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ALIENATION OF CONSERVATION EASEMENTS

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A few weeks ago I was listening to my car radio during the Paul Harvey talk show. I have an imperfect knowledge of radio talk shows because I listen to them only in the car, and I don't drive much. But my general impression had been that Mr. Harvey had mellowed in recent years and was not nearly as ardent as the new wave of hard-righters, such as Rush Limbaugh. Harvey had seemed related to Limbaugh the way that Barry Goldwater is to Phil Gramm.

On the subject of land trusts, I was wrong. Harvey delivered a jeremiad against the Nature Conservancy worthy of anything one might hear from Rush. The evil moguls of the Nature Conservancy, flush with cash, sneak up on unsuspecting land owners and (horrors) buy their land on the open market!

Since then, Pat Buchanan has assumed the national mantle of anti-market political guru. So maybe Mr. Harvey will be backing Pat for Commander-in-Chief. That used to be a military post, but in the New World Order, Pat would switch the position to mercantilism. There is a cheery sort of nostalgia for Japan as the enemy.

It is useful to have markets in mind as we evaluate conservation easements and land trusts. As Professor Cheever has shown, there are various public interest arguments against enforcement of some conservation easements after the passage of a generation or two.[1]

The danger in judicialized America is to avoid turning judges loose to do whatever they wish according to their view of the public interest, or to make conservation easements into one more version of litigation lotto. The hypothetical case of Deadlock Ranch is a fine example. We are told that Nora will make over $14 million if her lawyers can break the land trust created by her grandmother and paid for by tax deductions. This is another variation on $4 million for a repainted BMW.[2] We need to leave such inducements to Las Vegas.

Historically, the courts have done a pretty good job of addressing obsolescent land restrictions. The problem they have tried to address is maintaining the alienability of land—that is, freeing land markets from private efforts to

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1. *See* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

2. *See* BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *rev'd*, 116 S. Ct. 1589 (1995) (overturning jury award of $4 million for failing to disclose that a new BMW had been repainted).

gum them up and from the unintended effects of private arrangements made long ago under very different conditions.

The proper solution, which courts have followed, is to make sure that there are owners in the present generation who can bargain about whether dead-hand restrictions should be maintained. Courts have used various devices to achieve this, such as the Rule Against Perpetuities,[3] the rule against unreasonable restraints on alienation,[4] the doctrine of changed conditions for covenants,[5] and the courts' power to interpret ambiguous conveyances and statutes in favor of alienability.[6] Some courts have gone further under the rubric of relative hardship.[7]

Even when there are persons in the present generation who can bargain over land restrictions, transaction costs can block effective bargaining. When subdivision covenants benefit many owners and no provision for majority rule is in place, it is unlikely that one can obtain unanimous consent for modification or release. To meet this problem, courts have developed the doctrine of changed conditions, and, in its proper use, the doctrine of relative hardship.[8]

A related problem occurs when future interests are retained by creators of defeasible fee interests and come to be owned by many scattered heirs of the original owners. Common law courts have failed to find a generally satisfactory solution to this problem. Various strategies, however, have overcome some barriers. The situation is not common and is diminishing as defeasible fees are less often created.[9]

Conservation easements present none of these problems because ownership cannot be divided. The easement is created in a unitary organization, either a government or private corporation. The common law rule against division of ownership of the benefit of an easement in gross ought to apply (the "one-stock" rule),[10] so there should always be one owner in the present generation who can bargain about modification or release of a restriction.

This is not to say that conservation easements cannot become obsolete. But when they do, barriers to alienation do not arise from multiple ownership. Rather, any barriers must derive from the terms of the easement itself or from governing legislation.

Deadlock Ranch is an example. Laura did not like government and preferred a land trust because it was private. So the terms of the easement may

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3. *See* 3 THOMPSON ON REAL PROPERTY ch. 28 (Thomas ed. 1994) [hereinafter THOMPSON].

4. *See id.* ch. 29.

5. *See* 7 *id.* § 62.15.

6. The previous rules were created by English judges. Ambiguities are construed against other barriers to alienation, such as defeasible fee interests. *See* 2 *id.* § 20.07.

7. *E.g.*, Lange v. Schofield, 567 So. 2d 1299, 1302 (Ala. 1990).

8. *See* 7 THOMPSON, *supra* note 3, § 62.15. The doctrine of changed conditions is recognized by § 3 of the Uniform Act and its comments, but the comments acknowledge that its application to interests called "easements" may be "problematic" under the law of some states. UNIF. CONSERV. EASEMENT ACT § 3, 12 U.L.A. 68, 77 (Supp. 1995); *see infra* notes 13-15 and accompanying text.

9. *See* 2 THOMPSON, *supra* note 3, ch. 20.

10. *See* Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646, 651-52 (Pa. 1938).

bar conveyance to a government. Other contractual barriers to alienation can appear in the terms of a conservation easement. When these become serious barriers to alienability, however, they should be subject to the common law rule barring unreasonable restraints on alienation.[11] This would free a moribund or broke land trust to convey either to government or to a robust land trust.

Turn now to governing legislation. Common law easements may be reunited with the fee by voluntary, private action. What of statutory conservation easements? May private land trusts reconvey to the fee owner? Is the rule otherwise when an easement is owned by government?

Governing state legislation might prohibit a conveyance to the fee owner. For example, the Colorado statute that would govern Deadlock Ranch provides: "A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in [this article] and transferable by any lawful method for the transfer of interests in real property in this state."[12] One can argue that this bans transfers to the fee owner because such would not be for the purposes stated in the statute. If so, this is contrary to the common law. It is a permanent restraint on alienation of the development rights in the land. And it can, over time, create a barrier to alienability of the burdened fee interest, when allowed uses become obsolete. However, the Colorado statute is not clear, and courts concerned with alienability should read it otherwise. A land trust holding an obsolete restriction could sell it to the fee owner and reinvest the proceeds in other easements or land, thus serving the statutory purposes. Government-held easements could be sold yet more freely.

The Uniform Conservation Easement Act[13] is friendlier still to alienability. Section 2(a) states: "Except as otherwise provided in this Act, a conservation easement may be . . . assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[14] The comments expressly recite:

> The state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.[15]

If land trusts can reconvey to fee owners, one may argue that the trusts will not behave like rational market actors, so the bilateral monopoly problem[16] is heightened, and intervention by judges is justified. I would not

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11. *See supra* note 4.

12. COLO. REV. STAT. §§ 38-30.5-101 to -110 (1982 & Supp. 1995).

13. UNIF. CONSERV. EASEMENT ACT § 2, 12 U.L.A. 173 (1996). The U.L.A. edition reported that 16 states and the District of Columbia had adopted this act. *Id.*

14. *Id.* § 2(a) at 173.

15. *Id.* at 174. Section 4(2) provides, "A conservation easement is valid even though: . . . (2) it can be or has been assigned to another holder." *Id.* at 179.

16. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 61-62, 253-54 (4th ed. 1992).

accept this argument. If there are parties able to bargain over ending land restrictions, that ought to end any need for judicial intervention. If the need is great enough, legislatures will respond. Eminent domain is available. Any greater judicial intervention will destabilize the conservation easement. Security of property rights in conservation easements is as much in the public interest as any other. If judges with Paul Harvey's mindset persuade themselves that conservation easements are uniquely evil interests, they will be tempted to undo them and try to confine the rule to conservation easements. But the genie of remaking property won't be so easily confined. Judges with other attitudes will apply "public interest" reasoning elsewhere. True, lawyers will be busy. Too busy.