

Salzburg v. Dowd

Another Look

By Nancy A. McLaughlin and W. William Weeks

In the last edition of the *Wyoming Lawyer*, C. Timothy Lindstrom published a summary of the recently settled *Salzburg v. Dowd* case, giving special attention to arguments made by the Jackson Hole Land Trust (JHLT) in its Motion to Intervene, which was denied. The issues that were at stake in *Salzburg* are important enough to justify the presentation of a different view.¹

The Case

At issue in *Salzburg* was Johnson County, Wyoming's attempted termination of a perpetual conservation easement that had been conveyed to the County in 1993 as a tax-deductible charitable gift. In 2002, at the request of new owners of the land (the Dowds), the County executed a deed transferring the easement to the Dowds, intending to thereby terminate the easement. A County resident (Hicks) filed suit alleging, *inter alia*, that the easement was held in trust for the benefit of the public and could be terminated only in a *cy pres* proceeding. In 2007, the Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing, but invited the Wyoming Attorney General (AG), as supervisor of charitable trusts, "to reassess his position" with regard to the case.²

In July 2008, the Wyoming AG filed suit, requesting that the deed transferring the easement to the Dowds be declared null and void. The AG's primary argument was that the original conveyance of the easement constituted a restricted charitable gift or charitable trust, and the County had violated its fiduciary duties by agreeing to terminate the easement without obtaining court

approval in a *cy pres* proceeding. In support, the AG cited state law governing the administration of charitable gifts, federal tax law, the express provisions of the easement deed, commentary to the Uniform Conservation Easement Act and the Uniform Trust Code (both adopted in Wyoming), the Restatement of Trusts, and the Restatement of Property: Servitudes.

The Dowds, for their part, argued that there is "nothing special" about a conservation easement and cited to Mr. Lindstrom for the proposition that conservation easements can be modified or terminated "in the same manner as other easements."³

In February, the case was settled. The Stipulated Judgment declares:

- (i) the County's resolution purporting to authorize the transfer of the easement to the Dowds was of no legal effect,
- (ii) the County's deed purporting to transfer the easement to the Dowds was null and void, and
- (iii) the original deed of conservation easement remains in full force and effect with minor amendments.

JHLT's Arguments

Title Report

In 1997, the Board of County Commissioners (the Board) transferred the conservation easement to the Scenic Preserve Trust (SPT), a charitable organization created and governed by the Board. In 2002, the Board, as County Commissioners (rather than as Trustees of SPT), executed the deed trans-

ferring the easement to the Dowds. JHLT argued that the easement had never been terminated because a title report indicated the easement was still held by SPT. But the title report was not dispositive for two reasons.

First, in *Hicks v. Dowd*, the Wyoming Supreme Court specifically rejected the argument that the Board was required to hold a separate meeting when its members intended to act in their role as Trustees of SPT, explaining: "To agree with such an argument would place technicalities and form over substance."⁴ Second, even if the court were to find that the deed was ineffective, the Board had passed a resolution in which it agreed to transfer the easement to the Dowds. If that resolution were to stand, the Board (this time wearing its SPT hat) could have executed a new deed in favor of the Dowds, and the Dowds could have argued that the Board was required to do so. Accordingly, protection of the conservation easement required that both the deed **and** the resolution be declared of no legal effect, which is precisely what the AG requested and received in the settlement.

State Constitution

JHLT argued that the title report, together with the Wyoming Constitution's prohibition on government entity donations to individuals "provided adequate grounds for 'correction' of the County's actions." That is not the case. Like the private benefit and private inurement prohibitions applicable to land trusts, the state constitutional prohibition on donations does not ensure that government entities will administer con-

servation easements in accordance with the easements' stated terms and purposes. If all government holders were required to do is avoid running afoul of the constitutional prohibition, and if conservation easements were modifiable and terminable "in the same manner as other easements" as JHLT argued, then government entities would be free to sell conservation easements to the highest bidder, provided only that they receive appropriate compensation and use that compensation consistent with their broad public missions.

Uniform Conservation Easement Act

JHLT argued that the Wyoming Uniform Conservation Easement Act (UCEA) permits conservation easements to be modified or terminated "in the same manner as other easements." That is not true. The UCEA expressly "leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and the enforcement of charitable trusts*,"⁵ and Wyoming has a well developed body of charitable trust case and statutory law. Moreover, to address any possible lingering confusion on this point, the comments to the UCEA were amended in 2007 to explain that

while Section 2(a) [of the UCEA] provides that a conservation easement may be modified or terminated "in the same manner as other easements," the [holder], in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first

obtaining court approval in a *cy pres* proceeding.⁶

JHLT's assertion that conservation easements may be modified or terminated "in the same manner as other easements" is also inconsistent with the representations it makes to donors and the public. On its website under "Easement Basics" it explains:

[a conservation easement] is donated by the landowner to the land trust, which then has the authority and *obligation to enforce the terms of the easement in perpetuity*. The landowner still owns the property and can use it, sell it, or leave it to heirs, *but the restrictions of the easement stay with the land forever*.⁷

Amendments and Terminations

JHLT further argued that, if charitable principles apply, conservation easements can be amended only if the original purpose of the easement can no longer be achieved, and only then with court approval. Those assertions reflect a fundamental misunderstanding of the laws governing charitable gifts. The following briefly summarizes how such laws would affect amendments and terminations.

