Exacted Conservation Easements
Emerging Concerns with Enforcement

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By Jessica Owley

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A conservation easement is a nonpossessory interest in land restricting a landowner’s ability to use land in an otherwise permissible way with the goal of yielding a conservation benefit. The most widely discussed and studied conservation easements are those that are donated or sold. Landowners who donate qualifying perpetual conservation easements can deduct the value of the conservation easements from their income taxes as they do for other charitable donations. See IRC§ 170(h) (outlining the rules regarding charitable deductions for conservation easements). In other situations, landowners receive cash in exchange for relinquishing their rights. Donations and sales are not the only ways to create conservation easements, however. Conservation easements also arise in eminent domain proceedings, through judicial settlement processes, and by exaction.

Exaction of conservation easements is popular throughout the country at all levels of government. Exacted conservation easements exchange public goods for private gain. For example, in exchange for allowing the building of coastal vacation homes or enabling expansion of suburban development into fragile ecosystems, the government may require an exacted conservation easement to give the public the benefit of land conservation.

This article explores the enforceability of exacted conservation easements. Uncertainty in enforceability of exacted conservation easements calls into question their effective use as a method of land conservation. Furthermore, the questionable validity of exacted conservation easements indicates that the permits and approvals obtained in exchange for such exactions could be ill-advised and potentially in jeopardy. Although this article presents reasons to discourage the exactation of conservation easements, it concludes by offering methods for improving the enforceability of exacted conservation easements.

**Exacted Conservation Easements**

Conservation easements are nonpossessory property rights in land held by someone other than the landowner. In addition, these rights must have a conservation purpose. When a landowner places a conservation easement on land, whether by donating it, selling it, or creating it to meet legal requirements, the landowner is agreeing to refrain from exercising certain rights. These rights can include the right to develop, the right to farm in a certain manner, and the right to fill in wetlands.

Conservation easements are essentially rights of enforcement. The holder of the conservation easement has the right to bring an action against the landowner if the landowner violates terms of the conservation easement. Under most state laws, the conservation easement holder can be either a government entity or a nonprofit conservation organization.

Conservation easements vary in duration, but most are perpetual. Indeed, the desire to make long-term and perpetual land conservation restrictions is one of the chief reasons states have passed conservation easement statutes. Perpetuity is required for donated conservation easements to qualify for federal tax benefits. IRC § 170(h)(5)(A).

Increasingly, instead of being part of private decisions about the future of one family’s farm, conservation easements are part of large development projects with complex permitting programs. When developers and individual landowners want to develop or otherwise change the use of their land, there are often local, state, and federal permit requirements. Exacted conservation easements arise in these permitting contexts when, in exchange for a government benefit, landowners either create conservation easements on their own property or arrange for conservation easements on other land. The “exactation” terminology is perhaps a bit tricky—not only because there is a lack of clarity in the courts on what constitutes an “exaction” but also because of the placement of the conservation easement. When a landowner is required to place a conservation easement on its own land, the restriction clearly qualifies as an exaction. When a landowner is required to buy a conservation easement from a willing seller, some would characterize the resulting restriction as a sold conservation easement. These conservation easements belong in the same category because the restriction would not exist but for the permitting requirement.

Although largely similar to other conservation easements, exacted conservation easements differ in key ways. Generally, conservation easements are voluntary, private agreements made by groups or individuals seeking to protect land outside of a governmental context; but exacted conservation easements are the opposite. Exacted conservation easements do not arise out of personal motivations to protect land or conserve species. Exacted conservation easements do not result in charitable tax deductions. Instead, exacted conservation easements are a gov-
enforcement tool—negotiated and often held by government entities. Arguably, they are not entered into willingly; landowners are “coerced” into creating or contributing to these conservation easements to gain governmental permission for their otherwise illegal use of their land.

**Enforceability of Exacted Conservation Easements**

Enforceability of exacted conservation easements is a threshold question of analysis for the continued use of this tool. Based on their widespread use, it is important to establish that exacted conservation easements are valid, legal agreements. Assessing the validity, and thus legal enforceability, of exacted conservation easements involves examining the state’s conservation easement statutes and state servitude law.

**State Conservation Easement Statutes**

The first step in analyzing whether an exacted conservation easement is enforceable is to examine the state conservation easement statute. The drafters of the Uniform Conservation Easement Act (UCEA) and state conservation easement statutes did not appear to contemplate exacted conservation easements. The legislative history of the UCEA shows no discussion of exactions. Indeed, most conservation easement statutes appear to be designed around donated conservation easements with applications to sold conservation easements sometimes included.

