

# Capturing the Value of Appreciated Development Rights On Conservation Easement Termination

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## I. A COLLECTIVE EPIPHANY

The last week in April of 2006 was remarkable in at least one journalistic sense. While I was browsing in an airport magazine shop, I happened to glance up to see former presidential candidate and globe-trotting environmental crusader Al Gore peering at me from not one but two magazine covers. The first cover was the "Special Green Issue" of *Vanity Fair*<sup>1</sup>, a cover Al Gore shared with Robert F. Kennedy, Jr., George Clooney and Julia Roberts. The other cover, which Al Gore's visage dominated, was that of *Wired*<sup>2</sup> magazine. I didn't need to open either publication to know that these magazines, appearing together as they did, represented the beginning of a collective epiphany in our consumer culture. As I predicted, both magazines spent considerable ink uploading the dangers of global warming and climate change into the American psyche.

As well they should. No one with a rational and informed mind can doubt that we have plotted a trajectory towards global disaster with our individual and collective addictions to greenhouse gas-producing lifestyles. Because of the sophistication of anyone reading this article, I needn't argue that global warming and climate change not only will happen, but are happening.<sup>3</sup> We also already

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<sup>1</sup> VANITY FAIR, May 2006 (bearing the cover title: "A Threat Graver than Terrorism: Global Warming, How much of New York, Washington, and other American cities will be underwater?").

<sup>2</sup> WIRED, May 2006 (bearing the cover title: "Climate Crisis! The Pro-Growth, Pro-Tech Fight to Stop Global Warming").

<sup>3</sup> AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (Rodale 2006); ELIZABETH KOLBERT, FIELD NOTES FROM A CATASTROPHE: MAN, NATURE, AND CLIMATE CHANGE (Bloomsbury Publishing 2006) [hereinafter FIELD NOTES]; BILL MCKIBBEN, THE END OF NATURE xxiii (Random House 2006) (1989) ("We didn't create this world, but we are busy decreasing it."); TIM FLANNERY, THE WEATHER MAKERS: HOW MAN IS CHANGING THE CLIMATE AND WHAT IT MEANS FOR LIFE ON EARTH (Atlantic Monthly Press 2005); CHRISTOPHER FLAVIN, PREFACE TO STATE OF THE WORLD: 2006 xxvii (Linda Starke ed., W.W. Norton & Company 2006) ("Researchers warn that Arctic ice melting is accelerating, with an 8-percent loss in sea ice area over the past 30 years and the possibility of ice-free summers before 2100."); ROSS GELBSPAN, BOILING POINT: HOW POLITICIANS, BIG OIL AND COAL, JOURNALISTS, AND ACTIVISTS HAVE FUELED THE CLIMATE CRISIS -- AND WHAT WE CAN DO TO AVERT DISASTER (Basic Books 2004); SUSAN JOY HASSOL, IMPACTS OF A WARMING ARCTIC (Cambridge University Press 2004); ROBERT F. KENNEDY, JR., CRIMES AGAINST NATURE 46 (Harper Perennial 2004) ("Scientists agree that we are now pumping out vastly more [carbon dioxide] than the Earth's system can safely assimilate."); CHAD KISTER, ARCTIC MELTING: HOW CLIMATE CHANGE IS DESTROYING ONE OF THE WORLD'S LARGEST WILDERNESS AREAS (Common Courage Press 2005); MARK MASLIN, GLOBAL WARMING: A VERY SHORT INTRODUCTION (Oxford University Press 2004); A. BARRIE PITTOCK, CLIMATE CHANGE: TURNING UP THE HEAT 21 (Csiro Publishing 2005) ("Warming as large and rapid as that projected for the twenty-first century might be expected to create severe problems for natural ecosystems and human societies."); WILLIAM SWEET, KICKING THE CARBON HABIT: GLOBAL WARMING AND THE CASE FOR RENEWABLE AND NUCLEAR ENERGY (Columbia University Press 2006) [hereinafter KICKING THE CARBON HABIT]; DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING (Princeton University Press 2004); SPENCER R. WEART, THE DISCOVERY OF GLOBAL WARMING 199

know that this spells at least change, and more likely disastrous change. Likewise we know that this change will profoundly affect every living creature voyaging around the sun on our beautiful but fragile planetary spaceship, including us.<sup>4</sup> What we have yet to agree on is which data and which models to use to predict the details of the impending disaster and what to do about it.

One thing we can all agree on is that as the planet heats up, weather patterns will change, and plant and animal life, including microscopic life, will adapt, migrate or become extinct.<sup>5</sup> Obviously, both the micro and macro level changes

(Harvard University Press 2003) [hereinafter DISCOVERY] ("[W]e can conclude (with the IPCC) that it is *very likely* that significant global warming is coming in our lifetimes. This surely brings a likelihood of harm, widespread and grave."); CHARLES WOHLFORTH, *THE WHALE AND THE SUPERCOMPUTER: ON THE NORTHERN FRONT OF CLIMATE CHANGE* 151 (North Point Press 2004) ("No one can doubt any longer that more carbon dioxide tends to warm the atmosphere."); Maria Gilardin, *Apocalypse Now: How Mankind is Sleepwalking to the End of the Earth*, 30 *LEFT CURVE* 4 (Kelly Knauer ed., 2006); *From Ice to Water: As Glaciers and Ice Shelves Melt, Things Aren't Looking Up at the Bottom of the World*, *TIME: NATURE'S EXTREMES*, 2006, at 60-64 ("The Arctic is warming up even faster than scientists feared."); Beth Daly, *National Panel Supports '98 Global Warming Evidence*, *THE BOSTON GLOBE*, June 23, 2006. DISCOVERY, *supra*, is supported by a remarkable website described by the author as containing over two dozen essays running in parallel, interconnected by over 700 hyperlinks, and with references to over 1,000 scientific and historical publications and links not noted in the book. The site may be found at <http://www.aip.org/history/climate/>. For an outstanding synthesis of *THE WEATHER MAKERS*, *FIELD NOTES FROM A CATASTROPHE* and the book and film versions of *AN INCONVENIENT TRUTH*, see Jim Hansen, *The Threat to the Planet*, *THE NEW YORK REVIEW OF BOOKS*, July 13, 2006, at 12 (book review) ("Jim Hansen is Director of the NASA Goddard Institute for Space Studies and Adjunct Professor of Earth and Environmental Sciences at Columbia University's Earth Institute.").

<sup>4</sup> Jeffrey D. Sachs, *Ecology and Political Upheaval*, *SCIENTIFIC AMERICAN*, July 2006 at 37 ("Small changes in climate can cause wars, topple governments and crush economies already strained by poverty, corruption and ethnic conflict."); Robert T. Watson, *Climate Change: The Political Situation*, *SCIENCE MAGAZINE'S STATE OF THE PLANET 2006-2007*, at 179 (Donald Kennedy ed., Island Press 2006) ("The overwhelming majority of scientific experts and governments acknowledge that there is strong scientific evidence demonstrating that human activities are changing the Earth's climate and that further human-induced change is inevitable. Changes in the Earth's climate are projected to adversely affect socioeconomic systems (such as water, agriculture, forestry, and fisheries), terrestrial and aquatic ecological systems, and human health."). As this article goes to press, the Stern Review on the Economics of Climate Change has been made available on the Internet at [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/stern\\_review\\_report.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm). (last visited Oct. 31, 2006). SIR NICHOLAS STERN, *STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE* (2006) (Global warming is "the greatest market failure the world has seen."). As noted on the official website address provided above, the Stern Review will be available in hardcover in December, 2006. This approximately 600 page report may ultimately be one of the key documents in bringing about the global paradigm shift that will be necessary to minimize the impacts of global warming. That the Stern Review is extraordinarily thorough, makes it absolutely clear that global warming is a reality that if left unchecked will lead to disastrous consequences for all of humanity and is apparently an official publication of the government of Great Britain all suggest the potentially vast importance of this document.

