

Conservation Easements—A Troubled Adolescence

*Nancy A. McLaughlin**

I. INTRODUCTION

The conservation easement is arguably the single most popular private land protection tool in this country today, and its use has increased dramatically (indeed, almost exponentially) over the past two and a half decades. With this increased popularity, however, have come increased reports of abuse and serious questions regarding the efficacy of conservation easements as a land protection tool. To set the stage for John D. Echeverria and Edward Thompson, Jr. to debate the relative merits of voluntary conservation easement acquisitions and “command and control” regulatory efforts, Part II of this article briefly describes conservation easements and how they operate to protect the conservation values of land; Part III describes the dramatic growth in the use of conservation easements over the past two and a half decades; and Part IV highlights some of the more troubling issues that have arisen as a result of the growth in the use of easements, as well as proposals for reform. Part V concludes on an optimistic note, asserting that if reforms can be successfully implemented, conservation easements can emerge from their troubled adolescence to take their appropriate adult role in the panoply of land conservation techniques, and may help lead us to a new paradigm of private property ownership.

II. WHAT IS A CONSERVATION EASEMENT?

A conservation easement is a legally binding agreement between the owner of the land encumbered by the easement and the holder of the easement that restricts the development and use of the land to achieve certain conservation goals, such as the preservation of wildlife habitat, open space, or agricultural land. Conservation easements are generally sold or donated by a landowner to a government agency or charitable conservation organization (typically referred to as a land trust¹) that agrees to enforce the development

* © 2005 Professor of Law, University of Utah S.J. Quinney College of Law (J.D. University of Virginia). The author would like to thank the Wallace Stegner Center for Land, Resources and the Environment and the sponsors of the 10th Annual Stegner Center Symposium for their support.

¹ Land trusts can be broadly defined as local, state, regional, and national charitable organizations that operate to conserve land for the benefit of the public through a variety of means, including the acquisition of conservation easements. The Jackson Hole Land Trust, which operates to protect the conservation values of land in Jackson Hole, Wyoming, is an example of a local land trust. *See* Jackson Hole Land Trust, <http://www.jhlandtrust.org> (last visited Sept. 19, 2005). Utah Open Lands, which operates to protect the conservation values of land in the state of Utah, is an example of a statewide land trust. *See* Utah Open Lands, <http://www.utahopenlands.org> (last visited Sept. 19, 2005). The Teton Regional Land Trust, which

and use restrictions in the easement for the benefit of the public.² Conservation easements are also generally conveyed “in perpetuity,” meaning that the development and use restrictions in the easement are intended to run with the land and bind all future owners.³

Conservation easements are partial interests in land and, as such, they represent a unique way of protecting the conservation values of privately owned land for the benefit of the public. A landowner who conveys a conservation easement to a government agency or land trust retains ownership of the land, subject to the easement, and the right to continue to use the land in any manner not inconsistent with the terms or stated purposes of the easement.⁴ In addition, a government agency or land trust that acquires a conservation easement is obligated to enforce the easement in perpetuity for the benefit of the public, and generally is granted a limited right of access to the land in the deed of conveyance so that it can monitor and enforce compliance with the easement terms. Thus, every sale or donation of a perpetual conservation easement to a government agency or land trust results in a permanent form of public/private co-ownership of the encumbered land, and the arrangement is intended to benefit the public by ensuring that the conservation values of the land are protected in perpetuity.⁵

operates to protect the conservation values of land in the Upper Snake River Valley in Montana, Idaho and Wyoming is an example of a regional land trust. *See* Teton Regional Land Trust, <http://www.tetonlandtrust.org> (last visited Sept. 19, 2005). The Nature Conservancy, which operates to promote biodiversity conservation, is an example of a land trust that operates on a national (and international) level. *See* The Nature Conservancy, <http://nature.org> (last visited Sept. 19, 2005).

² All 50 states and the District of Columbia have enacted “easement enabling statutes” that remove the common law impediments to easements in gross acquired for conservation purposes provided, in general, that the easements are: (i) conveyed for one or more of the conservation purposes specified in the statute and (ii) conveyed to a government agency or charitable organization. *See* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426 n.13 (2005).

³ Most conservation easements are granted “in perpetuity” because government agencies and land trusts generally acquire only perpetual easements, and landowners donating easements are eligible for federal (and, in many cases, state) tax incentives only if the easements are perpetual. *See* Federico Cheever and Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10226 (2004).

