Denver Law Review

Volume 78 | Issue 3 Article 3

January 2001

A Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date

Melissa K. Thompson

Jessica E. Jay

A Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date

AN EXAMINATION OF COURT OPINIONS ON THE ENFORCEMENT AND DEFENSE OF CONSERVATION EASEMENTS AND OTHER CONSERVATION AND PRESERVATION TOOLS: THEMES AND APPROACHES TO DATE

MELISSA K. THOMPSON

JESSICA E. JAY

INTRODUCTION

This article surveys conservation easement enforcement and defense decisions to date, and examines those decisions under the rubric of several general themes. The article focuses on themes influencing or driving the opinions of courts in conservation easement enforcement and defense actions across jurisdictional lines. These themes include issues of standing, ambiguity and the role of intent in judicial decision-making on issues of conservation easement enforcement and defense, judicial attitudes towards restrictive servitudes, the role of common law rules of real property and contract construction and interpretation, and cost-benefit analyses.

Part I of this article provides an overview and survey of the cases reviewed. Part II examines the issue of standing and participation. Part III looks at the roles of intent, common law rules of real property and contract construction, the merger doctrine, and cost-benefit analyses in a series of defense and enforcement opinions. Part III also includes an analysis of a unique line of case involving the Foundation for Preservation of Historic Georgetown. In conclusion, we advise land trusts to anticipate confronting most or all of the issues raised to date in cases involving conservation easement enforcement and defense.

I. OVERVIEW AND SURVEY OF ENFORCEMENT AND DEFENSE CASES TO DATE

For purposes of this article, we examine nineteen published opinions, the group of which resulted from an exhaustive search for enforcement and defense cases in jurisdictions throughout the United States.[1]

---

1. Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446 (2nd Cir. 1985); Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994); Racine v. United States, 858 F.2d 506 (9th Cir. 1988); Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992); Gallaway v. Idaho Forest Indus., Inc., No. 94-36-M-CCL, 1996 U.S. Dist. LEXIS 21636 (D. Mont. April 22, 1996); Gallaway v. Idaho Forest Indus., Inc., No. 94-36-M-CCL, 1997 U.S. Dist. LEXIS 16645 (D. Mont. March 25, 1997); Friends of the Shawangunks, Inc. v. Clark, 585 F. Supp. 195 (N.D.N.Y.

Our analysis also includes a minimum number of unpublished decisions, or cases subject to appellate review. The majority of cases surveyed here occurred in the East: New York (two), New Jersey (one), the District of Columbia (four), Massachusetts (three), Connecticut (three), New Hampshire (one), Vermont (one), and Pennsylvania (one).[2] This finding is logical because landowners and land trusts in the East have been using conservation easements for a longer period of time than any other part of the country.[3] Of the cases brought in the Midwest/West, three examined take place in federal court.[4] Only two of the Eastern cases analyzed occurred in federal court,[5] and *Natale* was brought only after after the landowners lost soundly in state court in Pennsylvania after a decade of proceedings.[6] In *Madden* and *Gallaway*, Montana state law applied to the claims at issue, and while the *Natale* case ostensibly posed some federal questions, the court rejected those claims.[7]

Landowners trying to invalidate the deed restrictions or servitudes on their property initiated three of the cases reviewed; we refer to these as defense cases because the grantee of the deed restriction is defending

---

1984); Natale v. Schwartz, No. 98-3298, 1999 U.S. Dist. LEXIS 18933 (E.D. Pa. Dec. 10, 1999); Sagalyn v. Found. for the Pres. of Historic Georgetown, 691 A.2d 107 (D.C. Cir. 1997); Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110 (D.C. Cir. 1994); Found. for the Pres. of Historic Georgetown v. Arnold, 651 A.2d 794 (D.C. Cir. 1994); Acheson v. Sheaffer, 520 A.2d 318 (D.C. Cir. 1987); Southbury Land Trust, Inc. v. Andricovich, 757 A.2d 1263 (Conn. App. Ct. 2000); Burgess v. Breakell, No. 95-0068033, 1995 Conn. Super. LEXIS 2290 (Conn. Aug. 7, 1995); Harris v. Pease, 66 A.2d 590 (Conn. 1949); Goldmuntz v. Chilmark, 651 N.E.2d 864 (Mass. App. Ct. 1995); Knowles v. Codex Corp., 426 N.E.2d 734 (Mass. Ct. App. 1981); Bennett v. Comm'r of Food and Agric., 576 N.E.2d 1365 (Mass. 1991); New Hampshire v. Rattee, 761 A.2d 1076 (N.H. 2000); Redwood Constr. Corp. v. Doornbosch, 670 N.Y.S.2d 560 (N.Y. App. Div. 1998); Redwood Constr. Corp. v. Doornbosch, 655 N.Y.S.2d 655 (N.Y. App. Div. 1997); Friends of the Shawangunks, Inc. v. Knowlton, 64 N.Y.2d 387 (N.Y. 1985); Friends of the Shawangunks, Inc. v. Knowlton, 475 N.Y.S.2d 910 (N.Y. App. Div. 1984); Smith v. United States, 979 F. Supp. 279 (D. VT 1997).

2. *Id.*

3. *See* Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE 9, 17-21 (Julie Ann Gustanski and Roderick H. Squires, eds., 2000) [hereinafter, PROTECTING THE LAND].

4. *Madden*, 823 F. Supp. 815; *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Clark*, 754 F.2d 446.

5. *Natale*, 1999 U.S. Dist. LEXIS 18933, *Smith*, 979 F. Supp. 279.

6. *Natale* is a famous case involving the French & Pickering Creeks Conservation Trust. At the state level, the Trust succeeded in obtaining court orders for the demolition of a house that violated the conservation easement at issue in the case. The landowners refused to remove the house so the Trust made the necessary arrangements and bulldozed the residence. Thereafter, the lanowners filed a number of scattershot constitutional and state law claims in federal court. The state court decisions preceding *Natale* are not published and the authors could not obtain the ten years of court documents in time to include an analysis of the case in this paper.

7. *See Madden*, 823 F. Supp. 815; *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Natale*, 1999 U.S. Dist. LEXIS 18933.

that tool against attack and attempting to uphold its validity. Two of the three landowners failed to invalidate the deed restriction; one succeeded.[8]

With the exception of two, in all of the cases examined, second (or later) generation landowners owning property already encumbered by some form of deed restriction or conservation easement initiated or defended the actions.[9] In *Burgess*, a neighbor brought a claim against another landowner for failing to adhere to the terms of a conservation easement on the landowner's property; the court found the neighbor lacked standing.[10] In *Acheson*, residents and voters of a town attempted to sue a developer for executing a development plan different from the one they voted to approve, but the court ruled that they too lacked standing to bring the action.[11]

In the enforcement cases, or those in which land trusts or the creators of conservation easements, restrictive covenants, or deed restrictions filed actions against landowners to force them to comply with the terms of restrictions encumbering their property, the violations at issue include construction of new dwellings on property (four),[12] adding to existing dwelling on property (four)[13], subdividing property (two)[14], logging on property (two)[15], changing density or proposing development on property (two)[16], creating a right-of-way across property (one)[17], and building a pool.[18] In one case from the West, a landowner brought suit to determine whether the "scenic easement" on his property precluded construction of dude ranching facilities.[19]

It is important to note that not all of the cases involve conservation easements *per se*. Some involve deed restrictions (*Madden, Gallaway, Harris*),[20] others agricultural restrictions or easements created by statute (*Rattee, Bennett*),[21] and still others involve preservation servitudes

---

8. *Madden*, 823 F. Supp. 815; *Harris*, 66 A.2d 590, *Gallaway*, 1997 U.S. Dist. LEXIS 16645.

9. *Burgess*, 1995 Conn. Super. LEXIS 2290; *Acheson*, 520 A.2d 318.

10. *Burgess*, 1995 Conn. Super. LEXIS 2290.

11. *Acheson*, 520 A.2d 318.

12. *Natale*, 1999 U.S. Dist. LEXIS 18933; *Southbury Land Trust, Inc.*, 757 A.2d 1263; *Bennett*, 576 N.E.2d 1365; *Rattee*, 761 A.2d 1076.

13. *Sagalyn*, 691 A.2d 107; *Arnold*, 651 A.2d 794; *Bagley*, 647 A.2d 1110; *Acheson*, 520 A.2d 318.

14. *Sagalyn*, 691 A.2d 107; *Acheson*, 520 A.2d 318.

15. *Burgess*, 1995 Conn. Super, LEXIS 2290; *Knowles*, 426 N.E.2d 734.

16. *Harris*, 66 A.2d 590; *Friends*, 754 F.2d 446.

17. *Redwood Constr. Corp.*, 670 N.Y.S.2d 560.

18. *Goldmuntz*, 651 N.E.2d 864.

19. *Racine*, 858 F.2d at 506.

20. *Madden*, 823 F. Supp. 815, *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Harris*, 66 A.2d 590.

21. *Rattee*, 761 A.2d 1076; *Bennett*, 576 N.E.2d 1365.

(*Acheson, Bagley, Arnold, Sagalyn*).[22] The balance of the cases involve conservation easements (*Southbury, Redwood, Clark, Goldmuntz*),[23] but all concern a conservation or preservation instrument of some type.

II. STANDING AND PARTICIPATION IN DEFENSE AND ENFORCEMENT CASES

A. *Third Party Standing*

When evaluating the issues of conservation and historic preservation easements, courts have addressed in litigation the question of who can participate in such actions repeatedly.[24] In at least one case, the court examines in detail whether a neighbor had standing to argue that the landowner of property next door to him violated the terms of the easement to which the landowner/grantor was subject.[25] In another case, the court determines that residents and voters harmed by misrepresentations concerning the conservation easement agreed to by a developer lacked standing to challenge alleged violations of the easement.

In *Burgess v. Breakell*, a third-party neighbor brought an action to enforce a conservation restriction.[26] Burgess alleged that Breakell was violating the terms of the conservation restriction at issue by engaging in commercial logging on the property.[27] The conservation restriction on Breakell's land required the property to be maintained as an area of "wild, natural, and semi-natural open space for scientific, educational, scenic, environmental, aesthetic and cultural purposes, for the preservation of its natural features."[28] Breakell argued the court should dismiss Burgess's complaint for lack of standing because the Connecticut Conservation Commission, and not Burgess, held the restriction at issue on his property.[29]

The court agreed with Breakell, finding that Burgess did not have standing to bring the action, and pointed to Connecticut's conservation

---

22. *Acheson*, 520 A.2d 318; *Bagley*, 647 A.2d 1110; *Arnold*, 651 A.2d 794; *Sagalyn*, 691 A.2d 107.