This lack of reference to or acknowledgment of exacted conservation easements makes it likely that legislators did not consider the exactation of conservation easements and whether they should adhere to the same rules and format as other conservation easements. In the context of this legislative silence, it is unclear whether courts will uphold exacted conservation easements based on state conservation easement statutes.

Very few statutes mention exactions outright and those that do discuss them unfavorably. Arizona prohibits all exaction of conservation easements. Ariz. Rev. Stat. § 33-272(A) (“[C]onservation easements shall be voluntarily created and shall not be required by a political subdivision or government entity”). California appears to prohibit exactions by local governments, Cal. Civ. Code § 815.3(b) (“No local governmental entity may condition the issuance of an entitlement for use on the applicant’s grant of a conservation easement pursuant to this chapter”); the statute requires all conservation easements to be voluntary without squarely addressing whether exacted conservation easements would be considered voluntary. Id. § 815. See also Montana’s law, Open-Space Land and Voluntary Conservation Easement Act, Mont. Code § 76-6-101. Colorado also has a creation by “voluntary act” requirement but only for conservation easements in gross that encumber water rights. Colo. Rev. Stat. § 38-30.5-103(5). A few other states require conservation easements to be “voluntary,” but accompanying statutory language indicates only that condemned conservation easements are involuntary without addressing the issue of exaction. For example, Iowa’s statute explains that a local government can acquire a conservation easement “by purchase, gift, contract, or other voluntary means, but not by eminent domain.” Iowa Code § 457A.1. Exactions are left out of the list, leaving enforceability under such statutes uncertain. See also Ill. Open Land Trust Act, 525 Ill. Comp. Stat. 33/15(b).

**State Servitude Law**

When statutory requirements for conservation easements cannot be met or courts are hesitant to apply these laws to exacted conservation easements, state servitude law can provide enforcement options. Most states’ servitude laws recognize easements, real covenants, and equitable servitudes. All three of these common-law categories can be applicable to exacted conservation easements, but the restrictions regarding these categories limit their effectiveness for enforcing exacted conservation easements. Indeed, common-law impediments to negative easements in gross led to the creation of state conservation easement acts.

California’s servitude law follows the same common law trends seen in all 50 states and serves as an example of the inquiry one would undertake in state property law. California common law defines an easement as “an incorporeal interest in the land of another that gives its owner the right to use the land of the other person or to prevent the other property owner from using his or her land.” Miller & Starr California Real Estate Laws § 15:1 (3d ed. 2006). Easements in California may be affirmative or negative. B.E. Witkin, 12 Summary of California Law (10th ed. 2005), Real Prop. § 382(2), at 446. They may be appurtenant or in gross. See Roth v. Cottrell, 246 P.2d 958, 959 (Cal. Ct. App. 1952) (appurtenant easement); LeDeit v. Ehlert, 22 Cal. Rptr. 747, 754 (Ct. App. 1962) (easement in gross). In some jurisdictions, easements in gross are not transferable. In California, however, an easement in gross is clearly alienable, assignable, and inheritable. Cal. Civ. Code §§ 802, 1044. As in other jurisdictions, California statutory law specifically delineates potential easement purposes. Id. § 801 (rights include pasture, fishing, taking game, rights-of-way, taking water, wood, minerals, and other things, transacting business on land, conducting sports, receiving air, light, water, or heat, party walls, adjacent support, a seat in church, and right of burial). None of the purposes fits habitat protection and conservation goals.
This list of traditional easements includes both appurtenant and in gross easements. Although there is judicial language regarding the non(exclusiveness of the statutory list of appurtenant easements, *Wright v. Best*, 121 P.2d 702, 711 (Cal. 1942) (“Although an easement of pollution is not among the servitudes specified in section 801 of the Civil Code, that section does not purport to enumerate all the burdens which may be attached to land for the benefit of other property” (citing *Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593 (Cal. 1913))). California courts have not expressly stated whether the list of easements in gross set forth in the code is exclusive. They have, however, recognized two additional categories: (1) utility easements and (2) easements related to navigation and the public trust. *Miller & Starr* § 15:7. Notably, both of these additional easements in gross are affirmative easements. Conservation easements are negative, and courts may be less amenable to approving them as an additional permissive category of easements given the traditional restrictions on permissible negative easements.

