

Defending Against Condemnation of Conservation Easements

Land Trust Alliance Rally 2007

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I. The Issue: What is the “Value” of Land Under Conservation Easement

- A. Land under CE is subject to, even targeted for, condemnation for various types of development
1. Undeveloped or largely undeveloped land presents **fewer engineering challenges** for the condemnor’s project. Also, condemning a single large tract under CE involves **fewer condemnation transactions** than condemning several successive parcels along an alternative alignment.
 2. Lands under CE may be the **least expensive** to condemn, because condemnors argue that a CE permanently **“extinguishes”** a property’s development rights, with the result that the property’s value for purposes of a condemnation award is a fraction of the value of that same property without the CE. (This argument is examined and rebutted in section III.B, below.) Unfortunate examples of courts adopting this line of argument in the context of undeveloped land or open space (not CE’s):
 - (a) *Albahary v. Bristol*, 853 A.2d 577 (Conn. App. 2004) (when a property’s “highest and best use” is considered to be restricted, undevelopable open space, the value awarded is substantially reduced)
 - (b) *Dep’t of Conservation v. Dornier*, 548 N.E.2d 749, 754 (Ill. App. 1989) (same)

Note: Our vocabulary is important. Common use of “extinguishing” development rights feeds into the condemnor’s argument that those rights cannot be used in valuing CE-encumbered property.
 3. **Public outcry and political backlash** over condemnation of undeveloped land is often **less vehement** than when residential neighborhoods or commercial businesses are condemned.
- B. Unless CE’s are disregarded by courts in eminent domain valuation, a number of unintended consequences follow
1. An **incentive to condemn land under CE is created**, making it the most likely

site for locating utilities or other public projects and facilities

2. The **public's investment** in directly funding the creation of CE's (e.g., by tax-supported programs for acquisition of lands under CE) or in indirectly subsidizing the donation of CE's (e.g., by a tax system that permits tax deductions or tax credits) **is lost**
3. The **condemnee is likely not made whole**, with the result that the condemned property interest cannot be replaced by a like acquisition, and the protected resource values are lost.
4. The constitutional mandate of "**just**" compensation is **subverted**

II. Approaches to Valuation of Conservation Easements

This is uncharted territory, in the sense that we have found no reported cases directly on point. The forthcoming article by Nancy McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation* (U.C. Davis Law Review, Spring 2008), will help to fill the gap.

- A. **"Before/After."** The value of a CE is equal to the difference in value between the fee underlying simple interest without any encumbrance and the fee interest with the encumbrance. See, e.g., *United States v. Welch*, 217 U.S. 333 (1910); *Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency of Bristol*, 321 A.2d 469, 473 (Conn. 1973)
 1. See also case law on condemnation of property held in trust subject to conservation restrictions set by donor: *Winchester v. Cox*, 26 A. 2d 592 (Conn. 1942).
 2. See generally Carol A. Crocca, *Annotation, Measure of Damages or Compensation in Eminent Domain as Affected by Premises Being Restricted to Particular Educational, Religious, Charitable, or Noncommercial Use*, 29 A.L.R. 5th 36 (1995)
 3. Before/After is the way CE's are valued under Treasury Regulations for purposes of determining the value of the CE for tax deduction purposes. Value should not be less for condemnation purposes.
- B. **Replacement or Substitution.** A less accurate method of valuing restricted interests in land is the "replacement cost" method. Other than in locations such as Aspen, CO, Jackson, WY and the like, use of replacement cost may yield a lower value than use of the before/after method.

1. *State Road Comm'n v. Board of Park Comm'rs of City of Huntington*, 173 S.E.2d 919 (W. Va. 1970) (replacement or substitution value should prevail because “just compensation consists in paying the cost of providing equivalent substitutes or necessary replacements for the property taken,” to make the owner whole)
2. *But see 0.744 of an acre of land v. Delaware*, 251 A.2d 341 (Del. 1969) (rejecting request for damages to be set at an amount that would enable the city to establish a comparable park; setting damages at a lower, non-commercial “market” value)
3. See Crocca, *supra*, 29 A.L.R 5th 36 at [7].