<sup>5</sup> *FIELD NOTES*, *supra* note 3, at 71-87, 125; *MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: BIODIVERSITY SYNTHESIS* (World Resources Institute 2005); Julia Whitty, *The Fate of the Ocean*, *MOTHER JONES*, Mar./Apr., 2006, at 32; *Green Facts: Scientific Facts on Climate Change and Global Warming*, at <http://www.greenfacts.org/studies/>

of plant and animal life caused by global warming present tremendous challenges for those of us in the conservation easement business. Complicating matters further, global warming is but one of many planetary scale changes that will confront us in the future. Overpopulation, increases in air and water pollution, urban sprawl,<sup>6</sup> depletion of non-renewable resources and loss of biodiversity represent only a partial list of global environmental problems future generations will face. Like global warming, all of these mega-trends will force plant and animal species to adapt, migrate or die.<sup>7</sup> Returning to our original example of global warming, how then should we draft a conservation easement—the purpose of which is to protect an endangered ecosystem, one or more endangered species or biodiversity in perpetuity—when we know that climate change, or some other equally catastrophic trend, may either destroy or cause to migrate the life forms that our easement was intended to protect?

## II. “PARK” VERSUS “ARK” CONSERVATION EASEMENTS

### A. “Park” Conservation Easements

While our practices for drafting conservation easements in a world of unpredictably fluctuating temperatures, rising oceans, melting glaciers, mass extinctions and ecosystem migrations must of necessity evolve as rapidly as possible, it is worthwhile to begin with two opposing drafting models. The first model is the “park” model. In modern, progressive parks we attempt to maintain realistic natural environments. Within these environments, we protect species that either entertain us or that we wish to save from extinction, usually resulting from the destruction of their natural habitat in other venues by humans. In the park model we strive for rigid consistency with every possible aspect of a species’ environment, including the precise intermixture of flora and fauna that we have determined represents a “natural” or “indigenous” ecosystem. However, the most important constant is that of location. The inhabitants of parks are unable to migrate in response to background environmental changes because of the park’s fixed geographical location. Accordingly, the internal features of a park are highly monitored and manipulated to remain rigidly constant, even against an external background of rapid and potentially harmful

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[climate\\_change/1\\_2/global\\_warming\\_9.htm#1](#) (last visited Oct. 29, 2006).

<sup>6</sup> Regarding the environmental implications of urban sprawl and how to combat sprawl, see generally James Olmsted, *Handling the Land Use Case: A User's Manual for the Public Interest Attorney*, 19 J. ENVTL. L. & LITIG. 23 (2004).

<sup>7</sup> One could even express the human creation of this dismal new world in equation form: DAI + BAU = AMD. Here, DAI refers to “dangerous anthropogenic interference,” FIELD NOTES, *supra* note 3, at 125, BAU refers to “business as usual,” *Id.* at 131, and AMD refers to “adapt, migrate or die.”

change. Certainly most of the 18,000 conservation easements in the United States held today by private land trusts follow the “park” model and are, consequently, extremely vulnerable to the coming effects of global climate change.

### B. “Ark” Conservation Easements

In stark contrast with the “park” model is the “ark” model. Like the biblical ark, a conservation easement following this model is designed to be “mobile.” Obviously, such mobility is not literal in the sense that a piece of land or even the creatures that inhabit that land can be picked up and moved. Instead, an “ark” model conservation easement could be more easily terminated than a “park” model conservation easement should its ecological mission fail because of changing environmental conditions. An ark model conservation easement would be drafted so that it can be terminated<sup>8</sup> at the discretion of the holder and without the governmental or judicial oversight that normally would be required for the termination of a perpetual conservation easement.<sup>9</sup>

The above distinctions notwithstanding, both perpetual park model conservation easements and non-perpetual ark model conservation easements should contain provisions that allow the holder of the easement to recover the full, appreciated value of the easement upon its termination. The easement holder could then use this value to purchase a new and viable conservation

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<sup>8</sup> This is not to say that termination would be the only solution for an ark conservation easement whose original purposes could no longer be achieved. In some cases the remedy might be to modify the easement to permit its use for other conservation purposes.

<sup>9</sup> In most states conservation easements are not required to be perpetual. See Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 40-42 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (noting that only four states -- California, Colorado, Florida, and Hawaii -- require that easements be perpetual); see also Uniform Conservation Easement Act (UCEA) § 2(c) (providing that “a conservation easement is unlimited in duration *unless the instrument creating it otherwise provides*”) (emphasis added). Accordingly, most easement enabling acts permit the creation of *non-perpetual* “ark” model easements, which could be terminated at the discretion of the holder (with the agreement of the owner of the encumbered land). In the case of *perpetual* easements, it is likely that termination will be governed by state law governing charitable trusts. For a thorough and thoughtful analysis of the application of charitable trust principles to the termination and amendment of conservation easements, see Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 Harv. Envtl. L. Rev. 421 (2005) [hereinafter *Rethinking*]; Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. OF RICH. L. REV. 1031 (2006). See also RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (2005) (recommending that the modification and termination of conservation easements be governed by charitable trust principles); IRC § 170(h) (requiring that a tax-deductible easement be “granted in perpetuity”); Treas. Reg. § 1.170A-14(g)(6)(i) (requiring that a tax-deductible easement be extinguishable only in the context of a judicial proceeding, and only if a subsequent unexpected change in conditions makes “impossible or impractical” the continued use of the encumbered property for conservation purposes). Donors of non-perpetual “ark” easements would not be eligible for the federal charitable income tax deduction.

easement possessing as many of the conservation values of the terminated conservation easement as possible. Alternatively, the holder could also use the value to purchase fee title to land, facilitate species reintroduction or otherwise promote conservation goals similar to those of the terminated conservation easement. The holder of the value from the terminated easement would ideally use these funds to promote similar conservation goals in the same jurisdiction or region as the original easement. However, this may not always be possible or even desirable. If, for example, the species the terminated conservation easement was designed to protect was extirpated from the area with no hope of recovery, the funds could be better used in another location.<sup>10</sup>

To summarize, the key requirement for an ark model conservation easement is that it be drafted to be terminable at the discretion of the holder.<sup>11</sup> Both the park and ark easements should contain provisions that allow the holder to recoup the full value of the easement upon its termination.<sup>12</sup> This ensures that such value

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<sup>10</sup> The vulnerability of traditional "static" conservation easements is increasingly being recognized. As noted by one law review author, "[t]he static, 'equilibrium' view of nature as unchanging is yielding to a dynamic model based on the conclusion that 'natural systems change incessantly.' Yet, conservation easements traditionally have been drafted as unchanging legal agreements between landowners and easement holders, reflecting the obsolete model of nature as 'static and unchanging.'" Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883 (2005). While Greene's distinction between "static" and "dynamic" conservation easements reflects the same underlying concerns as the "park" versus "ark" distinction in the present article, Greene argues generally that the key to creating truly perpetual conservation easements lies in drafting conservation easements to contain sufficiently dynamic, flexible and adaptive provisions. *Id.* at 923. The author of this article agrees that conservation easements need to be more dynamic, flexible and adaptive, but the focus of this article is on what should happen when adaptation is no longer possible or practical, and the easement should be terminated and re-deployed elsewhere to maximize its social benefit. To the extent that dynamic, flexible and adaptive provisions allow for or make easier such re-deployment, the ideas in this article harmonize with those espoused by Greene. Another of Greene's conclusions with which this author agrees is that "[I]and trusts that use perpetual conservation easements face a fundamental paradox of land conservation: how to truly preserve land in perpetuity in the face of perpetual change." *Id.* at 901.

<sup>11</sup> See *Rethinking*, *supra* note 9, at 449 ("If the donee of a conservation easement wishes to be free to terminate the easement or modify its charitable purpose in accordance with only those conditions imposed under the applicable state easement enabling statute, it should negotiate for the inclusion of a provision to that effect in the deed of conveyance, and the import of such provision should be explained to the prospective donor.").

<sup>12</sup> Just as "ark" model conservation easements can be drafted to be more easily terminated than "park" model conservation easements, so too could "ark" model conservation easements be drafted to be more easily amended; provided, however, that such amendments would be required in some fashion to further the conservation goals as originally stated in the easement. It must be noted, however, that just as the termination of appreciated conservation easements raises the practical question of how the easement holder is to be compensated for such appreciation, i.e., the subject matter of this article, so too does the amendment of conservation easements where the amendment has a conservation-diminishing effect. Although beyond the scope of this article, it remains for future scholars and practitioners in this area to devise means for conservation easement holders to capture the appreciated value of conservation easements in the event of conservation-diminishing amendments that would otherwise deprive the public of its investment in the easement and result in

can be re-deployed<sup>13</sup> for similar conservation purposes in some other manner or location.