Real covenants are burdens on property “intimately and inherently involved with the land” that have the ability to bind subsequent landowners indefinitely. *Black’s Law Dictionary* 421 (9th ed. 2009). That is, unlike contractual covenants, real covenants have the power to bind persons who were not party to the original agreements. In California, real covenants must benefit a particular parcel of land, *Cal. Civ. Code* § 1468; *Marra v. Aetna Const. Co.*, 101 P.2d 490 (Cal. 1940), and only appurtenant covenants contained in grants of estates in real property will run with the land. *Cal. Civ. Code* §§ 1460,1462; accord *Richland Calabasas L.P. v. City of Calabasas*, 45 Fed. Appx. 661 (9th Cir. 2002) (unpublished decision). The limitation to appurtenant covenants means that the benefit of the restriction must be tied to property. This is an arrangement between neighbors. A restriction on your neighbor’s property (for example, prohibiting accumulation of trash) benefits your property, often by maintaining a neighborhood appearance and affecting land values. Such restrictions could include things like habitat preservation. Protection of open space and iconic landscapes also could increase property values and benefit a particular parcel of land. The constraint is that the owner of the benefited property must be the one who enters into the agreement.

Real covenants could provide an avenue for enforcing exacted conservation easements, but only a limited set of exacted conservation easements. When the land in question borders public land, the public entity could hold an exacted conservation easement. Transfer of the exacted conservation easement to another holder, however, would jeopardize the enforceability of the agreement. The appurtenance requirement also would reduce the number of exacted conservation easements that could be held by nonprofit organizations (called land trusts). Moreover, the limitation on transferability may be particularly worrisome for the viability of real covenants held by land trusts. Some land trusts have short histories. Permitting agencies should be rightfully hesitant about designating land trusts as holders of exacted conservation easements that they expect to be enforced as real covenants.

If the requirements for a real covenant are not met, a court might enforce an agreement as an equitable servitude. *Moe v. Gier*, 2 P.2d 852 (Cal. Ct. App. 1931). Yet, California case law on the enforcement of equitable servitudes indicates that such agreements are not enforceable when they are personal. *Anthony v. Brea Glenbrook Club*, 130 Cal. Rptr. 32 (Ct. App. 1976). That is—like real covenants—unless the agreement benefits a parcel of land instead of a person or entity, it will not be enforceable in equity. *Hunt v. Jones*, 86 P. 686 (Cal. 1906).

These requirements for real covenants and equitable servitudes mean they do not provide a likely route for validating exacted conservation easements. A court would have to be persuaded to reject the rule that the burden will not run with the land when the benefit is in gross. Or perhaps a court would be willing to carve out an exception to the rule. This seems unlikely because of the background justification for the prohibition, which is to promote the free use of land. *Kent v. Koch*, 333 P.2d 411, 415 (Cal. Ct. App. 1958) (resolving any doubts about enforceability of servitudes in favor of the free use of land).

**Enforceable as Exactions**

Another possibility for enforcement of exacted conservation easements lies beyond state conservation easement statutes or servitude law. Courts might choose to uphold exacted conservation easements because they are exactions.

A few California cases give some guidance on the different ways courts can deal with exacted conservation easements. *Ojavan Investors, Inc. v. California Coastal Commission*, an unpublished California Court of Appeal case, indicated that California property law definitions of covenants do not apply to exactions. 32 Cal. Rptr. 2d 103, 109 (Ct. App. 1994). Two developers received permits for residential construction activities in the coastal zone under the California Coastal Act in exchange for extinguishing development rights over certain parcels by creating scenic easements and development restrictions. Later, activities on these parcels that should have been prevented by those scenic easements and development restrictions led the California Coastal Commission to bring actions.
against the infringing landowners. The landowners were not associated with the permit (indeed they had no knowledge of it) and were not involved in structuring the covenants or scenic easements. Although the restrictions were not valid covenants under California property law, the court enforced the restrictions because they were permit conditions.

Applying the logic of the Ojavan court, exacted conservation easements need not follow any particular property-law structure. Exacted conservation easements could be enforced based on underlying permits, and they could be enforced against the violator. The action need not be brought against the permit holder. The permit holder’s ability to proceed with permitted activities is not affected. Because it is likely that permitted activities will have already occurred, this may be the only sensible resolution.

