

ZONING FOR CONSERVATION EASEMENTS

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“It will be extremely difficult to commit the sin of choosing too much open space in getting started (or at almost any other time, for that matter), and any planner who can’t think now of some land worth saving ought to get into another line of work.”¹

I

INTRODUCTION

Federal and state income tax and other tax benefits have spurred a huge increase in the number of conservation easements, private agreements that restrict the development of property. Most conservation easements are perpetual and may have a huge impact on the land use in a community. With few exceptions, however, conservation easements have not been incorporated in any meaningful way into local land-use planning. Local comprehensive plans establish goals and set out a vision for the future land use of the community. Many comprehensive plans contain future land-use maps, delineating the future vision graphically. These maps rarely include designation of areas for conservation easements.

Land-use regulations, like zoning ordinances, implement the comprehensive plan. Zoning ordinances generally delineate districts allowing certain uses “by right” (without further permissions), prohibiting other uses, and allowing some uses only with additional levels of review (“conditional uses”). To this date, however, zoning ordinances fail to incorporate conservation easements into zoning ordinances in this way.

While no known zoning ordinances address conservation easements as a use, a handful of states link conservation easements to land-use planning. Eight state conservation-easement-enabling statutes explicitly link conservation easements with local land-use planning. The provisions in these enabling

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1. WILLIAM H. WHYTE, JR., SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 9 (1959).

statutes fall into four categories: (1) review and approval by local governments, (2) required consultation with local government planning authorities, (3) consideration of land-use planning factors, and (4) conformity with the local comprehensive plan. Although most easement-enabling statutes incorporating zoning and land use focus exclusively on the initial placement of conservation easements, a few statutes incorporate land-use planning factors into subsequent easement decisions such as whether to terminate the easement.

II

CONSERVATION EASEMENTS

The Uniform Conservation Easement Act (UCEA) defines “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, archaeological, or cultural aspects of real property.²

The number of conservation easements meeting this definition has grown dramatically over the past several years.

The number of land trusts—private nonprofit organizations that currently hold conservation easements—stands at 1,667, a thirty-two percent increase from 2000.³ When private nonprofit land trusts are added to state easement holders, the combined rate of conservation easement creation between 2000 and 2005 more than tripled.⁴ As of 2005, local, state, and national land trusts held easements on thirty-seven million acres, a fifty-four percent increase from five years earlier.⁵ These statistics are based on data gathered by The Land Trust Alliance Census and actually undercount the total number of conservation easements. For example, while the Land Trust Alliance includes large national land trusts like the Nature Conservancy and Ducks Unlimited, the census does not count the increasingly numerous easements held by governmental entities.⁶

Despite the rapid growth in the deployment of conservation easements, reliable data regarding them is difficult to locate.⁷ Many easements are held by

2. UNIF. CONSERVATION EASEMENT ACT § 1(1) (2007).

3. Rob Aldrich & James Wyerman, Land Trust Alliance, *2005 National Land Trust Census Report 3* (2005), available at <http://www.landtrustalliance.org/land-trusts/land-trust-census/2005-national-land-trust-census>.

4. *Id.*

5. *Id.* (2005 figures represent the latest available).

6. *See id.* at 4 (discussing total acreage covered through *private* means).

7. Gerald Korngold, *Private Conservation Easements: Balancing Private Initiative and the Public Interest*, in PROPERTY RIGHTS AND LAND POLICIES 358, 367 (Gregory K. Ingram & Yu-Hung Hong eds., 2009).

private land trusts and currently no complete or all-inclusive central national database exists. Efforts to create such a database, however, are in progress.

III

LAND-USE PLANNING

A. The Comprehensive Plan

The land-use planning process begins with the comprehensive plan, which sets out goals and objectives for the future land use of the community. The comprehensive plan is created with community input and involvement and represents the community's vision of how its land should be allocated in terms of various uses. Thus, the comprehensive plan forms the centerpiece of any land-use planning effort and guides the growth of the community.⁸ Future development and conservation efforts should be consistent with the provisions of the comprehensive plan.