### III. THE FICTION OF PERPETUITY AND THE REALITY OF SERIAL LANDOWNERS

The non-perpetual ark model conservation easement clearly differs from the perpetual conservation easements traditionally acquired by land trusts.<sup>14</sup> While land trusts typically draft conservation easements to exist "in perpetuity," doing so creates a fiction of ecological stability far removed from the reality of global warming and many other dynamics of our environment.<sup>15</sup> We cannot be sure

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an unwarranted financial windfall to landowners.

<sup>13</sup> Regarding the re-deployment of failed conservation easements, see generally RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 102-114 (University Press of New England 2003) [hereinafter *CONSERVANCY*]. In his sophisticated and comprehensive treatise on the land conservation movement in America, Professor Brewer acknowledges the challenges to conservation efforts posed by global warming, noting encouragingly, "[f]ighting the anti-biodiversity effects of global climatic change is a contribution to worldwide conservation for which local land trusts are uniquely suited." Interestingly, Professor Brewer does not explicitly include the "ark" model proposed in this article as one of the ways that conservation easements can be used to mitigate the "anti-biodiversity" effects of global systems change. Nevertheless, one of the species preservation schemes that Professor Brewer does discuss, namely "gap-analysis," fits nicely with the "ark" model as an underlying methodology for choosing new sites for preservation through conservation easements. Using gap-analysis, scientists locate preserves where species or species communities are absent or under-represented. Land trusts may then use this data in selecting and creating new preserves that contain the under-represented species or species communities that fill the conceptual diversity gaps identified by gap-analysis.

<sup>14</sup> The mainstream's bias in favor of literal interpretations of perpetuity in conservation easements is illustrated by this excerpt from the Land Trust Alliance Strategic Plan: 2004-2008, Executive Summary:

When landowners donate land or an easement to a land trust, *they expect the land trust to protect their land for all time*. And when a land trust accepts that gift, *it makes a promise in perpetuity with the landowner*, to its donors and to the surrounding community. The best way to keep this promise is to build strong and enduring institutions that are managed in accordance with Land Trust Standards and Practices. To perpetuate our conservation mission for generations to come, land trusts will need to build strong memberships and public support that will come to the defense of protected land whenever it is threatened.

LAND TRUST ALLIANCE STRATEGIC PLAN: 2004-2008, EXECUTIVE SUMMARY, available at [http://www.lta.org/aboutlta/strategic\\_plan\\_summary.doc](http://www.lta.org/aboutlta/strategic_plan_summary.doc) (last visited June 19, 2006) (emphasis added).

<sup>15</sup> Regarding the perpetuity aspect of conservation easements, the major issues can be divided into the following two, over-lapping, categories: (1) *Should* conservation easements exist in perpetuity, and (2) *Can* conservation easements exist in perpetuity? To say that both these questions have sparked a raging debate, both in academia and in the trenches of the conservation easement movement, would not be overstatement. The most influential article arguing *against* perpetual conservation easements is Professor Julia D. Mahoney's challenge: *Perpetual Restrictions on Land and the Problem of the Future*. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) [hereinafter *Perpetual Restrictions*]. Professor Mahoney's article has produced many thoughtful and detailed responses. Perhaps the most prominent and constructive of these responses are the following: See *Rethinking*, *supra* note 9, and JEFF PIDOT,

that every, if any, "perpetual" conservation easement will last for perpetuity. Quite to the contrary, we can be sure that every conservation easement ever drafted will eventually terminate or require amendment.<sup>16</sup>

Moreover, a conservation easement drafted to last in perpetuity, or any substantial length of time for that matter, creates another issue. It guarantees that there will be a succession of underlying landowners. Eventually, these serial landowners will be tempted to attempt to extinguish the conservation easement and capture the appreciated value represented by the restored development rights.<sup>17</sup> Accordingly, for all conservation easements, it is critical

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REINVENTING CONSERVATION EASEMENTS, POLICY FOCUS REPORT (Lincoln Institute of Land Policy 2005). See also Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 607-608 (2004) (rebutting generally Professor Mahoney's views on perpetuity, but also noting "[a]s Professor Mahoney recognizes, however, the notion of 'perpetual' land conservation is a bit of a canard."). As noted above, the debate has not been limited to academia; for example, the widely distributed publication *Range* magazine devoted almost its entire Winter 2004 issue to the subject of perpetuity in conservation easements. See, e.g., Tim Findley, *Forever and Ever, Amen: Land Trusts and the Frightening Thought of Perpetuity*, Vol. XI, No. 4 RANGE 42 (2004).

<sup>16</sup> In fairness to the land trust community, land trusts have long recognized the need to build some flexibility into their conservation easements to enable the holders to respond to changed conditions. For example, both the "old" and the "new" Conservation Easement Handbooks as well as the Land Trust Alliance Standards and Practices Guidebook recommend amendment and discretionary approval provisions in conservation easements. See JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* (The Trust for Public Land and the Land Trust Alliance 1988) [hereinafter *HANDBOOK*]; ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK, 2ND EDITION* (The Trust for Public Land and the Land Trust Alliance 1988-2005) [hereinafter *HANDBOOK 2ND EDITION*]; *THE LAND TRUST ALLIANCE, THE STANDARDS AND PRACTICES GUIDEBOOK: AN OPERATING MANUAL FOR LAND TRUSTS* (The Land Trust Alliance 1997). Furthermore, most conservation easements expressly address the issue of termination (i.e., termination must occur in the context of a judicial proceeding and then only if continued protection of the land for the specified conservation purposes becomes impossible or impractical as required by the Treasury Regulations). In other words, contrary to the representations of some, notably Professor Mahoney, the land trust community has not been oblivious to the issues raised by changed circumstances as they relate to conservation easement perpetuity and termination. See generally *Perpetual Restrictions*.

<sup>17</sup> That such a cynical forecast is not merely a creature of the author's imagination is chillingly corroborated in the following even gloomier, but undoubtedly accurate, prediction by Professor Brewer, author of *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA*:

The next few decades will bring rising land prices, sales of many eased properties, and many more court tests of conservation easements. It wouldn't be surprising if half of the 11,700 properties on which local land trusts hold easements were to be sold in the next ten years. Some of the new owners will be environmentalists, just as interested in protecting the property's conservation values as the original owners. Of the others, some will be ignorant of easements, some disdainful, and some hostile. Some will buy easement-protected land in the full expectation of breaking the easement so that they can do what they want with the land. Properties in the path of development that are worth a couple of hundred thousand dollars as restricted but millions without the easement will attract such speculators.

that the drafters allow the holder of the easement (on behalf of the public) to recover the full present value of the easement. This includes not only the full dollar value which society initially invested in its acquisition, whether by purchase or tax benefits provided upon donation, but any appreciation in the value of the easement (which is an asset that belongs to the public).

#### IV. BETWEEN TIME AND TERMINATION

The remainder of this article describes how both perpetual and non-perpetual conservation easements should be drafted to ensure that the holder recovers the full, appreciated value of the easement upon its termination. The provisions should also allow the funds to be used to accomplish similar conservation purposes in some other manner or location. Before examining such language, however, it is necessary to clarify certain issues regarding the value of an easement that has been in existence for some time prior to its termination.

##### A. *The Fiction of "Extinguished" Development Rights*

First, we should remind ourselves that the primary economic effect of the termination of a conservation easement is the "release" of the development rights. Stated differently, the termination causes a "reunification of the development rights with the underlying fee ownership." Such an idea is doubtless anathema to the conventional wisdom and terminology of most conservation easement drafters who routinely draft provisions stating that all development rights have been "extinguished."