⁴ The landowner also retains the right to sell, exchange, or otherwise transfer the land, subject, of course, to the easement.

⁵ Some easement enabling statutes expressly state that conservation easements are enabled because they provide benefits to the public. *See, e.g.*, CAL. CIV. CODE § 815 (1982) (providing that “The Legislature . . . finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations); 32 PA. CONS. STAT. ANN. § 5052 (2005) (providing that “The General Assembly recognizes the important and significant public and economic benefit of conservation and preservation easements in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open space and scenic resources of this Commonwealth.”).

III. DRAMATIC GROWTH IN THE USE OF CONSERVATION EASEMENTS

Although scenic easements were used by the National Park Service to protect the view along parkways in certain southern states as early as the 1930s and 1940s, and the modern concept of a “conservation easement” was first introduced by journalist William Whyte in the late 1950s, it was not until the mid-1980s that conservation easements began to be used on a widespread basis.⁶

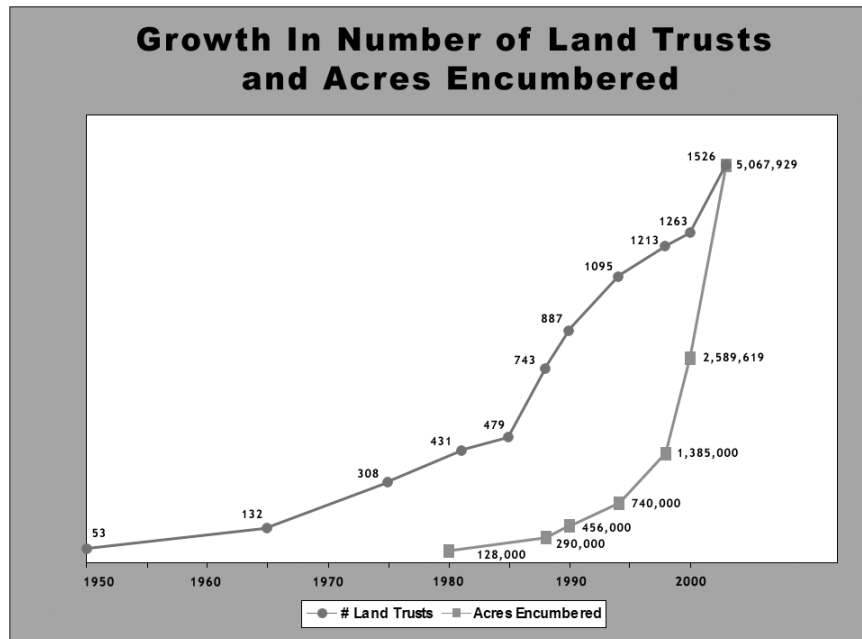
As Graph 1⁷ below illustrates, in 1980 (which is the first year for which figures are readily available), only a modest 128,000 acres were encumbered by conservation easements held by local, state, and regional land trusts operating in the United States. By the end of 1990, that number had more than doubled, but was still a relatively modest 456,000 acres. Over the next ten years the number of acres encumbered by conservation easements held by local, state, and regional land trusts increased more than five-fold, with more than 2.5 million acres encumbered as of the end of 2000, and a mere three years later that number had doubled again, with over 5 million acres encumbered as of the end of 2003.

Graph 1 also illustrates the dramatic growth in the number of land trusts operating in the United States. In 1950 there were only 53 local, state, and regional land trusts operating in the United States, and by 2003 that number had grown to over 1,500, with the most dramatic growth beginning in the mid-1980s. In addition, as of 2003, new land trusts were being formed at the rate of two per week, with the most rapid growth occurring in the west.⁸

⁶ See Cheever & McLaughlin, *supra* note 3, at 10224–27 (providing a brief history of the use of conservation easements in this country).

