Section 5: Land Conservation and Permanence

5.1: Background
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Time complicates virtually everything, particularly environmental issues. The passage of time makes it difficult to analyze and judge the causes and nature of environmental damage (Thompson, 2004). Permanence is among those environmental issues. The permanence or “perpetuity” of land preservation across different conservation strategies has become increasingly controversial in recent years.

Most conservationists agree that permanence is essential to a successful land conservation strategy. However, how that permanence is achieved is still up for debate. This background paper will analyze several different land conservation strategies as they relate to permanence with a special focus on two of those strategies—private land acquisition and public land use regulation; it also addresses eminent domain or “takings” issues, which are essential to the debate. Conservationists must find ways to reconcile and combine public and private approaches to help achieve permanence and ensure that a particular conservation strategy or combination thereof is successful far into the future.

The Permanence of Private Land Acquisition

Land trusts and other private land acquisition organizations highlight the ability of fee ownership and conservation easements to protect land in perpetuity.

Fee simple ownership by a land trust or government agency dedicated to the management and protection of open space is typically the most “permanent” form of protection. That being said, land trusts and government agencies (in spite of constitutional and legislative protections) have been known to trade, or to sell lands that others thought would be conserved forever, not even to mention the other issue of insufficient management.

Conservation easements are permanent by design, and many statutes that facilitate their creation actually require that they be perpetual (Harding, 2009). While permanent protection of land is an important, substantive feature of conservation in general, the instigation of the statutory perpetuity requirement can be traced to tax
incentives legislated by federal and state legislatures, as well as land trusts’ traditional appeal to charitable donors.

For the donation of a conservation easement to be tax deductible, the Internal Revenue Service (IRS) requires that the easement must be “in perpetuity.” Securing and maintaining conservation easements in perpetuity are the most critical and complicated challenges and opportunities for the private land conservation community (LTA, 2007). The perpetuity requirement traces back to the policy concern that donations not in perpetuity would be difficult to value. Federal and state regulators were also wary that this tax deduction might be used to allow a public subsidy for property held in a long-term investment for development. The involvement of the IRS and the use of a charitable donation to receive a tax deduction render a traditional private transaction into one with public implications. Hence, the advent of a perpetual conservation easement not only holds important ecological and financial benefits, but also holds important private and public policy implications.

Perpetual restrictions on land are not unique to the conservation easement context. Perpetual restrictions have been placed on the development and use of land in the charitable context for centuries. This includes the donation of property to government entities and charitable organizations to be used for specified charitable purposes in perpetuity as hospitals, libraries, public parks, and nature preserves, all of which limit the use of the land for economic development or other purposes (McLaughlin and Machlis, 2008).

Like the above charitable donations, conservation easements are legally binding documents that can be enforced by a court of law. When a land trust accepts a perpetual conservation easement, the land trust promises the easement grantor, land trust members, funding sources, and the public that the land trust will uphold the easement in perpetuity. As a charitable organization chartered under state law and as a federally tax-exempt nonprofit entity, a land trust has legal and ethical responsibilities to ensure perpetual protection of its easements and lands donated for conservation purposes (LTA, 2007).

Ironically, proponents of conservation easements also argue that one benefit of conservation easements is that they preserve the ability to make choices about property under easement in the future. This is an efficiency argument that suggests reversing the impacts of development is much more difficult than reversing the impacts of conservation. This is evident because mistakes in the conservation of a parcel are less socially, economically, and ecologically costly than mistakes in the development of a parcel. In essence, the conservation of the land may make it more susceptible in the future to change because it has yet to be permanently altered by development. Development limits what can be changed. This produces an underlying conundrum for land trusts. While conservation easements essentially help keep conservation options alive, they can also potentially keep development options alive as well. This may inappropriately lock up lands that, from a broader view of the public interest, ought to be set aside for future development or, at least, should be considered for future development through a public planning process (Echeverria and Pidot, 2009).
Opponents of conservation easements as a means to permanent land conservation offer further reasons why conservation easements may not be the most permanent of instruments. For instance, there are substantial questions as to whether easement restrictions can be effectively enforced over the long term, especially with the transfer of the property under easement to a landowner that may not have the same values as the previous landowner. Also, the ecological changes of a parcel or landscape may not be accounted for in a conservation easement especially when dynamic changes are inherent in natural systems. In addition, there is scientific consensus that climate change may produce sizeable shifts in ecological conditions across a landscape having a dramatic impact on areas such as coastal watersheds and other riparian zones, as well the habitat of many endangered species. The predictability of the conservation value of a certain property will be in jeopardy, leading to situations where conformance to a conservation easement may be impossible (Echeverria and Pidot, 2009).

