

The Durability of Conservation Easements in Georgia

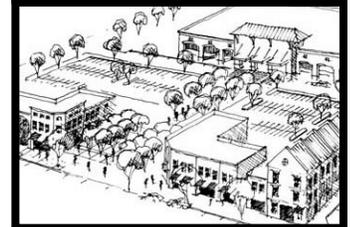
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I. Introduction

Conservation easements, generally defined as “nonpossessory interest[s] in land that impose use restrictions on...landowner[s] in order to achieve a conservation purpose,”¹ have proliferated over the last few decades as tools to accomplish the goals of land preservation. Protected acreage has risen from 128,000 in 1980 to just over 5 million in 2003.² This drastic increase has been encouraged in part by the passage, in most states, of conservation easement enabling legislation, a reaction to the 1981 publication of the Uniform Conservation Easement Act (UCEA) by the National Conference of Commissioners on Uniform State laws.³ Prior to the widespread enactment of such enabling statutes, conservation easements were entirely creatures of the common law, and the UCEA was drafted largely in response to the lack of protection afforded conservation easements by the common law.⁴

Even with the validation provided by enabling statutes, however, conservation easements remain a relatively new and untested legal device. The majority of these easements are drafted in perpetuity, meant to encumber the land they protect forever.⁵ The possibility of such permanent restrictions on real property has caused some concern and confusion: legal scholars have noted “considerable confusion and uncertainty regarding whether, when, and how ostensibly ‘perpetual’ conservation easements may be modified or terminated....”⁶ should future conditions change in such

a way as to render the original terms of the conservation easement impracticable or its initial purpose unfeasible. A general disdain for “dead hand” control also exists in the law and in public policy.⁷ Courts have expressed “a concern about permitting past generations to control current property owners” and “some discomfort with perpetually imposing the past’s vision on the lives of the future.”⁸

Recent litigation before the Supreme Court of Wyoming demonstrates some of the ambiguities and concerns surrounding the durability of conservation easements.⁹ In 1999, Fred and Linda Dowd knowingly purchased a parcel of land subject to a conservation easement and soon sought to have the easement terminated.¹⁰ The couple argued that the discovery and development of coalbed methane beneath their property by a company owning mineral interests underlying the land was “inconsistent with the terms of the conservation easement.”¹¹ The conservation easement in question here provides that the Dowds’ land can only be used for agriculture.¹² Now that drilling rigs have made their way onto the property, Fred Dowd contends, the land is worthless for agricultural purposes, and, therefore, lacking in value unless the conservation easement is extinguished in response to the “unforeseen circumstances” of this mineral discovery.¹³ The Board of County Commissioners of Johnson County agreed with the Dowds; it extinguished the conservation easement over the Dowds’ ranch in 2002. Litigation was then initiated by Robert Hicks, a resident of Johnson County and owner of the local newspaper.¹⁴

The Wyoming Supreme Court dismissed this case for lack of standing without addressing the merits of Hicks’s claim.¹⁵ Even though this case has not yet provided

1 Jeffrey Tapick, Note, *Threats to the Continued Existence of Conservation Easements*, 27 Colum. J. Envtl. L. 257, 259 (2002).

2 Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 Ecology L.Q. 673 (2007).

3 Tapick, *supra* note 1, at 272.

4 *Id.*

5 McLaughlin, *supra* note 2, at 675.

6 McLaughlin, *supra* note 2, at 425.

7 See Gerald Korngold, *Solving the Contentious Issues of Private Conservation: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 Utah L. Rev. 1039 (2007).

8 *Id.* at 1052.

9 See *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007).

10 See David Baron, *In Land Conservation, ‘Forever’ May Not Last*, NPR, available at: <http://www.npr.org/templates/story/story.php?storyID=88028482> (last visited September 16, 2008).

11 *Id.* 157 P.3d at 916-17.

12 *Id.*

13 Baron, *supra* note 10.

14 *Id.* 157 P.3d at 917.

15 *Id.* 157 P.3d at 918.

any further clarification on the subject, it has raised an important question about the use of conservation easements. Following its initial dismissal by the Wyoming court, the Attorney General of Wyoming has taken up the case,¹⁶ so it remains likely that *Hicks v. Dowd* will eventually have broad implications on the field of conservation easements. The remainder of this memorandum will address these concerns about conservation easements in the context of Georgia's laws.

