe to such easements. Worse, when government purchases or finances conservation easements that mirror current or reasonably achievable regulation, this can have a significant undermining effect on the reasonable expectations of landowners, who understandably will come to insist that they be paid for what government could have accomplished through regulation. One should not underestimate the undermining effects of such practices on zoning and regulatory programs.⁴⁵

It is similarly easy to confuse the rightful role of conservation easements with that of public land ownership. While conservation easements have been on a strikingly fast growth track over the past 15 years, outright public land acquisition in many areas has been relatively slow during the same period. The latter trend has had an effect in spawning the former, as well as vice versa. As with government regulation, while there can be subtle distinctions between the purposes served by a conservation easement and those of public land acquisition, the gathering trend toward easements has the potential to have, and in some places is already having, a negative effect on public land acquisition for parks and other uses.⁴⁶

Proponents of conservation easements point out that the cost of acquiring an easement on any particular land will be less than the cost of acquiring outright fee ownership, but that is only part of the necessary analysis in making these comparisons. One should also consider whether there may be more public benefit to a smaller park in an area that is accessible to where people live, as an alternative to spending the same public dollars on conservation easements covering larger and more remote lands where the public will be able to make little or no actual use of the property and may not know that it is under easement.

⁴⁵ The Endangered Species Act affords an illustration of this phenomenon. If government buys development rights, via a conservation easement, on lands that contain habitat for an endangered species, then government will be, and already is, hard pressed to explain why it may impose virtually identical restrictions exercising its regulatory power.

⁴⁶ Officials interviewed in one state indicated that the administration’s preference, in spending its money for conservation acquisitions, is to favor conservation easements over outright acquisition wherever possible.

In making cost comparisons between fee and easement acquisitions, one should also bear in mind that the true cost of a conservation easement is not its up-front acquisition price or tax subsidy. The cost of an easement can only be known over an extensive period of time, in dealing with monitoring, enforcement and defense issues, which when litigated can add extraordinary and unbudgeted expenses. In some cases, especially where the cost of a conservation easement approaches the cost of fee ownership of the same land, a conservation easement, which represents a perpetual liability to its holder, may ultimately become more expensive than buying the property outright.

Finally, many states have enacted “current use” or other land taxation policies that are designed to encourage farm, forest and open space landowners to keep their lands in these uses by taxing them at a lower rate than if the land were available for development. Often, these policies include a penalty if the land is to be withdrawn from the program and subdivided or developed. These programs too have their rightful place in the suite of tools available to conserve lands, providing as they relatively temporary protection. Conservation easements should not be viewed as displacing these policies, or vice versa, but as supplementing them in cases where more assured, long term protection is the appropriate goal.

While it is easy to see that sensitive evaluation and weighing of these issues is necessary to good public policy-making, certain financial incentive programs,⁴⁷ favoring conservation easement acquisition, may skew the outcome in a fashion that, when closely scrutinized, might not be to the public’s greatest benefit.

Potential Solutions:

As a general matter, conservation easements should be employed as a tool to conserve publicly beneficial conservation values that cannot be protected using reasonably available regulatory and land taxation measures and, at the same time, the public values and uses of which are not so great as to justify outright public ownership. Even recognizing that different minds may come to different conclusions about where to draw the lines of demarcation, all who are involved with conservation easements should remain mindful of them. The various tools of land protection (i.e. regulation, taxation, conservation easement, outright land acquisition) all have a legitimate role and should be viewed by policy makers, land trusts and government agencies as complementary to, rather than substitutes for, each other.

For instance, where the primary objective is broad, public recreational use of land, that should generally be accomplished through public ownership, which yields the best opportunities for the public to determine how the land will be managed and used for its benefit. By contrast, conservation easements, whether held by land trusts or government agencies, are best utilized where conservation of the land provides an important public benefit, but the public interest is best promoted by continued private ownership and use. Similarly, where the goal of potentially

⁴⁷ In addition to the federal and state tax incentive programs described in this paper, there are also direct subsidization programs, such as the federal Forest Legacy Program, that are often earmarked for particular types of conservation easement acquisition. The Legacy Program, initially envisioned to acquire forest lands of national significance by the federal government, has been transformed into a grant program to states, with the moneys mostly spent on conservation easements.

shorter term land conservation can be accomplished through “current use” or similar land taxation policies, that tool should be selected.