The Rolling Easement

An innovative take on the traditional form of an easement is the rolling easement. Rolling easements have been enacted in a few jurisdictions to balance wetlands preservation with private property rights. As the sea advances, the easement automatically rolls landward, thus permitting the creation of new wetlands and preserving public access to the shore. The owner of the underlying fee can develop and use the land as long as the land is above sea level. This allows the owner to plan for the future based upon sea level rise projections. Innovative easement designs like this demonstrate the flexibility of these instruments and their ability to adapt to future environmental changes (Sussman et al., 2010).

Owners of the underlying fee interest may also be able to modify or extinguish conservation easements in the future through legal action with or without the cooperation of the easement holder. This can be done by arguing that a change in circumstances makes the purposes of the easement impossible or impracticable to accomplish or that the easement is too vague, ambiguous, or impossible to enforce.

If a conservation easement is deemed to be no longer useful, it “might legally die of neglect” (Thompson, 2004, p. 611). This could happen in at least two ways: first, through a failure to formally re-record the conservation easement under a particular state’s marketable title acts; or second, through estoppel1 after repeated violations of the easement’s restrictions by the owner of the property under easement (Bray, 2010).

However, a well-drafted easement may be able to reconcile these potential impediments by being able to adapt to future contingencies. The challenge for each land trust is to develop criteria for amendments to conservation easements to address unexpected or evolutionary changes in a manner that honors its legal and ethical obligations and maintains public confidence in the integrity of the organization and its conservation easements (LTA, 2007). Conservation easements must be careful not

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1 Estoppel is a legal doctrine that means a person is prevented from denying or asserting a position contrary of that which has been established as the truth by his or her previous actions.
to “pigeonhole” too narrowly the conservation purposes of a landscape that may be subject to change in the future.

Preparation of Conservation Easements for Future Exigencies

An amendment provision in a conservation easement affirmatively declares the land trust’s powers to modify easement terms and the restrictions or requirements that apply. The LTA recommends that conservation easement holders should include an amendment clause to allow amendments consistent with the easement’s overall purposes, subject to all applicable laws, and that the amendments meet the following to muster legal scrutiny:

- Clearly serve the public interest and be consistent with the land trust’s mission.
- Comply with all applicable federal, state and local laws.
- Not jeopardize the land trust’s tax-exempt status or status as a charitable organization under federal or state law.
- Not result in private inurement or confer impermissible private benefit.
- Be consistent with the conservation purpose(s) and intent of the easement.
- Be consistent with the documented intent of the donor, grantor and any direct funding source.

Another potential problem with conservation easements is recalcitrant landowners. As the conservation easements become older, the more detached the landowner or easement holder will be to that specific transaction, and the harder the enforcement of those easements will be. The novelty of conservation easements makes it hard to know how future actors might attempt to undo them, much less whether they will fail or succeed in their attempts (Bray, 2010). The need to establish and formalize standards and procedures to ensure that conservation easements do not outlive their usefulness is imperative to the perpetuity of the conservation easements.

Yet, even if conservation easements are indeed permanent, the permanent hold on the development of a particular property may not be in the best interest of a community. Obverse to the efficiency argument above is that not every development will permanently or inappropriately impact a resource or property. Ecological restoration has improved the likelihood of natural landscape restoration of previously developed land. This can range from the conversion of a waterfront highway to a public park, to the re-establishment of a natural forest system on abandoned mining sites. Likewise, lands on the edge of a growth area that are currently suited for conservation may not be so in the future. Land on the growth zone edges may not be needed for development at the time of protection, but, as developed areas grow outward, the need increases. Otherwise, unless appropriate zoning is in place, the result will be leapfrog or spot zoning, wherein the continuity of
developed and protected land will be interrupted, nullifying much of the conservation importance of a parcel.