23. *Southbury*, 757 A.2d 1263; *Redwood*, 670 N.Y.S.2d 560; *Clark*, 754 F.2d 446; *Goldmuntz*, 651 N.E.2d 864.

24. For example, in *Redwood Construction v. Doornbosch*, the court recognized the standing rights of a contract-vendee to challenge a conservation restriction. Redwood Constr. Corp. v. Doornbosch, 248 A.D.2d 698 (1998). *Doornbosch* involved the holder of a conservation easement across property with an easement of right of way, which Redwood Construction sought to purchase and utilize. *See id.* The court recognized that Redwood, as the contract-vendee, had standing to challenge the construction and application of the conservation easement to the easement right-of-way. *See id.*

25. *Burgess*, 1995 Conn. Super LEXIS 2290.

26. *See id.* at *1.

27. *See id.*

28. *Id.*

29. *See id.* at *2-*3.

restriction statutes.[30] The court expressly acknowledged that "the question of who may enforce a conservation restriction is not clearly resolved by statutory language."[31] Thus, the court could have reached a much different conclusion on the issue of standing in *Burgess*. The court stated that while the Connecticut legislature chose to abrogate certain common law doctrines governing conservation restrictions, it did not specifically abrogate an ownership requirement for standing in an easement dispute.[32] The language of the statutes, asserted the court, shows that the legislature, "while recognizing the public benefit that such [conservation] restrictions provide, intended to limit the enforceability of conservation restrictions to the holder or owner of the restriction."[33] The court relied on statements by the Massachusetts Supreme Court to interpret Connecticut statutes.[34]

In the face of unclear statutory language, the court could have looked to federal environmental laws and cases for guidance on the issue of standing, rather than the laws of Massachusetts. For example, the same principles expressed in *Sierra Club v. Morton* and *Sierra Club v. SCRAP*, wherein third-party citizens with an interest that could be harmed or impaired by the outcomes in the cases were granted standing, could have provided the Connecticut court with an alternative approach to the standing question in *Burgess*, an approach more consistent with the express purposes of the conservation restrictions at issue under Connecticut's General Statutes.[35] There is little doubt that adjacent landowners like Burgess were harmed by Breakell's commercial logging venture; their property values were adversely affected by the activity. Further, the logging operation likely impaired the conservation restriction's public benefit, which was reflected in the "scenic, environmental, aesthetic and cultural" values served by the restriction.[36]

One published decision, at the time of writing this article, cites *Morton* to confirm standing in a suit by a third party in interest. In *Friends of the Shawangunks, Inc. v. Clark*, discussed at length below in section III(B), the United States District Court for the Northern District of New York relied upon allegations in the Friends of the Shawangunks' complaint concerning its mission statement and the adverse effects of the proposed development at issue to conclude that the organization did have standing to bring the action. [37] Friends of the Shawangunks asserted that

---

30. *See id.* at *6-*7.

31. *Burgess*, 1995 Conn. Super. LEXIS 2290 at *5.

32. *See id.* at *7.

33. *Id.* at *7.

34. *See id.* at *6.

35. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

36. *Burgess*, 1995 Conn. Super. LEXIS 2290, at *1.

37. 585 F. Supp. 195, 199 (N.D.N.Y. 1984).

it had been formed "to ensure the preservation and prudent development of the Shawangunk Mountains" and that the development slated for land subject to a conservation easement would "adversely affect" the use and enjoyment of the land by many members of the Friends of the Shawangunks.[38]

In contrast to Friends, in *Knowles v. Codex Corp.*, the court essentially ignored the *Morton* and *SCRAP* principles altogether. In *Knowles*, the court examined whether residents and voters had standing to sue a corporation for misrepresenting its plans for a proposed development, which also included a conservation easement, in a brochure it distributed to all the voters of Canton, Massachusetts prior to a town meeting on the development.[39] After voters agreed to permit development, Codex executed and recorded a plan different from that circulated to the townspeople.[40] The court found that the residents/voters failed to state a claim against Codex or the town's conservation commission (which was joined as a defendant) because the plaintiffs lacked standing to seek an invalidation of the town vote or an injunction for compliance with the original plan.[41] The court stated that none of the residents or voters had standing to pursue their claims because they did not qualify as private individuals litigating questions of public nuisance or the wrongful use of public or private lands under state statutes.[42]

The court asserted that the specific statute establishing a conservation commission to manage and control the public's interests in the land subject to conservation easements safeguarded the town's rights.[43] The court did not address individual resident's rights, but noted in cursory fashion that the court in *Morton* and *SCRAP* relied upon "adversely affected or aggrieved" language in 5 U.S.C. 702.[44] The court's reference to *Morton* and *SCRAP* is so brief that it belies the importance and relevance of the principles in those two cases to the standing issues in cases like *Knowles*. In *Knowles*, it is difficult to skirt the fact that the plaintiffs' interests were adversely affected, not only by the changed development plans, but also by the developer's conduct.[45] In light of the number of cases that we reviewed wherein courts interpret unclear state statutes conservatively, and either ignore or avoid the standing principles set forth in federal environmental cases, it appears state courts may fear opening a floodgate of litigation by conferring standing on plaintiffs traditionally excluded from enforcement rights, or it may be that courts are

38. *Id.*
39. *See Knowles*, at 735-37.
40. *See id.* at 735-36.
41. *See id.* at 738.
42. *See id.* at 737.
43. *See id.* at 737-38.
44. *Knowles*, 426 N.E.2d at 738, n.13.
45. *Id.* at 735-36.

simply reluctant to depart from conventional common law rules holding that only record holders of interests in land have standing to bring actions related to those interests.

One of the noteworthy aspects of *Knowles* is that it appears from the face of the court's published opinion that the defendant-developer pulled a fast one on the community, with the tacit approval of the town's conservation commission. The defendant furnished a development map to voters that was not adhered to upon commencement of the office park, and demolished several historical farm buildings contrary to representations made or implied in meetings with townspeople.[46] The court addressed the defendant's back-handed actions in a footnote only:

> An observant student of the plan might have concluded that at least one of the existing buildings lay in the path of a proposed access road to the 'campus.' An observant student of the formal instrument might have concluded that nothing therein obligated Codex to maintain or preserve any of the existing buildings.[47]

Apparently, the court expected the community to be an "observant student" with regard to the precise language of the agreement, notwithstanding Codex's representations at town meetings.[48] One outstanding question in the case, which cannot be determined from the court's opinion, is why the conservation commission itself declined to challenge the defendant's actions. The reason may be because the commission had reviewed the agreement and understood its implications, contrary to the perceptions and desires of community residents.

B. *Ways that Land Trusts Participate in Civil Actions as Third Parties*

Whether a neighboring landowner or town residents and voters have standing to sue in a lawsuit is a different inquiry from whether a land trust may participate in litigation, within the scope of its trust documents, by intervening in a case to which it is not already a party. The court addresses the question of whether the trustees of a land trust have authority under their Trust Declaration to engage in litigation in *Nebraska v. Rural Electrification Administration.*[49]

In *Rural*, the court debated whether to limit the participation of the Platte River Whooping Crane Maintenance Trust in environmental litigation involving the Grayrocks Dam and Reservoir in Wyoming and the Missouri Basin Power Project.[50] The Trust was established as part of a settlement agreement reached in prior litigation that gave one of the par-

---

46. *Id.* at 736.
47. *Id.* at 736, n.8.
48. *Id.*
49. Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994).
50. *See id.* at 1338.

ties in the action an exemption to the Endangered Species Act and permitted construction of the dam and reservoir at issue in *Rural*.[51] In its review of whether the Trust could participate in relicensing proceedings for Grayrock, and more broadly in proceedings related to other dams and legal cases, the court examined the purposes set forth in the Trust Declaration.[52] That document stated as the Trust's purpose: "to finance programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska."[53] As noted by the court, the Trust Declaration also stated that:

> programs, activities, and acquisitions . . . shall be formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life-support system for the whooping crane and other migratory species which utilize it.[54]

The court found that the Trust Declaration did not conflict with the specific directives, also contained in the Declaration, against participation by the Trust in influencing legislation, political campaigns, or any litigation other than litigation directly related to the administration of the Trust.[55]

The court's reliance on, and deference to, the Trust Declaration underscores the importance of clear, well-defined purpose statements for land trusts. The *Rural* court concluded that participation in litigation by the Trust that bore directly on the supply of water flowing to critical crane habitat was within the powers, duties, and administration of the Trust.[56] The court read the Trust Declaration as clearly authorizing the Trustees "to counteract through litigation the depletion and degradation of the critical habitat" of the endangered whooping crane.[57]

When land trusts seek to participate in lawsuits, the trust's purpose or declaration may become an issue, as in *Rural*, along with rules of standing. In *Smith v. United States*, the court rejected the Vermont Land Trust's (VLT) bid to intervene as a matter of right or by permission in a lawsuit concerning a taxpayer's action for a refund of the taxes that both the taxpayer and VLT felt were unwarranted.[58] Smith disputed the tax on his property and the resulting refund because, he argued, the IRS failed to recognize a reduction in the value of his property that resulted from

51. *See id.* at 1337.
52. *See id.*
53. *Id.* at 1338.
54. *Id.*
55. *See id.* at 1338, 1340.
56. *See id.* at 1340.
57. *See id.*
58. Smith v. United States, 95 CV 195, slip. op. at 3 (D. Vt. Sept. 19, 1997).

the imposition of the conservation easement that he had donated to VLT.[59] While VLT argued that it should be permitted to participate on Smith's behalf because of its interest in the recognition and valuation of the conservation easement,[60] the court allowed VLT to participate in the action only as a friend of the court, or *amicus curiae*.[61] The court found that VLT had neglected to address the sovereign immunity of the U.S. government and acquire the waiver necessary for intervention.

Permitting VLT to participate as an *amicus curiae* in the action was the court's way of allowing VLT to voice its position on the issues, without being a party. The court offered, "[I]n many cases, appearance as amicus can be as effective as formal intervention."[62] The court made clear that it valued the land trust's involvement by asserting, "VLT has demonstrated to the Court both a genuine interest in the subject matter at hand as well as expertise in the area of development rights and conservation easements. VLT will therefore be granted the opportunity to be heard by this Court."[63]

In *Smith*, the court not only allowed VLT's participation, but endorsed it and specifically noted the potential value of the land trust's contribution to the case. Land trusts should be encouraged by the court's decision in *Smith*. Even if a land trust cannot intervene as a party in an action by right or by permission, it may still be able to participate in a meaningful way as a resource for the court as an *amicus curiae*.

