CONSERVATION EASEMENTS – THE PRIMER

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Introduction

Conservation easements generally are nonpossessory interests in land that restrict landowners' ability to use land in otherwise permissible ways in order to conserve the natural, historical, agricultural, or open space character of the land. Most conservation easements restrict development of the land for residential, commercial, industrial, or other such uses.

Conservation easements most commonly are created when landowners donate or sell them and, if the transactions qualify, obtain tax benefits for making charitable donations. Such easements may be created in other contexts as well, including eminent domain proceedings, judicial settlements, and exactions by federal, state, or local agencies.

All fifty states have by statute authorized conservation easements and prescribed their features and limitations.

I. CONSERVATION EASEMENTS AND THE COMMON LAW OF PROPERTY

Conservation easements are not just a species of common law easements that the Legislature has honored with a fancy title. Rather they are more a creature of statute that the Legislature has accorded some of the attributes of common law easements.

The common law historically has been loath to recognize interests in land that sharply restrict its use. A common law easement generally is a grant of a right by a landowner to another to affirmatively use the owner's land in a specified manner or for a specified purpose. The common law generally has recognized so-called "negative" easements, i.e., those prohibiting certain uses, only in four instances: prohibiting the blocking of sunlight, blocking of air, removing subjacent and lateral support for a building on adjacent property, and interfering with the flow of an artificial stream.

A conservation easement generally is a grant of a right by a property owner to another to prohibit specified uses of the property in order to preserve its natural, agricultural, or open space character. As such, a conservation easement is basically a negative easement of a sort not generally recognized in common law.

A conservation easement typically is not "appurtenant" to another parcel of property it is intended to benefit, so it is considered an easement "in gross," meaning it is granted to a person and not tied to ownership of any other parcel of property. Under the common law, an easement in gross generally may not be transferred by the grantee to another person, except when the easement is created for commercial purposes. A conservation easement, thus, might not be transferable at common law, and might not survive a change in the holder.

Owing to the absence of an obvious analogue in common law easements, conservation easements have sometimes been likened to restrictive covenants. Restrictive covenants, though, are generally regarded as personal promises arising from contract rather than interests in real

property. While the common law recognizes that some covenants "run with the land," meaning that the obligations burden the land and survive changes of ownership, that generally is so only if the covenants "touch and concern" adjacent land, a limitation akin to that of appurtenant easements. While courts of equity might overlook such considerations and enforce covenants as equitable servitudes, that uncertainty and the possibility covenants may not survive changes of ownership fall short of the long-term protection that is the essence of conservation easements.

II. ENABLING STATUTES

All fifty states have statutes authorizing conservation easements in one way or another. Massachusetts enacted the first such statute in 1956. (1956 Mass. Acts 565.) California came next, enacting the Scenic Easement Deed Act in 1959. (Cal. Gov. Code §§ 6950-6954.) These first two statutes authorized only public entities to hold such easements. Massachusetts amended its statute in 1969 to allow nonprofit organizations to hold conservation easements. In 1981, the National Conference of Commissioners on Uniform State Laws approved a Uniform Conservation Easement Act. Many states have since enacted statutes modeled on that act.

California adopted the Open-Space Easement Act in 1969 and amended it in 1974. It authorizes cities and counties with open space plans to acquire or approve open-space easements in perpetuity or for a term of at least ten years for the purpose of preserving and maintaining open space. (Cal. Gov. Code §§ 15070-15097.) Under this statute, an "open-space easement" means "any right or interest in perpetuity or for a term of years in open-space land acquired by a county, city, or nonprofit organization pursuant to [the statute] where the deed or other instrument granting such right or interest imposes restrictions which, through limitation of future use, will effectively preserve for public use or enjoyment the natural or scenic character of such open-space land." (Cal. Gov. Code § 15075(d).) The statute further provides:

> An open-space easement shall contain a covenant with the county, city, or nonprofit organization running with the land, either in perpetuity or for a term of years, that the landowner shall not construct or permit the construction of improvements except those for which the right is expressly reserved in the instrument provided that such reservation would not be inconsistent with the purposes of this chapter and which would not be incompatible with maintaining and preserving the natural or scenic character of the land. Any such covenant shall not prohibit the construction of either public service facilities installed for the benefit of the land subject to such covenant or public service facilities installed pursuant to an authorization by the governing body of the county or city or the Public Utilities Commission.

(*Id*.) Lands constrained by open-space easements may be assessed for property tax purposes at their use related, rather than market, value. (See Cal. Gov. Code § 51096.)

Because city or county approval was not always available or practical, the Legislature remedied this problem by enacting the somewhat broader California Conservation Easement Act in 1979. (Cal. Civ. Code §§ 815-816.) The Act, which was amended in 1981 and 2004, provides that a conservation easement is (1) an enforceable property interest without regard to city or

county approval and notwithstanding its negative character, (2) freely transferable among qualified holders, (3) binding on successive owners of the land, (4) enforceable notwithstanding lack of privity of contract, lack of benefit to particular land, or lack of a specific provision that it runs with the land, and (5) enforceable by injunction. It thus resolves the various common law complications to enforcement of conservation easements.

Three types of entities may hold conservation easements under the Act: (1) a tax-exempt non-profit organization with the primary purpose of preservation of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use, (2) the state or any city, county, district, or other state or local governmental entity authorized to hold real property, and (3) California Native American Tribes recognized by the federal government or listed by the Native American Heritage Commission.