In Rossco Holdings, Inc. v. State of California, a California Court of Appeals stated that a landowner could not challenge a condition imposed on the granting of a permit after acquiescence to the condition. 260 Cal. Rptr. 736, 743 (Ct. App. 1989). In the eyes of the Rossco court, acquiescence can occur by either specifically agreeing to a permit or by failing to challenge a permit’s validity and accepting the benefits afforded by the permit. In other words, one who benefits from a permit cannot later challenge its terms. Once an exacted conservation easement is agreed to, put in place, and not challenged within the statute of limitations described by the permit, it is valid.

Another unpublished case presents a less hopeful outlook for enforcement of exacted conservation easements: Richland Calabasas L.P. v. City of Calabasas, 45 Fed. Appx. 661 (9th Cir. 2002) (unpublished decision). Richland owned land subject to a development agreement between the city and a previous landowner. The Ninth Circuit declined to uphold the agreement against the new landowner. The court looked to California property law and held that because the benefit of the agreement did not run with the land, it was not a valid appurtenant agreement. The city entered into the agreement with the developer in its regulatory capacity, not as a neighboring landowner. Therefore, the benefit that the city gained from the agreement could not run with the land and the agreement did not continue once the land changed hands because the burden and benefit were not both tied to the land.

These cases present two possibilities. On the one hand, courts might choose to enforce exacted conservation easements based on the underlying law that served as the basis for the exaction. On the other hand, however, courts might refuse to enforce exacted conservation easements that do not follow the requirements of state property law, requiring any created restrictions to adhere to the conservation easement or servitude statutes. The result is a conflicting legal landscape with few published cases and little legislative history to guide courts, local governments, or citizens.

Conservation easements exacted under federal schemes have stronger enforceability support even if they contradict state property law. Generally, state law governs interpretations of real property conveyances, but there is an exception when the state law is either aberrant or hostile to federal property rights. See United States v. Little Lake Misere Land Co., 412 U.S. 580, 596 (1973). In United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974), the Eighth Circuit held that conservation easements negotiated and held by the U.S. Fish & Wildlife Service did not have to conform to state law because they were part of a federal scheme. The conservation easements at issue there were created under the Migratory Bird Hunting Stamp Act, which authorizes the Fish & Wildlife Service to hold a partial interest in land to protect the habitat of migratory birds. 16 U.S.C. § 718d(c). The landowners had argued that the easements were invalid because no North Dakota law specifically enabled a restriction of that sort or acknowledged the right of the federal government to hold such interests. The Eighth Circuit held state law did not apply because federal law trumps when state law is hostile to federal property rights.

In examining a similar situation, the U.S. Supreme Court held that North Dakota could not restrict the federal government’s ability to acquire easements and prohibited the North Dakota legislature from placing any restrictions on acquisitions by the federal government. North Dakota v. United States, 460 U.S. 300 (1983). Because the federal government served as the conservation easement holder (and thus property rights owner) in each case, it is not clear whether these holdings extend to situations in which the federal government is not the holder. The court relied heavily, however, on the presence of a federal scheme to protect birds that North Dakota seemed to be interfering with, instead of invoking the federal government’s rights as a property owner under the Property Clause.

Ways Forward

Enforceability of conservation easements is uncertain. The above examples of potential routes of enforcement illustrate concerns that can arise with exacted conservation easements. Legislators, activists, and academics did not contemplate the proliferation of exacted conservation easements when enacting, advocating for, and writing about state conservation easement statutes. Despite this early oversight, exactation has become one of the most common ways that conservation easements come into being. With the understanding that exacted conservation easements are here to stay, this section presents three suggestions to increase the likelihood that exacted conservation eas-
ments will be enforceable and to increase the ease of enforcement.

First, states should explicitly address exaction in their state conservation easement acts. Even though exacted conservation easements may be upheld as exactions even when they conflict with state conservation easement statutes or property law, the rules governing them are hazy. Most state conservation easement laws are simply silent on the issue of exactions. Because legislators did not often contemplate exaction, legislative histories (if one can track them down) do little to illuminate the issue.

Second, drafters of exacted conservation easements should increase the precision and detail of the agreements. Increasing the transparency and availability of exacted conservation easements would work to combat many concerns. See Jessica Owley, Keeping Track of Conservation (unpublished manuscript on file with author) (detailing the difficulty of learning about land use permits and the exacted conservation easements associated with them). At a minimum, this measure should include acknowledging and explaining the nature of the exaction and the underlying permitting law within the text of the exacted conservation easement. Exacted conservation easement agreements should indicate (1) that the conservation easement was exacted, (2) the permit associated with the agreement, (3) what has been exchanged for the conservation easement, (4) what underlying environmental law governed the transaction, (5) what state property law provides the foundation for the agreement, and (6) any other information that describes the background of the transaction.