II. Conservation Easement Termination in Georgia

A. Introduction to the Georgia Uniform Conservation Easement Act

In Georgia, the General Assembly first recognized conservation easements by statute in 1995, through passage of the Georgia Uniform Conservation Easement Act (GUCEA).¹⁷ This statute, closely modeled after the UCEA, begins by defining a conservation easement as:

a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.¹⁸

The statute delineates terms for the creation and alteration of a conservation easement: “[A] conservation easement may be created...released, modified, terminated, or otherwise altered or affected in the same manner as other easements....”¹⁹ Though this provision of the Act allows for the modification and termination of conservation easements, the statute expresses a preference for preservation easements that cannot be terminated: “[A] conservation easement is unlimited

in duration unless the instrument creating it provides otherwise.”²⁰ In other words, the default arrangement is for conservation easements to last forever; in order for the duration to be otherwise, the parties involved must expressly allow for this in creating the easement.

This default provision fits within a broader policy favoring perpetual conservation easements in the state of Georgia. The Georgia Land Conservation Act, which provides funding to cities or counties that enact conservation easements, requires that the land conserved be a “*permanently* protected land...”²¹ in order to receive funds. Further, in enacting the Georgia Land Conservation Tax Credit, Governor Sonny Perdue expressed his intent behind the credit: to incentivize individual landowners “to donate *perpetual* conservation easements.”²² In fact, the very passage of the GUCEA demonstrates the desire for legal legitimatization and protection of permanent conservation easements, as it was passed partly in response to the problems in recognizing conservation easements at the common law.²³ Even though the GUCEA alludes to termination and modification and goes so far as to state that no provision of the statute should “affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity,”²⁴ the law of conservation easements must be studied against this backdrop of a policy strongly favoring permanence over conservation easements of a fixed duration.

B. Methods of Conservation Easement Termination in Georgia

An initial reading of the GUCEA reveals little about how a conservation easement might be modified or terminated, except that it can be done according to the principles governing easements generally or according to the “principles of law and equity.”²⁵ Under Georgia statute, ordinary easements can be terminated by either

20 O.C.G.A. §44-10-3(c) (2008).

21 O.C.G.A. §12-6A-2(5) (2008) (emphasis added).

22 “Governor Perdue Signs Land Conservation Tax Credit and Litter Prevention Legislation into Law at Earth Day Breakfast,” *available at* http://gov.georgia.gov/00/press/detail/0,2668,78006749_91434832,00.html (last visited October 16, 2008).

23 See Tapick, *supra* note 1 (explaining reasons for passage of the UCEA and the state acts that followed).

24 O.C.G.A. §44-10-4(c) (2008).

25 *Id.*

16 Baron, *supra* note 9.

17 O.C.G.A. §44-10-1 *et. seq.* (2008).

18 O.C.G.A. §44-10-2(1) (2008).

19 O.C.G.A. §44-10-3(a) (2008).

of two methods: abandonment or forfeiture.²⁶ As discussed below, the common law in Georgia provides for several other means of terminating traditional easements.

I. Statutory Methods of Termination

The Georgia statute addressing the termination of traditional easements dictates that an easement “may be lost by abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment.”²⁷ In order to see how this statute might apply to conservation easements it is important to consider the nature of easements in general and the ways in which conservation easements differ from traditional easements.

An easement is defined generally as “an interest in land owned by another person, consisting in the right to use or control the land...for a specific limited purpose.”²⁸ *Black’s Law Dictionary* further explains that the “land benefiting from an easement is called the *dominant estate*; the land burdened by an easement is called the *servient estate*.”²⁹ Unlike traditional easements, which impose an affirmative benefit on the holder of the easement (the owner of the dominant estate), conservation easements impose a negative burden on the owner of the servient estate – that is, a conservation easement “restricts the servient owner’s use of his land.”³⁰ Furthermore, where a typical easement is held appurtenant to land,³¹ a conservation easement is held in gross.³² “An easement in gross benefits its holder whether or not the holder owns or possesses other land. There is a servient estate, but no dominant estate.”³³ Logically, it is difficult to imagine what circumstances would lead a court to conclude that a conservation easement – created for

the express purpose of forcing certain nonuse of land – has fallen into sufficient nonuse or been adequately abandoned to call for its extinguishment. Nonetheless, at least one state has expressly allowed for termination of conservation easements by abandonment.³⁴

Even if this statute were to apply to conservation easements in Georgia, however, courts here have consistently construed the statutory language to require a high threshold for the showing of nonuse or of abandonment of any easement. For instance, courts have ruled that “[E]vidence to establish a forfeiture of an easement by abandonment or nonuser must be decisive and unequivocal.”³⁵ Furthermore, easements created by deed³⁶ or by grant cannot be extinguished by mere nonuse alone,³⁷ to establish abandonment, a showing must be made that nonuse has been ongoing for a period of at least twenty years,³⁸ and “clear, unequivocal, and decisive evidence of the intent to abandon” must be demonstrated.³⁹ These demanding rules regarding nonuse and abandonment further reveal the reluctance of Georgia courts to extinguish easements.