To help ensure the permanence of conservation easements, the easements should be drafted so that land can be freed from obsolete restrictions. However, any provision that renders the conservation easement too easy to undo or relax should conservation values change may also make it less effective for its stated purposes (Bray, 2010). For conservation easements to be effective, the current generation must find a workable way to dictate conservation policy into the indefinite future. This will require conservation easements to be flexible, while also maintaining their conservation purposes into the future.

Formulating strategies for the future also relates to situations where land trusts use public money to purchase property. Often times, the use of public money to buy property requires the property to have restrictions on the development of that property into the future. These restrictions need to also be mindful of future changes.

Finally, governments may also acquire both the underlying fee and a conservation easement through eminent domain to convert the protected land to some other, more valuable, public use. Just because a land trust owns legal title to some part of the property does not prevent such takings – only local political processes do. This underscores the importance to land trusts of using their land to provide and demonstrate clear value to the communities within which they work.

The Permanence of Regulation

Regulation of land use is another important technique to conserve and protect land. Protection of land through regulation is mostly done on the local government level through various forms of planning and zoning ordinances and other planning instruments (see Section 4 above). For purposes of this paper, land use regulation refers to the entire spectrum of local, state, and federal government requirements and procedures controlling private land use, including zoning, growth management ordinances, wetlands permitting statutes, the Endangered Species Act, and the Clean Water Act among others (Echeverria and Pidot, 2009).

Critics of conservation easements often see regulations as more effective, more equitable, and immune to the contradictory permanence issues arguably inherent in conservation easements (Bray, 2010). However, much like conservation easements, the permanence of land protection via land use regulations is a concern of many in the conservation community. While laws have the ability to regulate land use on a consistent landscape level, persuading a government body to regulate based on conservation is not a simple or rapid process. Even when a government does decide to promulgate progressive regulations and ordinances to protect land, those regulations are subject to elimination or modification through the political process at any time. For example, legislatures or town councils may discard regulation because of waning political support or a loss of funding. Unwanted regulations can also be replaced by new regulations that are more in vogue, or they can expire through sunset provisions (Vinson, 2007).

Proponents of regulation for land protection argue that despite the propensity of a political body to change a land use regulation when it deems necessary, the process
to actually get to that point is very difficult. A major political struggle is often required to establish a new regulatory program that protects land. Yet, once these regulations are established over a few years, changing the regulations can be an arduous task. Certain kinds of land use regulations, especially those in areas with settled land use patterns, tend to have durability (Echeverria and Pidot, 2009).

**Hyde Park, New York – Impact of Changing the Political Guard**

After passing regulations and ordinances aimed to protect and conserve the environment for over a period of twenty years, Hyde Park, New York has recently gone through a political upheaval among the town’s administration and planning board, inviting revision to its local conservation laws that can negatively impact the environment. For example, recent revisions to its wetlands protection ordinance would no longer prohibit agricultural activities, motorized vehicles, the use of pesticides and herbicides for lawn care (subject to certain criteria), control of invasive species, paving and repaving of driveways, and installation of fountains in ponds within the 100-foot riparian buffer zones (Town of Hyde Park, New York Code § 63-1).

The permanence of regulatory land conservation programs can also be maintained for another reason. Once zoning and land use regulations are established, landowners must adapt to the restrictions by taking advantage of certain aspects of the regulations and making accommodations to minimize conflicts with others (Echeverria, 2005). Landowners can become substantially invested in the regulation – “the devil we know” – making it that much harder to change it again.

Still, others argue that impermanence – the ability to adapt to change – is an advantage to the land conservation community, and that the fickle nature of political decisions may actually help the protection of land. Impermanence may be both unavoidable and valuable, undermining a primary argument for using conservation easements in the first place. The malleability of regulation may be the best tool to allow restrictions to be modified as circumstances change. For example, the flooding of a coastal flood plain due to increased sea-level rise may be a great candidate for protection through appropriate regulation and not by a conservation easement in its current traditional form (Echeverria and Pidot, 2009). However, regulators must be careful to plan adequately for the long political process of regulation modification and amendment.