III. THE ROLE OF INTENT IN ENFORCEMENT AND DEFENSE CASES

Once courts resolve issues of standing and participation, they turn next to the focal point of the dispute, often the meaning and interpretation of the documents at issue. In enforcement and defense cases concerned with the validity and/or construction of particular conservation easements or restrictions, courts have looked beyond the plain language in the easement or restriction at issue and, when faced with what they characterize as an ambiguity, attempted to discern the parties' intent at the time the parties entered into the agreement. This type of analysis appears repeatedly in opinions involving conservation documents and, when combined with other analyses such as cost-benefit evaluations and the role of common law rules, has a marked impact on judicial decision-making.

---

59. *See id.*

60. *See id.*; Motion to Intervene (Paper #6), Smith v. United States, 95 CV 195 (D. Vt. Sept. 19, 1997).

61. *See* Smith v. United States, 95 CV 195, slip. op. at 1, 4.

62. *See id.* at 5.

63. *See id.*

A. *Defense and Validity Actions*

Courts have searched for conservation easement drafters' intent in a trio of cases in which the parties opposed to the easement challenge the validity and enforceability of the conservation restrictions prior owners placed on property.[64] These are cases in which a prior or current landowner or land trust is forced to defend the validity and enforceability of the easement or restriction on the property while the parties opposed to the restrictions, here all second (or later) generation landowners, hope to do away with the restrictions altogether by arguing that the original intent was not to create such a restriction in the first place.

In the first of the three, *Madden v. The Nature Conservancy*, the owners of the Shining Mountain Ranch sought a declaratory judgment in hopes of invalidating the restrictions placed on the property by The Nature Conservancy.[65] After a determination that a reservation under Montana law can create conservation servitudes, the court examined the actual language of the deed transferring the property from The Nature Conservancy to the Maddens' predecessor to determine the intent of the parties who created the original restrictions.[66]

The court looked to two specific clauses in the covenants and servitudes incorporated into the deed from The Nature Conservancy. The first stated: "[t]he rights retained by the Grantor by the covenants are the following . . . ,"[67] and the second stated: "[a]fter title to the surface of the land has been conveyed to a third party, then the Grantor shall retain the same rights of enforcement, with the same privileges and discretions."[68] The Maddens argued that conflict between the uses of the word "retain" in the two clauses made it impossible for the second clause to have reserved conservation rights.

Avoiding what it referred to as an "overly technical interpretation of words" to ascertain the parties' intent, the court found that "retain" means "reserve," and that The Nature Conservancy had reserved property restrictions in its conveyance to the Maddens' predecessor, which rights and reservations were still in effect when the deed was subsequently conveyed to the Maddens.[69] The court ruled, therefore, that The Nature Conservancy held a valid servitude on the Shining Mountain Ranch, which was enforceable against the Maddens.[70] One notable aspect

64. *Madden*, 823 F. Supp. 815; *Harris*, 66 A.2d 590; *Gallaway*, 1997 U.S. Dist. LEXIS 16645.
65. *Madden*, 823 F. Supp. at 816.
66. *See id.* at 817.
67. *Id.*
68. *Id.*
69. *Id.* at 818.
70. *See id.* at 819.

of *Madden*, which contrasts the case to others discussed *infra*, is that the court specifically reviewed the entire document at issue to determine the intent of the parties, and not just isolated phrases or sections.

In a second validity case, *Gallaway*,[71] the parties cross-motioned for summary judgment on the issue of whether restrictions on the subject property were valid and enforceable.[72] Van Hook co-owned 125 acres in Montana, which he and his co-owners sold to Gallaway and Ritter in 1975 by way of a contract that contained restrictive covenants limiting natural resource development, specifically timber harvesting.[73] Although the contract for purchase contained express restrictions, the warranty deed transferring the property did not.[74] Hasstedt purchased the property from Gallaway and Ritter in 1991, also by a contract containing restrictive language, and a deed that did not.[75] Hasstedt assigned his contract for deed to the Merritts by quitclaim deed, made subject to the express restrictions in the contract.[76] The Merritts sold the property to defendant Idaho Forest Industries, Inc. ("IFI") in 1992 by a warranty deed that stated the property was free from encumbrances except for those of record.[77] IFI admitted having knowledge of the timber harvest restrictions, but after purchasing the land promptly notified the plaintiffs that it considered the restrictions unenforceable.[78]

Gallaway and Van Hook argued that the restrictions were valid conservation servitudes reserved pursuant to Mont. Code Ann. § 70-17-102(7)[79] and, as such, could be held "in gross" in order to allow the burden on the property to run with the land even though the benefit did not touch or concern any land.[80] IFI argued that Gallaway and Van Hook failed to reserve such an interest in the property.[81] In the alternative, IFI asserted that any restrictions reserved by the plaintiffs were extinguished by merger because the plaintiffs owned the land at the same time that the restrictions were placed on it.[82]

---

71. *Gallaway*, 1997 U.S. Dist. LEXIS 16645; *Gallaway*, 1996 U.S. Dist. LEXIS 21636.

72. *Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *2.

73. *See id.* at *2.

74. *See id.* at *3.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. The court takes pains to point out, though, that Gallaway and Van Hook originally argued that the restrictions were restrictive covenants running with the land under §§ 70-17-201, *et seq.*, but that the plaintiffs subsequently conceded that the restrictions, called "restrictive covenants", failed to place a benefit on the land at issue, or any of the tract of land that touched or concerned the property, and so only imposed a burden on the property that did not run with the land.

80. *See Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *3-4.

81. *See id.* at *4.

82. *See id.*

The court concluded that the intent of the parties was to restrict logging on the property *only* until the purchase price for the property was paid, and not perpetually.[83] The court found support for this position by citing the absence of restrictive language in the warranty deed (even though such language appeared in the contract for purchase and subsequent buyers took notice of the restrictions), which it referred to as a key fact in the case.[84] Because the court found that a warranty deed controls questions about the extent and nature of parties' rights after a contract for deed terminates, and that the warranty deeds at issue contained no limiting language, the court found it to be a *matter of fact* that the parties did not intend the restriction on logging to run with the land.[85] The court reached this conclusion in spite of Gallaway's and Van Hook's assertions that it was their *intention* to preserve the natural integrity of the property by limiting natural resource development, timber harvesting *in particular*.[86] Even with the original parties to the contract explaining their intent, the court justified a contrary finding regarding the parties' intent through the absence of limiting language in the warranty deed.[87] The court stated further that even if the warranty deed had possessed such restricting language, it would have found the restrictions therein to be unenforceable by way of merger.[88]

Gallaway represents an instance where the court appears to determine the proper outcome of the case, and then subsequently devises the intent of the parties in a way that supports and justifies its findings. The court never references the actual language in the restrictions in the conveyance documents. This omission, combined with specific language in the court's opinion, disclose the possible underlying reason for the outcome in *Gallaway*: loss of economic value. A "let's not lose this valuable timber" undercurrent in the magistrate's recommendation in the case is overt; the presence of that concern in the district court's opinion is more subtle.

U.S. Magistrate Judge Holter explained in a footnote:

> These restrictions are, in substance, timber reservations designed to prevent the harvesting of trees from the land in question. This court recognizes that a contract reserving timber rights may be so made as to . . . reserve to the grantor a perpetual right to have the timber remain on the land . . . . However, because the creation of an unlimited interest in all existing timber and all the timber to be grown in the future severely curtails the use of the soil itself and greatly diminishes

83. *See id.* at *10.
84. *See id.*
85. *Id.* at *2.
86. *See Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *2.
87. *See id.* at *2-3.
88. *See id.* at *10.

> its value, the intention to create such an extensive timber interest must be very clearly manifested.[89]

So what Magistrate Holter appears to aver is while it is clear that Gallaway and Van Hook intended to create timber harvesting restrictions, and IFI purchased the land with notice of those limitations, the court will not uphold them. The magistrate relies on the merger doctrine to justify extinguishing the conservation restriction.[90] But under the circumstances, the merger doctrine's applicability is suspect at best. The court applies that doctrine in spite of the fact that one of IFI's predecessors entered into a contract to purchase the land from the plaintiffs under certain terms and conditions, a contract that called for transfer of the deed two years from the date of the contract subject to certain reserved rights (including the restriction).[91] One explanation for the magistrate's strained opinion on intent and the applicability of the merger doctrine is a possible underlying proverbial thorn in his side: a cost-benefit perspective on the perceived loss of a heavily-forested parcel.[92]

The district court makes reference to the heavily-forested nature of the land at issue in *Gallaway*.[93] The court then goes on to rely on the warranty deeds to determine "as a matter of fact that the intention of the parties was to restrict logging only until the purchase price was paid."[94] The court so finds in spite of express language in the original conveyance documents that it was the express intention of the parties to protect the land's natural character and that all vegetation on the property was to "remain undisturbed by forces other than nature."[95] The conveyance document also conferred standing on the plaintiffs and any of plaintiffs' heirs or assigns to bring an action for any violation of the restrictive covenants.[96] How, then, can the district court characterize the restrictive documents as a "temporary security device?"[97] It does so based on an underlying set of values, the first of which appears to be free and reasonable land use, e.g. timber harvesting.[98]

With respect to *Madden* and *Gallaway*, it is worthwhile to comment on the merger doctrine to which the courts refer in those opinions. The doctrine of merger operates in situations where a dominant estate benefits from, and a servient estate is bound by, a servitude. If the owner of the dominant estate acquires title to the servient estate, the two estates

---

89. *Gallaway*, 1996 U.S. Dist. LEXIS, 21636, at *20, n.8 (citations omitted).
90. *See id.* at *19.
91. *See id.* at *15-16.
92. *Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *2.
93. *Id.* at *2.
94. *Id.* at *10.
95. *Gallaway*, 1996 U.S. Dist. LEXIS 21636, at *3.
96. *Id.* at *2-3.
97. *Gallaway*, 1997 U.S. Dist. LEXIS 16645, at *10.
98. *Id.* at *11.

merge and the servitude is extinguished.[99] The merger doctrine is of particular importance when considering the law of conservation easements because although a conservation easement may be imposed on a piece of property "in gross," or without a dominant estate,[100] some courts hold that if the owner of an easement acquires the fee title to the eased property, the easement is extinguished.[101]

In addition to a common law doctrine of merger, several states provide for the extinguishment of conservation easements by merger in their state conservation easement statutes.[102] Colorado and Utah are two such states.[103] By contrast, Mississippi and New York specifically prohibit the extinguishment of conservation easements by merger.[104] Land trusts and landowners in states without statutory language either specifically permitting or prohibiting termination of conservation restrictions by merger may find themselves the vagaries of courts applying traditional common law rules like the doctrine of merger to eradicate intended conservation tools.[105]

The federal court in Montana has twice examined the validity and enforceability of conservation restrictions in the context of Montana's statutory merger doctrine.[106] Montana recognizes conservation easements in the form of conservation servitudes reserved pursuant to Mont. Code Ann. § 70-17-102(7).[107] It also recognizes, however, the doctrine of merger in Mont. Code. Ann. § 70-17-105, which states "[a] servitude thereon cannot be held by the owner of the servient tenement," and § 70-17-111, which states that "[a] servitude is extinguished by the vesting of the right to the servitude and the right to the servient tenement in the same person."[108]

---

99. *Gallaway*, 1996 U.S. Dist. LEXIS 21636, at *15.