Like the notion of a truly perpetual conservation easement, the "extinguishment" of a development right is also a fiction. The landowner has simply made a promise to an easement holder that the landowner will not exercise what would otherwise be its right to develop the property. Thus, in the case of conservation easements, it would be more realistic to state that the exercise of the development rights has been "suspended" rather than "extinguished." Other descriptors that come to mind are that the development rights have been made "dormant" or "inoperative," or are "held in abeyance."<sup>18</sup>

In any event, to use the specific term "extinguished" could actually disadvantage the conservation easement holder by allowing for an estoppel-like

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<sup>18</sup> Professor McLaughlin notes that the conveyance of a perpetual conservation easement to a government agency or charitable organization could be conceptualized in at least two useful ways: (1) as the conveyance of a right to restrict the development and use of the encumbered land as specified in the easement, coupled with an obligation to enforce the restrictions in perpetuity on behalf of the public, or (2) as the conveyance of the actual development and use rights restricted by the easement, coupled with an obligation to hold those rights in abeyance in perpetuity on behalf of the public. See *Rethinking*, *supra* note 9, at 490. She notes further that the "extinguishment" of a perpetual conservation easement would involve, among other things, the reunification of either that "right to restrict" or the actual development and use rights with the fee title to the land. *Id.* at 491.

argument.<sup>19</sup> One could argue that because the holder intended and believed the development rights were actually extinguished (a word that denotes permanence), the holder should not then later be allowed to receive the value inherent in those development rights when they are reunified with the underlying land upon the termination of a conservation easement.<sup>20</sup>

### B. *The Appreciation of Development Rights*

Second, we must ask ourselves what effect the passage of time is likely to have on real estate development rights. This question is easy. If the development rights will one day be reunited with the underlying fee ownership, it is almost certain that they will have appreciated in value. Over time, one can expect the value of real estate to appreciate as demand increases or when economically favorable zoning and land use changes are enacted. Moreover, development rights naturally appreciate significantly because of various background economic forces operating that occur simply as a consequence of

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<sup>19</sup> *But see* *Weston Forest and Trail Ass'n, Inc., v. Fishman*, No. 05-P-1076, slip op. (Mass. June 30, 2006) (holding that estoppel arguments do not apply against a conservation restriction that is in the public interest).

<sup>20</sup> For the conservation easement to state that it "extinguishes" the development rights in the underlying land could come back to haunt the easement holder in other ways as well. For example, it is possible that after a conservation easement is acquired the development rights it purported to extinguish may become marketable or tradeable, for example if a transfer of development rights program is created for which the development rights in the conservation easement would have been eligible. *See* CONSERVANCY, *supra* note 13, at 240 (explaining transfer of development rights programs); *see also* HANDBOOK 2ND EDITION, *supra* note 16, at 398 (explaining transfer of development rights programs). Whether the easement holder would have been free to sell, trade or transfer the development rights would turn on several factors. These factors would include the easement terms and whether the easement was acquired by donation, in which case selling, trading or transferring the development rights could affect the perpetuity requirement of the tax code and ultimately the legality of donor tax deductions. It is also possible that post-easement acquisition mitigation banking programs could come into being so that had the holder not extinguished the development rights it could have received some form of compensation for holding them in abeyance or conveying them to the mitigation bank to do likewise. In both the above scenarios, the easement holder would receive some form of compensation from the transaction in question, perhaps offsetting the cost of the easement. *See* HANDBOOK 2ND EDITION, *supra* note 16, at 398-99 (providing alternative easement language in which development rights are transferred to the easement holder rather than extinguished). Provisions purporting to extinguish all "development" rights, rather than conveying such rights to the easement holder, could also thwart the holder's participation in cutting-edge anti-climate change programs or other such critical global conservation strategies. For example, a provision purporting to "extinguish all development rights" could be read broadly to extinguish such "ancillary" development rights as the right to market carbon sequestration credits on eased forest lands (such credits are discussed later in this article). *See* HANDBOOK 2ND EDITION, *supra* note 16, at 398 (observing that conservation easement drafters must consider the impact of language purporting to "extinguish" development rights, as traditionally conceived, on so-called "ancillary development rights" such as the transfer of carbon sequestration and carbon dioxide credits, noting further that "[s]ometimes, a holder may not want to extinguish these transferable development rights.").

the passage of time.<sup>21</sup> Whatever the source of the appreciation, the easement holder must capture any such appreciation on termination of the easement. This allows the easement holder to recover the full social entitlement that has been tied up in the conservation easement from the day of its creation. The holder could then use such capital to accomplish similar conservation purposes in some other manner or location.

*C. Arguments Supporting Easement Holder Recovery of the Full, Appreciated Value of Development Rights*

Third, we must explore different models of bifurcated real property ownership to see how accumulated appreciation is allocated between the multiple stakeholders of the property in question. By exploring these models, we can develop legal arguments supporting the easement holder's right to recover the full, appreciated value of development rights released upon easement termination. Such arguments undoubtedly will become necessary as time passes and profit-motivated later generation landowners begin seeking legal arguments with which to plunder the stored reserves of appreciated capital in conservation easements.

The first step in developing such arguments is to characterize the legal nature of conservation easements. Conservation easements are partial interests in land conveyed to charitable organizations and governmental units to be held for the benefit of the public. As such, they are assets that belong to the public and the public should be entitled to the full, appreciated value of such assets. Professor McLaughlin notes that "a perpetual conservation easement suppresses the development and use value of the encumbered land, and that value lies dormant and inaccessible until the easement is extinguished...."<sup>22</sup> She argues that upon

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<sup>21</sup> Although discussion of the following issue is beyond the scope of this article, the author finds it difficult to conceptualize economic appreciation without also speculating as to the concurrent existence of what might fairly be called "conservation appreciation." For example, just as the increasing scarcity of developable lands will tend to result in increasing values of the remaining reserves of such land, so might the increasing scarcity of "protection-worthy" lands drive up the value of those remaining land reserves. In this example, one might think of "protection-worthy" lands as a subset of developable lands, i.e., the very lands that land trusts seek most to protect. Perhaps these different forms of appreciation could even combine to result in greater than expected asking prices for new conservation easements. Thus, the appreciation of a terminated conservation easement could be based primarily upon the increased value of the now released development rights. However, the cost of an equivalent replacement conservation easement might exceed even the appreciated value of the terminated conservation easement and released development rights because the value of the replacement easement is based on the combination of the normal economic appreciation of land and development rights and, additionally, on so-called "conservation appreciation." The result of such a value differential would likely be to price the prospective holder out of the market. Whether such a quantum leap in conservation easement valuation standards would ever evolve or whether such "conservation equity" would ever be recognized as a marketable value is left to the prescience of the reader.

<sup>22</sup> See *Rethinking*, *supra* note 9, at 491.

the extinguishment of a perpetual conservation easement, the full, appreciated value of the development and use rights restricted by the easement be paid to the holder of the easement.<sup>23</sup> This payment should be made on behalf of the public, and the holder should use it for similar conservation purposes.<sup>24</sup> The value of the payment should be equal to the difference (measured at the time of extinguishment) between: (1) the fair market value of the land free of the easement restrictions and (2) the fair market value of the land subject to the easement restrictions.<sup>25</sup> This assumes that the restrictions will not be extinguished and the easement will continue to be enforced in perpetuity (described in *Rethinking* as the “after and before” appraisal method).<sup>26</sup>

Support for this approach is found in *Hartford National Bank v. City of Bristol*.<sup>27</sup> That case involved a charitable trust that held, “in gross,” certain covenants restricting in perpetuity the development and use of land.<sup>28</sup> The land was condemned and the restrictive covenants were consequently extinguished.<sup>29</sup> The Supreme Court of Connecticut addressed the issue of compensating the trust for the taking.<sup>30</sup> The court held that the correct way to determine the value of the “in gross” interest held by the trust was by subtracting the value of the land subject to the restrictive covenants from the value of the land free of such restrictions.<sup>31</sup> There also exists at least one common law model, the tenancy in common, in which the appreciation in land with multiple ownership is apportioned to the various owners upon the termination of the multiple ownership form.<sup>32</sup> Specifically, in a suit to partition property owned by tenants in common, a court will divide the property or the proceeds from the sale of the property according to the cotenants’ respective proportional interests in the property.<sup>33</sup> There may yet be other models in commerce and law, which I leave to my readers’ imaginations to discover and bring to light.<sup>34</sup> There is no

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<sup>23</sup> See *id.* at 491-497.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* (setting forth policy arguments in favor of this approach).

<sup>27</sup> *Hartford Nat'l Bank v. City of Bristol*, 321 A.2d 469 (1973).

<sup>28</sup> *Id.* at 470-473.

<sup>29</sup> *Id.* at 471.

<sup>30</sup> *Id.* at 473.

<sup>31</sup> *Id.* at 473-474.

