(15)

ATTACHMENT 4

CHAPTER 11

Term and Termination:

When Easements Aren't Forever

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Most conservation easements will be of potentially infinite duration. State enabling statutes in the field are usually flexible—generally permitting any term desired by the parties, although a few require a minimum life such as 10 or 15 years.[1] But to obtain a federal tax deduction for the contribution of a conservation easement, it must be granted in perpetuity. In addition, maximum real property tax benefits will be available only if the easement is permanent. A shorter specified term may result in a smaller reduction in assessed valuation or the gradual phase-out of any reduction. Since the purpose of conservation restrictions is usually the permanent protection of a historic structure or open space, it would seem that restrictions should be of infinite duration.

Easements with Limited Terms

In certain circumstances, however, a limited term on conservation restrictions may be necessary or even desirable. Suppose, for example, a property is the habitat of a rare and endangered species of plant. The owner wishes to continue to occupy the property for a few years, but is willing ultimately to sell it to a conservation organization or a governmental agency. An interested conservation organization may be able to raise the necessary funds to purchase the property if it has sufficient time but wants to protect the habitat in the interim by limiting the uses of the land. If the funds cannot be raised within a certain period of time, the owner wants to be free to sell the property on the open market. The owner and the conservation organization might agree on an option to purchase, coupled with conservation restrictions to protect the parcel during the option period.

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1. For example, Virginia requires a minimum of five years, Michigan and California at least 10, and Montana 15. The New York statute provides that a minimum term will be set by regulations, which have not yet been issued.

More simply, some owners will be unwilling to restrict their property in perpetuity but may be willing to do so for a period of years. The hope would be that, with the passage of time, the owner might have a change of heart and be willing to donate or sell the land or conservation restrictions on the land. A conservation easement for a period of years will establish a relationship with an interested conservation organization and protect the property while the owner makes a longer-term decision.

In almost all circumstances, however, conservation easements should be perpetual. Short-term arrangements may give the illusion of protection and establish a false sense of security. Furthermore, it takes as much time and money to negotiate and process an easement that lasts 10 years as one in perpetuity. Most conservation organizations and governments have limited staff time and should expend it on projects that will have long-term impact. Similarly, owners will often be unwilling to pay the costs associated with the placing of short-term restrictions or to contribute adequate funds for overhead and monitoring expenses of short-term conservation easements.

Methods of Termination

Because most conservation easements are designed to run in perpetuity, the question of how or when an easement can be extinguished is usually far from the minds of the grantor and grantee. The subject, however, is an important one. Conservation easements are frequently resisted by property owners or government officials simply because they are, theoretically, to be held in perpetuity, and perpetuity is a very long time. There is a concern that mistakes may be made or that circumstances may change, and the permanent restrictions may be a cause for regret. Fears have even been expressed that the use of conservation easements might be so widespread in a community that they would prevent the construction of necessary public facilities such as schools, hospitals, and housing.

Such concerns might have some validity if, in fact or in law, anything were truly permanent. But this is rarely the case, and conservation easements are no exception. They should, as already indicated, potentially be of infinite duration, but that is very different than *actually* being of infinite duration.

Conservation easements granted to run in perpetuity can be terminated by several methods and in a variety of circumstances, some of which are under the control of the grantor and grantee, and others not. Some states have anticipated that issues may arise with respect to the termination of conservation restrictions, and several statutes, as well as the Uniform Conservation Easement Act, provide that they may be terminated "in the same manner as other easements."[2] Other state statutes are silent on the question, probably assuming that

2. See, for example, Arizona, Colorado, Maryland, New Hampshire, and Utah.

(17)

there is no need to restate the obvious, and therefore pre-existing legal doctrines apply.[3] In a small number of states, statutory provisions are ambiguous or suggest that termination provisions, if desired, should be included in the easement document. New York, in particular, requires care in this respect. The following methods of termination, however, will be relevant in all states.

Eminent Domain (Condemnation)

If land is needed for a public purpose such as a school, road, or even a sports stadium, it may be taken by government, even against the wishes of the private owner. In such an event, the owner must be compensated for the value of the property. If the land is restricted by a conservation easement that prevents the proposed use, the restrictions may also be terminated by condemnation.[4] The nature and extent of compensation to the holder for the termination of the restrictions is a matter of some legal complexity and may vary from state to state. The definition of *public purpose* is very broad; thus the government's power of eminent domain makes it unlikely that a conservation easement will, at some future time, prevent necessary public activity.

