

Law Update

Restatement of the Law: Conservation Easements and the Doctrine of Changed Circumstances

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An influential publication by the American Law Institute, *Restatement of the Law Third—Property (Servitudes)*—published in 2000, recognizes that permanent conservation easements can only be terminated in very unusual circumstances and makes other important distinctions between conservation easements and other servitudes.

The American Law Institute's series of *Restatements of the Law* presents discussions on various topics treated under common law (based on traditional legal principals and precedents), as well as laws enacted by the U.S. Congress and state legislatures. The American Law Institute is an organization of judges and attorneys formed in 1923 for "the clarification and simplification of the law and its better adaptation to social needs." Its publications are often relied on by judges, particularly when they are called upon to make decisions in areas where court case precedent is lacking—such as conservation easements.

The *Restatement of the Law Third, Property (Servitudes)* discusses in detail the law of what it terms conservation and preservation servitudes—conservation and facade easements. A servitude is a generic term that describes legal devices private parties use to create rights and obligations that "run with the land," passing to successive owners or occupiers of the land or the

interest in the land. (Examples could include homeowners association covenants or rights-of-way for a driveway on a neighboring property.)

This is the first in a two-part series examining the *Restatement's* treatment of conservation and preservation easements. This article will address conservation and preservation easements and the doctrine of changed circumstances and termination. The second article will describe the *Restatement's* findings with regard to enforcement and defense of conservation and preservation easements.

The Doctrine of Changed Circumstances

Although servitudes usually last for a fixed period of time—so long as the necessity giving rise to it lasts, or as long as the life of the person holding the benefit or burden, for example—the drafters of the *Restatement* recognize that conservation and preservation easements must be perpetual in order to meet the qualifications and receive tax and other benefits provided by the statutes authorizing the creation of servitudes for historic preservation, agricultural preservation, open space or other conservation purposes. While the drafters of the *Restatement* recognize the perpetual element of conservation and preservation servitudes, they also rec-

ognize the applicability of the doctrine of changed circumstances and the possibility of termination.

The *Restatement* provides that a conservation servitude held by a governmental body or conservation organization may not be modified or terminated because of changes that have taken place since its creation [Section 7.11]. Only in circumstances where the particular purpose for which a servitude is created becomes impracticable may the servitude be modified to permit its use for other purposes (unless otherwise provided by the document that created the servitude), or, if the servitude can no longer be used to accomplish any conservation purpose, it may be terminated. The common law rule of *cy pres* provides that the intention of the parties should be carried out as closely as possible, even if the legal document cannot be followed to the letter, due to changed conditions.

The drafters make clear that changes in the value of the eased estate, as a result, for example, of surrounding development, are not changed conditions that permit modification or termination of a conservation servitude [Section 7.11].

The *Restatement* notes that conservation servitudes are afforded more stringent protection than other servitudes because there is strong public

interest in conservation and preservation. In addition to the statutory requirements that they be perpetual, “conservation and preservation servitudes will continue to increase in importance as population growth exerts ever greater pressure on undeveloped land, ecosystems, and wildlife,” the *Restatement* notes.

However, the drafters recognize it is inevitable that, over time, changes will make it impracticable or impossible for some conservation servitudes to accomplish their purpose. In this instance, the *Restatement* advises that if no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the power to terminate the servitude so that some other productive use may be made of the land. However, the drafters also emphasize that, pursuant to the *cy pres* doctrine, if the particular purpose for which the servitude was created can no longer be accomplished but the servitude is adaptable for other conservation or preservation purposes, the servitude should be continued for those other purposes, unless the document that created the servitude provides otherwise.

Termination of Servitudes

The *Restatement* specifies that con-

servation easements are much more difficult to terminate than other types of servitudes. Likewise, the termination of a conservation servitude is likely to incur a higher penalty than the termination of other types of servitudes. When changed conditions lead to termination of servitudes, particularly in residential subdivisions, there is seldom an entitlement to damages. However, with conservation easements, the opposite is true.

There are two reasons for this difference. The first is a difference in the likely expectations of the parties to the servitudes. Servitudes are terminated when it would be unfair to continue to enforce them. People who buy properties subject to homeowners' covenants in residential developments generally do not foresee the changes that could ultimately result in termination of a servitude. By contrast, conservation servitudes usually are made on the premise that there will be a change in circumstances, and that legally enforceable measures are necessary to prevent undesired changes on the eased land, even as surrounding properties continue to change in use. Second, the drafters again point to the strong public interest in the continued existence of property devoted to conservation purposes and the need to protect the public investment made in such properties.

Because widespread use of conservation servitudes dates only from the 1970s, no reported appellate opinions have modified or terminated a conservation or preservation servitude due to changed conditions, the *Restatement* notes. However, the drafters support their positions with the growing body of literature on the subject as well as with the many state statutes in place.

As the *Restatement* makes clear, the basis for exemption of conservation and preservation servitudes from traditional rules of servitudes lies in their importance to society. The drafters' recognition and treatment of conservation and preservation easements helps to strengthen their legal standing. 

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For More Information

For more information on the American Law Institute or the *Restatement of the Law—Property (Servitudes)*, see the organization's Web site: www.ali.org. (The two-volume *Restatement* is for sale on the site for \$195.)

Defining “Conservation Servitudes”

Conservation easements are given special treatment in the *Restatement of the Law—Property (Servitudes)*. The drafters went to great lengths to define and distinguish “conservation servitudes” and “conservation organizations” [Section 1.6]:

A “conservation servitude” is a servitude created for conservation or preservation purposes. Conservation purposes include retaining or protecting the natural scenic or open space value of land, assuring the availability of land for agricultural, forest, recreational, or open space use, protecting natural resources including plant and wildlife habitat and ecosystems, and maintaining or enhancing air or water quality or supply. Preservation purposes include preserving the historical, architectural, archeological, or cultural aspects of the real property. A “conservation organization” is a charitable corporation, charitable association, or charitable trust whose purposes or powers include conservation or preservation purposes.