



Carving Out Some Space

A Guide to Land Preservation Strategies

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The legal instruments we use to conserve habitat are still evolving. Continuing experimentation is needed, if we are to save more land at less cost. Meanwhile, the many conservation easements that have sprung up nationwide let us see how well some instruments are working.

In the years ahead, demographic and economic changes should fuel pressure for more land development in this country. In turn, the growing scarcity of natural habitats will increase the social value of preservation. Thus the need is growing for policies and institutions that can balance the requirements of economic development with the benefits of species, habitat, and open-space conservation.

If the challenge is balance, regulation does not look promising for the purpose. Many interested parties view the law as an “extreme” option that does a relatively poor job of weighing competing interests. Under the current version of the Endangered Species Act, for example, animal and plant species threatened by changes in land use are designated public trust resources, but most of the land on which they live is not. It is rather as if Solomon went ahead and cut the baby in two: neither wildlife conservationists nor private developers are satisfied with the result.

Alternatively, “market-based” incentives to motivate conservation are gaining favor. These incentives include full- and partial-interest land purchases, tax-based incentives, and tradable or bankable development rights. The key to their attraction lies in compensating private owners for putting restrictions on the use of their land for public benefit.

The Costs of Habitat Conservation

We can divide the costs of implementing any conservation policy between *transaction* and *opportunity*

costs. The transaction cost is the amount of time, money, and effort needed to establish, monitor, and enforce such a policy. The opportunity cost is the difference between the value of land in its “highest and best” private use and its value when employed in ways compatible with conservation.

No policy can avoid the cost of foregone development. What may appear to be striking differences in the costs of alternative policies are actually differences in *who* bears the cost of conservation. While *who* deserves to pay will always be a subject of political debate, the cost itself cannot be avoided. Any policy that appears to provide for conservation without full compensation for the land’s lost use for other gainful purposes is one whose costs are hidden, or one that will not be effective.

The fact that the opportunity cost of foregone development cannot be avoided does not mean that all conservation policies are equivalent, of course. From an implementation standpoint, and in terms of likely effectiveness, there are important differences. One way to organize an analysis of these differences is to focus on the institutions and actions necessary to implement the policies in the real world.

Such an analysis reveals differences in the information required by agencies, the types and difficulty of enforcement, and the structure—all of which add up to the transaction costs of a given conservation plan. The notions of opportunity and transaction costs can be used to characterize alternative approaches to habi-

tat conservation, a number of which are described briefly below. Because of its relatively active use, we save our description of a conservation easement for last and devote the rest of this article to its discussion.

Purchase of full property interests. A “fee-simple” acquisition for conservation purposes requires a purchaser to pay the full value of the seller’s use of the land. This arrangement can result in “overkill” if, for example, the price includes the value of agricultural or low-intensity activities that are actually compatible with conservation. On the other hand, purchase of full ownership obviates the need to specify future management practices and engage in the expensive monitoring of other approaches.

Tax credits and penalties. Another way to keep land out of development is for the government to give owners tax credits or other subsidies for doing so. Tax-based incentives result in at least some of the opportunity costs of conservation being shared among other taxpayers, who must either make up the revenue shortfall resulting from conservation-related tax breaks or make do with fewer public services.

Private landowners have an incentive to overrepresent the value of the lands they devote to conservation, to the extent that they receive tax breaks for doing so. However, the tax system typically “under-rewards” conservation donors. Because tax codes require payment of something less than the entire amount of income or value of property, relief from this tax payment incompletely compensates the donor for the claimed value of the donation. Tax-based conservation incentives also require monitoring in order to confirm that the taxpayer is maintaining the land.

Offering tax-based incentives is generally less effective than acquiring particular properties. The decision to make tax-deductible donations is a voluntary one, and it is generally impossible to predict exactly which landowners eligible to make such donations will choose to do so.

Tradable development rights. A tradable development rights (TDRs) program distributes “rights” to some fraction of the land in an area. Anyone who wishes to develop land in excess of the amount of TDRs he owns must purchase additional rights. The opportunity cost of these programs is minimized because the land set aside for conservation is also the land with the least value for alternative uses. Transaction costs

Anatomy of An Easement

While the conservation easement contracts we reviewed exhibited a fair degree of variability, most shared a basic set of characteristics.

- A description of the subject property, its ecological conditions and known environmental hazards, and a broad “statement of purpose”;
- An agreement by the owner to submit the land to an environmental assessment, identify and correct any encroachments, and identify and remove disamenities;
- A limitation on the owner’s ability to develop the land or alter its existing uses, and a description of the land uses that are allowed;
- An agreement by the owner to meet certain standards in management of the property;
- A right granted to the conservator to enter the property to ensure through observation that the contract is being honored;
- A demonstration by the grantor that the property has no liens attached to it;
- Provisions for adjudication or arbitration in the event of an alleged breach of contract;
- Indemnification of the conservator against liabilities associated with the property;
- Application of the easement to all subsequent owners of the property (often, the conservator must be given right of first refusal if the property is sold); and
- A number of provisions that set out responsibilities, deadlines, and payments associated with the original easement sale itself.

may be low to the extent that private markets in TDRs work relatively efficiently, but the need to monitor and enforce preservation requirements on lands for which TDRs have not been issued remains. In addition, TDRs are similar to tax-based incentives in that one typically cannot know in advance which lands will be preserved.

Regulation. Regulation that prohibits development may appear to be costless at first glance; when land use restrictions are imposed by regulation, no payments or subsidies are made to landowners. Nevertheless, regulation deprives a landowner of the

What's An Easement Worth?