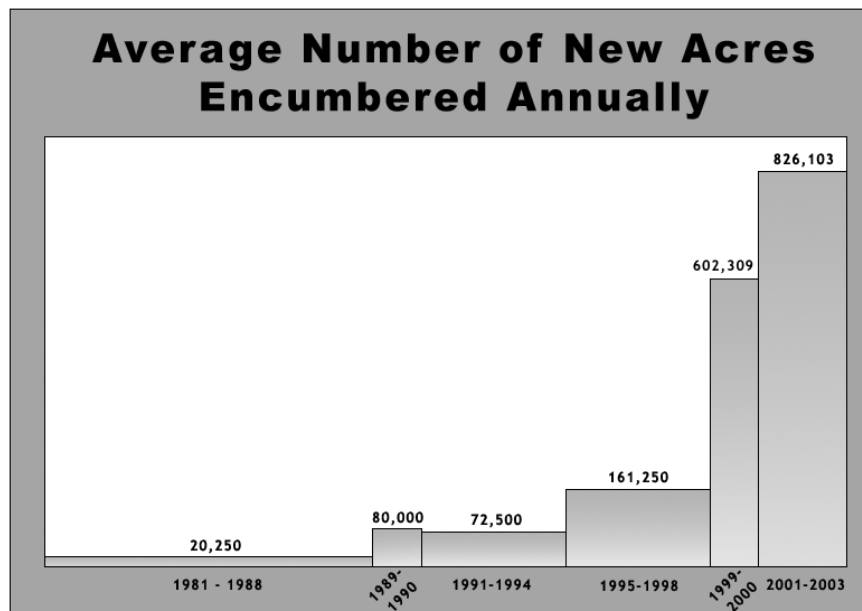
⁷ Graph 1 is based on the periodic census data collected by the Land Trust Alliance, the umbrella organization for the nation’s land trusts (on file with the author). For the most recent census results, see <http://www.lta.org/aboutlt/census.shtml> (last visited Sept. 18, 2005).

⁸ See National Land Trust Census Press Release (Nov. 18, 2004), available at <http://www.lta.org/aboutlt/census.shtml> (last visited June 27, 2005).

Graph 1

Graph 2⁹ below provides an even more dramatic illustration of the growth in the use of conservation easements, particularly since the late 1990s. Graph 2 illustrates the average number of acres encumbered by conservation easements acquired by local, state, and regional land trusts on an annual basis during the time periods indicated. Thus, in each of the years 1995, 1996, 1997, and 1998, on average, over 160,000 acres were encumbered by conservation easements acquired by local, state, and regional land trusts. In 1999 and 2000, that number jumped dramatically, with an average of over 600,000 acres encumbered by conservation easements acquired by such land trusts in each of those years. And in 2001, 2002, and 2003 that number jumped again, with an average of over 825,000 acres encumbered by conservation easements acquired by local, state, and regional land trusts in each of those years.

⁹ Graph 2 is also based on the periodic census data collected by the Land Trust Alliance. *See supra* note 7.

Graph 2

It should be noted that Graphs 1 and 2 reflect only the acreage encumbered by conservation easements held by the nation's local, state, and regional land trusts. Graphs 1 and 2 do not reflect the number of acres encumbered by conservation easements held by national land trusts, such as The Nature Conservancy, or by governmental units that do not operate as land trusts, such as the U.S. Forest Service or state and local governments, which also have been active in acquiring conservation easements.¹⁰

A number of factors converged in the 1980s to make voluntary conservation easement conveyances attractive as a conservation tool, including: increasing development pressures; a growing understanding of the need to incorporate privately-owned land into conservation efforts; a disillusionment with the ability of government to protect privately owned land from development through traditional "command and control" regulatory measures; approval of the Uniform Conservation Easement Act, which provided states with a template statute that removes the common-law impediments to the creation and enforcement of easements in gross for conservation purposes (an "easement enabling statute"); and the enactment of generous federal tax incentives designed to encourage landowners to voluntarily convey conservation easements to government agencies and land

¹⁰ See Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 5 (2004).

trusts for the benefit of the public.¹¹ Conservation easement sales and donations also proved popular with landowners because they are voluntary (and, thus, they avoid the perceived unfairness associated with regulatory measures); the restrictions in a conservation easement can be tailored to the particular characteristics of the land and the particular desires of the landowner; the landowner can continue to use the land in manners not inconsistent with the terms or stated purposes of the easement; and there generally is no requirement that the public be granted access to land subject to a conservation easement.¹² As voluntary conservation easement conveyances gained prominence as a private land protection tool, the federal government and state and local governments began to increasingly rely on such conveyances to accomplish their land protection goals, and to funnel significant public funds into easement purchase and tax incentive programs.¹³