When exacted conservation easements follow these requirements, any reader of the agreements can understand that they were exacted in exchange for permits. For example, when a conservation easement over agricultural land is exacted to meet program requirements, one could look at the agreement and understand that farmland was converted in exchange for the conservation easement. This information could be useful to future holders making decisions about amendment, to courts making enforcement determinations, and to members of the public trying to keep track of public benefit programs and to pressure holders to enforce agreements. Such information could also be important for permitting programs with public enforcement provisions because it enables citizens to assess whether there is meaningful compliance with the permit terms.

Third, to clarify the elements and uses of exacted conservation easements, government agencies that use exacted conservation easements should promulgate regulations related to their use. Permitting agencies also should clarify and codify procedures relating to exacted conservation easement creation. It should be clear to the public and to courts what standards the agency employs. Although agencies would retain flexibility to craft agreements that address specific situations, some general elements could be made uniform.

Such regulations should include ensuring that permit issuers retain, at a minimum, a third-party right of enforcement in the conservation easements they exact. This will keep the permitting agency involved even if it is not the holder of the exacted conservation easement. To work against termination or substantial modification of valuable environmental protections, permitting agency approval should be required for any changes to or dissolutions of exacted conservation easements.

Conclusion

Exacted conservation easements are numerous but uncertain. Whether state legislatures intended to enable their creation or whether the agreements will be enforceable is unclear. These concerns are bolstered by uncertainty in statutory language, absence of legislative history on the issue, conflicting (and minimal) case law, and lack of attention to exactions by scholars and others. Although few people contemplated the exaction of conservation easements when states first began passing conservation easement statutes, their use has been pervasive since the early days of conservation easements and their use seems to be growing. Indeed, given the interests local governments have in land use planning and exactions, it is strange that exaction of conservation easements has gone so long under-examined.

Despite the questions raised here about exacted conservation easements, however, it is not clear how extensive the problem actually is. We must begin by asking whether we think exacted conservation easements should be enforceable. The answer to this is undoubtedly yes. We would not create conservation easements and would not grant permits in exchange for them if we did not hope they would persist. This answer leads to two additional questions. First, does it matter whom we enforce against? Should permit holders be on the hook for the conservation easements they create? For how long? The length of the permit term? In perpetuity?

Second, is there actually an enforceability problem out there? At this stage, few studies have examined the prevalence of conservation easement violations or challenges in enforcement. We do know, however, that challenges to conservation easements and violations of the agreements increase generally as the agreements age and the underlying property changes hands. What we cannot currently determine is whether this problem is greater for exacted conservation easements than for other conservation easements.

We might suspect that exacted conservation easements are more likely to have violations. When a landowner donates a conservation easement, it may be that a special connection with the land is passed on to future generations. A
similar connection to the land might arise when landowners sell conservation easements over their land in an attempt to keep a working landscape (like a forest or farmland) economically viable. Such conservation easements may be associated with a land protection ethos that continues beyond the current generation. When developers begrudgingly create conservation easements to obtain permits, land protection may be less of a motivation. When such exacted conservation easements increase land values by increasing environmental and open space amenities for the landowners and neighbors, violations and challenges may be few. But, when exacted conservation easements constrain land attractive for development or other land uses, we might worry that these agreements are more susceptible to problems than other conservation easements.

In addition, exacted conservation easements are more likely to be held by government agencies instead of nonprofit organizations. Although publicly held exacted conservation easements may appear to offer greater opportunities for transparency and public accountability, there is also some evidence that public entities are less diligent enforcers. See, e.g., Feduniak v. California Coastal Comm’n, 56 Cal. Rptr. 3d 591 (Ct. App. 2007) (stating that the California Coastal Commission issues over 1,000 permits a year and does not have time to monitor compliance with servitudes exacted under those permits because of budgetary and time constraints). See also Bay Area Open Space Council, Ensuring the Promise of Conservation Easements 14 (1999) (studying violations of conservation easements in the San Francisco Bay Area and finding that, although around 75% of land trusts monitored their conservation easements regularly, only 30% of public entities did so).

Finally, even if the percentage of violations and challenges are the same for exacted conservation easements as they are for other conservation easements, we may still have a heightened interest in enforcability of the exacted conservation easements. Because exacted conservation easements are created in exchange for a public good, ensuring their long-term viability is in the public interest. A greater understanding of the risks and benefits of exacted conservation easements will help better determine when to use the tool.