Unlike sales of full interests in property, easements are still relatively rare. Moreover, the particulars of each easement are unique. Thus, no typical "market price" exists on which to base tax deductions. To avoid fraud, tax authorities allow deductions only for donations of land made to bona fide conservation organizations. Regulations on appraisers and penalties for excessive appraisals also constrain abuses. Still, overappraisal can be difficult to prove. The Federal Tax Code penalizes excessive donations only if the appraisal is off by more than 100 percent.

Typically, easement valuations range from 20 percent of the land's estimated total value to upwards of 90 percent. The Florida easements purchased by the state water management districts range in value from 28 to 60 percent of the properties' total value.

opportunity to earn income from future development. It is for this reason that many consider such regulations to be "takings" of property. Like the other options, regulation entails monitoring and enforcement costs. Unlike TDRs and tax incentives, however, it has the virtue of being able to target specific habitat types. In fact, regulation may seem to be a particularly efficient way of approaching conservation, since it eliminates the need for intervening institutions such as markets or tax assessment and collection. The specificity of regulation can also be its greatest drawback, however. The involuntary and information-constrained nature of regulation means that the properties whose opportunity costs are the lowest will not necessarily be selected.

Purchase of a conservation easement. In exchange for payment (or a tax deduction) a purchaser receives assurances that a landowner will not develop designated land any further. Since a conservation easement involves the purchase of a "partial interest" in the land, it is less expensive than acquiring fee-simple ownership. On the other hand, easements involve substantial transaction costs, both in writing a contract and in subsequently monitoring and enforcing it.

Conservation Easements

Considerable recent experimentation with conservation easements has afforded us an opportunity to see how such incentives work in practice. Thus, we have looked at a number of easement contracts in order to identify their common features, evaluate their effectiveness, and make suggestions for their improvement. Numerous conservation organizations and public agencies are currently engaged in easement acquisitions nationwide. More than thirty states have passed legislation specifically sanctioning conservation easements for conservation, scenic, or historic purposes.

Easements possess several advantages. First, partial interest in a piece of land is less costly to acquire than full ownership. Second, compared with conservation tax incentives or tradable development rights, easements entail few new administrative burdens. Third, they necessitate few, if any, changes in environmental and property statutes. Finally, because they involve voluntary transactions, easements are more politically palatable than direct land use regulation.

Easements do present challenges, however. The money saved upfront in acquisition costs must be balanced against the higher, long-term costs associated with monitoring and enforcing the division of ownership rights between the primary landowner and the conservator (the owner of the easement). While these costs can, to an extent, be anticipated and reduced by drafting an enlightened initial contract, the process of contracting itself thus becomes more expensive.

We have assessed a number of easement contracts in the state of Florida. These agreements were signed between landowners and Florida Water Management Districts (WMDs) or the Nature Conservancy (TNC). While a couple of the TNC contracts were completed more than ten years ago, the rest are of more recent vintage and signify the emergence of easements as a conservation tool in Florida. The properties concerned are dispersed throughout the state and are relatively large in size, in some cases encompassing over ten thousand acres.

Several aspects of these easement contracts are worth noting. First, they tend to be perpetual. Why? One reason is that bargaining for contract terms is costly. A short-term contract implies frequent bargain-

ing (every time the contract expires) whereas a perpetual contract minimizes the activity. Balanced against a desire to avoid the costs of repetitive bargaining may be a desire to retain flexibility. Many contracts contain terms regarding their own termination.

Our review of the Florida easement contracts revealed many “optimal” characteristics. In the economic theory of contracting, the party that can best prevent or ensure against risks should be required to do so. In the cases that we looked at, that party was the landowner, who was responsible for two basic contingencies in the easement contracts. The first was degradation in a property’s ecological condition, over which a landowner has the most direct control.

The second contingency consisted of pre-existing liabilities attached to the property, the most prominent examples being delinquent tax payments and environmental contamination. Once again, responsibility for these problems lay with the landowner, who was better positioned to anticipate and remedy them than was the conservator. The easement contracts acknowledged this ownership of responsibility by indemnifying conservators against such liabilities.

In addition, the review of the records showed that a property owner is typically required to conduct an environmental audit prior to transfer of the easement, to make a representation that the property is free of contamination sources such as leaking storage tanks, and to ensure that title to the property is free of any liens or encumbrances.

Of course contracts are never able to define every possible future contingency. The costs of identifying and allocating responsibility across a “complete” set of circumstances are prohibitive. For this reason, contracts often rely on underlying principles of law, precedent, or community custom to define what is acceptable. In the absence of explicit contract terms, it is left to the courts to decide whether or not a contract breach has occurred and to specify damages if one has.

How Should Properties Be Managed?

It is difficult to specify how easements to protect wildlife habitat should be managed. Easement contracts often call instead for standard Best Management Practices (BMPs) usually approved by federal or state organizations. Other contracts refer to a more general “duty of care.” Unlike BMPs, such a duty has not been well defined. However, examples do exist, such as those pertaining to land management in the 1976 Federal Land Policy Management Act.

The Need for Experimentation

Public support for, and increased government involvement in, land conservation initiatives call for an analysis of alternative preservation policies. Each of the alternatives raises a set of legal, institutional, and economic issues. Experimentation with these alternatives is essential if the greatest possible benefit is to be realized from scarce conservation dollars.

All land use policies are not alike, differing in the way in which they ensure conservation, the complexity of their execution, and their costs. Preferences for one policy over another must be rooted in the merits of implementation.

Conservation instruments are evolving toward accomplishing their objectives more efficiently, but continuing experimentation with innovative instruments will facilitate the goal of achieving more conservation at less cost.

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