While the comprehensive plan is the overarching legal document controlling land use, zoning, subdivision, and a myriad of other more specialized ordinances implement the plan. These land-use planning tools—such as zoning and subdivision ordinances and, at least arguably, conservation easements—should promote and implement the goals of the comprehensive plan. Zoning ordinances are the most common ordinance used to implement the comprehensive plan.

B. Zoning

United States law clearly grants state governments the authority to regulate land use under the police power.⁹ Traditionally, the states delegate this authority to local governments through state legislation that grants local governments authority to conduct land-use planning.¹⁰

The Standard Zoning Enabling Act, upon which many state-zoning-enabling laws are based, grants to local governments the power

to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of the lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.¹¹

Further, the zoning ordinance may “divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the

8. JOHN M. LEVY, *CONTEMPORARY URBAN PLANNING* 123 (9th ed. 2011).

9. See Dix W. Noel, *Retroactive Zoning and Nuisances*, 41 COLUM. L. REV. 457, 457 (1941) (discussing the legislative power to restrict private land uses in legislatively created zones).

10. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 3.5, at 56 (2d ed. 2007).

11. Standard State Zoning Enabling Act § 1 (Advisory Comm. on Zoning, U.S. Dep't of Commerce 1926).

purposes of [the zoning ordinance].”¹² Within each district, the local government may regulate the use of land.¹³ Other purposes of zoning include the provision of adequate light and air, the prevention of overcrowding, and the avoidance of “undue concentration of population.”¹⁴

The typical zoning ordinance generally contains two parts. First, the zoning map divides the community into different sections and designates the zoning classification of each section.¹⁵ The second part, the text of the ordinance, sets out detailed regulations pertaining to the uses allowed and the structures permitted in the zoning classification, as well as setbacks, open-space requirements, and other restrictions.¹⁶

Three types of uses exist within zoning ordinances.¹⁷ “Permitted” or “of right” uses refer to uses that are allowed in a particular district with no further approval.¹⁸ For example, in a single-family, residential zoning classification, a landowner may generally build a single-family, detached home without any further permission. “Conditional” or “special uses” are uses that are allowed within a particular zoning classification, but not in all locations, or without any additional restrictions.¹⁹ For example, a gasoline station may be a conditional use within an agricultural zoning classification. A landowner within that classification desiring to construct a gasoline station must apply for a conditional use permit. The local government holds great discretion as to whether to grant or deny the application. If the application is granted, the local government may place additional requirements on the use, like the establishment of vegetated buffer areas or limitations on hours of operation.²⁰

The zoning ordinance also includes “prohibited uses” in each classification. Most commonly, if a particular use is not listed as permitted or conditional, the use is prohibited.²¹ Without receiving a variance from the zoning regulations or a rezoning to a different classification, an owner may not engage in a prohibited use.

The genesis of zoning lies in the increased urbanization of the United States.²² The 1920 United States Census was the first to show a predominantly urban population.²³ The larger population centers, where population densities

12. *Id.* § 2.

13. *Id.*

14. *Id.* § 3.

15. LEVY, *supra* note 8, at 140–41.

16. *Id.* at 141.

17. JUERGENSMEYER & ROBERTS, *supra* note 10, § 4.2(A), at 92–95.

18. *Id.* § 4.2(B), at 71–72.

19. *Id.* § 5.24(A), at 170–71.

20. *Id.* § 5.26, at 289–90.

21. *Id.* § 4.3(C), at 98.

22. See Gordon Whitnall, *History of Zoning*, 155(2) ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2 (1931) (stating that zoning first begun in larger population centers when population concentration became pronounced).

23. *Id.*

were increasing significantly, first implemented comprehensive zoning.²⁴ Although zoning initially focused on cities, recognition that jurisdictional boundaries failed to coincide with the boundaries of functioning communities prompted “regional zoning.”²⁵

Regional zoning spreads land use and zoning practices into areas outside of cities, representing the preventive aspect of zoning.²⁶ The preventive aspect refers to maintaining open space, as opposed to regulating only the type of development that will occur on the parcel. “The regional approach not only permits but usually incorporates consideration of open spaces that probably will be *perpetually* preserved against the urbanization so typical of large centers of population.”²⁷

Although zoning ordinances may be amended and thereby do not provide for perpetual preservation of land, the purposes of zoning include delineation of appropriate locations for perpetual preservation. “The core principle of use zoning . . . is that everything has its place.”²⁸ Even “uses” of land that some may consider “non-use,” like designation for open space for perpetual preservation, have a place in zoning ordinances.