IV. A TROUBLED ADOLESCENCE

A variety of problems have arisen as a result of the dramatic growth in use of conservation easements and the number of government agencies and land trusts acquiring such easements. In May of 2003, the Washington Post published a series of articles questioning some of the practices of the nation's largest and most well-funded land trust, The Nature Conservancy.¹⁴ In December of the same year the Washington Post published a follow-up article

¹¹ See *id.* at 22. See also John Harte, *Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System*, 27 *ECOLOGY L.Q.* 929, 961-63 (2000) (noting that "As a result of our increasing numbers and affluence, huge areas of once ecologically healthy private land in the United States, far more land than is now or ever could be in public protected status, are gradually being converted to land with little ecological value The most obvious examples of this stem from the trends across the nation toward increasing suburbanization and exurbanization (extremely low density residential development in rural areas) This trend is creating patchworks of ecologically incoherent micro-landscapes that, as a whole, cannot support the diversity of species and the ecological functions of the habitats that previously existed on the land [S]uccess or failure in reversing this trend is critical to the future of ecosystem integrity in the United States"). (footnotes omitted).

¹² See Cheever & McLaughlin, *supra* note 3, at 10227.

¹³ See McLaughlin, *supra* note 10, at 10-17 (describing the history of the federal tax incentives offered to easement donors). At least 10 states have enacted state tax incentives intended to further encourage the donation of easements encumbering land within their borders. See Conservation Tax Credit State by State Comparison, prepared by the North Carolina Department of Environment and Natural Resources (2004) (on file with author). For an example of an easement purchase program, see Forest Legacy Program National Report for Fiscal Year 2004, United States Department of Agriculture Forest Service, FS-816, at 1 (Dec. 2004) available at http://www.fs.fed.us/spf/coop/library/FS_Legacy_Report_2004.pdf (last visited Sept. 17, 2005) (describing the USDA Forest Service's Forest Legacy Program, which provides funding for the purchase of privately owned forest land and conservation easements encumbering such land, and reporting that since its first appropriations in 1992, the Forest Legacy Program has conserved over 1 million acres across twenty-nine states and territories, protecting more than \$361 million of land value with a Federal investment of approximately \$183 million).

¹⁴ See David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST, May 4, 2003, at A1; Joe Stephens & David B. Ottaway, *How a Bid to Save a Species Came to Grief*, WASH. POST, May 5, 2003, at A1; Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A1.

describing allegedly abusive conservation easement donation transactions involving “wildly exaggerated” easement appraisals and developers who received “shocking” tax deductions for donating conservation easements encumbering golf course fairways or otherwise undevelopable land.¹⁵ Those articles raised the ire of Congress, which began to investigate The Nature Conservancy and, more generally, conservation easement transactions and the alleged abuse of the federal tax incentives offered to easement donors.¹⁶

In June of 2004, in an unusual move, the Internal Revenue Service (the IRS) issued a Notice warning that it is aware that some taxpayers may be improperly claiming federal charitable income tax deductions with regard to conservation easement donations, and that it intends to disallow such deductions and impose penalties and excise taxes in appropriate cases.¹⁷ The Notice further provides that the IRS may challenge the tax-exempt status of charitable organizations that participate in such abusive transactions, and may impose penalties on promoters and appraisers involved in such transactions.¹⁸

In January of 2005, the Joint Committee on Taxation issued a report to Congress recommending, *inter alia*, that the federal charitable income tax deduction offered to conservation easement donors be eliminated with respect to easements encumbering property on which the donor maintains a personal residence, that the deduction be substantially reduced in all other cases, and that new standards be imposed on appraisers and appraisals with regard to the valuation of easements.¹⁹

On June 8, 2005, the Senate Finance Committee held a hearing on the federal tax incentives available with respect to conservation easement donations. In connection with that hearing, the Senate Finance Committee issued a report recommending numerous reforms, including: (i) revocation of the tax-exempt status of conservation organizations that regularly and continuously fail to monitor the conservation easements they hold (or the suspension of the ability of such organizations to accept tax-deductible

¹⁵ Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1. For a discussion of abusive conservation easement donation transactions see generally Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, 18 PROBATE & PROPERTY 40 (2004); Stephen J. Small, *Proper—And Improper—Deductions for Conservation Easement Donations, Including Developer Donations*, 105 TAX NOTES 217 (2004).