<sup>32</sup> See *Rethinking*, *supra* note 9, at 495-496.

<sup>33</sup> See *id.*

<sup>34</sup> In addition to developing legal arguments in support of apportioning the appreciated value of development rights to the holder upon termination, it is also useful to explore various models of bifurcated ownership in general for examples of how accumulated appreciation is allocated among the multiple stakeholders in question. Through exploring these models, we can by analogy predict some of the arguments that landowners might assert *against* a conservation easement holder attempting to recover the full, appreciated value of development rights formerly restricted by a now terminated conservation easement.

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For example, a landowner might argue that a conservation easement is really like a deed of trust which is a recorded document that secures a debt by granting a third party trustee legal ownership of the debtor's land until the debt to the creditor, who is technically the beneficiary, is paid off and the deed of trust cancelled. The landowner could next argue that even though the trustee actually holds a legal interest in the land through the deed of trust, which one could argue is as much an interest in land as a conservation easement, under standard deed of trust law no one would assert that the trustee, or even the creditor as beneficiary, has thereby acquired a compensable interest in any appreciation in the "deeded" land. The landowner might then argue by analogy that the holder of a conservation easement is no more entitled to appreciation deriving from termination of the "deed of conservation easement" than a third party trustee or beneficiary creditor would be entitled to appreciation deriving from deeding back to the debtor the interest in land originally transferred to the trustee by a deed of trust. Indeed, in the case of a conservation easement, the landowner holds not just a possessory interest in the eased land, but also a legal interest. Compare this to the debtor who has signed a deed of trust to a third party trustee with the creditor as the beneficiary. The debtor's possessory interest here is solely equitable (i.e., as the trustor), and yet the debtor is still entitled to the appreciation. At first glance this analysis would appear to present a substantial hurdle to the easement holder recovering the full, appreciated value of a terminated conservation easement.

Another argument supporting the position that it is the landowner and not the easement holder that is entitled to the appreciation of the development rights held in abeyance by a conservation easement is based on a more general trust analogy. In a simple trust situation, a trustee holds legal title to property, say land for instance, on behalf of a beneficiary, who holds only an equitable interest in the property. In the deed of trust analogy, *supra*, no one would argue that any appreciation in the trust *res* inures to the benefit of either the third party trustee (or to the beneficiary creditor for that matter). Likewise, under the general trust analogy, no one would argue that any appreciation in the trust *res* inures to the benefit of the trustee.

From the landowner's perspective, the critical point in the above analogies is that in neither one does the appreciation in the trust *res* inure to a party who is not the ultimate legal and equitable owner of the trust *res*. By analogy to conservation easements, this would be the landowner. In using these analogies to challenge an easement holder's claim for recovery of full appreciation on a conservation easement, landowners may attempt to forge a principle that it is either the original and/or the ultimate owner of land interests temporarily held by another, even if the interest in question was held legally rather than merely equitably, that is entitled to the appreciation that accrued during the period of multiple ownership.

Both of the above arguments by analogy fail because a conservation easement simply does not create a set of trust relationships or even trust-like relationships. More specifically, a conservation easement simply does not create trustor, trustee and beneficiary relationships as would a trust instrument (except to the extent that the general public might be considered a beneficiary of the rights donated to a non-profit easement holder). Unlike a trust instrument, a conservation easement will almost always contain language separating control and/or ownership of the development rights from the rights of the underlying landowner and vest either the control or the ownership of these development rights fully in the conservation easement holder, usually to be held in perpetuity. To drive the point home, the incidence of income taxation follows ownership, and any income earned on the property subject to a deed of trust or on assets held in trust is imposed on the owner of the property or the beneficiaries of the trust (rather than the trustee) because the trustee is not the beneficial owner of the property in either case.

Finally, one might expect an argument by analogy based on the nature of easements generally. There is literally an infinite variety of easements: from prosaic easements for ingress and egress to a land-locked property to esoteric easements such as aviation easements which permit the flight of aircraft in the airspace directly above the easement grantor's property. It is beyond cavil that none of the holders of such easements would be entitled to partake of the appreciation of the underlying eased land. Why then should the holder of a conservation easement be any different?

This analogy is likewise inapt because once conditions change making the purpose of a traditional easement (e.g., a right of way easement) no longer necessary or viable, the easement has no market

authority directly on point regarding this issue. Therefore, the safest route for the conservation easement holder is to ensure that the easement is drafted expressly to provide that the holder receive the full value of the easement on termination.<sup>35</sup>

## V. DRAFTING EASEMENTS TO CAPTURE APPRECIATED VALUE

Drafting to ensure the capture of appreciated value of released development rights in a terminated conservation easement presents the following three problems: (A) How should the appreciated development rights be valued on cash-out on termination? (B) How can the landowner now in possession of the development rights be compelled to cash-out the former easement holder? and (C) How can the landowner raise the capital for the cash-out?

### A. *Cashing-Out: Valuation of Development Rights*

#### 1. Treasury Regulations Ratio-Based Percentage Valuation on Termination

The Treasury Regulations require that upon the termination of a tax-deductible easement the holder must be entitled to a percentage of the proceeds from the subsequent sale or exchange of the newly unencumbered land. This percentage must be *at least* equal to the percentage that the easement represented of the value of the land at the time the easement was donated (the "division of proceeds" requirement).<sup>36</sup> At first glance, this ratio-based percentage valuation method seems simple. First, the value of the conservation easement is determined. This is accomplished by subtracting the value of the land as appraised with the conservation easement in place from the value of the

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value -- whereas the development rights inherent in a conservation easement retain their value, even if the purpose of the easement (conservation) has been rendered impossible due to changed conditions. Stated differently, in the conservation easement context, there is a disconnect between (1) the purpose of the easement (conservation) and (2) the market value of the easement, which has nothing to do with conservation and everything to do with market value of the restricted development rights.

Rather clearly then, none of these analogies fits the conservation easement model well and none is persuasive. However, it is worth being aware of them because they all contain the kernel of an argument that the holder of a conservation easement will never have. Namely, the conservation easement holder will never possess the ownership of precisely that combination of rights (i.e., all, or almost all) which could be sold to a willing buyer at a profit. Thus, in capturing the appreciated value of development rights held in abeyance by a now terminated conservation easement, the holder of the conservation easement must rely primarily on the language in the conservation easement as a basis for asserting its rights. It is this language, i.e., language which gives conservation easement holders dominion over the development rights which comprise the appreciable component of the underlying real property, that trumps the above arguments by analogy.

<sup>35</sup> HANDBOOK 2ND EDITION, *supra* note 16, at 462-65 (providing sample easement provisions for allocating the appreciated value of conservation easements to the former holder).

<sup>36</sup> Treas. Reg. § 1.170A-14(g)(6)(ii) (*Proceeds*).

land as appraised without the conservation easement in place. The difference represents the appraised value of the conservation easement (the so-called "before and after" method). Next, a ratio is established between the appraised value of the land unencumbered by the conservation easement and the appraised value of the conservation easement at the time of its creation. The Treasury Regulations treat this  $x/y$  ratio-based percentage as remaining constant during the life of the conservation easement. Upon termination of the conservation easement the holder is then entitled to *at least* the  $x/y$  ratio-based percentage of the proceeds realized from the sale or exchange of the newly unencumbered property.