C. Conclusions

Although not used in every jurisdiction, zoning is one of the most common land-use tools used to implement the comprehensive plan. Contrary to the popular notion of zoning as applying to development only, zoning appropriately also addresses open space. Where allowed by the comprehensive plan, zoning is a tool that may be used to prevent development on lands considered more valuable in their undeveloped state.

IV

ZONING ORDINANCES AND RESTRICTIVE COVENANTS

A. Introduction

The comprehensive plan and implementing tools, like zoning, represent public control of land use. Private parties also control land use through means such as restrictive covenants. A restrictive covenant consists of a promise to limit the use of land.²⁹

Restrictive covenants essentially consist of private agreements, usually initiated by the developer of the property. The covenants are privately

24. *Id.*

25. *Id.* at 3.

26. *Id.* at 3–4.

27. *Id.* at 14 (emphasis added).

28. JUERGENSMEYER & ROBERTS, *supra* note 10, § 4.1, at 90–92.

29. Rajeev D. Majumdar, Comment, *Racially Restrictive Covenants in the State of Washington: A Primer for Practitioners*, 30 SEATTLE U. L. REV. 1095, 1095–97 (2007).

enforced. Restrictive covenants have proved to have “a more enduring effect than other agreements since the restriction will be binding on subsequent purchasers of the land.”³⁰ This more enduring effect results from the fact that most restrictive covenants are designed to “run with the land”: they remain in effect regardless of transfer of ownership of the property.³¹

Restrictive covenants raise some concerns that parallel those of conservation easements. Like conservation easements, restrictive covenants are private agreements that receive no public input and often no public oversight. Neither generally receives public approval. Both forms of restrictions are privately enforced, and so normally are not coordinated with local land-use planning and regulations that implement the local plan.

Generally, however, conservation easements require court approval for termination and amendments may be difficult to implement.³² The majority of scholars addressing the issue regard conservation easements as charitable trusts, with the application of the *cy pres* doctrine applying to any modification or termination.³³ For restrictive covenants, the parties may amend or terminate the restrictions much more easily—by agreement.³⁴

B. The Interaction Between Zoning and Restrictive Covenants

One issue that arises with respect to conservation easements and restrictive covenants centers on the interaction between public regulation (like zoning), on the one hand, and private land-use restrictions (like restrictive covenants and conservation easements) on the other. Unlike conservation easements, the law on the interaction between public land-use regulations and restrictive covenants is well-settled.

Public regulation of land use through zoning ordinances and other tools, and private restrictive covenants often act independently of one another.³⁵ Zoning ordinances typically do not affect the validity of private restrictive covenants.³⁶ When public zoning and private covenant restrictions conflict, the more restrictive provision applies.³⁷

30. Law Reform Comm'n of Western Australia, Report on Restrictive Covenants § 1.2, at 1–2 (1997), available at <http://www.lrc.justice.wa.gov.au/2publications/reports/P91-R.pdf> [hereinafter *Western Australia Report*].

31. JUERGENSMEYER & ROBERTS, *supra* note 10, § 15.6, at 905–10.

32. Court approval of termination is required for the conservation easement donation to maintain deductibility pursuant to Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 2009). See also Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 431–58 (2005) (discussing application of the charitable trust provisions to conservation easements).

33. See, e.g., McLaughlin, *supra* note 32.

34. JUERGENSMEYER & ROBERTS, *supra* note 10, § 15.9, at 912–15.

35. EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 82:2 (2010).

36. *Id.*

37. *Id.*

The “changed circumstances” doctrine for restrictive covenants, however, provides that if circumstances in the area make the purposes of a restrictive covenant impossible to achieve, a court should not enforce the covenant.³⁸ Case law provides that a change in zoning, though not alone sufficient to overturn a restrictive covenant, provides evidence of changed circumstances.³⁹ Further, when a clear conflict between the two exists—where a restrictive covenant allows only uses that are prohibited by the zoning ordinance—courts may refuse to enforce the restrictive covenant.⁴⁰ Otherwise, the landowner would have no reasonable use of the property. In these cases, public regulation, in the form of zoning ordinances, may trump private restrictions.