Regulations are permanent until they are not and most landowners across the country are weary of any additional regulations that may affect the use and enjoyment of their property. The challenge to conservationists is first to convince the community and government officials that regulating land for protection is in their best interests and then to maintain the momentum across administrations and changes in the political culture of a community (Echeverria and Pidot, 2009). The permanent perspective of local land trusts may, in fact, make them uniquely well positioned to help maintain this momentum over the long term.
Temporarily Protection

Regulations also hold an advantage over the apparent permanency of conservation easements when dealing with constantly changing ecological conditions. The impermanent political reality of regulations makes them well-suited to facilitating the gradual, orderly transformation of land on the urbanizing fringe to development uses. Regulation may be a better conservation strategy on the fringe of urban growth where downzoning can be done relatively quickly. Conservation easements may lack the same adaptability unless they are drafted in a way that allows the easements to take into account future change. Likewise, regulations offer some advantages in addressing changing landscapes such as receding ocean shorelines. Regulations may provide more appropriate temporary protection for these areas (Echeverria, 2005). However, relying on regulation for conservation of individual properties may prove problematic by not being able to take into consideration the specific characteristics of that property and the property’s owners.

Eminent Domain

Whenever government regulation impacts the ability of a landowner to use and enjoy his or her property, there may be constitutional restraints that must be considered. The Takings Clause of the United States Constitution requires the government to give “just compensation” for any property it may condemn. It is important to note that the Constitution does not prevent the taking of private property, but instead places a condition on that power – payment of financial compensation. There are two types of takings – physical and regulatory. If the government physically appropriates property, the action would constitute a taking. However, whether a regulation imposed can trigger the finding of a taking is not so certain.

Regulatory Takings and the Impermanence of Regulation

Oregon Measures 37 and 49

In November 2004, Oregon voters adopted Measure 37, which requires local governments either to compensate landowners when land use restrictions reduce the value of their property or to waive the offending restrictions. The underlying premise of Measure 37 is to give rights to landowners that go beyond the private property rights recognized in the federal and state constitutions that protect against uncompensated takings of private property by governments. Unsurprisingly, Oregon governments received more requests for compensation than they could afford and instead waived the offending restrictions in all but one case. As a result, Oregon voters approved Measure 49, modifying Measure 37 in November, 2007. Measure 49 changed Measure 37 by not allowing challenges to restrictions on industrial or commercial uses of property. Claimants must now also prove their losses by presenting appraisals of the property one year before and one year after the enactment of the regulation that causes the restriction on the property. This
demonstrates one state’s frustrations with land use regulations and Oregon’s government and citizens’ ability to change a regulation or statute within a short period of time. For more information visit http://www.oregon.gov/LCD/MEASURE49/index.shtml.

The United States Supreme Court currently gives the Takings Clause a narrow interpretation, reducing the likelihood that most regulations can give rise to viable takings claims (Echeverria, 2005). The Court has consistently held that takings recovery is limited to extreme circumstances. U.S. Supreme Court cases over the years suggest that diminutions in value of over 90% are not sufficient to establish a taking and lower federal and state court decisions apply this fairly consistently (Echeverria, 2005). In fact, a regulatory taking finding is unlikely unless a property only retains a value that is slightly greater than \textit{de minimis}.

Another important factor in a court’s takings determination is whether a regulation singles out a particular owner to bear a special burden or applies broadly across similarly situated folks in the community. If the regulation applies to only a few owners, the government may be forcing the few to bear the burdens of the public as a whole. Courts are more comfortable with a regulation that counterbalances the burden imposed by a regulation with the benefits of enforcement of the regulation to neighboring properties.

Takings should not be an impediment to comprehensive land use planning or land protection. Courts have consistently rejected takings challenges to sound growth regulations and laws, wildlife protection rules, historic preservation ordinances, and forest and agricultural zoning districts (Echeverria, 2005). In the rare instances when regulation may constitute a taking, the government is still allowed to condemn as long as just compensation is paid to the landowner. However, the courts have signaled that these cases will be few and far between.

As noted above, land trusts should also be mindful of the use of the eminent domain power to condemn property for uses that might include new transmission line corridors and renewable energy generation sites. In order to transport electricity from places where wind energy, solar energy, and other renewable sources are most prevalent, new transmission lines will have to be constructed, imposing a new wave of condemnation proceedings. The land will more than likely be condemned even with conservation easements or other restrictions.