¹⁶ See Joe Stephens & David B. Ottaway, *IRS Toughens Scrutiny of Land Gifts*, WASH. POST, July 1, 2004, at A1 (noting that the Senate Finance Committee began investigating easement transactions involving The Nature Conservancy and other charities in 2003).

¹⁷ I.R.S. Notice 2004-41 (I.R.B. 31). See also Albert B. Crenshaw, *Tax Abuse Rampant in Nonprofits, IRS Says*, WASH. POST, Apr. 5, 2005, at E1 (quoting the Commissioner of the Internal Revenue Service as stating that the IRS is auditing 50 donors of conservation easements and several exempt organizations that acquire such easements and is doing a “pre-audit review” of 400 open-space easement donations “to be followed by a similar review of 700 facade easements.”).

¹⁸ I.R.S. Notice 2004-41 (I.R.B. 31, 32).

¹⁹ Staff of the Joint Committee on Taxation, 110TH CONG., *Options to Improve Tax Compliance and Reform Tax Expenditures*, JCS-2-05, 281 (2005), available at <http://www.house.gov/jct/s-2-05.pdf> (last visited June 1, 2005).

contributions), (ii) implementation of an accreditation program for conservation organizations acquiring easements, (iii) limiting charitable contribution deductions for certain small easement donations and providing the IRS with the authority to pre-approve deductions for such donations, and (iv) issuance by the IRS of guidance regarding how a conservation organization can establish that it is appropriately monitoring the easements it holds.²⁰

Even before the Washington Post articles were published and Congress and the IRS began investigating abuses, some had expressed other concerns relating to the dramatic growth in the use of conservation easements and the number of land trusts. Some worried about the ability of the growing number of often all volunteer and under-funded land trusts to appropriately screen and steward the easements being acquired.²¹ Others feared that providing financial incentives to private landowners to encourage them to protect their land for conservation purposes would sap the will of governments to regulate the development and use of land and undermine the very legitimacy of the regulatory process.²² Still others expressed concern regarding the potentially harmful consequences to society when, as is inevitable, some perpetual easements cease to provide the public benefit for which they were acquired or actually become detrimental to the public good.²³

While the need to address such concerns is clear, the problems associated with the use of conservation easements as a land protection tool are not insurmountable. Congress and the IRS are considering making changes to the federal tax incentive provisions to increase the quality of easements and reduce abuse.²⁴ The Land Trust Alliance is in the process of developing an

²⁰ See *United States Senate Committee on Finance, Report on The Nature Conservancy*, Executive Summary, available at <http://finance.senate.gov/sitepages/TNC%20Report.htm> (last visited June 19, 2005).

²¹ See, e.g., STEPHEN J. SMALL, PRESERVING FAMILY LANDS: BOOK III 12 (2002) (noting that “[i]oo many organizations with no experience, no guidance, no checklist, and no criteria are now accepting conservation easements.”); Andrew Zepp, *LTA to Launch Land Trust Quality Initiative*, EXCHANGE, J. LAND TRUST ALLIANCE 19 (2000) (in describing a new program being launched by the Land Trust Alliance to increase the competency of land trusts, the director of the program noted that “[g]iven the explosive growth of both land trusts and the use of conservation easements, concerns about land trust quality and effectiveness were increasingly voiced. Could the missteps of one land trust affect the ability of others to conserve land? Might the future use of conservation easements be jeopardized by a single enforcement case?”); Darla Guenzler, *Creating Collective Easement Defense Resources: Options and Recommendations* (2002) (on file with author) (noting that studies have found significant deficits in all aspects of stewardship of conservation easements and that, traditionally, the land trust community has focused on acquisition, not on securing funds for stewardship or defense costs).

²² See John D. Echeverria, Editorial, *Construction Bans and Land Value*, WASH. POST, May 17, 2003, at A24; Cheever & McLaughlin, *supra* note 3, at 10227 (noting that this is a common perception among traditional environmental lawyers).

²³ See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 441-42 (1984); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 753 (2002).