100. A servitude in gross allows the burden to run even if the benefit side does not touch or concern any land.

101. *Gallaway*, 1996 U.S. Dist. LEXIS 21636; *Madden*, 823 F. Supp. 815.

102. Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in PROTECTING THE LAND, *supra* note 5, at 46. For more information on merger, Mayo cites William R. Ginsberg, The Destructibility of Conservation Easements through Merger, THE BACK FORTY, August 1991, at 5-8, and Paul Doscher and Sylvia Bates, Merging Ownership of Conservation Easements with Fee Interests: The Experience of the Society for the Protection of New Hampshire Forests, THE BACK FORTY, August 1991, at 1-4. *Id.*

103. Colo. Rev. Stat. § 38-30.5-107 (2000); Utah Code Ann. § 57-18-5 (2000).

104. See Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in PROTECTING THE LAND, *supra* note 5, at 46.

105. *See id.* at 47.

106. *Gallaway*, 1996 U.S. Dist. LEXIS 21636; *Madden*, 823 F. Supp. 815.

107. The section of the code provides that "the following land burdens or servitudes upon land may be granted and held though not attached to land . . . (7) the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural and natural values on or related to land." Mont. Code Ann. § 70-17-102(7) (2000).

108. *Gallaway*, 1996 U.S. Dist. LEXIS 21636 at *15.

In *Madden*, the landowner argued that The Nature Conservancy reserved a conservation easement on the Shining Mountain Ranch before conveying the property and, therefore, actually granted the servitude to itself. As a result, argued Madden, the conservation easement was extinguished by merger.[109]

The court disagreed.[110] It focused on timing and concluded that at no time did The Nature Conservancy hold fee title *and* the conservation restriction together because it "clearly" conveyed the fee to Shining Mountain Ranch and reserved the conservation easement *simultaneously*.[111]

While the court in *Madden* recognized a simultaneous conveyance of restriction and fee, the court in *Gallaway* did not.[112] Although the same court again examined the timing of the reservation of the easement and the conveyance of fee title, in *Gallaway* it agreed with the purchaser.[113]

The doctrine of merger is important to note because, according to the two federal Montana cases, if the owner of a property reserves a conservation easement in a deed prior to selling the property, the easement may merge with the dominant estate.[114] Similarly, if a land trust, as the holder of a conservation easement, acquires fee title to eased property, that easement runs the risk of being extinguished, particularly in states with statutes like Montana's, or in states where statutes are silent and courts apply the common law doctrine of merger.[115]

Following *Madden* and *Galloway*, *Harris v. Pease*, an early 1949 case, is the last in the trio of cases that we examined in which courts have looked to the intent of the parties to determine a conservation restriction's validity.[116] There, Harris filed a declaratory judgment action to determine the validity and enforceability of a development restriction.[117] Harris' predecessor-in-interest, Doyle, had restricted development on

---

109. *Madden*, 823 F. Supp. 815.

110. *Gallaway*, 1996 U.S. LEXIS 21636.

111. The court states:

> Clearly, if the court is to follow the dictates of the Montana Supreme Court and 'ascertain the intent of the grantor from a consideration of the entire instrument,' it must conclude that the reservation was made contemporaneously with the passing of title and that title to the conservation rights and the fee estate have never been merged.

Madden, 823 F. Supp. at 816.

112. *Gallaway*, 1996 U.S. Dist. LEXIS 21636.

113. *See* discussion *supra* notes 70-100 and accompanying text.

114. *See* discussion *supra* notes 70-100 and accompanying text.

115. *See* Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in PROTECTING THE LAND, *supra* note 5, at 46.

116. *See Harris v. Pease*, 66 A.2d 590 (Conn. 1949).

117. *See Harris*, 66 A.2d at 590.

eight of the fifty-one acres that Harris purchased.[118] Harris acquired the land with actual knowledge of the restriction.[119]

Before Harris bought property from Doyle, Pease purchased land from Doyle directly across from the restricted property and paid more for it *because of* the restriction, which was of great value to her property.[120] The court asserted that Harris' proposed development of the eight acres "would result in serious damage to [Pease] by interfering with the view from her property and disturbing her privacy and quiet."[121]

Harris argued that the restriction against building on the eight-acre tract should not extend beyond the life of, or twenty-one years after the death of, the grantee.[122] The court ruled against Harris, and explained that the restriction against building in the original deed created a servitude in the nature of an easement for the benefit of the grantee's (Doyle's) retained property (later purchased by Pease).[123] The court upheld the prior deed restriction as intended to be "a perpetual restriction."[124]

Defendant Pease benefited from the restriction imposed by Doyle. The eight acres provided her with an "unusually extensive and picturesque view."[125] This description appears in the court's opinion, and may indicate that Judge Maltbie had the opportunity to view the property at issue.[126] Additional language in the opinion further reflects the court's attitudes. The judge notes that the restricted tract was used by Doyle for farming, and since its sale, "corn, hay and other crops have been raised on it; and it is particularly adapted for use as an orchard."[127] The court describes the surrounding country as "rural in its characteristics, sparsely settled, and consist[ing] in the main of woodland and farms."[128] This kind of specificity and familiarity with respect to the land in question may aid a party arguing for the validity and enforceability of a restriction. It certainly appears to have worked in Pease's favor before the rise in use of conservation easements and other preservation tools.

Foreshadowing major concerns for the conservation easement movement, the court in *Harris* stated specifically, "the fact that the plaintiff's property would be of more value if the restriction were re-

118. *See id.* at 591.
119. *See id.*
120. *See id.* at 590.
121. *Id.* at 591.
122. *See id.*
123. *See Harris*, 66 A.2d. at 591.
124. *Id.* at 592.
125. *Id.* at 590.
126. *See id.*
127. *Id.* at 590-91.
128. *Id.* at 591.

moved is of no consequence."[129] While holding that the restriction at issue was not against public policy nor void because it ran in perpetuity, the court acknowledged potential issues in future cases involving land restrictions. The court opined:

> That does not, of course, mean that there may not be circumstances which would render such restriction invalid . . . . Under peculiar circumstances, it may be so contrary to public policy that the law would hold it void, as where it is of no benefit to anyone and its enforcement might seriously interfere with the proper development of the community. Changed circumstances, such as use of the defendant's property for other than residential purposes, might produce a situation where equity would refuse to enforce even an appurtenant right of this nature.[130]

Judge Maltbie implies here that a cost-benefit analysis, depending upon the circumstances in the future, might justify voiding the restriction upheld in *Harris*.[131] Whether a conservation restriction interferes with community development and whether the doctrine of changed conditions warrants that a restriction be nullified, asked in the context of a cost-benefit analysis, are threats to conservation and preservation instruments no matter how well intended and drafted.

B. *Construction and Enforcement Cases*

In the same way that intent plays an important role in cases involving the validity of easements or other restrictions, it also appears as a crucial factor in conservation enforcement actions focused not on questions of the validity of the agreement itself, but rather on the meaning and interpretation of provisions in conservation easements.

In *Friends of the Shawangunks Incorporated v. Clark*, a nonprofit corporation and four of its members challenged a decision by the National Park Service under the Land and Water Conservation Fund Act of 1965.[132] The federal government provided matching funds to the state of New York for acquisition of approximately 1400 acres in fee simple and 240 acres as a conservation easement in and around a significant state park with a large natural lake.[133] Friends contended that the defendants did not fulfill their obligations under the Land and Water Conservation Fund Act, which governed the federal government's funding, when they decided to allow Marriott Corporation to expand a golf course and related facilities across the 240 acres subject to the conservation

---

129. *Id.* at 592.

130. *Harris*, 66 A.2d at 592.

131. *Id.*

132. *See* Friends v. Clark, 585 F. Supp. 195, 196 (N.D.N.Y. 1984), *rev'd*, 754 F.2d 446 (2nd Cir. 1985).

133. *See Clark*, 585 F. Supp. at 197.

easement.[134] The United States District Court for the District of New York framed the question in the case as whether a conversion would occur.[135] The Conservation Fund Act, 16 U.S.C. § 460 1-8(f)(3) provides: "No property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the Interior], be converted to other than public outdoor recreation uses."[136]

The district court determined that no conversion would occur because "public, outdoor, recreation" activities would be increased by Marriott's use of the acreage.[137] The court stated that the public had no right of access under the conservation easement, and expanded rights of access once a golf course was constructed on the land.[138] The court described the mostly-private golf course as a "bonus to the public."[139] The court explained that because the eased-lands were "not intended for outdoor, public, recreational use there [could] be no conversion" under the Act.[140]

In citing only a general portion of the language in the conservation easement itself in its decision, the district court downplayed the role of the document in the controversy. Instead, the court relied upon the language of the Land and Water Conservation Fund Act and the duties of the Secretary.[141] Construing the term "conversion," the court opted for a narrow, exclusive definition of outdoor public recreational use.[142] Intent of the grantor of the conservation easement played no role in the lower court's decision. The district court referred briefly to language from the document stating that the easement was acquired "for the purpose of, but not solely limited to, the conservation and preservation of unique and scenic areas . . . ," but the court never mentions it again in its opinion.[143]

On appeal, the Second Circuit reversed the district court.[144] In doing so, the appellate court cited considerably different provisions of the conservation easement and adopted a noteworthy tone. After reciting the case's procedural history and applicable federal laws, the court commenced the substantive part of its ruling with the following passage:

> The Shawangunks Range, located in Ulster County, New York, is noted for spectacular rock formations, sheer cliffs, windswept ledges with pine barrens, fast-flowing mountain streams and scenic water

134. *See id.* at 196.
135. *See id.* at 197.
136. *Id.*
137. *Id.* at 200.
138. *See id.*
139. *See Clark*, 585 F. Supp. at 200-01.
140. *Id.* at 200.
141. *See id.*
142. *Id.* at 201.
143. *Id.* at 197.
144. *See Clark*, 754 F.2d at 452.