2. Common Law Methods of Termination

a. Estoppel

The doctrine of estoppel⁴⁰ has been used by Georgia courts to terminate traditional easements. Borrowing from the Third Restatement on Property, courts have held that an “easement may be extinguished by estoppel if the owner of the servient tenement acts inconsistently with the continued existence of the easement, and such action is taken in reasonable reliance upon conduct of the dominant owner evidencing an intent on the part of the dominant owner not to make use of the servient

26 O.C.G.A. §44-9-6 (2008).

27 *Id.*

28 *Black’s Law Dictionary* 232 (3rd pocket ed. 2006).

29 *Id.*

30 Timothy C. Lindstrom, *Hicks v. Dowd: The End of Perpetuity?* 8 Wyo L. Rev. 25, 37 (2008).

31 An easement held appurtenant to land is “created to benefit another tract of land, the use of the easement being incident to the ownership of that other tract” (*Black’s Law Dictionary* 233).

32 An easement in gross is one in which the benefit is not attached to any particular piece of land but instead accrues to a particular person (*Black’s Law Dictionary* 233 (3rd pocket ed. 2006)).

33 Lindstrom, *supra* note 30, at 37.

34 See Utah Code Ann. §57-18-5 (2008) (“A conservation easement may be terminated, in whole or in part, by release, abandonment, merger...”).

35 *Gaston v. Gainesville & D. Electric Ry. Co.*, 48 SE 108 (Ga. 1904).

36 *Stozzo v. Coffee Bluff Marina Property*, 550 S.E.2d 122 (Ga. 2001).

37 *Hardigree v. Hardigree*, 262 S.E.2d 127 (Ga. 1979).

38 *BMH Real Estate Partnership v. Montgomery*, 540 S.E.2d 256 (Ga. 2000).

39 *Weaver v. Henry*, 473 S.E.2d 495 (Ga. 1996).

40 *Black’s Law Dictionary* defines estoppel as a “bar that prevents one from asserting a...right that contradicts what one has said or done before.” (*Black’s Law Dictionary* 253).

tenement in the future.”⁴¹ Essentially then, in order for the doctrine of estoppel to apply to any easement, the dominant owner (or the holder of the conservation easement, since there is no dominant estate owner in the context of conservation easements⁴²), must demonstrate an intent that he no longer wishes to make use of the easement. The servient estate owner (the landowner, in cases of conservation easements) must then, depending upon this perceived intention of the easement holder, act in a manner inconsistent with the continued existence of the easement.

The doctrine of extinguishment by estoppel does not present a great threat to conservation easements in Georgia. The state of Georgia offers tax benefits to landowners who donate land to be placed in conservation easements that essentially allow taxpayers to “claim a credit against their state income tax of twenty-five percent of the fair market value of the donated property.”⁴³ These tax benefits for landowners serve as an incentive not to act inconsistently with the terms of a conservation easement. Furthermore, in cases where the government is the easement holder, the very existence of these tax benefits demonstrates a desire on the part of the government (easement holder) for conservation easements to exist in perpetuity.⁴⁴ As long as tax benefits are being offered specifically to encourage the permanence of conservation easements, therefore, it would be difficult for a landowner to establish that the easement holder no longer intends for the conservation easement to exist, which is a necessary step in applying the doctrine of estoppel.⁴⁵

Even in situations where tax benefits are not accruing to the servient tenant – so that this particular incentive for the landowner to act consistently with the terms of the easement has been removed – the doctrine of estoppel still does not pose a great danger to the permanence of conservation easements. Whether the holder of the

conservation easement is a charitable organization or a government entity, the easement is being held for the benefit of the public,⁴⁶ and courts have demonstrated a reluctance to terminate or modify by estoppel easements held for the public’s benefit.⁴⁷ The Appeals Court of Massachusetts has even gone so far as to hold that estoppel cannot be applied to terminate a conservation easement “where to do so would frustrate a policy intended to protect the public interest.”⁴⁸ Because the state of Georgia favors permanent conservation easements,⁴⁹ it seems likely that Georgia courts would follow those in Massachusetts and elsewhere in the country that have declined to terminate easements held for the public’s benefit by estoppel.