²⁴ See, e.g., *supra* note 19 and 20 and accompanying text (discussing recommendations for reform made by the Joint Committee on Taxation and the Senate Finance Committee); IRS, Conservation Easements, available at <http://www.irs.gov/charities/article/0,,id=137244,00.html> (last visited March 31, 2006) (soliciting comments from members of the public regarding abusive conservation easement donation

accreditation program for the nation's land trusts.²⁵ Organizations such as the Lincoln Institute for Land Policy are raising awareness of the problems associated with the use of conservation easements and suggesting recommendations for reform, including greater standardization of easement deeds (which would facilitate both the valuation of easements and the monitoring and enforcement of their terms); the creation of a mandatory public registry of conservation easement deeds in each state; and coordination of easement acquisition programs with land regulation, acquisition, and taxation policies.²⁶ And finally, the "problem of perpetuity" in the conservation easement context has been overstated. As the author has noted elsewhere, "the perpetuity issue is neither new nor unique to [conservation] easements. The legal doctrine of *cy pres* has been developed and refined over the centuries to deal precisely with the issue presented by conservation easements—how to adjust when the charitable purpose to which property has been 'perpetually' devoted becomes obsolete due to changed conditions."²⁷

V. CONCLUSION

Despite the problems that have arisen as a result of the widespread use of conservation easements, if reforms can be successfully implemented, conservation easements can not only emerge from their troubled adolescence to take their appropriate adult role in the panoply of land conservation techniques, but also may act as a significant transformative force. Many commentators have discussed the need to shift to a new paradigm of property ownership in this country—one that contemplates stewardship obligations as well as ownership rights. However, the question of how to shift to that new paradigm with a minimum of social upheaval remains unanswered.²⁸ Conservation easement donations may offer at least part of the answer.

The landowner who donates a conservation easement voluntarily agrees to restrict the development and use of his land in perpetuity to accomplish certain conservation goals. The government agency or charitable organization

transactions). See also McLaughlin, *supra* note 10, at 87–91 (recommending that the Treasury Department consider creating an Easement Advisory Panel, similar to the existing Art Advisory Panel, to help quell easement valuation abuse).

²⁵ See <http://www.lta.org/accreditation> (last visited March 12, 2006) (describing the accreditation program).

²⁶ See Jeff Pidot, *Reinventing Conservation Easements, A Critical Examination and Ideas for Reform* (LINCOLN INSTITUTE OF LAND POLICY 2005) (on file with author).

²⁷ Nancy A. McLaughlin, A Constructive Reformist's Perspective on Voluntary Conservation Easements, available at <http://www.law.utah.edu/faculty/bios/mclaughlin.html> (last visited Sept. 19, 2005); see also McLaughlin, *supra* note 2, (discussing how the doctrine of *cy pres* should apply to conservation easements).

²⁸ See, e.g., Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 *ECOLOGY L.Q.* 631, 650 (1996) (noting that as property scholars set about constructing an ecologically sound property regime, they face the task of explaining how society might embrace it without unfairly hurting existing property holders).

acquiring the easement has the right and the obligation to enforce the restrictions in the easement in perpetuity for the benefit of the public. Thus, whenever a government agency or land trust acquires a conservation easement, the public acquires a permanent interest in the underlying land similar to the interest the public would have under a private property regime that contemplated stewardship obligations as well as ownership rights. Moreover, because the tax incentives generally compensate an easement donor for only a modest percentage of the reduction in the value of his land, in a nonabusive easement donation transaction, the landowner generally bears the lion's share of the cost associated with the permanent protection of the conservation values of his land.²⁹

The fact that thousands of landowners across the nation have been willing to voluntarily restrict the development and use of their land, and bear the lion's share of the cost associated with such restrictions, is a very positive sign—it indicates that at least some landowners embrace the notion that they have stewardship obligations as well as ownership rights with respect to their land. As easements become more commonplace, and the public benefits they provide become more visible and better understood, society at large may become more accepting of a view of private property that contemplates stewardship obligations as well as ownership rights. Thus, this unique form of conservation philanthropy may just be the vehicle that helps lead us to a new paradigm of private property ownership.³⁰

²⁹ See McLaughlin, *supra* note 10, at 28–41 (describing the operation of the tax incentives). The same is often true with regard to the “bargain sale” of an easement, where the easement grantor “sells” the easement for something less than its fair market value and is generally eligible to claim tax benefits for the donation component of the transaction.

³⁰ See Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453 (2002) (in which the author first discussed conservation easement donations as such a potentially transformative force).