> falls, as well as a series of five mountain lakes, the 'Sky Lakes.' Of these, Lake Minnewaska is one, with extremely steep banks and many magnificent cliffs rising as high as 150 feet along its northern and eastern shores.[145]

The court then noted the surrounding landscape, which consists of large tracts of open space, and the public use of the surrounding 22,000 acres by hikers and other limited recreational activities.[146] One interpretation of the disparity in the two courts' decision making rests upon the elemental possibility that the district court cared not one whit for the landscape at stake whereas the Second Circuit court from the outset of its opinion expressed great respect and appreciation for the natural beauty of the area at issue in the suit. This difference in values alone may account for the different outcome at the appellate level.

The Second Circuit emphasized the purpose of the conservation easement to conserve and preserve "unique and scenic areas" in its opening section reciting the law of the case that the conservation easement provided that the fee owner

> shall not develop or erect new facilities within the described area; alter the landscape or terrain; or cut trees but may operate, maintain and reconstruct existing facilities within the easement area, including, but not limited to buildings, roads, utilities and golf courses; provided that (a) Any reconstruction shall be in the same location and utilized for the same purpose as that which existed on the date hereof and that such reconstructed facilities shall be no larger in area than the facility being replaced.[147]

The lower court did not cite these provisions.

In its Discussion section, the Second Circuit explained that it interpreted public outdoor recreational uses more broadly than the district court because of the "policies of the Department of Interior and the purposes of the statute" (the Conservation Fund Act).[148] The appellate court interpreted public outdoor recreational uses to encompass uses not involving the public's actual physical presence on the property.[149] "After all," asserted the court, "Webster's Third New International Dictionary (1971) defines 'recreation' as 'refreshment of the strength and spirits after toil, . . .'; surely by exposing scenic vistas and serving as a buffer zone between Minnewaska State Park and developed areas, the easement area provides such refreshment."[150]

---

145. *Id.* at 447-48.
146. *Id.* at 448.
147. *Id.*
148. *Id.* at 449.
149. *Id.*
150. *Clark*, 754 F.2d at 449.

The court used a manual from the Department of the Interior as support for its definition of public outdoor recreational uses.[151] The Department's manual authorizes land acquisition for its scenic or natural values.[152] The court concedes that a surface reading of the Act indicates that Congress intended primarily active physical recreation.[153] However, the court opines, the Act itself as well as its legislative history reveal broader intentions.[154]

The court then refers to a Senate Report that mentions the need to improve the "physical and spiritual health and vitality of the American people."[155] In an era of law-making focused on cost-benefit analyses, takings and individual property rights, a circuit court making references to spiritual values is remarkable indeed.[156] The tone and import of the court's opinion, which ascribes values to land that transcend the simple notion of property as a base commodity, sets the opinion apart from most legal doctrine. The Second Circuit concluded that the proposed amendment to the conservation easement approved by the Secretary constituted a conversion. "It is after all," stated the court, "a conservation fund act."[157]

In the last section of its opinion, the court expressly recognized the time and expense invested by Marriott in the project.[158] And the court confirmed that courts do not control the process of land planning and development.[159] It noted that undertaking a private project like Marriott's necessarily involved expenses that presumably would be recouped by charging the ultimate consumer.[160] Of the cost-benefit argument, the court responded, "the court's duty remains to follow the law as written and intended."[161]

Likewise in *Goldmuntz v. Town of Chilmark*, the appeals court of Massachusetts upheld the validity of the restrictions set forth in the conservation easement at issue there.[162] In *Goldmuntz*, the plaintiff applied for a permit to build an in-ground swimming pool in an area near the existing dwelling on the property.[163] The Chilmark Conservation Commission notified plaintiff that building the pool would violate the conser-

151. *See id.* at 450.
152. *See id.*
153. *Id.*
154. *Id.*
155. *Id.* at 450.
156. *Id.*
157. *Clark*, 754 F.2d at 450.
158. *See id.* at 452.
159. *See id.*
160. *See id.*
161. *Id.*
162. *See* Goldmuntz v. Chilmark, 651 N.E.2d 864, 866 (Mass. App. Ct. 1995).
163. *See Goldmuntz*, 651 N.E.2d at 865.

vation easement.[164] A land court judge ruled in the plaintiff's declaratory judgment action that the proposed pool was a structure within the meaning of the easement, and not an improvement of the existing dwelling or an accessory structure appropriate to certain passive recreational uses.[165] The court supported its decision defining a pool as a structure by citing to the town code, which also defined swimming pools as structures for purposes of zoning set back requirements.[166]

The appellate court's analysis begins with the issue of intent. "The grantor's stated purpose," noted the court, was "to restrict the use of [the property] and retain it predominantly in its natural, scenic and open condition . . . ."[167] It found that the lower court had properly concluded that the grantor "wanted a tight rein kept on changes to the [p]roperty."[168]

The conservation easement controlling the court's decision in *Goldmuntz* contains specific and detailed prohibitions. To support its ruling, the court relied on the provision in the easement restricting "[a]ny surface use of the land, except for agricultural, farming, forest, outdoor recreational or other purposes consistent with allowing the land and related areas to remain predominantly in their natural condition."[169] Additionally, the court could have relied on another restriction in its decision to reach the same conclusion barring construction of the pool: the prohibition of "[e]xcavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to affect the surface."[170]

The Massachusetts appellate court's decision is interesting in that it cites the grantor's intent at some length even though the conservation easement contains clear language restricting the construction of a swimming pool. A harder question for the court may have been an application by the plaintiff to build an indoor pool attached to the existing dwelling. Would that proposal have fallen in the category of "an improvement to the existing dwelling" or an accessory structure?[171] The court noted that it would allow a bathhouse near the existing swimming pond, for example, because it would be an accessory to a passive use of the property.[172]

In *Clark* and *Goldmuntz*, the courts cited intent and based their opinions on specific and detailed provisions of the conservation ease-

---

164. *See id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 866.
169. *Goldmuntz*, 651 N.E.2d at 866.
170. *Id.* at 867.
171. *Id.*
172. *Id.* at 866.

ments at issue.[173] The court in *Rattee v. Commissioner* likewise relied on specific language of the restriction at issue, and the court used that language to determine the outcome in the action.[174] In the latter case, Rattee defended against the claims brought against him by trying to persuade the court that the agricultural preservation restriction (APR) that applied to his property contained ambiguous language.[175] An APR is a conservation restriction created by statute based entirely on protecting agricultural uses of land.[176] In *Rattee*, the defendant purchased two parcels totaling 185 acres at a foreclosure sale.[177] The former owners had granted the State of New Hampshire the APR.[178] After purchase, Rattee arranged for the house on a 3.3 acre farmstead site exempt from the APR to be burned down.[179] He then excavated a field in preparation for construction of a 5,500 square foot home with a 1,500 foot driveway, plans which would have eliminated two acres of the property from agricultural use.[180] The State informed Rattee that he was violating the APR shortly after he applied for a building permit.[181]

The court upheld the building restrictions contained in the APR.[182] The APR expressly required Rattee to seek prior approval for construction from the commissioner for the department of agriculture.[183] Rattee argued that he did not need approval because although the APR contained an express provision mandating it, the state statutes creating the APR did not contain approval requirements.[184]

In ruling in favor of the State, the court cited the state statute at issue:

> The stated purpose of RSA chapter 36-D is to 'recognize the importance of preserving the limited land suitable for agricultural production to safeguard the public health and welfare by encouraging the maximum use of food and fiber producing capabilities of the state's

173. *See Clark*, 754 F.2d at 449; *See Goldmuntz*, 651 N.E.2d at 866.

174. *See* Rattee v. Commissioner, 761 A.2d 1076, 1080 (N.H. 2000).

175. *See id.*

176. *See Rattee*, 761 A.2d at 1082; "The statutory purpose of an APR is 'to recognize the importance of preserving the limited land suitable for agricultural production . . . and to ensure the protection of agricultural land facing conversion to non-agricultural uses." *Id.* N.H. REV. STAT. ANN. RSA Chapter 36-D, (Repealed 1985).

177. *See Rattee*, 761 A.2d at 1078.

178. *See id.*

179. *Id.* at 1079.

180. *See id.*

181. *See id.*

182. *See id.* at 1083.

183. *See Rattee*, 761 A.2d at 1078.

184. *See id.* at 1080.

> agriculturally suitable land and to ensure the protection of agricultural land facing conversion to non-agricultural uses.'[185]

"Thus," reasoned the court:

> [W]hile the APR statute and deed both reserve the right to construct 'dwellings to be used for family living,' requiring prior approval for such construction is consistent with the statutory purpose. Prior approval ensures that family dwellings will be constructed in a manner that minimizes their impact on agricultural production and prevents potential abuse of the family dwelling exception.[186]

In other cases, rather than examining the specific, detailed provisions of the easement or other restriction at issue, courts instead frame the issues in a particular case in such a way as to shape the outcome of the action. The importance of the way courts frame issues is evident in *Southbury Land Trust, Inc. v. Andricovich*, in much the same way as in *Clark*.[187] In *Clark*, the lower court emphasized a conventional definition of 'public outdoor recreational activities' and virtually ignored the language of the conservation easement itself.[188] In reversing the lower court, the Second Circuit relied on the agreement and the intent reflected there to conserve natural and scenic areas.[189] Similarly in *Southbury*, the court's decision depends upon how the court frames the issue.[190] There, the court found that construction of an additional dwelling unit, separate from the original residence, was consistent with the drafters' intent to preserve a working farm.[191] The court disregarded express language evidencing the drafters' intent "to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use."[192] The latter language also appears in the General Statutes for Connecticut. The opinion states that the conservation easement at issue was to be a conservation restriction within the meaning of the statutes.[193]

In spite of the specific language concerning the retention of land in its predominantly natural condition, the court ruled that Andricovich could construct a separate residence for family members on the property.[194] The court writes: "The plain language of sections 2 (c) and (b) of the conservation easement clearly allows for the construction of a detached single-family home . . . . Clearly, the drafters wanted to pre-

185. *Id.*
186. *Id.*
187. *See Southbury Land Trust, Inc.*, 757 A.2d 1263; *Clark*, 754 F.2d at 449.
188. *See Clark*, 754 F.2d at 449.
189. *See Southbury Land Trust, Inc.*, 757 A.2d 1263.
190. *Id.* at 1266.
191. *Id.* at 1267.
192. *Id.* at 1264.
193. *Id.*
194. *See id.* at 1267.

serve the pastoral aspects of [the] parcel . . . ."[195] The provisions cited as clearly allowing construction are as follow:

> To restrict Parcel C to its agricultural and open space use, within Parcel C land, buildings and other structures shall be used for the following purposes and no other:
>
> (b) A single detached dwelling for one (1) family and not more than one (1) dwelling per lot, except as provided in subparagraph c below.
>
> (c) An additional dwelling unit for one family in a dwelling or another building, provided that the same is used only as a residence for one or more members of the family of persons directly employed in the operation of the uses in subparagraph a above on Parcel C of [the district] . . . .[196]

The land trust argued that these provisions meant a single family dwelling attached to or constructed within the existing house or another existing farm building.[197] The land trust also asserted that the court failed to consider the conservation easement as a whole in rendering its interpretation of the above-stated provisions.[198]

To support its decision that the conservation easement clearly provided for construction of a separate family dwelling, the court cited Southbury's town code.[199] As in *Goldmuntz*, the court turned, not to the conservation easement itself for a definition consistent with the easement's intent, but to local ordinances.[200] The code defined dwelling unit as a building or a part of a building, which the court essentially found dispositive of the issue as to whether the defendant could construct a separate building.[201] Finally, the court discussed the drafters' intent, concluding that they could have been more clear in the conservation easement if they wanted to restrict construction and that restricting ownership to family members ensured preservation of the pastoral setting.[202] Arguably, the court could have decided *Southbury* either way; the court's finding of clear language in the conservation easement, and the court's emphasis on the drafters' intent to preserve a working farm, as opposed to the drafters' intention to preserve the property in its natural and open condition, carried the day.

