



Viewpoint

Cultural heritage conservation easements: Heritage protection with property law tools



Jessica Owley*

SUNY Buffalo Law School, 722 O'Brian Hall, Buffalo, NY 14260, United States

ARTICLE INFO

Article history:

Received 10 August 2014

Received in revised form 25 April 2015

Accepted 6 July 2015

Keywords:

Conservation easements

Cultural heritage

Land trusts

Privatization

ABSTRACT

Conservation easements are quickly becoming a favored tool for protection of cultural heritage. Perpetual encumbrances on the use of private land, most cultural heritage conservation easements are held by private conservation organizations known as land trusts. With minimal public oversight, land trusts decide which lands to protect in perpetuity and what the rules regarding use of those lands should be. A variety of concerns arise when protection of cultural heritage resides with private organizations. First, as governments abdicate cultural heritage protection to private organizations, the public's role in site protection shifts. When private organizations and landowners negotiate which properties to protect and how to protect them, some culturally important sites go unprotected. Privatizing protection of cultural sites may reduce the ability of some members of the public to become involved in the decision of what to protect as well as hamper public oversight and enforcement of land-use restrictions. It may even reduce overall protection as public entities remove themselves from the cultural heritage protection game, ceding the territory to land trusts. Second, private perpetual restrictions problematize the balance between intergenerational rights and present responsibilities. Reverence of past cultural events and properties may hamper future growth as users of conservation easements restrict properties in perpetuity without enabling communities to revisit or modify the restrictions. Third, conservation easements may be protecting sites that were not in danger of development. In such cases, conservation easements subsidize landowners with questionable public benefits. Finally, using conservation easements to protect sacred sites commoditizes cultural heritage. Paying people to protect cultural heritage could degrade cultural heritage or civic responsibility.

© 2015 Elsevier Ltd. All rights reserved.

1. Introduction

The use of property law tools to protect important sites is not new (Fairfax et al., 2005). However, the use of conservation easements (CEs) to protect cultural property has played second fiddle to the use of CEs to protect environmentally important properties until recently.¹ CEs are quickly becoming one of the most popular mechanisms to protect important properties (Cheever and Owley, 2015). CEs are nonpossessory rights in land that seek to yield conservation benefits. The most common conservation easements (and

those chiefly used for heritage protection) are perpetual but most states allow nonperpetual CEs (McLaughlin, 2005). While most CEs preserve land for ecological goals, the use of the tool to protect historic, cultural, and archeological sites is growing. Most state laws identify such uses as valid, and the federal government provides tax incentives to promote the use of CEs as a protector of cultural heritage (Katz, 1986). While national and subnational governments hold many CEs, most cultural heritage CEs are held by private conservation organizations known as land trusts (Chang, 2011). With minimal public oversight, these land trusts (working in the context of state and federal law governing charitable organizations) wield great power in deciding which lands to protect in perpetuity and what the rules regarding use of those lands should be.

A variety of concerns arise when protection of cultural heritage resides with private organizations. First, when private organizations and landowners negotiate which properties to protect and how to protect them, important sites may receive little acknowledgement or support. Privatizing protection of cultural sites may reduce the ability of the public to become involved in the decision of

* Fax: +17166452064.

E-mail addresses: JOL@buffalo.edu, jessica.owley@gmail.com

¹ The earliest conservation easements protected public parks and other environmental amenities. The Fens in Boston is a great example (Morris, 2008). Early private land conservation also protected cultural sites, including battlefields and historical homes like Mount Vernon (Fairfax et al., 2005). Generally, however, such sites were protected with fee simple ownership, not with conservation easements or other nonpossessory property rights.

what to protect as well as hamper public oversight and enforcement of land-use restrictions (Owley, 2012b). Second, private perpetual restrictions problematize the balance between intergenerational rights and present responsibilities (Thompson, 2004). Reverence of past cultural events and properties may hamper future growth as users of CEs restrict properties in perpetuity without enabling communities to revisit or modify the restrictions. Third, CEs may be protecting sites that were not in danger of exploitation. In such cases, CEs subsidize wealthy landowners with little public benefit. The result is overuse of the tool and a strain on the public fisc.

Finally, using CEs to protect sacred sites commoditizes cultural heritage. The appropriateness of putting a dollar value on, for example, the ability of tribes to exercise their religion or carry out cultural ceremonies is questionable (Sandel, 2012). Do landowners deserve payment for *not* destroying the ruins of revolutionary war era buildings or civil war cemeteries? Paying people to protect cultural heritage could degrade cultural heritage or civic responsibility even if it is the only way to achieve some groups' conservation goals (Dorfman and Harel, 2013).