Local governments generally neither review nor approve restrictive covenants. Some restrictive covenants may promote sprawl or increase the cost of housing.⁴¹ For example, restrictive covenants that require large minimum lot sizes, minimum square footages, or the use of certain building materials may cause sprawl or increase housing costs.⁴² These effects contradict the purpose of land-use planning and land-use regulation. Other, more flexible ways to achieve the same goals as the restrictive covenants at issue may be available.⁴³ In these cases, zoning, or some other type of public regulation, may be more appropriate.

V

CONSERVATION EASEMENTS AND PLANNING

A. Introduction

Land trusts and land-conservation professionals traditionally have not integrated conservation easements with local land-use planning. In many cases, the local comprehensive plan is seen by some land trusts and citizens as inferior to a strategy of conserving as much land as quickly as possible. These citizens say, “Let’s save the best land as soon as we can, and then, at our leisure, rationalize with further studies how right we were to have done it.”⁴⁴

Many state and local land-conservation groups adopt this “more is better” perspective, setting goals for acreage or percentages of land area in the locality, with little or no regard for the quality of the easements. For example, Virginia Governor Timothy Kaine established a goal of preserving 400,000 additional acres of land in the state through purchase or donation of fee simple or through

38. *Id.* § 82:4.

39. *Id.*

40. *Id.* at § 1:1, n.19.

41. *Western Australia Report*, *supra* note 30, § 5.8, at 61–62.

42. *Id.* § 5.4, at 59; *id.* § 5.8, at 61–62.

43. *Id.* § 5.8, at 61–62.

44. WHYTE, JR., *supra* note 1.

the use of conservation easements during his administration.⁴⁵ No limitations on the quality of the easements were set, nor were any particular areas in the state targeted for the easements.

The Uniform Conservation Easement Act (UCEA) is one of a number of model laws that exist to provide models for state legislation. Like other uniform acts, the UCEA was drafted by the National Conference of Commissioners on Uniform State Laws. Also, known as the Uniform Law Commission, the National Conference of Commissioners on Uniform State Laws seeks to “[provide] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”⁴⁶

The UCEA contemplates that landowners will have significant freedom in crafting conservation easements without public interference.⁴⁷ The act’s authors reasoned that it simply removes common-law barriers to the validity of conservation easements.⁴⁸ The Commissioners opined that the added complexity and bureaucracy of a government review and approval process may discourage both landowners and states from participating.⁴⁹

The prefatory note of the UCEA cites the already existing Massachusetts program disapprovingly because the Massachusetts program requires public review and approval.⁵⁰ The commissioners felt that the act itself and other state and federal legislation provided adequate controls over conservation easements.⁵¹ Specifically, the commissioners maintained that the only allowable holders of easements, governmental agencies and charitable organizations, were not “likely to accept [conservation easements] on an indiscriminate basis.”⁵² The history of conservation easements, therefore, includes almost total disregard for local land-use planning.

Some of this aversion to incorporating conservation easements into land-use planning may arise from the perception that land-use planning in the United States traditionally equates to planning for development.⁵³ This view considers comprehensive planning as important for “industrial development, highways,

45. See Nikki Rovner, *400,000 Acres By 2010: Land Conservation in Virginia*, http://www.dcr.virginia.gov/stormwater_management/documents/LC_rovner.pdf (last visited Aug. 16, 2011).

46. *About ULC*, UNIF. LAW COMM’N, [http://www.nccusl.org/Narrative.aspx?title=About the ULC](http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC) (last visited May 6, 2011).

47. UNIF. CONSERVATION EASEMENT ACT (2007), at commissioners’ prefatory note.

48. *Id.*

49. *See id.* (“[P]roperty owners may be reluctant to become involved in the bureaucratic . . . process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.”).