Despite its apparent simplicity, the  $x/y$  ratio-based percentage valuation method is problematic in application. The problem is not with the Treasury Regulations "division of proceeds"<sup>37</sup> requirement, but, instead, with model conservation easement provisions based *only* on the  $x/y$  ratio-based percentage that omit the equivalent of the "at least" language in the Treasury Regulations and thus fail to consider the likelihood that the suspended development rights will appreciate more rapidly than the underlying fee. Such provisions also typically fail to recognize that the holder of the conservation easement, as the owner of those development rights, should be entitled to their appreciated value. For example, suppose that changes in the real estate market, or in the zoning or land use regulations, have caused the development rights to appreciate substantially. In this case, use of only the ratio-based valuation method on termination could provide the landowner with windfall profits. This would be unfair to the holder of the conservation easement, not to mention to the subsidizing public.<sup>38</sup> It is also inconsistent with the fact that the holder of the easement (and not the owner of the encumbered land) is the owner of the easement and the development rights restricted thereby. The easement holder therefore has absolute dominion over such rights. Further, if the holder does not receive the full, appreciated value of the easement upon termination, it will not be able to convert the terminated conservation easement into a new easement of equal social value. Its financial stake in the property will have actually lost ground, thereby pricing the holder out of the real estate market. In summary, if the conservation easement calls for the holder to receive *only* the  $x/y$  ratio-based percentage upon termination then the appreciated value attributable to the easement, which is an asset that belongs to the public, could pass as a windfall

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<sup>37</sup> *Id.*

<sup>38</sup> Generally the public subsidizes easements through the tax benefits provided to donors of easements as well as to donors of cash and other assets to land trusts and to foundations that provide grants to land trusts. Note, however, that the public subsidizes even conservation easements *purchased* by a non-profit corporation with private funding because the existence and operation of the § 501(c)(3) non-profit corporation is itself subsidized by the public. The public also subsidizes easements through government oversight of the non-profit sector.

to the landowner.<sup>39</sup>

As stated earlier, the problem is not with the Treasury Regulations "division of proceeds"<sup>40</sup> requirement but, instead, with the interpretation and application of this particular Treasury Regulation. Major land trusts have developed conservation easement forms that contain valuation on termination provisions based only on the  $x/y$  ratio-based percentage rather than upon valuation formulas that allocate to the easement holder *at least* the  $x/y$  ratio-based percentage or the *greater of* the  $x/y$  ratio-based percentage and some other calculation that captures the full, appreciated value of the development rights previously suspended by the conservation easement.

The most notable example of a model conservation easement valuation provision which omits the "at least" or "greater of" language is in the first Conservation Easement Handbook.<sup>41</sup> Initially published in 1988, the Conservation Easement Handbook has served as a guide for many thousands of conservation easements. It would be equally interesting and frightening to determine the number of conservation easements that specify that the holder receive *only* the  $x/y$  ratio-based percentage of the proceeds from the sale on termination rather than *at least* the  $x/y$  ratio-based percentage or, alternatively, the *greater of* the  $x/y$  ratio-based percentage and some other figure which includes the appreciated value of the development rights. The number is likely in the range of many thousands, perhaps amounting to most conservation easements extant.

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<sup>39</sup> See *Rethinking*, *supra* note 9, at 482-484, where Professor McLaughlin discusses the fact that limiting the holder's share to the ratio established at donation is not mandated by the Treasury Regulations, and, although technically permissible, is contrary to the intent of the Treasury Regulations, which expressly provide that the donation of a conservation easement "gives rise to a property right immediately vested in the donee" and that upon termination the holder must be entitled to "at least" (rather than "only") the donation percentage. As Professor McLaughlin recommends on page 484 of *Rethinking*, the easement deed should be drafted to provide that the holder receive the greater of (1) the ratio fixed upon donation and (2) the full, appreciated value of the easement upon extinguishment (the "greater of" formulation is necessary to satisfy the Treasury Regulation requirement that the holder be entitled to "at least" the donation ratio). Limiting the holder's share of the proceeds upon extinguishment to the ratio set at donation is contrary to the fact that ownership of the conservation easement has been conveyed to the grantee, and would also encourage owners of easement encumbered land to try and break easements to capture any appreciation in the value of such easements since their donation (although Professor McLaughlin argues in *Rethinking* that even where the holder is expressly limited to the ratio established at donation, the excess value inherent in the easement should pass by resulting trust to the donor or the donor's heirs -- and not to the owner of the encumbered land). See *Rethinking*, *supra* note 9, at 482-484.

<sup>40</sup> Treas. Reg. § 1.170A-14(g)(6)(ii) (*Proceeds*).

<sup>41</sup> HANDBOOK, *supra* note 16. The "modified" Treasury Regulation valuation methodology no doubt began to gain popular acceptance in non-donated easements as well when it was recommended in the first Conservation Easement Handbook.

## 2. "After and Before" Valuation on Termination

An "after and before" based valuation of the easement upon termination is similar to the "before and after" valuation performed at the inception of the conservation easement to determine the easement's value for tax or purchase purposes. Under the "after and before" method, the easement holder's interest is equal to the difference between the value of the property after the conservation easement is removed and the value of the property before such removal. A provision providing for this sort of valuation at termination need not be complicated, and can be drafted in a single sentence. The important difference between the "after and before" and the  $x/y$  ratio-based percentage valuation methods is that the former will capture the full appreciation in the value of the development rights that were transferred to the conservation easement holder and for which it (on behalf of the public) should be fully compensated. This is because the "after and before" valuation method is essentially an appraisal of the fair market value of the conservation easement *at the time of the termination of the conservation easement*. By comparison, the  $x/y$  ratio-based percentage valuation method is not an appraisal of the fair market value of the conservation easement on termination (unless it is so by coincidence). Instead, the  $x/y$  ratio-based percentage valuation is merely the apportionment of the full fair market value of the property on termination based upon the ratio of the value of the conservation easement and the value of the property without the conservation easement, *which was established at the time of the creation of the conservation easement*. This is because of the Treasury Regulation requirement that the original  $x/y$  ratio remain constant during the term of the easement. Therefore, it ignores the separate appreciation in the value of the development rights that can be expected during the term of the conservation easement.

## 3. Hybrid Valuation on Termination

One way to comply with the Treasury Regulations and assure that the conservation easement holder receives the full, appreciated value of the easement upon termination is to use a hybrid version of the two valuation methods described above.<sup>42</sup> Using the hybrid method, the holder of the easement would be entitled upon termination to the *greater of*: (i) the value of the conservation easement at the time of the termination determined under the after and before method and (ii) the before and after,  $x/y$  ratio-based percentage of the proceeds upon the sale or exchange of the newly unencumbered land. The author recommends that a provision mandating this hybrid method of valuing the holder's interest upon termination be henceforth included in all conservation easements. This includes both traditional perpetual (park)

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<sup>42</sup> See *Rethinking*, *supra* note 9, at 482-84; HANDBOOK 2ND EDITION, *supra* note 16, at 462-65.

easements and non-perpetual (ark) easements.<sup>43</sup>

### B. *Cashing-Out: Timing is Everything*

Most conservation easements provide that the holder of a terminated conservation easement is entitled to a share of the proceeds from a sale, exchange or involuntary conversion of the underlying property. These easements, however, typically do not address the issue of timing. That is, what happens if the landowner continues to own the property and there is no cash that can be distributed to pay the easement holder the value attributable to the easement? Unless the landowner is for some reason compelled to sell, the landowner could choose to do nothing with the property. There currently is no mechanism for compelling the landowner to enter into a transaction that would generate proceeds that could be paid to the easement holder. As a result, it is necessary for the easement holder to draft into the original conservation easement legal mechanisms for preserving the holder's rights long after the easement has terminated.<sup>44</sup> A representative sample of such mechanisms is discussed below.

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<sup>43</sup> The above discussion of different versions of valuation on termination provisions notwithstanding, there are some conservation easement attorneys who would argue that to include *any* provision for valuation on termination is tantamount to an admission that the easement is not intended to be perpetual. Indeed, even some of the nation's largest land trusts continue to struggle with this issue: "With regard to the provisions of valuation on termination, there is an ongoing discussion throughout the legal department of the [land trust] whether we should have such provisions. [S]ome people think it critical for enforcement[;] others think that if you provide a mechanism for termination then the easement, by its terms, is not 'forever.'" E-mail from legal counsel for major national land trust (May 17, 2006) (attribution withheld) (on file with author). Note, however, that because the IRS effectively requires that the "extinguishment and division of proceeds" language from the Treasury Regulations be included in tax-deductible conservation easements, this particular discussion of valuation on termination provisions is limited to non-deductible (e.g., purchased) conservation easements. A related concern regarding the development of more effective mechanisms for the conservation easement holder to capture the full, appreciated value of a conservation easement on termination has been expressed by Jeff Pidot, Chief of the Natural Resources Division of the Maine Attorney General's Office: "A downside to the preferred formula for distribution of the proceeds [as advocated in this article] is that it may make the easement holder actually *want* to liquidate the easement in order to get a much enlarged share of the proceeds." E-mail from Jeff Pidot, Chief of the Natural Resources Division, Maine Attorney General's Office (May 21, 2006) (on file with author). The point expressed above is not an argument against the formula for distribution proposed by this article, but rather an argument for applying the appropriate standard when considering the termination of an easement and for providing appropriate supervision of easement holders, whether by accreditation (e.g., the voluntary accreditation program being undertaken by the Land Trust Alliance), by state attorneys general or by court oversight.