\section{Eminent Domain as a Strategy for Protection?}

While eminent domain is mostly thought of as a potential impediment to regulatory protection of property, the eminent domain power of government may also be used to the advantage of the conservation movement. Eminent domain is mainly used against landowners who do not want to give up their land. When the government has a public need for the property such as utility
lines, roads, and other infrastructure necessities, it does not hesitate to use its eminent domain power to take the land. Governments can potentially use this same power to take land from unwilling landowners for conservation purposes. Unfortunately, governments and agencies are hesitant to do so because of the inflated transactional costs and use of resources necessary to pursue a condemnation action without the prospect of revenues usually associated with condemnation such as the construction of transmission lines, transportation corridors, and economic development.

Private and Public Approaches – Working Together to Achieve Permanence

At some level, arguments about the merits of the absolutely permanent nature of any form of land conservation may seem divorced from reality (Bray, 2010). Therefore, regulation and private acquisition should be coordinated to help achieve permanence when conserving appropriate lands in any given community or region. Some suggest that regulation should be considered first before private acquisition methods in order to provide a common baseline of mutual expectations and protections for the benefit of all members of a community, leaving private acquisition methods to be used for the following:

- When public access to the property is not a priority;
- When the property possesses extraordinary and enduring conservation attributes that warrant efforts to achieve permanent protection; and
- When needed regulations involve stringent or particularized restrictions or obligations that are so unfairly burdensome as to reach the level of a constitutional taking (Echeverria and Pidot, 2009).

Whether these suggestions take into consideration all the arguments for and against regulation and private acquisition is still up for debate. Moreover, this hierarchy fails to consider the use of other conservation strategies such as market-based incentives. Recognizing that not all communities in the country have the institutional and government resources or support to effectively regulate land uses for conservation, making regulation a priority for land conservation may not be the most efficient avenue for land conservation. This is especially true where there are clear differences in attitudes towards land use regulation across the United States. Instead, perhaps the method of conservation that will provide the most permanence is dependent on the situation and the goals of the community. This requires an organizational consideration of scale, resources, experience, and the political reality of a community.

Working to Ensure Permanence in Conservation

The Land Trust Alliance (LTA) is working to create good case law, educate attorneys, collect useful legal materials and provide tools to land trusts to assist the land trust community in ensuring that all conservation easements remain permanent. This includes the LTA’s implementation of Land Trust Standards and Practices, the
National Land Conservation Conference, The LTA’s Learning Center, the Standards and Practices Curriculum, and the Land Trust Accreditation Commission, an independent program of the LTA. Finding that the best way to avoid legal challenges is to prevent them, the Alliance’s training courses are building the knowledge of land trust practitioners, helping them draft strong legal documents and implement sound easement stewardship. The LTA also established the Conservation Defense Fund, for use by the Alliance to intervene in certain cases, usually by filing a friend of the court brief. See www.landtrustalliance.org.

While land trusts are attempting to understand and recognize the importance of permanence through certification and other measures, the permanence fight will likely play out in courts. In Wyoming, the case of Hicks v. Dowd gained national attention by being the first reported case where the termination of a conservation easement was upheld, albeit on procedural grounds. In a later related case, Salzburg v. Dowd, the court held that the termination of the conservation easement had no legal effect, recognizing that conservation easements can be created, modified, or terminated in the same manner as other easements and that the Treasury Regulations continue to provide severe penalties to land trusts and landowners who improperly amend or terminate conservation easements. This holding was a reminder to land trusts to take conservation easements seriously and to draft them with diligence and care to defend future challenges (Lindstrom, 2010).

Discussion Questions

- If there is a question about the permanence of any form of land conservation, should the conversation focus around using the lack of permanence to the advantage of land conservation, rather than why any one land conservation strategy is or is not less permanent than another?
- How can a conservation organization or government body determine when the permanence of a conservation strategy is a priority at a given property?
- How much of a threat is permanence to current IRS policies? Do the policies of the IRS contradict the nature of conservation and changes to the environment? Are not changes to the environment inevitable?
- What other innovative strategies or techniques are there to address permanence while maintaining land conservation and protection?
- How can the regulatory process be improved to resist shorter-term pressure to protect private property rights and values? How can we resist the shorter-term political pressures to preserve only the land’s financial value?