50. *Id.*

51. *Id.*

52. *Id.*

53. See Thomas L. Daniels & Mark D. Lapping, *Land Preservation: An Essential Ingredient in Smart Growth*, 19 J. PLAN. LITERATURE 316, 325 (2005) (“Planning in America has traditionally meant ‘planning for development.’”).

and the like” but not for conservation.⁵⁴ In practice, however, land-use planning, in the form of “smart growth” or otherwise, tends to focus almost exclusively on land conservation.⁵⁵ The “more is better” ideal of conserving land with little regard for conservation value promotes leapfrog and sprawl development, destroys the environment, and causes longer commutes, resulting in increased greenhouse gas emissions.⁵⁶

Excessive land conservation also raises equity concerns relating to affordable housing.⁵⁷ If the supply of buildable lots in a particular area decreases significantly through conservation easements, the price of buildable land will increase accordingly. The increased land costs will increase the likelihood that housing will be unaffordable for low- to moderate-income families.

B. States Incorporating Planning and Conservation Easements

1. Introduction

Although the UCEA and most state enabling statutes fail to consider land-use planning, a few states address the link between the two.⁵⁸ Eight states (Massachusetts, Michigan, Missouri, Montana, Nebraska, New Jersey, Tennessee, and Virginia) explicitly incorporate land-use planning principles into their conservation-easement-enabling authority. The provisions fall into four categories: (1) review and approval of the placing or termination of conservation easements by local governments, (2) required consultation with the local government by the entity holding the easement, (3) land-use planning principles as factors for consideration on whether to accept or terminate the easement, and (4) requirements of conformity with the local comprehensive plan. Some states combine one or more categories of provisions. Although most provisions address the original placement of the easement, a few provisions incorporate comprehensive land-use planning factors into the decision of whether to terminate the easement.

2. Approval of Local Government Required

Massachusetts and Nebraska require review and preapproval of conservation easements, at least in some circumstances, by local governments.⁵⁹ Public land-use restrictions result from a transparent and participatory process that seeks to involve stakeholders throughout the community. On the other

54. WHYTE, JR., *supra* note 1, at 7–9.

55. *See, e.g.*, Gerrit-Jan Knaap & John W. Frece, *Smart Growth in Maryland: Looking Forward and Looking Back*, 43 IDAHO L. REV. 445, 454 (2007) (discussing the popularity of land preservation programs in Maryland over programs that encourage development within communities).

56. *Id.* at 455.

57. *See id.* (“Such protection makes unavailable land that might otherwise have been suitable for new development, often driving up the cost of remaining raw land close to or inside existing communities. . .”).

58. *See infra* notes 59–104 and accompanying text.

59. *See infra* notes 60–71 and accompanying text.

hand, conservation easements consist of private agreements imposed by private parties with no public involvement. Public review of privately negotiated conservation easements helps bring the public into the process.

The strongest public approval process for conservation easements occurs in Massachusetts. Under Massachusetts law, conservation easements may be unenforceable unless the proposed easement is reviewed and approved by a state agency and the local government.⁶⁰ All easements must be approved by the secretary of environmental affairs, commissioner of the metropolitan district commission, the commissioner of food and agriculture, the Massachusetts historical commission, or the director of housing and community development, depending upon the type of easement.⁶¹ For easements held by a charitable corporation or trust, the local government body in which the land is situated must approve the easement.⁶²

In addition, to release a conservation easement in Massachusetts, the government body holding the restriction, or the local government within which the land is situated must approve the release.⁶³ A public hearing must be held upon reasonable public notice prior to the decision on the approval.⁶⁴ If state agency approval was required for the easement, the state agency must also approve the release.⁶⁵

Massachusetts law requires that the public interest must be considered in any decision to accept or terminate a conservation easement, regardless of the holder of the easement.⁶⁶ The determination of the public interest in any approval or release explicitly includes, among other factors, “any public state, regional or local comprehensive land use or development plan affecting the land.”⁶⁷

Like Massachusetts, Nebraska law expressly requires local approval of conservation easements. The statute provides for this approval “[i]n order to minimize conflicts with land-use planning.”⁶⁸ The local governing body, after referring the easement to and receiving comments from the local planning commission, must approve the proposed easement in order for the easement to be finalized.⁶⁹ The planning commission’s responsibility focuses on comments “regarding the conformity of the proposed [easement] to comprehensive planning for the area.”⁷⁰ Easements held by the state, a state agency, or a political subdivision other than a local government need not be approved by the

60. MASS. GEN. LAWS ch. 184, § 32 (2010).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. NEB. REV. STAT. § 76-2, 112(3) (2010).