Furthermore, careful drafting of the instrument creating the conservation easement can help parties avoid questions involving estoppel.⁵⁰ The instrument should contain detailed monitoring and enforcement provisions to ensure that the property in question is treated in compliance with the terms of the conservation easement.⁵¹ If such provisions are drafted well, the charitable organization or government entity holding the easement will be obligated to monitor the land, preventing the servient tenant from using the burdened land for purposes at odds with the easement terms. The GUCEA also allows for a third-party right of enforcement,⁵² if a conservation easement-creating instrument is drafted to include this right, then a third party may be obligated to monitor the property. This third-party monitoring could prevent non-compliance by the landowner even in a situation where the easement holder turns a blind eye to use by that landowner in violation of the easement terms. Inclusion of these provisions, therefore, should help to preempt any potential claims of estoppel.

46 Tapick, *supra* note 1, at 272.

47 Lindstrom, *supra* note 30, at 41-42.

48 *Weston Forest & Trail Ass’n, Inc. v. Fishman*, 849 N.E.2d 916 (2006).

49 *See supra*, pages 4-5 (explaining Georgia’s policy toward conservation easements).

50 *See Adam E. Draper, Now More than Ever – Overcoming Obstacles to Protect Private Lands*, 34 *Env’tl. L.* 247, 276 (2004) (discussing, in general, how careful tailoring of a conservation easement can mitigate potential problems).

51 Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 *Land & Water L. Rev.* 89, 120 (1997).

52 O.C.G.A. §44-10-2(3) (2008).

41 *Rolleston v. Sea Island Properties, Inc.*, 327 S.E.2d 489, 492 (Ga. 1985) (citing to Restatement of Property § 505 (1944)).

42 Lindstrom, *supra* note 30, at 37.

43 Georgia Land Conservation Program, available at http://glcp.georgia.gov/00/channel_title/0,2094,82613131_114687036,00.html (last visited October 14, 2008).

44 “Governor Perdue Signs Land Conservation Tax Credit and Litter Prevention Legislation into Law at Earth Day Breakfast,” *supra* note 22.

45 *See Rolleston* at 492 (citing to Restatement of Property § 505 (1944)).

b. Release

The GUCEA also provides that conservation easements can be released “in the same manner as other easements.”⁵³ Traditional easements can be released by agreement between the easement holder and the servient landowner; a release is a “bilateral transaction,”⁵⁴ which means that it requires the agreement of two parties: the owner of the estate burdened by the easement and the holder of the easement.⁵⁵ A release must also be in writing, as it is subject to the Statute of Frauds⁵⁶ (a doctrine “designed to prevent fraud and perjury” by rendering certain types of contracts unenforceable unless they are in writing and signed).⁵⁷ In order for a release of a conservation easement to occur, then, the governmental body or charitable organization holding the easement for the benefit of the public will have to be convinced to negotiate such a transaction.

c. Merger

Georgia courts also recognize the common law doctrine of merger as a means of extinguishing traditional easements. Merger occurs “where there is single ownership of an easement and fee title to the property encumbered by the easement;”⁵⁸ the idea behind this doctrine is that “one cannot have an easement on his own property.”⁵⁹ In order for merger to occur in the context of conservation easements, therefore, the governmental body or charitable organization that holds the easement would have to acquire the underlying land as well. While this scenario is probably not as likely as the holder of a traditional easement purchasing or otherwise acquiring the servient estate, it is certainly conceivable. At least one scholar, however, has suggested that language could be drafted into the instrument creating the conservation easement “prohibiting a merger of interests in this situation.”⁶⁰

53 O.C.G.A. §44-10-3(a) (2008).

54 Restatement of Property § 500 cmt. a (1944).

55 *Id.*

56 Restatement (Third) of Property (Servitudes) § 7.3 cmt. a (2000).

57 *Black’s Law Dictionary* 677.

58 *Elrod v. Elrod*, 526 S.E.2d 339 (2000).

59 *Broom v. Grizzard*, 71 S.E. 430 (1911).

60 Prohaska, Jane, Conservation Easements: Overview, American Law Institute-American Bar Association Course of Study, March 6-7, 2008.