---

195. *Id.* at 1266.
196. *Southbury Land Trust, Inc.*, 757 A.2d at 1264.
197. *See id.* at 1265.
198. *See id.* at 1266.
199. *See id.* at 1265.
200. *See id.*
201. *Id.*
202. *See id.* at 1266.

The court in *Redwood Construction Corporation v. Doornbosch* emphasizes not the actual language of the conservation easement at issue, but rather what it lacks.[203] There, plaintiff Redwood purchased and subdivided a parcel.[204] One of its lots lacked public street access, so Redwood sought to purchase an easement over an access way used by defendant Doornbosch and other area property owners.[205] Before transfer of the easement, Redwood learned that the Doornbosch's property was subject to a conservation easement.[206] The easement "prohibited any improvements or changes to the Doornbosch property that would affect its natural, open and scenic nature, or would cause damage to an environmentally-sensitive flood plain."[207] It further provided that changes in the use of the Doornbosch property could not be effected without the written consent of the West Branch Conservation Association.[208]

The court asserted that: "[h]ere, the restrictive covenants set forth in West Branch's conservation easement do not expressly address or prohibit the proposed use of the access way at issue."[209] Rather, said the court:

> [T]he conservation easement expressly reserved to the grantors the right to 'sell, give away or otherwise convey the Protected Property or any portion or portions thereof, provided such conveyance is consistent with and subject to the terms of this Conservation Easement,' and prohibited only those changes in use of the property 'as would be detrimental to any significant open space interest, significant natural habitat interest or other significant conservation interest sought to be protected by this Conservation Easement.'[210]

The court found that West Branch unreasonably withheld its consent to plaintiff's purchase of the easement. Of note to land trusts and litigators is the court's finding in the opinion that "Redwood presented an unrebutted prima facie case that its de minimis proposed use of the Doornbosch property would not be inconsistent with West Branch's conservation easement."[211] Read: likely, plaintiff hired a credible expert witness who signed an affidavit that plaintiff submitted with its motion for summary judgment; defendants probably did not submit an expert opinion to rebut plaintiff's expert in their response to plaintiff's motion thereby providing grounds for the court to declare that Redwood had presented "an unrebutted prima facie case."

---

203. *See Redwood Constr. Corp.*, 248 A.D.2d at 699.
204. *See id.* at 698.
205. *See id.* at 698-99.
206. *See id.* at 699.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Redwood Constr. Corp.*, 248 A.D.2d at 699-700.
211. *Id.* at 700.

Of particular interest in *Redwood* is the court's insistence on the detail lacking in West Branch's easement, *e.g.* no specific provision barring plaintiff's easement purchase.[212] The court seems to imply that express prohibition would have had to be present in order for the court to find for the defendants. Significant increased traffic and widening of the access road appear to outside analysis to be detrimental to both the open space interest and natural habitat of the property.[213]

In contrast to *Redwood*, in *Racine v. United States*, the Ninth Circuit expressly noted that the drafter of the "scenic easement" at issue could have prohibited the challenged activities specifically in the document.[214] *Racine* involved a federal statute that authorized the Secretary of Agriculture to acquire "scenic easements" in the Sawtooth National Recreation Area in Idaho.[215] A second-generation landowner with a scenic easement on his property brought suit to overturn the government's position that building structures for dude ranching violated the terms of the easement.[216] The easement provided, "[w]ith reference to 36 C.F.R. § 292.16(g)(1), it is agreed that only one residence and one tenant dwelling are authorized within the easement area."[217] Section 292.16(g)(1) allows structures that do not "substantially impair or detract" from the scenic, wildlife and other natural values of the land.[218] The section refers to dude ranching specifically as permitted activity.[219]

The court affirmed the lower court's interpretation of the restriction in the scenic easement, saying there was only one way to read the provision consistently.[220] The court held that the provision meant: "only one residence and one tenant dwelling will be permitted among the other dude ranching facilities permitted under . . . [section 292.16(g)(1)]."[221] Faced with seemingly contradictory, ambiguous language, the court emphasized that "it would have been easy for the Government's drafter to place language in the deed prohibiting all dude ranching buildings . . . ."[222]

Although the court ruled for the plaintiff-landowner on the issue of the construction of dude ranching structures, it upheld the lower court's denial of his motion for attorney fees.[223] The court opined that the gov-

212. *See id.* at 699.
213. *Id.* at 700.
214. *See Racine*, 858 F.2d at 509.
215. *See Id.* at 507.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 508-09
221. *Id.*
222. *Id.* at 509.
223. *Id.*

ernment's interpretation of the easement was reasonable and that its position was "substantially justified."[224]

C. *The Georgetown Cases*

A line of three cases, each decided between 1994 and 1997, litigated by the same organization in one district's lower and appellate courts provide a unique opportunity to examine a developing series of opinions by an appellate court dealing with issues concerning conservation and preservation easements.[225] These three cases involve Deeds of Scenic, Open Space and Architectural Facade Easements held by the Foundation for Preservation of Historic Georgetown (the Foundation) and appealed to the District of Columbia Court of Appeals.[226]

In the three cases, the court notes that in controversies over the correct interpretation of a contract, ambiguity and the parties' intent play key roles.[227] In these cases, where the court determines that the agreement is unambiguous and clear on its face, the court reasons that the agreement speaks for itself.[228] If the court finds that the easement document is ambiguous, the court seeks to ascertain the parties' intent by examining the document in light of the circumstances surrounding its execution, by examining any agreements or documentary evidence outside the four corners of the agreement, and, if necessary, by applying traditional rules of contract construction.[229] The court emphasizes in the Georgetown line of cases, however, that ambiguity in the language of deeds and contracts is to be construed in accordance with the intent of the parties insofar as it can be discerned from the language of the instrument itself.[230]

Bagley v. Foundation for the Preservation of Historic Georgetown was brought by the Foundation for the Preservation of Historic Georgetown against two homeowners (collectively "Bagley") to enforce the terms of an easement that applied to Bagley's home.[231] The easement prohibited Bagley from building any structure on his property, encroaching on any presently open space, or obstructing a view of the building facade from the street without first obtaining written consent

---

224. *Id.*

225. *See* Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110 (App. D.C. 1994); Found. for the Pres. of Historic Georgetown v. Arnold, 651 A.2d 794 (App. D.C. 1994); Sagalyn v. Found. for the Pres. of Historic Georgetown, 691 A.2d 107 (App. D.C. 1997).

226. *See id.*

227. *See id.*

228. *See Bagley*, 647 A.2d at 1113.

229. *See Arnold*, 651 A.2d at 796.

230. *See Bagley*, 647 A.2d at 1113; *See Arnold*, 651 A.2d at 796; *See Sagalyn*, 691 A.2d at 111-12.

231. *See Bagley*, 647 A.2d at 1111.

from the Foundation.[232] In late 1989, Bagley began to construct a two-story addition on the back of his residence to house new air conditioning units.[233]

When it learned in December 1989 of the addition Bagley was building, the Foundation informed Bagley that he had violated the easement on his property by failing to obtain the Foundation's permission for the construction.[234] In addition, argued the Foundation, the construction itself violated the easement by increasing the footprint of the existing house.[235] Although Bagley acknowledged that he should have requested permission to make changes to the house, still he asked the Foundation for a special accommodation allowing him to keep the addition.[236] The Foundation took the position that it would consider alternative design proposals for the house, but only after Bagley removed the addition.[237] Bagley refused.[238]

The Foundation filed a two-count complaint against Bagley in Superior Court in February 1991 alleging multiple violations of the easement.[239] The Foundation sought an injunction to force Bagley to remove the addition, as well as declaratory and other relief including an award of attorney fees and costs under the express terms of the easement.[240] Bagley counterclaimed for $1 million in damages and reformation or rescission of the easement.[241] He argued, among other positions, that the Foundation had selectively and, therefore, unfairly enforced its easements.[242]

The Foundation filed a motion for summary judgment on both of its claims.[243] The trial court denied the motion in part but did order Bagley to obtain a demolition permit to remove the addition.[244] It also awarded attorney fees and costs to the Foundation.[245] While the appellate court stayed the injunction against Bagley, the trial court declined to stay a hearing on attorney fees and costs. The trial court awarded the Foundation $78,304.85.[246] The appellate court then consolidated Bagley's first

232. *See id.*
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.* at 1112.
237. *See Bagley*, 647 A.2d at 1112.
238. *See id.*
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.*
244. *See Bagley*, at 1112. .
245. *See id.* at 1113.
246. *See id.* at 1112-13.

appeal concerning the restrictive easement violation with his second appeal on the issue of fees and costs.[247]

On appeal, Bagley argued that the language of the easement was ambiguous.[248] The court disagreed, and refused to "create ambiguity where none exists." It found instead that Bagley's arguments were altogether unpersuasive.[249] The court relied on what it determined to be the unambiguous language of the easement, and emphasized that the easement *expressly prohibited* the building of additional structures on the property and any extension of the existing building into open space.[250] The court concluded at the outset of its opinion that, at the very least, the easement required Bagley to obtain prior written approval from the Foundation before making any changes to his home's facade or its surrounding open space.[251]

One of the many arguments posited by Bagley during the course of the litigation concerned a previous easement that he had donated to the Foundation.[252] In that easement, explained Bagley, only the front of the house and property were subject to restrictions.[253] Therefore, he argued, he legitimately believed that the second easement was only pertinent to the front of his house and property.[254] This argument is of some interest here because in *Arnold*, discussed *infra*, the easement the landowner granted to the Foundation contained restrictions that did apply only to the front of the house.[255] The easement in *Arnold* had been granted in 1980, the easement in *Bagley* in 1988.[256] The issues and outcomes in *Arnold* and *Bagley* may reflect evolution in terms of easement drafting on the part of the Foundation.