69. *Id.*

70. *Id.*

local government, but must be referred to the local planning commission for comments.⁷¹

3. Consultation with the Local Government

Some states require consultation with the local government, but not local government approval, for the creation of conservation easements. Tennessee and Montana both require consultation with local planning authorities prior to the acceptance of a conservation easement. Although the consultation is not binding, the views of the local planning authorities may impact the potential holder's decision of whether to accept the easement.

Specifically, donations of open-space easements to the State of Tennessee must be accepted by the commissioner of agriculture.⁷² The commissioner must consult with the state planning office and the appropriate local planning commission before accepting the easement.⁷³ The advice by the planning commission "shall be in accordance with the provisions and recommendations of an officially adopted land use plan or the land use element . . . of an officially adopted plan for physical development."⁷⁴ If none of the named plans exist, the advice must be "in accordance with the principles of sound land use planning."⁷⁵

Montana also requires review of proposed conservation easements by the local planning authority "[i]n order to minimize conflict with local comprehensive planning."⁷⁶ These comments, however, are advisory only.⁷⁷

4. Land-Use Planning as a Factor for Consideration

Another way to incorporate local government land-use planning into the conservation easement process involves the consideration of land-use planning in the decision process. Michigan, Missouri, New Jersey, and Tennessee all include land-use planning as a factor for consideration in the conservation easement process. Some of these programs require consideration of the "public interest," which often explicitly includes land-use planning considerations.

Michigan conditions grants to local governments for the purchase of agricultural conservation easements upon adoption of a comprehensive land-use plan that includes a plan for agricultural preservation.⁷⁸ The state uses five criteria for evaluating grant proposals, including a catch-all category of "other factors considered important."⁷⁹ Of the four specific criteria, two refer to land-use planning. One criterion examines farmland that "would complement and is part of a documented, long-range effort or plan for land preservation by the

71. *Id.* § 76-2, 112(4).

72. TENN. CODE ANN. § 11-15-107(a) (2010).

73. *Id.*

74. *Id.*

75. *Id.*

76. MONT. CODE ANN. § 76-6-206 (2010).

77. *Id.*

78. MICH. COMP. LAWS. ANN. § 324.36203(2)(b) (2011).

79. *Id.* § 324.36205(1).

local unit of government.”⁸⁰ Another criterion tangentially refers to land-use planning. This factor references farmland that “complements other land protection efforts by creating a block of farmland” under easement.⁸¹ Conserving land contiguous to other protected land often promotes sound land-use planning.

Michigan also requires consideration of several factors for release of farmland from a conservation easement. The Michigan criteria for relinquishment of farmland from a conservation easement require, among other things, that land meet at least one of three conditions.⁸² The land must (1) be owned, operated, and maintained by a public body for public use; (2) have been zoned for industrial or commercial use for the immediately preceding three years; or (3) be zoned for commercial or industrial use and mitigation provided.⁸³

In addition, Michigan requires that the relinquishment must be in the public interest.⁸⁴ The governing body must consider three factors in determining the public interest.⁸⁵ Two factors relate to land-use planning. One of these factors examines the long-term effect of the relinquishment on agriculture in the surrounding area, including “nonfarm encroachment upon other agricultural operations in the surrounding area.”⁸⁶ Another of the factors considers the infrastructure changes and costs to the local government from development of the relinquished land.⁸⁷

Missouri’s conservation-easement-enabling authority also considers land-use planning, but in a less direct fashion. The Missouri statute focuses on the acquisition of conservation easements for open-space purposes.⁸⁸ The definition of open space includes ties to the local comprehensive plan.⁸⁹ Open space includes land that “[i]mplements the plan of development adopted by the planning agency of the state or county or municipality” and land that “[p]romote[s] orderly or suburban development.”⁹⁰ This consideration acknowledges the fact that some land is more appropriate for development while other land is more appropriate for conservation. Placing a conservation easement on land that lies within the planned development area of a locality, for example, promotes leapfrog, sprawl development.⁹¹ The development that

80. *Id.* § 324.36205(1)(b).

81. *Id.* § 324.36205(1)(c).

82. *Id.* § 324.36111A(1)(b).