- If a holder has negotiated for inclusion of a standard amendment provision in a conservation easement (as recommended by the Land Trust Alliance), the holder has the express power to agree with the landowner to amendments that are consistent with the conservation purpose of the easement. More-

over, the holder's exercise of this power will not be second-guessed by a court unless there has been a clear abuse.

- Absent an amendment provision, the holder may have the implied power to agree to amendments that are consistent with the purpose of the easement, or the holder could seek court approval of such "consistent" amendments in a deviation proceeding, the legal standard for which is more generous than the *cy pres* standard.
- It is only when a holder seeks to terminate a conservation easement, or "amend" it in a manner inconsistent with its conservation purpose (such as to permit the subdivision and development of the land), that court approval in a *cy pres* proceeding would be required.

These principles are consistent with federal tax law requirements. To be tax-deductible: (i) the conservation purpose of a conservation easement must be "protected in perpetuity" (i.e., the easement must not be transferable or amendable in a manner inconsistent with its charitable purpose), and (2) the easement must be extinguishable (other than through condemnation) only in what essentially is a *cy pres* proceeding. Thus, application of JHLT's "modification and termination by agreement" standard would not only be contrary to the laws governing charitable gifts, it would put the deductibility of conservation easements in Wyoming at risk.

JHLT also argued that applying charitable principles to conservation easements would discourage easement donations. That, too, is not the case. A landowner who donates an easement containing a standard amendment provision can expect AG or court involvement only if the holder later attempts to terminate the easement, or amend it in a manner clearly inconsistent with its stated conservation purpose, as occurred *Salzburg*. Indeed, well-informed easement donors are likely to welcome the application of charitable principles because such principles operate to safeguard the purposes of their gifts. On the other hand, what would discourage easement donations is the prospect that a holder could agree with a subsequent landowner to modify or terminate the easement to allow prohibited uses, sanction violations, or raise cash to fund other ostensibly “better” projects or programs.

The Reach of Federal Tax Law

Finally, JHLT asserted that, given stringent federal tax rules, there is no need for new remedies for improper easement administration. That assertion is also wrong. Even assuming the IRS had the resources and interest to involve itself in the enforcement of conservation easements, the IRS does not have the power to declare an improper easement amendment or termination null and void or to enjoin a holder from future wrongdoing; those key remedies are the province of state courts. The IRS is charged with enforcing federal tax laws; state attorneys general and state courts are charged with ensuring that charitable gifts are administered in accordance with their stated terms and purposes. It is therefore no surprise that the IRS was not involved in *Salzburg* or any of the other cases to date that involved the improper modification or termination of conservation easements.

The application of charitable principles to conservation easements is also not “new.” The UCEA has contemplated it since 1981, the Land Trust Alliance and other land trusts asserted it in an earlier case in support of the Maryland Attorney General’s defense of a conservation easement, and Alliance-sponsored publications discuss such principles as a potential constraint on amendments and terminations.

Conclusion

The Wyoming AG’s office should be applauded for its defense of the conservation easement at issue in *Salzburg*. The AG’s participation and the terms of the settlement should reassure charitable donors in Wyoming that the purposes to which they devote their gifts will be zealously guarded, whether those gifts consist of cash, land, or conservation easements. Of equal importance, the settlement ensures that conservation easement donations remain tax-deductible in Wyoming.

As to Wyoming land trusts, they remain free to negotiate with conservation easement donors for the discretion to amend the easements consistent with the easements’ purposes, and such discretionary powers will not be second-guessed by the AG or the courts absent a clear abuse. *

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ENDNOTES

1. A more detailed discussion of these issues can be found in a series of articles published by the Wyoming Law Review.
2. *Hicks v. Dowd*, 157 P.3d 914, 922 (Wyo. 2007).
3. Defendant Dowd’s Response to Motion for Summary Judgment at 4, 6-7, *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Sept. 4, 2009).
4. *Hicks*, 157 P.3d at 922-923.
5. Uniform Conservation Easement Act § 3 cmt (emphasis added), available at www.nccusl.org.
6. *Id.*
7. See <http://jmlandtrust.org/protection/easement.htm> (emphasis added).
8. See I.R.C. § 170(h)(5)(A); Treas. Reg. § 1.170A-14(c)(2), -14(g)(6)(i).
9. Some landowners are unwilling to grant the holder such broad amendment discretion and customize the standard amendment provision to, for example, preclude amendments that would increase the level of residential development permitted on the land.