To decide *Bagley*, the appellate court relied upon the actual language of the easement at issue.[257] The court's holding hinged, in part, on Section 4(f) of the easement, which provided that the Foundation will "exercise reasonable judgment and care in performing its obligations and exercising its rights under the terms of this easement."[258] In response to Bagley's contention that it was unreasonable for the Foundation to demand that he demolish his addition before any negotiations could take place, the court noted that the Foundation could have entered the prop-

247. *See id.* at 1113.
248. *See id.*
249. *Id.*
250. *See id.*
251. *See Bagley*, 647 A.2d at 1113.
252. *See id.* at 1112, n.2.
253. *See id.*
254. *See id.*
255. *See Arnold*, 651 A.2d at 795-96.
256. *See id.* at 795; *See Bagley*, 647 A.2d at 1111.
257. *See Bagley*, 647 A.2d at 1113.
258. *Id.*

erty and removed the addition itself.[259] The fact that the Foundation refrained from exercising its harshest remedy for Bagley's violation seemed to influence the court's ruling positively.

In addition to affirming the lower court's ruling on Bagley's violation of the easement at issue, the appellate court upheld the trial judge's award of attorney fees and costs, citing specific language from Section 10(d) of the easement, which provided that: "[i]n the event [Bagley is] found to have violated any of [his] obligations, [he] shall reimburse [the Foundation] for any costs or expenses incurred in connection therewith, including court costs and attorneys' fees."[260] In a sharp reprimand of Bagley's scattershot tactics, the court stated, "Bagley cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response."[261] It continued unapologetically by stating:

> In the present case, a clear violation of the easement agreement was brought to Bagley's attention at an early date. It was or should have been readily apparent that Bagley had no viable defense. Instead of coming promptly into compliance, Bagley interposed various defenses and counterclaims, some of which (e.g. his 'due process' claims, his 'selective enforcement' theory, and his demands for 'reformation' and 'rescission') were, in our view, patently frivolous. Approximately two-thirds of the Foundation's billable hours were addressed to discovery and litigation regarding Bagley's altogether implausible defense theories and counterclaims.[262]

Although the trial court reduced the Foundation's fee award for some of the hours billed by the associate attorney on the case, both the trial and appellate courts authorized payment of attorney fees for the two Foundation attorneys.[263]

The court in *Bagley* found that the language of the easement was unambiguous on its face. The court's strict adherence to the language of the easement in *Bagley* is notable because the court does not rely on, or abuse, the opportunity for interpretation of the parties' intent to reach a particular decision. Of note to land trusts is the fact that even though Bagley tried to strong-arm the Foundation by bringing myriad scattershot claims and seeking one million dollars in damages, the court found Bagley's claims, indeed his efforts to intimidate, "altogether implausible."[264]

---

259. *See id.*
260. *Id.* at 1115.
261. *Id.* at 1114-15.
262. *Id.* at 1115.
263. *See Bagley*, 647 A.2d at 1115. .
264. *Id.* at 1113, 1115.

In a decision that followed closely on the heels of *Bagley*, the Foundation appealed from a trial court's order granting summary judgment in an action it brought for declaratory and injunctive relief to enforce an easement granted by Arnold's predecessor in *Foundation for the Preservation of Historic Georgetown v. Arnold*.[265] The Foundation argued that Arnold violated the terms of his easement by laterally enclosing a space between two dormer windows on the roof of the dwelling and by building a seasonal awning across the patio at the rear of the house.[266]

The court examined two clauses of the easement. The first prohibited Arnold from undertaking any "construction, alteration, or remodeling . . . which would affect the exterior surfaces herein described, or increase the height, or alter the exterior façade . . . or the appearance of the building . . . ."[267] Section 1 of the easement defined "[t]he exterior surface of improvements . . . on the subject premises as those depicted in the photographs attached . . . to the easement and those improvements visible from the front of the house."[268] Because the photos of Arnold's house taken at the time of the donation of the easement, and the language of the easement itself, referred to the front of the house only, the Foundation was forced to agree that Section 1 did not prohibit Arnold's changes to the premises.[269]

The Foundation turned instead to a general, less-forceful second clause, which provided that "[n]o extension of the existing structure or erection of additional structures shall be permitted," and argued that the enclosure between the windows and the patio awning extended the house in terms of interior density in a way that violated the easement.[270] The Foundation's argument depended upon interpretation of the meaning of the word extension. If the court found that the term extension was ambiguous, asserted the Foundation, then the court could look to the appraisal that was prepared contemporaneously with the easement as an indication that the parties intended to prohibit increased density in the building's interior.[271]

The court scrutinized the language of the document and began its inquiry with a determination that the term extension was ambiguous.[272] The court iterated that because the term was not defined in the easement,

---

265. *See Arnold*, 651 A.2d at 795.

266. *See id.*

267. *Id.* at 796.

268. *Id.*

269. *See id.* Land conservation organizations can take away one important lesson from *Arnold*: photograph the entire site to be protected, *e.g.* the house, ranch, wetland et al.. Armed with photographs of the back of Arnold's house, the Foundation probably would have prevailed in the action.

270. *Id.*

271. *Arnold*, 651 A.2d at 795.

272. *Id.*

it could mean many things, and it could find no other language in the easement to eliminate the ambiguity of word.[273]

Because the court found the term extension to be ambiguous, it opened the door for consideration of extrinsic evidence as an indication of the parties' intent.[274] The Foundation argued that the contemporaneously-prepared appraisal evidenced the meaning of extension.[275] The court disagreed, finding that the appraisal did not evidence what *both* parties intended at the granting of the easement because it was prepared solely by and for the grantor of the easement.[276]

In rejecting extrinsic evidence, the court turned to traditional rules of construction, which are common law rules governing contract interpretation.[277] The court cited the well-recognized rule that restrictions on land use are to be construed *in favor* of the free use of land and *against* the party who drafted the document.[278] The Foundation argued that this common law rule should apply only to restrictive covenants, and not to statutorily-created conservation and preservation easements.[279] The court dismissed this argument as vague and unconvincing.[280] Because the Foundation lost on its only argument for the appraisal as extrinsic evidence, it was hamstrung by common law rules of construction having nothing to do with the intent of the parties.

An important doctrinal question raised by *Arnold* is whether traditional common law rules of construction related to real property restrictions should even apply in cases involving conservation easements or restrictions. In any such easement, the intent of the parties is expressed as preservation or conservation. Why, then, do courts like the District of Columbia apply rules of construction that contradict the goals of the parties and the entire justification for a grantor's tax break? Arguably, the well-recognized rule of construction that "restrictions on land use should be construed in favor of the free use of land and against the party seeking enforcement" has no business being recognized at all by courts determining enforcement and defense disputes concerning conservation easements.[281]

One court among the published opinions that we reviewed recognized this issue.[282] In *Bennett v. Comm'r of Food and Agriculture*, the

273. *See id.* at 796-97.
274. *See id.*
275. *Id.* at 797.
276. *See id.*
277. *Id.*
278. *Arnold*, 651 A.2d at 797.
279. *See id.*
280. *Id.*
281. *Id.*
282. *See Bennett*, 576 N.E.2d 1365.

Massachusetts Supreme Court upheld the plain meaning of an agricultural preservation restriction (APR) that conferred approval authority on the Commissioner with respect to the location of dwellings on the property subject to the APR.[283]

Bennett sought to build a large, hilltop house on his 250 acre farm, which was subject to an APR granted by Bennett's predecessor-in-interest.[284] The Commissioner of Food and Agriculture determined that the location would cause erosion as well as the loss of about two acres of farmland, and he offered Bennett five other possible building sites.[285] Bennett filed suit and argued that the provision conferring authority on the Commissioner was unenforceable under common law rules requiring privity of estate or contract in order for a party to enforce a servitude.[286] The court responded to Bennett's argument by asserting that:

> [W]here the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force. In such a case, the appropriate question is whether the bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.[287]

In a footnote, the court explained further:

> What we decide here does not, of course, endorse the enforcement of all easements in gross. It does, however, prompt us to observe that certain common law rules concerning the creation, validity, and enforcement of servitudes may no longer be sound and that we are willing to reconsider them in appropriate cases.[288]

In cases involving the enforcement and defense of conservation easements and other restrictive servitudes, courts should follow the Massachusetts Supreme Court's lead, especially when considering the relevance of traditional common law rules regarding the free use of land as well as those rules requiring that real property limitations be construed restrictively and against their drafters.

In keeping with its examination in *Arnold*, the court in *Sagalyn v. Foundation for the Preservation of Historic Georgetown* also relied on rules of construction to reach its decision.[289] The court began its inquiry

---

283. *See id.* at 1366, 1368.
284. *See id.* at 1365.
285. *See id.* at 1365-66.
286. *See id.* at 1365.
287. *Id.* at 1367.
288. *Id.* at 1368, n.4.
289. *See Sagalyn*, 691 A.2d 107.

by focusing on the language of the easement and whether it was ambiguous.[290]

In *Sagalyn*, second generation homeowners challenged the conservation and preservation easement encumbering their Georgetown property, which property was comprised of several different residential lots.[291] The easement imposed several restrictions on the alteration, use, division, and conveyance of the property, including a prohibition against subdivision or conveyance of the property, except as a unit.[292] It also provided that in the event of violation of its covenants or restrictions, the grantee could institute a suit for injunctive relief and recover costs and attorney fees if it prevailed.[293]

When the Sagalyns purchased their property a conservation and preservation easement already encumbered it.[294] Before they purchased the property, the Sagalyns requested, and the Foundation granted, permission to construct a swimming pool.[295] After they purchased the property, the Sagalyns sought another waiver of the easement to construct a one-story addition to their kitchen, which the Foundation denied.[296]

Without the Foundation's knowledge, the Sagalyns applied for and obtained a zoning change, which consisted of a new record lot designation for the property from multiple lots to a single lot of record, as a preliminary step towards securing a building permit for the kitchen addition they desired.[297] Even though the Foundation spoke in opposition to issuance of the permit at a hearing before the Commission of Fine Arts, the Commission issued the permit to the Sagalyns anyway, without making any findings related to the easement.[298]

The parties attempted to settle the dispute over the kitchen addition on several different occasions without success.[299] At one point, the Foundation offered to let the Sagalyns replace their existing kitchen wall with a glass wall if they would also agree to pay the Foundation's attorney fees and costs to date, which amounted to about $11,000.00.[300] The Sagalyns refused.[301] To protect its rights with respect to a timely challenge of the issuance of the building permit, the Foundation filed a complaint