<sup>44</sup> As Professor McLaughlin has pointed out, the public interest in terminating an easement might be sufficient in some cases to compel a court to force a sale of the land through eminent domain. See *Rethinking*, *supra* note 9, at 499. See also *id.* at 499 n.259, in which partition is discussed as another potential means of forcing the landowner to partition the land or pay the holder for the appreciated value of the development rights.

### 1. Perpetual Liens

Several drafting mechanisms exist for preserving the easement holder's right to the appreciated value of development rights in a terminated conservation easement. The most important of these mechanisms is language converting the appreciated value into a debt instrument in favor of the holder. The terminated easement would further secure the debt instrument by a perpetual lien on the property in favor of the easement holder and the holder's successors. The language should expressly state that such rights survive the termination of the conservation easement. Further, it should state that the landowner shall cooperate in any way necessary to execute the debt instrument and to file and perfect the lien. Such a lien would show up in any preliminary title report. Any potential purchaser would likely require that the debt underlying the lien be satisfied and that the lien itself be removed prior to any purchase. This would create a powerful incentive for the landowner to structure land transactions involving the formerly eased property in such a way as to pay off the debt and have the lien removed. Drafters could further bolster this method by adding language requiring that any subsequent debt instruments in which the property is used as collateral be subordinated to the holder's interest.

### 2. Continuing Court Jurisdiction

As a somewhat more novel approach to preservation of the holder's economic interest, drafters could include a continuing court jurisdiction provision. This is a provision in which the landowner and the holder agree to request that any court overseeing the termination of a conservation easement maintain jurisdiction over the case even after the conservation easement has been adjudicated as terminated. If this were done, the holder would have ongoing recourse to the court to adjudicate issues relating to the landowner's payment of the full dollar amount owed to the holder.

## *C. Cashing-Out: Costs and Market Differentials*

### 1. Installment Sale Model

Although unlikely with ark model conservation easements, it is possible that the termination process for park model conservation easements may result in transaction costs that, to use developer lingo, do not "pencil" (i.e., result in an acceptable profit margin or risk/benefit ratio). For example, assume that a developer has paid \$100,000 for a property encumbered by a conservation easement valued at \$900,000 (which includes appreciation of the development rights). In such a situation, the developer is faced with raising capital for the development project and with cashing-out the conservation easement holder for

\$900,000, a substantial sum of money. For a developer operating on a marginal capital basis, simultaneously funding the development project and cashing-out the holder may be impossible. As one possible solution, the developer could structure the project as if the easement holder contributed \$900,000 of capital to the project. This would entitle the easement holder to recoup that investment plus interest over time as the lots are sold. The holder would receive its \$900,000, plus interest, as the lots are sold, with the developer receiving none of that amount. Any residual appreciation in the value of lots would go to the developer, as the easement holder's investment would be fixed at \$900,000 (again, an amount including the lion's share of the appreciation of the development rights) plus a market rate of interest.

## 2. Unfavorable Price Differentials

At times, price differentials between real estate markets force holders of terminated easements out of the market for new easements of commensurate conservation value. This may require creative solutions similar to the easement-as-capital idea just discussed. For example, this article thus far has taken an approach of cautious optimism regarding the appreciation of eased land and, more importantly, of the development rights controlled by the holder. Of course, this may not always be the case. There may be situations, although unlikely, where land values have plateaued or even decreased during the term of the easement. In such cases, even paying the easement holder the full, appreciated value of the conservation easement may not solve the problem. Price differentials between real estate markets may make new conservation easements unaffordable. This renders it impossible to re-deploy the terminated conservation easement.

For example, one of the "side-effects" of global warming will be the intensification of major weather events. This will make catastrophes such as Hurricane Katrina, which devastated America's Gulf Coast region in August of 2005, increasingly common. A catastrophic weather event such as Hurricane Katrina can easily render the purposes of a conservation easement impossible or impractical and thus necessitate the termination of the conservation easement. Concurrently, the dislocation of the residents from the affected area, and other weather based market forces, may drive up real estate prices in the surrounding areas. This could result in price differentials between the hurricane devastated areas and the still pristine areas outside of the hurricane's swath. These differentials may make it impossible to re-deploy conservation easements to areas still possessing protection-worthy conservation values.

## 3. Transfer Fees

Any number of worst case scenarios exist in which the holder is financially

precluded from re-deploying terminated easements. One possible solution is to provide in the conservation easement a mechanism whereby the holder recovers not only the appreciated value of the development rights from the developer/landowner but also additional funding from the purchasers of the now unencumbered land. One such mechanism is the imposition of "transfer fees." These fees would be imposed on consumers of the formerly eased property after the property has been developed into multiple residential units. For example, a conservation easement could provide in the valuation upon termination provision language creating a transfer fee program. This language should also make the former easement holder the beneficiary of the transfer fees thus generated.

Transfer fees function much like a property tax. Typically, transfer fees represent a small percentage of the purchase price of a unit of development. For example, a transfer fee for a luxury condominium might be a quarter of a percent (.25%). Rather than being paid for by the conservation easement grantor or by a subsequent landowner/developer, such fees would be passed on to the consumer.<sup>45</sup> While transfer fees might not generate substantial sums of money immediately, if they are imposed in perpetuity, their income generating power can become substantial. This arrangement might allow the cash strapped conservation easement holder the extra funding needed to overcome price differential obstacles to re-deployment of conservation easements in locations outside the region of the terminated easement.

One obvious drawback to this funding mechanism is that the reimbursement now accumulates over time from the succession of purchasers of the developed property rather than from the landowner. However, local, state or federal governments, or even the private sector, could perhaps promote this funding mechanism by bonding or securitizing the income generating interests created

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<sup>45</sup> As one would expect, the imposition of transfer fees is not welcomed by everyone. First and foremost, property owners are likely to object to the additional cost of a land purchase created by transfer fees. On the other hand, by virtue of the nature of land trust land protection criteria (e.g., the protection of "scenic viewsheds"), there is always an above average probability that in any given instance of a terminated conservation easement the formerly protected lands in question will possess the type of natural, scenic, recreational and other similar qualities that make such lands marketable as luxury homesites. Such high-end "product" could be expected to attract wealthy land buyers more than able to pay the transfer fee. Perhaps a greater threat to the use of transfer fees to recover the full value of a terminated conservation easement comes from governmental opposition to various entities imposing a *de facto* property tax on purchasers of residential real estate. For example, California has enacted legislation, codified as California Civil Code § 1368, which provides that "neither an association nor a *community service organization* or similar entity may impose or collect any assessment, penalty, or fee in connection with the transfer of title or any interest except for [certain exceptions irrelevant here]." West's Ann. Cal. Civ. Code § 1368(c)(1) (emphasis added). Fortunately, this statute can fairly be read not to apply to land trusts because they would unlikely be characterized by courts as community service organizations. California statutory law notwithstanding, practitioners in other states should beware of similar statutes with potentially broader reach.

by transfer fees, thus providing an immediate cash-out for former holders of terminated conservation easements. This would allow funding for fungible and mobile conservation easements which will become a necessity as climate change or other catastrophic global events begin to destroy or force the migration of ecosystems that in a different world might have received permanent protection from a single, perpetual conservation easement.

While transfer fees might provide “bridge” funding for the re-deployment of conservation easements terminated as a result of catastrophic global warming caused events, the use of transfer fees does not come without risk. This economic “equalizer” could easily result in a “double-dip” for the landowner if any of the funds generated by the transfer fees are allowed to inure to the benefit of the landowner. In other words, if the landowner uses the transfer fees to recover a payment in addition to the fair market value of the property, either pre-termination or post-termination, the landowner will have improperly reached into the pockets of either the purchasers of the property or of the public. This could create perverse incentives for landowners to terminate conservation easements in order to plunder the extra profits potentially created by the imposition of transfer fees. Such a result must be diligently watched for and absolutely prevented.