3. Other Possible Means of Modifying or Terminating a Conservation Easement

Two more important doctrines – the doctrine of changed conditions and the charitable trust doctrine of cy pres – that may affect the termination of conservation easements have been discussed by legal scholars and are even addressed in the comments to the UCEA, though neither has been expressly recognized by Georgia statute. The doctrine of changed conditions may be used to modify or terminate restrictions on land where “conditions since [the restriction] was created have so changed that enforcement will not bring its intended benefits.”⁶¹ As a comment to the UCEA points out, however, while many states legislatively recognize the doctrine of changed conditions with regard to equitable servitudes and real covenants, “its application to easements is problematic in many states.”⁶² Indeed, the Third Restatement of Property specifically prohibits the application of the changed conditions doctrine to conservation servitudes except under certain conditions: first, if the purpose for which the servitude was created becomes impracticable, it must first be modified to serve other purposes under the cy pres doctrine,⁶³ and if the cy pres doctrine can’t successfully salvage the servitude, only then can the doctrine of changed conditions be used to terminate it, subject to damages and restitution.⁶⁴

Cy pres is defined as the “equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible so that the gift does not fail.”⁶⁵ In the context of conservation easements, the doctrine of cy pres would be used by courts to “adapt the easement to another conservation purpose compatible with the overall conservation goal,” which “could mean the sale of the easement and the transfer of the conservation easement to another parcel of land.”⁶⁶ Of course, the application of cy pres principles to conservation easements depends upon “the notion that a conservation easement constitutes a trust-like legal arrangement, with the easement holder acting as trustee and the general public standing as beneficiary

61 Korngold, *supra* note 6, at 1077.

62 Unif. Conservation Easement Act §3, cmt. (1981).

63 Restatement (Third) of Prop. (Servitudes) §7.11(1) (2000).

64 *Id.* §7.11(2).

65 *Black’s Law Dictionary* 173.

66 Korngold, *supra* note 6, at 1078.

of the trust.”⁶⁷ Though the application of cy pres to conservation easements has not been tested legally, it has received considerable scholarly attention recently.⁶⁸ The potential use of this doctrine should not, however, be viewed as a threat to conservation easements. If used to modify conservation easements, the doctrine would have to be construed so as to adhere closely to the intent behind the creation of the original easement. It is likely that, rather than frustrating conservation purposes, the doctrine would be used to advance the overall conservation goals of a community.⁶⁹ Indeed the words ‘cy pres’ come from the Norman French phrase meaning “as nearly as possible.”⁷⁰

4. Principles of Law and Equity

The Georgia Uniform Conservation Easement Act contains a clause that carves a notable exception from the default permanence provision. This clause suggests that nothing should affect “the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”⁷¹ While this language may seem worrisome and appear to give the courts boundless authority to change or extinguish conservation easements at their whim, at least one scholar has suggested that such language – which appears in the UCEA and a number of other states’ enabling legislation – actually just makes room for the court to consider common law doctrines such as the ones discussed above.⁷² This language “refer[s] to traditional common law termination doctrines that require a number of legal and factual elements to be established before an easement can be terminated.”⁷³ According to this argument, then, the “principles of law and equity” section of the statute actually does nothing to expand the grounds upon which a court can modify or terminate a conservation easement.

67 Tapick, *supra* note 1, at 286.

68 See, e.g., Tapick, *supra* note 1; McLaughlin, *supra* note 2; Korngold, *supra* note 6; Lindstrom, *supra* note 32; J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States*, 39 Urb. Law 19 (2007).

69 See Korngold, *supra* note 6, at 1078 (explaining that the doctrine of cy pres requires an adherence to the original purpose of the trust or, in this case, easement).

70 Korngold, *supra* note 6, at 1078.

71 O.C.G.A. §44-10-4(c) (2008).

72 See Tapick, *supra* note 1.

73 *Id.* at 286.

III. Conclusion

While courts have not addressed many of the more ambiguous aspects of conservation easements, there does not seem to be a significant legal threat to the continued use of these easements in Georgia. Because of the structure of conservation easements, the existence of tax benefits encouraging easements of perpetual duration, and the public policy in Georgia strongly favoring permanent conservation easements, none of the statutory or common law methods for terminating traditional easements seem to pose any significant threat to the permanence of carefully drafted conservation easements. The only doctrine for the modification or termination of conservation easements that seems to be gaining any traction in the legal community is the charitable trust doctrine of cy pres, and that doctrine works to further overall conservation goals and would probably be used only to modify conservation easements. After all, in Georgia, the “law does not favor the extinguishment of easements.”⁷⁴

74 *Whipple v. Hatcher*, 658 S.E.2d 585, 586 (Ga. 2008).

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