The Act provides that local governmental entities are not allowed to condition the issuance of an entitlement for use on the applicant's granting of a conservation easement.

The grantor of a conservation easement retains all interests not transferred and conveyed by the instrument creating the easement, including the right to engage in all uses of the land not affected by the easement nor prohibited by the easement or by law.

The Act states, in its entirety:

> 815. The Legislature finds and declares that the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California. The Legislature further finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.
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> 815.1. For the purposes of this chapter, "conservation easement" means any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.
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> 815.2. (a) A conservation easement is an interest in real property voluntarily created and freely transferable in whole or in part for the purposes stated in Section 815.1 by any lawful method for the transfer of interests in real property in this state.
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> (b) A conservation easement shall be perpetual in duration.
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> (c) A conservation easement shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding the fact that it may be negative in character.

(d) The particular characteristics of a conservation easement shall be those granted or specified in the instrument creating or transferring the easement.

815.3. Only the following entities or organizations may acquire and hold conservation easements:

(a) A tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

(b) The state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed. No local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter.

(c) A federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed.

815.4. All interests not transferred and conveyed by the instrument creating the easement shall remain in the grantor of the easement, including the right to engage in all uses of the land not affected by the easement nor prohibited by the easement or by law.

815.5. Instruments creating, assigning, or otherwise transferring conservation easements shall be recorded in the office of the county recorder of the county where the land is situated, in whole or in part, and such instruments shall be subject in all respects to the recording laws.

815.7. (a) No conservation easement shall be unenforceable by reason of lack of privity of contract or lack of benefit to particular land or because not expressed in the instrument creating it as running with the land.

(b) Actual or threatened injury to or impairment of a conservation easement or actual or threatened violation of its terms may be prohibited or restrained, or the interest intended for protection by such easement may be enforced, by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor or by the owner of the easement.

(c) In addition to the remedy of injunctive relief, the holder of a conservation easement shall be entitled to recover money damages for any injury to such

easement or to the interest being protected thereby or for the violation of the terms of such easement. In assessing such damages there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, or environmental value to the real property subject to the easement.

(d) The court may award to the prevailing party in any action authorized by this section the costs of litigation, including reasonable attorney's fees.

815.9. Nothing in this chapter shall be construed to impair or conflict with the operation of any law or statute conferring upon any political subdivision the right or power to hold interests in land comparable to conservation easements, including, but not limited to, Chapter 12 (commencing with Section 6950) of Division 7 of Title 1 of, Chapter 6.5 (commencing with Section 51050), Chapter 6.6 (commencing with Section 51070) and Chapter 7 (commencing with Section 51200) of Part 1 of Division 1 of Title 5 of, and Article 10.5 (commencing with Section 65560) of Chapter 3 of Title 7 of, the Government Code, and Article 1.5 (commencing with Section 421) of Chapter 3 of Part 2 of Division 1 of the Revenue and Taxation Code.

815.10. A conservation easement granted pursuant to this chapter constitutes an enforceable restriction, for purposes of Section 402.1 of the Revenue and Taxation Code.

816. The provisions of this chapter shall be liberally construed in order to effectuate the policy and purpose of Section 815.

III. OTHER PERTINENT BODIES OF LAW

Apart from the common law of property and the statutes authorizing conservation easements, issues concerning conservation easements touch on various other bodies of law.

Perhaps most obvious are issues concerning the treatment of conservation easement transactions under federal and state income and estate tax laws, including particularly whether they qualify as charitable donations that may be claimed as deductions from taxes. (See 26 U.S.C. § 1 et seq.; Cal. Rev. & Tax. Code § 1 et seq; Cal. Pub. Resources Code § 37000-37042.)

Similarly, issues may arise concerning the effect of conservation easements on property taxes and other liens on the lands encumbered by such easements. (See Cal. Rev. & Tax. Code §§ 402.1, 421-430.5, 439-439.4.)

Related to such issues are questions of valuation and qualified appraisals and appraisers. (See 26 U.S.C. §§ 170, 1001, 1011, 6662, 6695, 6695A; Treas. Reg. §§ 1.170A-13(c), 1.170A-14(h).) Those sorts of questions may arise as well if conservation easements are involved in eminent domain proceedings.

As conservation easements are to be recorded, (Civ. Code § 815.5), questions may arise concerning application of recording laws. (See Cal. Civ. Code §§ 1169-1173, 880.020-887.090; Cal. Gov. Code §§ 27201-27388.)

Conservation easements held by nonprofit organizations bring into play the bodies of federal and state law governing such organizations, their formation, operation, etc. (See 26 U.S.C. § 501(c)(3), 4958; Cal. Corp. Code §§ 5000-10841.)

Conservation easements, at least in some circumstances, are regarded by some, including the Attorney General of California, as charitable trusts, which raises the prospect that implementation, amendment, termination, etc., of conservation easements may also be governed by the body of law pertaining to such trusts. (See generally Cal. Prob. Code § 15000 et seq.; *In re Estate of Schloss* (1961) 56 Cal.2d 248; *In re Estate of Sutro* (1909) 155 Cal. 727.) Among the consequences of this theory (which is a subject of continuing controversy) may be that amendment or termination of conservation easements is governed not only by principles of contract and property, but also principles of charitable trust, which may call for review by the Attorney General or *cy pres* or similar proceedings in a court of equity.