

Opportunities for Reform in CE and Land Use Law: A To Do List for Sustainable, Perpetual Land Conservation

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Description: Over the last two decades of the 50-year-old field of land conservation law, the conservation community has instituted crucial supportive mechanisms and implemented new infrastructure to stabilize the perpetuity-long duration of conservation easements and their holders. In the face of extensive abuse, the conservation community now endeavors to bolster the legal framework supporting the federal tax incentive and its enforcement, while pushing back on IRS overreach. It is imperative now to also identify crucial tasks, goals, and stabilizing factors for the next half century. From the most urgent and obtainable in the short term to the most sea-changing and aspirational in the long term, presented here are the immediate, ongoing, and future needs in land conservation law, intended to sustain and secure perpetual land conservation as a continuing dynamic and flexible source for local, state, federal, and global protection and management of critical resources and public benefits.

Intro: Outline

Part I: Acknowledge historic reforms/support achieved to date based on Adaptive Legal Regimes: enforcement and defense mechanism by charities' support for land trust community-wide insurance company to protect itself (see Terrafirma Risk Management Company growing out of JJay's Land Trust Risk Management GW Law Review Article 1999); identifying third party enforcement options in support of easement holders in the form of Attorneys General (see Maine), citizens (see Mass, WY), neighbors, (see Ill) (see JJay's Vermont Law Review Article 2001); third party trespass enforcement through Terrafirma (see JJay's UCLA Law Review Article 2014); emboldening language, understanding, recognition, policy, and legislation of legal regimes for when perpetual land conservation mechanisms involve amendment and termination (see JJay's Harvard Environmental Law Review Article When Perpetual is Not Forever 2012); and understanding the primacy of laws and legal regimes surrounding federal and state perpetual land protection overlap and disposition (see JJay's Harvard Environmental Law Review Article Understanding When Perpetual is Not Forever 2013).

Part II: TO DO LIST: The immediate, ongoing, and future needs for reform in order to sustain and secure perpetual land conservation over time as a continuing dynamic and flexible source for local, state, federal, and global protection and management of critical resources with public benefits and ensuring environmental justice:

Subpart A: Immediate, Imminent, Urgent Needs within the Existing Legal Framework:

1. Update and expand/deepen conservation purposes' 26 USC 170(h) and 26 CFS 1.170A-14 definitions to include and reflect:
 - a. renewable energy resources/generation,
 - b. elements of climate change, sequestration, roots down, under "open space" protections,

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- c. under human and wildlife habitat, sustainable ecosystems, climate resiliency recognize integration with larger landscapes and other private landowner protections to amount to a fabric of interconnected protection;
 - d. interconnecting trail corridors, open spaces for recreation, pocket parks in urban areas for five minute access for all to clean air, water, green spaces for physical and mental health (see JJay's New Endeavors in Land Conservation: Redevelopment, Undevelopment, and Community Conservation, 2015-2019)
 - e. air quality and water quality,
 - f. expansion of common uses apart from conservation value of recreation and education such as commons and community gardens, greenhouses, farms, for food stability,
 - g. redevelopment of the already built environment for community and public goods and uses with essential, life sustaining needs such as food, shelter,
 - h. undevelopment or restoration of overbuilt or brownfield environments to return properties to habitat or open spaces (see JJay's New Endeavors in Land Conservation: Redevelopment, Undevelopment, and Community Conservation, 2015-2019)
2. Ensure and equalize gov't conservation easement holder regulation and oversight on the equal footing with charitable holder regulation and oversight under 501(c)(3) as holders should have equal consideration and requirements and not be able to reject the will of the public or landowners for current or changing political will and veto through home rule on the part of government holders.
 3. Promote and allow 501(c)(3) land trusts to operate to deepen actions and mission within their organized tax exemption to achieve both human and environmental needs to provide support and stability through changing political regimes recognizing use of 501(c)(2) leasing for workforce housing, agricultural leasing, within a land protection structure (see JJay's New Endeavors in Land Conservation: Redevelopment, Undevelopment, and Community Conservation, 2015-2019)
 4. Curtail manifest unfairness to landowners and taxpayers of gross imbalance of power, authority, deference, and lack of accountability attributed to IRS's unique position between branches of government, eluding administrative procedures, and imposing own tyranny over all government and citizens, as well as disparate treatment between tax court and district court of disputes; this inequity must be resolved in favor of fair and equal treatment of people seeking recourse for tax matters regardless of forum (see JJay's Down the Rabbit Hole Law Review Article Part 2, ELR 2021);

Subpart B: Ongoing and Responsive Needs with Adaptation to Legal Framework:

5. Address Ongoing subject of debate: Should CEs be integrated into LU processed? Put differently, should the State (government of any level) be involved in regulating private land conservation decisions and transactions?