Organizations Doing Interesting Work

The Land Trust Alliance — In response to recent criticism towards the permanence of conservation easements, the Land Trust Alliance is very active in providing resources and support for developing conservation easements that are both amendable and permanent. For more information visit http://www.landtrustalliance.org.
**Defense of Place** – Defense of Place focuses on upholding the permanence of conservation easements and land donated for purposes of conservation by providing strategic advice, public relations, technical information, and legal assistance to land trusts, land owners, and conservation organizations. For more information visit http://www.defenseofplace.org.

**Conservation Law, PC** – Conservation Law, PC is a law firm founded by Jessica Jay, attorney and adjunct professor of law at the Vermont Law School and the University of Denver’s Sturm College of Law. Conservation Law focuses on protecting working landscapes and environmentally significant lands in Colorado and the Rocky Mountain West, and ensuring the permanence and perpetual nature of land conservation, by partnering with land trusts, government entities, and landowners. For more information visit http://www.conservationlaw.org.

**Works Cited**


5.2: Examples, sources of information and other key points from the discussion

Some of the examples, sources of information and key points from the discussion included the following:

- Many in the land conservation community are starting to question the “sacred cow” of permanence:
  - Development will happen – how can land trusts embrace and help direct it without destroying the areas they love?
  - Need to think more broadly about permanence – how it derives from healthy cities, rural communities and economies.
  - Need to engage more widely to sustain more permanent effects – need a really big tent, including developers, environmental justice communities and many others.
  - Need to work at a landscape scale – from iconic protected areas, through productive working landscapes, to green suburbs and livable cities.
  - Static conceptions of permanence inhibit innovation and ignore the realities of a dynamic world – need to lay a foundation for protecting options for future generations that are more adaptive or resilient than permanent.

- In theory, regulation can be changed. In practice, change often happens less often as regulations become part of peoples’ embedded expectations.

- One suggestion for addressing the perceived unfairness of tough land use regulation is to: (a) adopt and enforce strong regulations; (b) know the value of the land at the time the regulation is adopted; and (c) if the value is less when the land is sold, make the landowner whole by having the government pay the difference.

- “Zoning by petition” allows a group of landowners to come together and develop their own controls over land use; which they can then take to the local government to have adopted more widely. Examples of this happening in Montana were cited.

- Neither conservation easements nor regulations are permanent.

- Should the responsibility for enforcing conservation easements be shifted from land trusts to the state or should land trusts consider offering – for a fee – to enforce municipal/publicly held easements?

- Both conservation easements and zoning requirements have impacts on surrounding land: easements benefit neighboring sites; regulations share benefits and burdens more widely across the jurisdiction.
• Valuing conservation easements at the development value of the property does not make sense – ideally the price should reflect the values (ecological, cultural, etc.) for which it is being acquired.

• If permanence means maintaining public support, it also means maintaining educational programs about and access to open space . . . a task land trusts are well positioned to help undertake through both private and public processes.

• These broader views of permanence, in effect, require land trusts to engage in local land use planning and regulation.

• Land trusts have an opportunity to host wide-ranging, inclusive discussions about future land use goals – in fact, it is often easier for them to do so than for governments.

• Land trusts have to look at how conservation affects local and regional economies. If economies fail, so too will many conservation efforts.

• The “green jobs” discussion within the present efforts to retool the U.S. economy is also creating new opportunities for conservation organizations to connect with groups working on economic development and social justice.

• The Cascade Land Conservancy (http://www.cascadeland.org/) is the largest land conservation, stewardship and community building organization in Washington State. It includes a wide range of skill sets and funding sources, including:
  ■ A R&D/policy team working on urban development and land conservation strategies (12-15 people);
  ■ A transactional team working on both conservation and new development projects (15 people);
  ■ Land stewards (15) and back office/administrative support (15);
  ■ Donations from individuals;
  ■ Grants from foundations; and
  ■ Transaction fees, plus proceeds from the sale of development rights or land to developers.

• If one focuses on the importance of people to permanence, one really should look to the stewardship traditions of Native American tribes for guidance – given their rich history of sustainable land use as trustees of the land.

• Are “mature” land trusts – i.e., those doing more stewardship than acquisition – trending toward bankruptcy as a result of their monitoring and enforcement responsibilities or toward a bright new future as community educators and stewards of healthy communities over time?