

Conservation Easements, the Good, the Bad and the Greedy

Charles B. Warren, ASA (urban real property)

The basic concept is easy to grasp. This is a simple compound of conservation, as defined in the particular circumstance, and easement, a property right conveyed to a private conservation organization or government. The effect is similar to CC&Rs (codicils, covenants and restrictions) but applied to land after its original subdivision, if any, and monitored by an outside entity rather than the similarly affected neighbors. Over the last couple generations urbanization and sprawl have distanced people from "the country". While few denizens of the suburbs yearn for the "real" country life; hard work, long hours, strong smells and real dirt, many if not most appreciate its open vistas, green growing things and perhaps wild or domestic animals. So here is a tool for preserving that quality of life. How did it become a timely one?

Early conservation easements were undertaken by private organizations such as Ducks Unlimited (DU). The problem in the era was that government policy, implemented by, for instance, the Department of Agriculture and the Army Corps of Engineers, was specifically aimed at draining swamps. The duck hunters perceived that if all the swamps were drained, there wouldn't be many places for the ducks. So they got together to pay farmers to leave land wet, at least during migration and breeding seasons. It has generally been a successful effort. Other organizations also are involved, Nature Conservancy has wide name recognition. It is quite likely that a swamp under their care is home to the Ivory Billed Woodpecker, once believed extinct.

Mentioning Nature Conservancy, and its cousins, brings up a second thread in the conservation easement story. Hunters, whether banded together as local clubs, or a national organization, pay money. Clubs lease land for hunting, and DU, at least in the beginning, mostly paid for what it wanted. Nature Conservancy, by contrast, mostly acquires land or rights in land by donation. Charitable donation is a virtue recognized not only by religion, but also the U.S. tax code, and there's the rub. Donating money is unambiguous and easy to quantify on the tax return. Valuing and declaring a donation of any sort of property is trickier. Valuing a partial interest in property is trickier still. Clearly there are competing interests here. The donor, no doubt, cherishes the virtuous feeling of giving, but would find it enhanced by a nice tax refund. The donee is relatively uninterested in that aspect, because the money in question is, effectively, a blank check on the U.S. Treasury. Government, though, deficits notwithstanding, is conscious that a tax loss is monetarily equivalent to and competitive with a legislated expenditure. As a consequence Congress has put the Land Trust Alliance on notice that it wants valuation standards in this area. The thrust of this piece is to help you sort out the good from the bad and the greedy, even if you are not a valuation expert.

There are, basically, three dimensions to this process. The first is a perspective of the broad tapestry of land economics, focused down to the question of conservation rights. The second is a brief review of value and price in this area. The third is a look at motivations in particular transactions. So, first, let us consider land and its value. Basically, land is valuable based on the sort of income it can

generate. In the urban core, land zoned for high rise development is generally more valuable than lower density. In the suburbs the land values are more uniform, particularly if police power has tipped the scales against, say, detached single family residential. Purely market forces tend to value industrial more highly than agricultural, with exceptions, of course. Detached residential is next, followed by multi-family residential and commercial, in ascending order. This schema is deliberately simplistic.

Now let us consider rights in property. Generally the "whole property" includes all private rights; the right to transfer, to borrow against, to inherit, to rent, to mine, to plant, or to build upon, for example. Public rights include police power, to regulate private land use, taxation, condemnation for public use (or purpose?), and escheat. There is a continual change in the actual boundaries of the private and public rights. At one point, conveying mineral rights in a property allowed the owner of those rights to mine in a manner that ultimately caused the surface of the ground to collapse. Generally police power now prohibits that, tipping the scale from the owner of the underlying mineral rights to that of the surface. A century ago urban development was left to private contract, CC&Rs, rather than public planning. In Houston it still is. At Lake Tahoe there was a dramatic shift in the late 1970's. Land which had previously been planned, zoned, developed, and sold to the public for construction of detached homes was declared to be unsuitable for that purpose. This was an expression of what was termed "The Police Power Revolution". The affected Tahoe landowners recently lost on part of their claim for compensation. Last year (Kelo) the U.S. Supreme Court validated government use of eminent domain to transfer property from one private owner to another. But while the government has moved the boundary of rights in its favor in some cases, Oregon recently passed a law requiring compensation to property owners if land is "downzoned", limiting its development. And in Kelo the Supreme Court noted that states could restrict eminent domain to public use, rather than public purpose, and many have or are in the process of doing so.