2. Conservation easement basics

Conservation easements are nonpossessory property interests, meaning the CE holder has a property right in a piece of land but is not the landowner or occupier. Conceptually, a CE is akin to a contract where the holder enters into an agreement with a landowner whereby the landowner agrees to refrain from engaging in an otherwise permissible activity. In exchange for this restriction, the landowner may receive benefits such as a permit to develop, a cash payment, or tax deduction. CEs differ from contracts because the restriction is tied to the land, not the landowner. When the landowner sells her property, the new landowner will be bound by the agreement. CEs are usually, but not necessarily, perpetual (McLaughlin, 2007). State law defines who can hold a CE, but usually they can be held by either government entities or land trusts. In some states this explicitly includes Native American tribes, and in other states it implicitly includes them.

By state law, the restriction embodied in a CE must have conservation as its purpose or intended outcome. To qualify for federal tax benefits, conservation easements must be donated in perpetuity to a qualifying organization for a conservation purpose (I.R.C. § 170(h)). Conservation purposes under federal law cover a broad array of goals including preservation of areas for education, recreation, natural habitat, open space, scenic values, and historically important areas (I.R.C. § 170(h)(4)(A)). State CE laws take a broad view of what constitutes "conservation." Most scholarship on CEs has focused on restrictions that seek to protect open space, scenic, and ecological values (e.g., Cheever, 1996; Merenlender et al., 2004). As the broad list of permissible purposes demonstrates, CEs can serve other purposes including protection of working landscapes like forests and farms (Rissman and Sayre, 2011). This Viewpoint examines CEs used to protect cultural heritage. These generally take three forms: historic preservation, archeological, and cultural.

2.1. Historic preservation conservation easements

Historic preservation CEs seek to maintain historic interiors, façades, or other architectural features. Most CE enabling statutes recognize protection of historic buildings and architectural features as acceptable purposes. For example, the Uniform Conservation Easement Act identifies "preserving the historical, architectural, archaeological, or cultural aspects of real property" as an acceptable purpose (National Conference of Commissioners on Uniform State Law (NCCUSL), 1981, UCEA 1981;§1(1)).

The IRS allows tax deductions when landowners donate historic preservation CEs to a qualifying land trust. Acceptable purposes for deductible CEs include "the preservation of a historically important land area or certified historic structure" (I.R.C. §170(h)(4)(A)(iv)). The code further details special rules for which historic buildings and structures qualify (include buildings, structures, "or land areas" listed in the National Register as well as buildings in historic districts (I.R.C. §170(h)(4)(B) & (C)). In exchange for agreeing to maintain their buildings' historic façades, landowners can claim a tax deduction for the value of the CE as a charitable contribution. The value of the contribution is determined by subtracting the fair market value of the property with the CE from the fair market value of the property without the CE. In many jurisdictions, if the CE reduces the property value, property taxes will also be reduced.

2.2. Archeological conservation easements

Many states allow CEs for protection of archaeological sites. States that have adopted the UCEA explicitly allow archeological CEs. In other states, it is less clear. For example, California permits CEs that have the purpose of retaining "land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition" (Cal. Civil Code §815). Archeological CEs may fall under natural or historical but it depends on the property. New York's law is more generous, explicitly recognizing the purposes of "of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property..." (N.Y. Env. Conserv. §49-0303). New Mexico is the only state whose CE statute specifically addresses archeological and cultural CEs. The New Mexico Cultural Properties Preservation Easement Act protects "structure[s], place[s], site[s] or object[s] having historical, archaeological, scientific, architectural or other cultural significance deemed potentially eligible for inclusion in the national register of historic places" (N.Mex Stat. Ann. § 47-12A-2). Note, the law does not indicate who determines whether sites are "potentially eligible for inclusion in the national register." The eligibility criteria for listing in the national register are readily available (National Park Service, 2015), but the statute does not indicate who will review the criteria and determine whether the site fits the bill. Many states have additional statutes regarding historic preservation easements alongside their general conservation easement enabling act. These preservation easements follow the same contours as other CEs but are more likely to explicitly recognize sites listed on the historic register. Maine for example has a separate statutory section for "Archeological Site Easements" (Maine Revised Statutes Annotated (MRSA), 2015, 33 MRSA §§1551-1555).

Even where archeological CEs are permissible under state law, landowners may not be able to claim charitable tax deductions for donations of them. IRS regulations clarify that tax deductions are available for CEs that preserve a "historically important land area." Yet, only one case has considered what constitutes a "historically important land area." In *Turner v. Commissioner of Internal Revenue*, the Tax Court examined the legislative history of the tax code in attempt to ascertain the meaning of the phrase. The Senate Report quoted by the tax court explained:

The term "historically important land area" is intended to include independently significant land areas (for example, a civil war battlefield) and historic sites and related land areas, the physical or environmental features of which contribute to the historic or cultural importance and continuing integrity of certified historic structures such as Mount Vernon, or historic districts, such as Waterford, Virginia, or Harper's Ferry, West Virginia [*Turner v. C.I.R.* (citing S. Rept. 96-1007 at 12)].

Download English Version:

<https://daneshyari.com/en/article/6547749>

Download Persian Version:

<https://daneshyari.com/article/6547749>

[Daneshyari.com](https://daneshyari.com)