All of these tools take their toll on the public treasury. Careful scrutiny should be applied by policy makers about how limited, available money for conservation of land should best be spent in applying these tools. Thus, the opportunity costs of spending public money for conservation easements should be carefully weighed against these other measures.

Especially when conservation easements protect from development areas that are already zoned or taxed for current uses, such as for forestry, farming or ranching, government should think carefully about paying for or otherwise subsidizing these if they do little more than resemble the regulations or tax policies that are already imposed. More than that, policy makers should also pursue the idea that needed land protection that can be realistically accomplished by regulation should be exhausted before one turns to the government’s purchasing conservation easements.

The Massachusetts model can serve as one means by which a public review and approval process could ferret out those easements that should be avoided for lack of any meaningful public benefit beyond that which is already accomplished by regulation or tax policy.

These points should not be seen as criticisms of conservation easements, which are an appropriate tool to achieve certain conservation purposes; but they should not be viewed, as they sometimes are, as supplanting government regulation or acquisition of public land, the public benefits of which are not well achieved by the type of mixed ownership and objectives that are the hallmark of the conservation easement.

Equity and Environmental Justice Issues

The Issues:

Conservation easements also engage issues of equity and environmental justice. Conservation easements are often concentrated in affluent communities, where wealthy donors can take maximum advantage of the tax incentives available. While rare is the conservation easement that exists in an urban or relatively low-income community, there are a few land trusts, notably the Trust for Public Land and the Black Family Land Trust, that have a principled mission of creating opportunities for the public, including those in urbanized areas, to have access to conserved areas.

Moreover, as discussed above, many holders of conservation easements do not inform the general public about them, even when the easement provides for public access, which, in some cases, may be the principal public benefit of the easement. This can mean that those who live outside the immediate (and often affluent) community where the easement is located simply won’t know of the easement’s existence, even when it provides for public access.

In sum, most donated conservation easements, and the public subsidies that go into them, are often of most benefit to the affluent and the communities in which they live. Such easements may have negative effects on affordable housing, or may even push development into less concentrated and more environmentally or socially inappropriate areas. One may legitimately

question whether the public subsidy that goes into these easements would be of broader public benefit if it were focused on conserving land that is near where people live, including urbanized communities of the less affluent, who often have no meaningful access to, and receive no meaningful benefit from, most lands subject to conservation easements.

Of course, it is fair to say that this general issue extends to many forms of charitable giving. Every year, the thousands of relatively wealthy donors to Harvard, which has the largest endowment in the world, receive a tax deduction that is of greater financial value to them, given their likely income tax brackets, than the dozens of annual donors to a community college that has much greater financial needs in serving a much less affluent constituency. Perhaps this too presents an issue that ought to be closely scrutinized, but the donation of most conservation easements present the added dimension of having permanence in their benefiting relatively wealthy communities, although subsidized (in some states heavily so) by everyone.

Potential Solutions:

Virginia has attempted to partially address the issue of tax equity by allowing the credits that it gives to conservation easement donors to be marketed by those in relatively low income tax brackets to those in higher tax brackets who can take greater advantage of them. Colorado's tax credit program deals with donor equity issues by potentially resulting in a refund to the taxpayer if the credit exceeds the amount of tax that is due. However, as discussed above, these programs may be flawed because, in their unsupervised generosity, they underwrite the donation of conservation easements to the point that their public benefits may not be worth their enormous public subsidies. Of course, even these programs do little to encourage conservation easement creation in less affluent communities, although an indirect impact may be that incentives for less affluent donors may result in more conservation easements in less affluent communities.

From a taxpayer equity viewpoint, the federal tax laws could likewise be re-written to provide a modified tax credit rather than a deduction for the donation of conservation easements, which would tend to equalize the incentives among donors of different income levels. However, such a measure, without more, also would not provide greater focus on conservation of lands in less affluent communities. To address this issue directly would seem to require additional legal supervision in evaluating the public benefits of easements or otherwise assigning greater incentives to easements located in relatively urbanized or low income communities. The Vermont model, where, under the auspices of one agency, public funding for conservation easements and community parks is balanced with financial incentives for affordable housing, perhaps comes closest to this ideal.

While conservation easement creation has been on a nearly exponential rise over the last decade, in some cases having a displacing effect on acquisition of public lands that might benefit more people of diverse income levels, one response to these issues of equity and environmental justice might be to consider diversion of at least some of the unsupervised, public subsidization of conservation easements to public park acquisitions in areas where most of the population lives. This goes to the issue, discussed above, of whether at least some of the rapidly increasing public investment in conservation easements would better be spent on parkland acquisition in relatively developed areas that are accessible to people of diverse income levels.