III. Counterarguments by Condemnors

- A. “CE’s are not compensable property interests; they are non-compensable, akin to restrictive covenants.” This is the minority historic rule. It is refuted by, among others:
 1. *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (compensable property interests for condemnation purposes are “every sort of interest the citizen may possess”)
 2. *Hartford Nat’l Bank & Trust Co. v. Redevelopment Agency of Bristol*, 321 A.2d 469 (Conn. 1973)
 3. *Morley v. Jackson Redev. Auth.*, 632 So. 2d 1284 (Miss. 1994)
- B. “The court must treat the CE as if it subtracts from the fair market value of the fee simple being condemned, *i.e.*, the CE removes the development value and the fee simple is valued solely as restricted, nondevelopable property.”

This argument finds its origins in cases such as *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974), which, in the context of a condemnation of property encumbered by a commercial lease, suggests that in setting damages, the court should first account for the value that an encumbrance subtracts from fair market value as a whole: “The undivided basis rule ... does not ignore the value which an encumbrance may add to or subtract from the fair market value of the property as a whole.”

1. CE’s do not actually extinguish development rights. Those rights are dormant, or held in abeyance, until the CE is terminated by any means allowed under the authorizing statute or the constitution
2. *Montgomery Ward* case is distinguishable. An alternative reading (and arguably the correct reading) of *Ward* is that when land is in divided ownership, the land is valued as if it belonged to one person and there were no lease, although the fact that the land could be leased and rent could be obtained under a lease would be

relevant considerations in establishing FMV. The total award so determined is then apportioned among owners of the interests in land based on their respective values.

- C. "Conservation restrictions are like zoning that prohibits a change in use of property and thus restricts value of property. Where there is no reasonable probability of changing the zoning, a parcel of property being condemned is valued using the current zoning. There is no reasonable probability that a CE can or will be changed."
1. This argument conflates the issue of *how much* compensation should be paid (which is affected by zoning) with the issue of *whether* compensation should be paid (which is not determined by zoning). The valuation, using before/after method, will be affected by the zoning and land use restrictions on the property, but not zeroed out by it.
 2. CE's are not like zoning. Zoning is an external, governmental restriction. In the context of a pending condemnation threat, the California Court of Appeals ruled that the holder of a CE could, in effect, change or waive the encumbrance to settle the condemnation action. See, e.g., *Johnston v. Sonoma County Agric. Pres. & Open Space Dist.*, 123 Cal. Rptr. 2d 226 (Cal. Ct. App. 2002). Note, this decision also implied that the CE was compensable at market rates.
 3. The better view is that land is valued at market value without regard to encumbrances.

See *Fairfax County Park Auth. v. Virginia Dep't of Transp.*, 440 S.E.2d 610 (Va. 1994) (unless condemned land is so committed to use as a park that it was not economically feasible to put it to other uses, the market value is calculated without regard to use restrictions, i.e., its FMV in general, not its value to the current owner); *Bd. of County Comm'rs v. Thornmyer*, 159 N.E. 2d 612 (Ohio 1959)

IV. Litigation and Negotiation Considerations

- A. Finding an Appraiser
- B. Evidentiary issue: How does your land trust value CE's on its books? Some book the value at \$1 or zero; others (e.g., TNC) assign real market value
- C. Aversion to litigation; aversion to precedent. Don't blink first! Utilities, in particular, tend to be very averse to taking the risk of setting a precedent that will alert other landowners to a higher valuation. Use this to negotiate from a position of strength.
- D. Coordination between owner of fee interest and owner of CE

1. Split of condemnation proceeds is commonly set in the Deed of CE
 2. Having common interest and strategy regarding valuation in condemnation litigation or negotiations is essential
 3. Vast majority are settled by granting easement deeds to would-be condemnor for a negotiated amount
- E. Use of other forums in which to seek alternative siting for a condemnor's project

V. Legislative solutions

1. Prohibit condemnation of CE-encumbered land where a feasible alternative exists
2. Establish the "before/after" method of valuation
3. See CA, PA, and VA examples, attached

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Statutory Appendix

California: Ann.Cal.Pub.Res.Code § 10261

§ 10261. Property subject to easement; acquisition by eminent domain; compensation

(a) Whenever any entity exercises the power of eminent domain to acquire land subject to an agricultural conservation easement under this program, the condemnor shall pay just compensation to the owner of the land in fee and to the owner of the easement as follows:

(1) The owner of the land in fee shall be paid the full value that would have been payable to the owner but for the existence of the easement less the fair market value of the easement, as determined by an independent appraisal, at the time of condemnation.

(2) The program, and any other contributing parties if so provided in the easement, shall be paid the value of the easement at the time of condemnation.