Foreclosure

Another means whereby conservation restrictions may be terminated without the consent of the holder or landowner is through the foreclosure of a pre-existing lien on the property, such as a mortgage, mechanic's lien, or lien for unpaid taxes. At the foreclosure sale, the purchaser will take title free of restrictions placed on the property after the creation of the lien being foreclosed. This unfortunate result can be avoided with respect to a mortgage if, at the time the conservation easement is placed on the property, a subordination agreement is obtained from the holder of the mortgage. Such a subordination agreement is required by Internal Revenue Service regulations if the grantor is donating the easement and wishes to take a federal tax deduction for its value.

In a minority of states, the foreclosure of a tax lien placed on property *after* the conservation easement is recorded may also terminate the prior existing conservation restrictions. Fortunately this approach is changing, but the law of the state in which the property is located must be consulted on this point. In any event, if there is a pre-existing, unsubordinated mortgage on the property, or if state law with respect to tax liens is in doubt, a conservation easement should provide that the holder has the right to make mortgage and tax payments if the owner fails to do so, and that such payments will then become a lien on the

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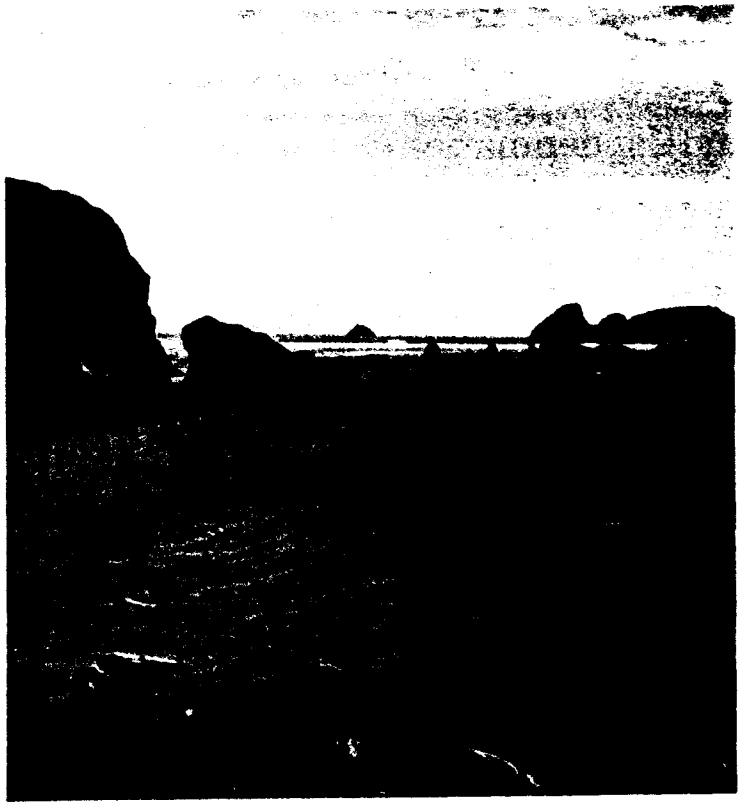
3. For example, Connecticut, Delaware, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, and Washington.

4. In most states with conservation easement statutes, a conservation easement can also be created through the condemnation of the restrictions by a governmental entity.

(18)

restricted property. Such a provision will give the holder of the easement an opportunity to protect the restrictions should the need arise.



Funds allocated to the state of California from the federal Land and Water Conservation Fund helped purchase this conservation easement on California's northern coast, near Trinidad. The easement is held by the Humboldt North Coast Land Trust.

Marketable Title Acts

More than a third of the states have passed legislation providing that, after a certain number of years, claims to or restrictions on real property are automatically extinguished.[5] While Massachusetts and Wisconsin have such statutes, they specifically exempt conservation easements. In other states, however, the holder of the conservation easement may find that it is automatically voided after 20 to 30 years, notwithstanding that it was intended to restrict the land in perpetuity. The provisions of these statutes vary, but if one is on the books in your state, you might consider joining with other organizations to try to have the law amended in order to exempt conservation easements and other restrictions placed on property for public benefit purposes.