## VI. A LOOK AT THE FUTURE: CAPTURING APPRECIATED VALUE THROUGH CARBON CREDITS

The underlying assumption of this article is that human-caused mega-trends are causing or will cause massive global changes that will force every creature on this earth to “adapt, migrate or die.” A further assumption is that the most dangerous, cataclysmic and advanced of these mega-trends is global warming. One need not look far for conclusive evidence of this statement. The verdict is in. The sheer volume of scientific reports, analyses, disquisitions, exposés and warnings addressing global warming and its causes is enormous and sustained.<sup>46</sup>

Nor must one look far to find the underlying source of global warming. While the totality of causes of global warming are complex, interactive and involve intricate feedback loops, it is possible to identify one primary source—human caused disruption of the carbon cycle resulting in the release of carbon dioxide into the atmosphere where it traps heat from the sun, creating a greenhouse effect.<sup>47</sup> Granted, there are many other human induced greenhouse

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<sup>46</sup> For those who seek a good starting point on the current literature of global warming, see *supra* note 3.

<sup>47</sup> For a high-level but easily accessible explanation of the relationship between human disruption of the carbon cycle and global warming and political and legal responses to this planetary crisis see, e.g., Ari Bessendorf, *Games in the Hothouse: Theoretical Dimensions in Climate Change*, 28 SUFFOLK TRANSNAT'L L. REV. 325 (2005). See also Kenneth Berlin, *Arresting Climate Change*, SL098 ALI-ABA 79, 81 (2006) (“The World Resources Institute (“WRI”) recently wrote that ‘2005

gases. However, carbon dioxide is so prominent in global warming that the effects of other greenhouse gases are measured in terms of their equivalencies to the effects of carbon dioxide. As the comic strip character Pogo famously said on Earth Day in 1970, "we have met the enemy and he is us."<sup>48</sup>

Pogo's observation notwithstanding, one of the most exciting innovations in the battle to combat global warming has been the development of "carbon markets."<sup>49</sup> Such market-based programs allow carbon emitting industries to purchase "carbon credits" that permit them to continue to operate legally. Such carbon credits can be purchased from industries that have reduced their carbon emissions or even from holders of natural "carbon sinks," most notably forests. In a nutshell, the government has created a carbon market by placing regulatory caps on carbon emissions and then "dealing" out a specific and limited number of carbon credits to the "players." The players may then trade these credits among themselves. Such markets are typically referred to as "Cap and Trade Systems."<sup>50</sup> Because the sale of carbon credits can result in substantial profits, carbon markets can create powerful economic incentives for reducing carbon emissions or for "sequestering" previously emitted carbon. Although it is beyond the scope of this article to explain this phenomenon in technical terms, generally speaking, carbon sequestration can occur when plants take on carbon dioxide and store the carbon in their cells. Thus, forests, such as the rainforests of South America, or the remaining vast tracts of forested land in the west coast states of California, Oregon and Washington, are major carbon "sinks." If such forests are preserved by conservation easements imposing management practices that facilitate the carbon sequestration process, they can be certified to create tradable carbon credits.

As one might intuit, before carbon credits are awarded to a particular carbon sink, for example a forest under a conservation easement that protects the forest's carbon sequestration properties, certain protocols and standards must be met. Currently, California is one of the leading players in this field by virtue of

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was a year in which scientific discoveries and new research on climate change confirmed the fears of the science community. The findings reported in peer-reviewed journals last year point to an unavoidable conclusion: the physical consequences of climate change are no longer theoretical; they are real, they are here and they can be quantified.").

<sup>48</sup> Walt Kelly, *We have met the enemy . . . and he is us*, Igo Pogo, at [http://www.igopogo.com/we\\_have\\_met.htm](http://www.igopogo.com/we_have_met.htm), (last visited June 26, 2006). This is a website dedicated to preserving and celebrating the cartoonist Walt Kelly's legacy of the political and satirical "Pogo" cartoon series.

<sup>49</sup> One major carbon market is the Chicago Climate Exchange, which describes itself as "the world's first and North America's only voluntary, legally binding rules-based greenhouse gas emission reduction and trading system." Chicago Climate Exchange, <http://www.chicagoclimatex.com/>, (last visited June 26, 2006); The Pacific Forest Trust, *Forest Carbon Credits: New Funds for Conservation, Protect Forests and Offset Carbon Dioxide Emissions Verifiably and Cost-Effectively . . . While Achieving Multiple Environmental Benefits*, at <http://www.pacificforest.org/services/forever.html> (last visited June 26, 2006).

<sup>50</sup> See *Arresting Climate Change*, *supra* note 47, at 87.

having developed protocols by which carbon credits can be calculated.<sup>51</sup> Should protocols such as those being developed in California be adopted by major national and international carbon trading markets, holders of conservation easements of qualifying forest lands should be able to tap into these markets to achieve additional sources of funding for conservation easement acquisition and stewardship.<sup>52</sup>

While the scientific aspects of global warming and the intricacies of newly emergent national and international markets based on trading carbon credits to combat the disastrous consequences of global warming are beyond the scope of this brief article, the message these facts convey to the conservation easement drafter is clear. Just as the value of development rights held in abeyance by conservation easements can be expected to appreciate greatly over time, so too can the value of any available carbon credits be expected to appreciate as well. Accordingly, it is incumbent on the cutting-edge forest land conservation easement drafter to negotiate for provisions which would allow the holder to market carbon credits generated during the term of the conservation easement or to recover their full, appreciated value on termination.

This process may not be easy or even feasible in the early stages of the development of carbon markets. First, it will likely be both difficult and expensive to retain the services of a "certified" expert in calculating the number of carbon credits created by the conservation easement. Also, it is possible that the value of the credits will dissipate upon termination of a forest management conservation easement which created certifiable carbon credits. A simple example illustrates this point. Imagine that the owner of a heavily forested tract of land executes a conservation easement that provides for the management of the forest in a manner that makes the creation of carbon credits possible. The easement holder could presumably market these credits and if the conservation easement is drafted properly the profits should go to the easement holder. Now imagine that the easement is terminated and the landowner clear-cuts the property. The carbon credits are now gone, as well as any chance to secure their appreciated value. As a society, we must figure out how to capture the appreciated but now vanished value of the carbon credits. Until then, the holder may only recover for two things. It may recover the appreciated value of the timber (a subject to be addressed in future articles), and it may recover the appreciated value of the development rights, should the now clear-cut forest be developed.

The crisis of global warming is now upon us, and its apocalyptic

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<sup>51</sup> The California Climate Action Registry, Forest Protocols, at <http://www.climateregistry.org/PROTOCOLS/FP/> (last visited June 26, 2006).

<sup>52</sup> Cf. KICKING THE CARBON HABIT, *supra* note 3, at 202-08 (providing a general comparison of the advantages and disadvantages of carbon "cap and trade" systems with broader reaching carbon tax systems).

consequences are imminent. However, it may be some time before all the pieces are in place to maintain fully functioning national and international carbon markets which are available to all potential players. Even then, arranging for the recovery of the value of appreciated carbon credits will require innovation and creativity on the part of the conservation easement holder. Nevertheless, now is the time to begin drafting provisions in conservation easements which will insure that the conservation easement holder has the full rights to any potential carbon credits during the term of the conservation easement and to their appreciated value upon termination.

## VII. CONCLUSION

As a result of humanity's past and continuing actions, we are entering an epoch in which virtually all of our planet's great cycles will exist in a state of flux at a magnitude unknown to previous generations. Our glaciers are melting, our increasingly acidic oceans are warming and rising, the carbon cycle is being disrupted, major weather events are becoming catastrophic and more unpredictable, and we are in the midst of one of the greatest mass extinctions in our planetary history. Obviously, these global changes will affect the lands we should try to preserve through conservation easements.<sup>53</sup> One such effect will be the migrations of individual species or entire ecosystems. This article suggests that we address these migratory changes by developing "mobile" or "ark" model conservation easements. However, for these mobile conservation easements to work effectively, it will be necessary to recover every penny of appreciated value of failed conservation easements that must be terminated. This article suggests valuation methods that will accomplish this goal. It also presents legal mechanisms to ensure that funds realized from released development rights ultimately reach the former easement holders. This will ensure that these funds benefit the public who subsidized the terminated conservation easements in the first place. In this author's opinion, it is only through these measures that the land trust community will be able to adjust and to adapt to the changes to come.

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<sup>53</sup> See *supra* notes 1-7.