(b) The director may provide, by regulation, or, pursuant to the terms of the easement, that in the case of acquisition of the easement by a federal agency, that the agency shall agree to the amount of compensation paid for the easement that is determined pursuant to subdivision (a), or pay the current fair market value of the land subject to an agricultural easement. The director shall distribute the proceeds of a land sale that is made in accordance with the conditions set forth in subdivision (a).

Pennsylvania: 3 P.S. § 914.1

§ 914.1. Purchase of agricultural conservation easements

(c)(5) Whenever any public entity, authority or political subdivision exercises the power of eminent domain and condemns land subject to an agricultural conservation easement, the condemnor shall provide just compensation to the owner of the land in fee and to the owner of the easement as follows:

(i) The owner of the land in fee shall be paid the full value which would have been payable to the owner but for the existence of an agricultural

conservation easement less the value of the agricultural conservation easement at the time of condemnation.

(ii) The owner of the easement shall be paid the value of the easement at the time of condemnation.

(iii) For easements owned jointly by the Commonwealth and an eligible county, if the eligible county commits its share of funds received under this paragraph toward the purchase of agricultural conservation easements, the condemnor shall provide the Commonwealth's share of funds to the eligible county for use in purchasing agricultural conservation easements in accordance with this act.

(iv) For easements owned by the Commonwealth, the condemnor shall provide the Commonwealth's share of funds received under this paragraph to the eligible county for use in purchasing agricultural conservation easements in accordance with this act.

(v) Funds received by an eligible county under this paragraph shall not be considered matching funds under subsection (h).

(vi) If an eligible county which receives funds under this paragraph fails to spend the Commonwealth's share of funds within two years of receipt of the funds, the eligible county shall pay the Commonwealth the Commonwealth's share of funds received under this paragraph plus 6% simple interest. These funds shall be deposited into the Agricultural Conservation Easement Purchase Fund.

Virginia: Va. Code Ann. § 10.1-1700 (2006)

**OPEN-SPACE LAND ACT
§ 10.1-1700. Definitions**

As used in this article, unless the context requires a different meaning:

"Open-space easement" means a nonpossessory interest of a public body in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural,

forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.

"Open-space land" means any land which is provided or preserved for (i) park or recreational purposes, (ii) conservation of land or other natural resources, (iii) historic or scenic purposes, (iv) assisting in the shaping of the character, direction, and timing of community development, or (v) wetlands as defined in § 28.2-1300.

"Public body" means any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority formed pursuant to Article 6 (§ 15.2-5152 et seq.) of Chapter 51 of Title 15.2, or the Virginia Recreational Facilities Authority.

§ 10.1-1701. Authority of public bodies to acquire or designate property for use as open-space land

To carry out the purposes of this chapter, any public body may (i) acquire by purchase, gift, devise, bequest, grant or otherwise title to or any interests or rights of not less than five years' duration in real property that will provide a means for the preservation or provision of open-space land and (ii) designate any real property in which it has an interest of not less than five years' duration to be retained and used for the preservation and provision of open-space land. Any such interest may also be perpetual.

The use of the real property for open-space land shall conform to the official comprehensive plan for the area in which the property is located. No property or interest therein shall be acquired by eminent domain by any public body for the purposes of this chapter; however, this provision shall not limit the power of eminent domain as it was possessed by any public body prior to the passage of this chapter.

§ 10.1-1704. Diversion of property from open-space land use; conveyance or lease of open-space land

A. No open-space land, the title to or interest or right in which has been acquired under this chapter and which has been designated as open-space land under the

authority of this chapter, shall be converted or diverted from open-space land use unless (i) the conversion or diversion is determined by the public body to be (a) essential to the orderly development and growth of the locality and (b) in accordance with the official comprehensive plan for the locality in effect at the time of conversion or diversion and (ii) there is substituted other real property which is (a) of at least equal fair market value, (b) of greater value as permanent open-space land than the land converted or diverted and (c) of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as is the land converted or diverted. The public body shall assure that the property substituted will be subject to the provisions of this chapter.

B. A public body may convey or lease any real property it has acquired and which has been designated for the purposes of this chapter. The conveyance or lease shall be subject to contractual arrangements that will preserve the property as open-space land, unless the property is to be converted or diverted from open-space land use in accordance with the provisions of subsection A of this section.

§ 10.1-1705. Chapter controlling over other laws; powers supplemental

Insofar as the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter shall be controlling. The powers conferred by this chapter shall be in addition and supplemental to the powers conferred by any other law.