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5. Connecticut, Florida, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, and Wyomin~

Modified - Chapter 443, 1995 Session Laws - to add exception for conservation easements.

(19)

Changed Conditions

The uses of land change with time. Farms may be turned into residential subdivisions. Residential areas may become commercial and commercial areas may become residential. It is this very process of change that conservation easements are intended to prevent, at least on the property subject to the easement. There is, however, a legal doctrine that permits the owner of property to prevent the enforcement of restrictions on the land if the surrounding area has changed so that the restrictions can no longer fulfill their original purposes. This is known, appropriately, as the doctrine of changed conditions.

There is some question whether this doctrine applies to conservation easements. It was not originally intended to do so, since it evolved before conservation easements were first used. Clearly it should not apply in most instances, since it is highly unlikely that the purposes of a conservation easement will be frustrated by changes in the surrounding neighborhood. Conservation easements are intended to preserve landmark structures or open space for historic, scenic, educational, recreational, or environmental reasons. It is quite likely that achieving these objectives will become more important if the character of the surrounding area changes. Because of the doctrine of changed conditions, it is important, however, to state the purposes of the restrictions clearly and to indicate, when it is appropriate to do so, that several objectives are to be achieved.

Release, Inaction, and Merger

The holder of a conservation easement may terminate it through its own action or, in some instances, inaction. The right of a holder to extinguish an easement by voluntarily releasing the restrictions on the land is sometimes limited by statute. In Arizona, the written consent of the property owner as well as the holder of any enforcement right is required. Most owners will not object to ending restrictions on their property. If they have taken a federal tax deduction for the value of a donated easement, however, they may lose the deduction if the restrictions are terminated. In Massachusetts, termination requires a public hearing, and in Nebraska, the approval of the governmental body that originally approved the easement is needed.

No nonprofit conservation organization or government should release an easement on privately held land without receiving adequate compensation. To do so would probably violate state law, be contrary to the purpose for which the organization was formed, and jeopardize the organization's tax-exempt status. The compensation should at least be equal to the increase in the value of the land resulting from the termination of the restrictions. Thus, in theory, a conservation organization or the governmental holder of a conservation easement could negotiate with the owner of restricted property on a price for which it would release the easement. It could then use the proceeds to purchase land or another conservation easement.

In practice, however, such a procedure would be dangerous and undesirable. It might result in a lawsuit by the state attorney general and could cast doubt on the integrity of the organization and of the easement process. As a matter of policy, a holding organization should not consider releasing a conservation easement, even for compensation, except under the most extraordinary circumstances. In such a situation it should consider obtaining an advisory opinion from a court or appropriate governmental agency.

If the owner of restricted property violates the restrictions, and the holder of the conservation easement fails to bring suit within the period of time set forth in the state's statutes, the right to bring an enforcement action expires. As a result, the easement will be extinguished through the holder's inaction. This is the primary legal and practical reason why adherence to the provisions of a conservation easement must be carefully and consistently monitored by the holder, at least on an annual basis.

If the holder of a conservation easement on a piece of property becomes the owner of that restricted property by gift or purchase, the right to enforce the restrictions "merges" with the rights of ownership, and the easement will be extinguished. This result is logical and necessary, since it would be unrealistic to expect the holder-owner to enforce restrictions against itself and, in any event, it could agree with itself to release the restrictions, as discussed above. This situation will not occur often and is of little importance since the holder-owner's interest is to protect the property. Trouble could arise, however, if the owning organization subsequently were to sell the property. In such a case, the owning organization should impose any restrictions that are agreed upon with the purchaser by including them in the deed of sale.

The Holder's Responsibility

Even when a conservation easement provides that it will run in perpetuity, the easement may be terminated by the holder or without the holder's consent and notwithstanding its objections. When an easement is accepted by a conservation organization or government, it accepts the responsibility of enforcement and the duty to prevent termination, accidentally or otherwise. If questions of termination arise, the holder should promptly discuss them with a knowledgeable attorney.