There is no known empirical analysis available of exactly what the public subsidy in conservation easements amounts to, and therefore policy makers are simply in the dark as to whether that sum, large as we know it must be, might be better spent on a mosaic of easements and public park acquisitions, distributing the public benefits of these investments across a broader range of the population and its diverse communities. Meanwhile, a large industry has grown up around conservation easements, and there has been little interest in scrutinizing the rising tide of easements, its primary beneficiaries and its opportunity costs. Although it goes beyond the scope of this report, perhaps the time has come to seriously engage in that process of scrutiny.

Conclusions

Conservation easements have played and will play an increasingly major role in protecting portions of the American landscape. However this should be an uneasy time for those in the conservation easement community. Because of alleged conservation easement abuses widely reported by the news media, both Congress and the IRS are investigating easement practices by their donors and holders. As of January 2005, Congressional proposals are emerging to substantially reduce tax incentives for donations of conservation easements. The time is right to explore potentially useful reforms of all kinds in order to avoid throwing the baby out with the bathwater.

The principal source of many issues with conservation easements is that the current laws and conventions that govern these new interests in real estate were created at a time when no one could have anticipated the explosive growth of easements and land trusts. Accordingly, for many of the solutions to these problems, we have to consider reforming these laws and conventions in order to respond to the reality that we now know. While national organizations like the Land Trust Alliance, and regional land trusts like the Maine Coast Heritage Trust, have shown outstanding leadership in devising and promoting standards, practices and other assistance for land trusts, these standards are purely voluntary, and land trusts have no legal obligation to follow them. Moreover, in some cases, the worst offenders with respect to long term management of conservation easements involve understaffed or inattentive government holders.

While currently the Land Trust Alliance and other industry leaders prefer reforms that are voluntary and not incorporated into the law, one should also consider the more uniform and universal benefits of reforming the laws governing conservation easements, in part perhaps by legally incorporating LTA's forthcoming accreditation system, if it is sufficiently rigorous. Certainly, any movement to restructure the conventions and laws governing conservation easements and their holders must involve the full participation of the community of land trusts and other holders. In this regard, it is interesting to note that many of those interviewed or from whom communications were received for this report, including from the land trust community, generally stated support, in some cases enthusiastically, for a greater degree of legal supervision of conservation easements as is suggested here.

The most universal approach to legal reform would be to create more rigorous IRS standards for conservation easements, their appraisals and holders, so that there is greater assurance that their

public subsidy will result in conservation easements that are permanently monitored and enforced. A second and complementary approach would be for the National Conference of Commissioners, which gave birth to the Uniform Conservation Easement Act in 1981, to reconvene and consider the issues that went unresolved in its earlier work. A third approach would be for each state to consider amendments to its conservation easement enabling act that respond to these issues. Finally, the Land Trust Alliance is already making efforts to inform and encourage its members to take affirmative action to resolve many of these issues on a voluntary basis.

Even while considering needed reforms, we should avoid imposing unreasonable transaction costs on conservation easements. The goal is to select reforms that are efficient in making a difference. At the same time, it is important to consider the tremendous and increasing public subsidies of conservation easements, their opportunity costs and potential effects on government regulatory and land acquisition programs, all as discussed in this report.

How dire is the future of conservation easements regarding the issues outlined in this report? Just as conservation easements are intended to endure, each of the problems reported here will have its day, and some already have. When evaluating the effectiveness of conservation easements under the prevailing legal structure, perhaps the best answer is that the jury will be out for a century, but one should be sufficiently concerned about a possibly adverse verdict to consider these issues and ways to resolve them.

If conservation easements are to serve future generations as is their promise, they will have to live up to three essential principles:

First, the value of conservation easements depends upon their being able to effectively and permanently deliver the public benefits they promise.

Second, landowners, land trusts and other conservation easement holders, who receive the benefits of the state and federal laws that provide for and subsidize conservation easement acquisition, should be legally accountable for upholding their part of the bargain, including monitoring and upholding each easement and assuring that its public benefits are secured in the future.

Third, the process by which conservation easements are created, appraised and managed should be more rigorous, publicly transparent and accountable.

With these principles in mind, there are many approaches to resolving the issues presented by conservation easements as described in this report. However, to fashion the solutions, one must first acknowledge the problems. If ever we are to take action to assure the future of conservation easements, the time to do so may never be better, nor easier, than now.