290. *See id.*, at 111.
291. *See id.* at 109.
292. *See id.*
293. *See id.*
294. *See id.*
295. *See id.*
296. *See Sagalyn*, 691 A.2d at 109.
297. *See id.* at 109-10.
298. *See id.* at 110.
299. *See id.*
300. *See id.*
301. *See id.*

for declaratory and injunctive relief to enforce the easement.[302] The trial court enjoined the Sagalyns from constructing any addition without the Foundation's approval and referred the Foundation's request for attorneys' fees and costs to a mediator.[303] After mediation failed, the trial court entered final summary judgment in favor of the Foundation, concluding that the Sagalyns had violated the easement by having their multiple lots re-designated as a single lot.[304]

At issue on appeal was the meaning of subdivide as used in the servitude, which read: "[t]he property shall not be subdivided, nor shall it ever be devised or conveyed except as a unit."[305] The Sagalyns argued that the term should be given its plain, ordinary, and usual interpretation in accordance with *Webster's Third New International Dictionary* and *Black's Law Dictionary*, which define subdivide as to divide into smaller parts and subdivision as the division of a lot, tract, or parcel of land into two or more lots, tracts, or parcels for sale or development.[306] The Foundation contended that "subdivide" is a term of art without any plain or ordinary meaning.[307]

Based upon the Historic Landmark and Historic District Protection Act and local regulations, the court determined that "subdivide" could be interpreted in a number of different ways.[308] Both the Act and local regulations defined "subdivide" to mean both the division of land and the assembly of it.[309] Once the court determined that "subdivide" could mean two different things, the court turned to rules of construction.[310] The court cited the objective law of contracts, which states that the written language of an agreement will govern the parties' rights unless its meaning is unclear.[311] "[T]he first step in contract interpretation," asserted the court, "is determining what a reasonable person in the position of the parties would have thought the disputed language meant."[312]

It is hard to imagine any reasonable person defining subdivision as anything other than a division of property into two or more smaller parcels. Leave it to the masters of legal wrangling, including both legislators and lawyers, to come up with an assemblage version of the word subdivide. Notwithstanding the counter-intuitive meaning of subdivide in the

---

302. *See id.*
303. *See Sagalyn*, 691 A.2d at 109.
304. *See id.* at 111.
305. *Id.*
306. *Id.*
307. *Id.* at 111-12.
308. *See id.* at 112.
309. *See id.*
310. *See id.* at 112.
311. *See id.* at 111.
312. *Id.*

District of Columbia as well as the court's previous ruling in *Acheson*,[313] the *Sagalyn* court held that the homeowners violated the subdivision prohibition of the conservation easement by obtaining a zoning change that assembled their multiple lots into two.[314]

Having agreed with the Foundation's interpretation of the word subdivide, the court partially upheld the lower court's $33,994.65 award of attorney fees and costs under the express provisions of the easement.[315] The Sagalyns argued that the Foundation was not entitled to fees and costs related to its claim for injunctive relief because the Sagalyns had agreed not to start construction of the addition until the dispute was resolved.[316] The appellate court agreed with the homeowners and ruled that the Foundation's injunctive relief claim was premature.[317] The court remanded the attorney fees and costs issue to the district court for a determination of the proper amount of the award, which would be reduced by amount of the fees and costs related to the injunctive relief claim only.[318]

The Georgetown cases provide the only opportunity to date to examine one court's approach to analyzing conservation and preservation easements over time in the context of defense and enforcement actions. We learn that if a court cannot readily assess the meaning of the document and the parties' intent, as it could not in *Arnold*, then a court may turn to traditional common law rules. Because common law principles of property as well as contract construction and interpretation are not consistent with the goals of conservation statutes, decisions wherein courts rely on common law rules, are most often at odds with the original conservation purpose of an easement and the intent of the parties. Land trusts enforcing and defending easements should provide evidence of the plain meaning of the easement by pointing to clear, unequivocal, uncontradicted language in the document itself (which, of course, requires that such language be drafted clearly), and, if necessary, by bolstering the document's meaning with extrinsic evidence of the drafters' intent, such as with an appraisal or baseline. Once a court has determined that it cannot devise the meaning of a document or the intent of its drafters from the conservation easement or other restrictive document itself, then a court may evaluate the document in terms of common law real property and contract doctrine, where, as we have seen, anything goes.

---

313. *Acheson*, 520 A.2d 318.
314. *Sagalyn*, 691 A.2d at 115.
315. *See id.* at 114, 115.
316. *See id.* at 114-15.
317. *See id.*
318. *See id.* at 115.

IV. PRELIMINARY FINDINGS FOR LAND TRUSTS

Considering what we have reviewed and looking ahead, land trusts can and should anticipate confronting most or all of the issues raised to date in cases involving conservation easement enforcement and defense. Legal opinions to date spotlight themes that will arise in future litigation: third-party standing; the role of carefully drafted purpose and intent statements in trust documents and conservation documents alike; traditional common law rules involving real property rights and contract construction and interpretation; the merger and changed conditions doctrines; and how cost-benefit analyses may influence judicial decision-making.

In light of the outcomes so far in enforcement and defense cases, conservation and preservation organizations with sound drafting practices and solid documents should feel confident. However, several strategies are worth considering. For example, can land trusts draft conservation documents designed to contract around some of the issues that have arisen in litigation? Such qualifying language as "This conservation easement shall not be subject to extinguishment by the doctrines of merger or changed conditions" may provide ammunition in a challenge. Inserting a provision such as "Any question as to the validity or interpretation of this conservation easement shall not be determined on the basis of cost-benefit analysis" may force a court to limit its considerations in a particular enforcement or defense action in a way favorable to land trusts.

Many creative drafting possibilities exist for anticipating future challenges, at least in terms of traditional legal doctrine and court opinions to date. In addition to the suggestions described above, land trusts should contemplate and implement the following, as appropriate:

- Drafting of thorough and consistent conservation documents.

We see this principal play out in most of the cases that we analyzed because in a civil action courts look first and foremost to the language within the four corners of a conservation document. The more thorough and consistent the document, the better the chance a court will uphold its restrictions. Drafting for ambiguity, or amending a conservation document to resolve an enforcement issue, weakens a land trust's ability to enforce restrictions and uphold the conservation values of its easements. Particularly with regard to drafting for ambiguity, dangers arise for land trusts because courts to date have turned to common law rules of property and contract to interpret conservation documents. Where ambiguity exists in conservation documents, courts may apply common law rules that further compromise a conservation document's purpose.[319]

---

319. *See* discussion *supra* Section III(C) for case law on this point.

- Inclusion of clear and unambiguous statements of intent and purpose.

In cases involving conservation documents that courts determine are ambiguous, the courts turn to the question of the parties' intent in executing the agreement at issue. Section III of this paper addresses the role of intent and the cases in that section demonstrate how important statements of intent and purpose can be in conservation documents.

- Make deliberate choices with respect to picking battles; e.g. are the permitted and prohibited uses in the conservation document tied directly to the document's purpose section.

As evidenced by the cases that we examined in this paper, the strength of conservation documents and the attitudes of a tribunal are important considerations for a land trust evaluating its position for purposes of litigation. If a court chooses to look beyond the restrictive language in a document, or finds that language ambiguous, a clear and consistent statement of purpose tied to the prohibition a land trust seeks to enforce is extremely useful.

- Anticipate issues that may arise as a result of changed conditions and draft documents accordingly.

The court in *Harris v. Pease*,[320] stated that changed conditions in the future could give rise to circumstances justifying elimination of the land use restrictions at issue in the case. If the purpose of a conservation easement is narrow, for example to preserve a crane rookery, a particular endangered species of plant, or a wetlands area, it is important for land trusts to try to think ahead 100 years or more to a changed landscape. Will the purpose of the conservation easement still exist, or will the restrictions be voided by elimination of the purpose of the original easement? Is the goal long term preservation of the land or just the specific ecological feature of the property? Although narrow purpose statements in conservation documents aid land trusts' stewardship efforts and assist in litigation when the particular purpose is at risk from landowner activity, a long view of the conservation effort is important and conservation easements should contain language barring extinguishment by changed conditions.

- In litigation, know your tribunal and provide detailed and scenic visual images of the property at issue; before a receptive tribunal, present the multidimensional nature of land and our interaction with it, e.g. the ecological, wildlife, historical and spiritual aspects of a particular landscape; photo documentation can be invaluable for resolving disputes.

---

320. *See* discussion *supra* Section III(A).

The *Friends of the Shawangunks* and *Bagley* cases, illustrate these principles best. The maxim "a picture is worth a thousand words" applies with double force to land use issues generally, and especially when the integrity of a natural landscape is at issue as it so often is in conservation easement enforcement and defense cases.

- Be prepared in litigation to confront the possibility that a court may apply a cost-benefit analysis to the issues.

The starkest example of this threat in the cases we examined is in *Gallaway*.[321] Also, the court in *Harris* references this issue specifically. Land trusts should anticipate the cost-benefit issue in drafting their documents, as suggested above, and, when relevant in litigation, be prepared to present a court with their own economic analyses of the benefits of conserving land. Courts may or may not uphold the waiver of the cost-benefit defense (which is the intended effect of the proposed language stated above), but even so such provisions are worth including in conservation documents.

- When it is appropriate and useful, do not hesitate to formally mediate disputes and to seek legal remedies and attorney fees and costs.

As we have seen in the cases discussed in this paper, courts generally uphold conservation documents. And courts will award substantial attorney fees and costs, as in *Bagley*. Land trusts should feel confident as a result of our findings, and be willing to consider litigation issues now as a preventive measure, as well as to continue to improve their conservation documents.

CONCLUSION

Based upon our examination of the case law to date, land trusts should be aware that courts are considering common law doctrines and economic factors in their examination of conservation documents. While courts are examining the intent of the parties, they also reject evidence of the parties' intent and devise their own interpretations of documents. Land trusts should prepare for defense and enforcement actions by formulating responses in these areas with the knowledge that a court may not rely upon the land trust's testimony as to intent or the facts of a situation, but may look elsewhere for guidance in decision-making.

In the evolving area of law on conservation easement defense and enforcement, land trusts can look forward to court opinions that clarify and illuminate the issues addressed so far in litigation. Land trusts should also cast a wary eye toward our courts for opinions that may not comport with the values and goals of the land trust conservation movement and

321. *See* discussion *supra* Section III(A).

the sincere intentions of landowners to preserve the natural, scenic and wildlife values on their property. Many challenges lie ahead, like for example establishing the rights of standing for third-parties in all jurisdictions to bring citizen actions to enforce conservation easements. Land trusts and their legal counsel are definitely up to the task.