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- a. The struggle between the State and private ownership in controlling private land conservation decisions—should the State take on more of a role in preventing tax incentive abuse upon which the motivation for perpetual land protection is based? imminently/urgently in responding to federal abuse, and ultimately in overseeing the redistribution of wealth associated with land ownership, making right past wrongs of pushing indigenous populations onto reservations, not fulfilling emancipation promises, redlining, agricultural land divestiture from black, indigenous, and people/communities of color.
 - b. Recent abuses would indicate so. Colorado in response to abuse of its own conservation tax incentive now gatekeeps private decisionmaking without prioritizing applications, conservation values, or public and private benefits. Massachusetts reviews each proposed conservation easement on a town-by-town basis, starting with each town’s conservation commission. Legacy of undermined CE programs, orphaned, neglected CEs, rogue land trusts, and perpetually protected land will also be a State problem
6. Address CE abuse on the federal, state and local/municipal level (Corporate structure driven abuse btw) and stop relying on the IRS to right wrongs after the fact even in the face of their exponentially increasing and broad powers (see JJay’s Down the Rabbit Hole Law Review Article Part 1, ELR 2021), as they are ill-equipped to oversee such aspects (see JJay’s forthcoming Through the Looking Glass Law Review Article 2022):
- a. instead establish gatekeeping to access the benefit, not just to the benefit itself(Integrity Act), but also by evaluating the conservation transactions proposed for tax incentives, as well as the holders holding the perpetual promises;
 - b. Gatekeeping through Preapproval and Review and Required ownership/valuation thresholds: Integrity Act, statewide response/preapproval, local review?
 - c. Look to MA, NE, CO, MT pre-approval processes, this could be done at federal level, state level, municipal level if won’t implement pre-approval at federal level,
 - d. also institute a statewide or local review of appropriateness and qualification of land conservation—why not—public dollars, public benefits, going to have to manage ugly legacy of orphan and neglected CEs, rogue land trusts, and harm to public perception. (see JJay’s forthcoming Through the Looking Glass Law Review Article 2022)
7. Remove land “valuation” as highest and best use of land and replace with appropriation of public funds on the basis of public benefits being sought to conserve and protect. Several states DIY: Tax-based incentive—unless or until find another way to motivate behavior—CO still statewide tax credit/transferrable, paying landowners for granting CEs but preapprove for validity, authenticity, and working on another way to “value” or reward land ownership for public benefits (see CO’s pilot testing for next generation valuation of land and distribution of state tax credit benefits),

8. Use/incorporate/adopt community bonding or lottery funds as a funding mechanism instead of tax incentives to support wholesale and whole purchases of land or sticks in land bundle as the charitable concept/public benefit, even while dedicating and directing dollars to specific individual users or land owners such as agricultural owners, or water rights owners to attach resource or use to the public benefit directly (see JJay's CCC research of alternative methods of land conservation 2018). Enhance flexibility of tools of perpetual land "ownership" to include leasing to achieve long-term goals

Subpart C: Necessary Future Reforms, Dismantling and Rebuilding Legal Framework and Paradigms

9. Strike a balance between the private land "ownership" and tax incentive structure and the tragedy of the commons to promote good acts for the greater good by private landowners while also allowing redistribution of wealth, return of land to indigenous, native populations, tribes, and peoples, heirs' land to people of color to be given as reparation for slavery and further dismantled by land use abuses, redlining, failure to provide 40 acres and a mule. More directed gifting or regifting as a part of redistribution.
- Root of the problem could be continuing monetization of land by tax incentives growing out of myth of land ownership.
 - Property is not an inalienable right/constitutional right/human right.
 - Re-democratizing land and its uses
 - Or removing concept of ownership and replacing with concept of borrowing, leasing, using under certain requirements for public good, even if promoting individual good at local level to individuals, such as new farmers and ag owners or users/lessees.
 - If cannot broaden charitable acts under land conservation incentives, detach land conservation incentives and motivation from tax structure because promotes continuation of wealth in white, land owning upper classes, to be protected forever in that ownership instead of redistributing land ownership benefits and allowing nuanced concepts of ownership to be conflated with use.

Conclusion: Immediate, ongoing, and future needs envisioned helps us to formulate plans within existing legal regimes while recognizing needs for adaptation, adjustment, and possibly dismantling and rebuilding new frameworks shift paradigms.