Now, let's dip our toes into the question of value, basic land economics. Basically the right to build a replica of the World Trade Center in the middle of the Badlands of the Pine Ridge Indian reservation, South Dakota, would probably not have a large value. The right to extract coal from a property where there is none would probably not have a large value. The right to raise alfalfa on land without a supply of water would probably not have a large value. The converse of those propositions would probably also be true. The right to build the World Trade Center, on Port of New York land, was valuable. While the actual value of the right to rebuild it may be in doubt, that there is a value there is likely. By extension the right to build homes in a region with a static or declining economy and population is likely to be small.

If the right attaches to land which is remote from that economic activity and its associated population centers, then it is likely to be lower. It may still be higher than alternative values if, for example, the land in question is timberland which was logged 30 years ago and regrowth takes 60. But timberland re-use to country vacation home development has not been widely or wildly profitable, so the net value to the undeveloped land is still usually a small number.

First rule of thumb: trade level. If someone presents a value for a wholesale commodity based on its retail value, that may be bad or greedy. With reluctance, let us move on to the arcane art of valuation, or appraisal. Basically, if you are reading this, you may have on the other side of your desk a more weighty document called an appraisal. The objective of an appraisal is to develop and communicate an opinion of value. If the property in question is common and uncomplicated, the appraisal will probably reflect those characteristics. The simplest example is a newish suburban home, typical of its neighborhood. Value is usually easily established by reference to sales of similar houses. By contrast the value of a partial interest is bound to be complicated by a lack of similarly numerous market transactions. In fact, and here is a trap, any transactions which may exist may be sales to public agencies. Sonoma County, California, has an active program of conservation easement acquisition. Some public agencies are more discreet than others in the prices they pay. And while in many cases the public price is not only the most probable but may be the only price, it still is not a private market price. At best it is an appraisal of a market value. So if an appraisal references public acquisitions as evidence of value, at best it is an appraisal of an appraisal.

Second rule of thumb, an appraisal that relies on the price of public acquisitions for its conclusion of value is suspect.

Last let us look at motivations. The motivation of the government in conservation easements is driven by the widespread opinion of its constituents that preservation of a rural environment is, first, important, and, second, urgent. Many people have flown across the continent, and may even have looked out the windows, but there is this perception that we're running out of rural countryside. There are bears in New Jersey and mountain lions eat joggers in California, but in this century the common perception is of gridlock on the New Jersey turnpike, or extending from San Francisco to beyond Vacaville, once The Onion Capitol, on Interstate 80. While there are many other possible priorities for government, take education, many who would benefit from addressing them don't bother to vote. Also, the price tag on acquiring a lot of open space, even at inflated prices, is orders of magnitude smaller than some other projects, like building highways. Landowners in the urban fringe were seriously and adversely affected by the Police Power Revolution, nor have they been mollified by a generation of NIMBY(Not In My Backyard)ism. Market value for some of this urban fringe land may not exist. It may not be very productive for farming or ranching, and its proximity to the city renders its agricultural future uncertain. Sellers have little motivation to accept low agricultural prices when they have some prospect of more lucrative prices, either for development, or public acquisition. Rather, practical self-interest, if not simple bitterness leads to hold-out pricing: "If you want it, this is the price." And some public agencies pay it, either for simple political reasons, or as one agent put it, "If we don't pay based on its development potential we kind of have to admit that we took it by inverse condemnation (via downzoning)..."

But let us move away from the fringe. As we do, we leave the area of acquisitions and into the area of donations. Some fringe parcel acquisitions include a donation element, notably the (controversial)

Cargill salt ponds in the south of San Francisco Bay. But as actual realizable prices go down, the monetary disincentive to give goes down in proportion. Other motivations come to the fore. Inter-generational control comes to mind. NIMBY morphs to Not In My Posterity. The owner of the land where he or she built their country estate wants to limit their childrens' ability to turn it into Levittown, or even Pebble Beach. Now, if in the process they are also able to avoid some taxes, can it get any better?

Third rule of thumb, related to the first, the likely value foregone by conserving a parcel distant from urban areas and their economies is likely to be small. Now, there are other possibilities in the conservation easement area. Facade preservation in urban areas comes to mind, though that could extend to airspace or even entire buildings through designation as historic. The same sorts of rules apply, but the urban area has a bit more complexity.