83. *Id.*

84. *Id.*

85. *Id.* § 324.36111A(2).

86. *Id.* § 324.36111A(2)(a).

87. *Id.* § 324.36111A(2)(c).

88. MO. REV. STAT. § 67.880 (2011).

89. *Id.* § 67.900.

90. *Id.* § 67.900(6)–(7).

91. Jesse J. Richardson, Jr., *Conservation Easements: Smart Growth or Sprawl Promotion?*, 23 AGRIC. L. UPDATE 4, 4 (Sept. 2006).

would have occurred on the protected parcel instead occurs on a parcel further from the population center.⁹² The conservation easement does not “prevent” development, but merely affects the location of the development.

New Jersey law also considers land-use principles, but only in the release of conservation easements. The Commissioner of Environmental Protection must consent to the release of any conservation easement.⁹³ When determining whether to approve the release, the commissioner must consider the public interest, and must take into account “any State, regional or local comprehensive land use or development plan affecting such property.”⁹⁴

Tennessee law also references land-use concerns in the termination of conservation easements. The Tennessee Commissioner of Agriculture may only cancel an easement on behalf of the state if five conditions are met.⁹⁵ Two of these conditions pertain to land-use planning. One condition requires that the open space “is not needed in that location and that the public interest would be better served by the cancellation of the easement.”⁹⁶ Another condition requires that the local planning commission adopt a resolution stating the same conclusion.⁹⁷

5. Conformance with the Local Comprehensive Plan

One state, Virginia, requires that conservation easements conform to the local comprehensive plan. This requirement very directly links land-use planning and conservation easements.

Virginia adopted two enabling acts for conservation easements, one pertaining to easements held by state agencies and local governments,⁹⁸ and the other applying to easements held by charitable organizations.⁹⁹ Both acts contain similar language mandating that any conservation easement conform to the local comprehensive plan.

The Open-Space Land Act¹⁰⁰ applies to public bodies, including state agencies and local governments. This act provides that “[t]he use of the real property for open-space land shall conform to the official comprehensive plan for the area in which the property is located.”¹⁰¹ The Virginia Conservation Easement Act¹⁰² applies to charitable organizations and states that “[n]o conservation easement shall be valid and enforceable unless the limitations or obligations created thereby conform in all respects to the comprehensive plan at

92. *Id.*

93. N.J. STAT. ANN. § 13:8B-6 (2011).

94. *Id.*

95. TENN. CODE ANN. § 11-15-108(b) (2010).

96. *Id.* § 11-15-108(b)(2).

97. *Id.* § 11-15-108(b)(3).

98. The Open-Space Land Act, VA. CODE ANN. §§ 10.1-1700–1705 (2010).

99. The Virginia Conservation Easement Act, VA. CODE ANN. §§ 10.1-1009–1016 (2010).

100. VA. CODE ANN. §§ 10.1-1700–1705.

101. *Id.* § 10.1-1701.

102. *Id.* §§ 10.1-1009–1016.

the time the easement is granted for the area in which the real property is located.”¹⁰³

Although the language in both provisions provides a strong link to local land-use planning, neither act contains a provision for review or enforcement by local governments. The language implies that conservation easements that fail to conform to the comprehensive plan are void and of no effect, but no case law exists to clarify the provisions. The statutes fail to even define “conformance.”

Given that many comprehensive plans span hundreds of pages and contain a variety of goals that often seem to conflict, the conformance requirement could cause much uncertainty and litigation in future years when future landowners or others attempt to void easements based on these provisions. The language of the Virginia Conservation Easement Act proves particularly troublesome, requiring that the conservation easement “conform in all respects to the comprehensive plan.”¹⁰⁴

Recordation of the comprehensive plan with the easement proves impractical due to the length of the plan. Even if the plan were included in the conservation easement file, different interpretations may yield different conclusions as to whether the easement conforms to the comprehensive plan. Amendment of the statute to require a local review and approval process, with recordation of documentation of the approval, would enhance certainty in the future.

C. Conclusions

Perpetual conservation easements hold the potential to greatly impact land-use planning, in both positive and negative ways. Despite this fact, state and local government regulation rarely addresses the link between conservation easements and land-use planning.

Only eight state enabling statutes for conservation easements incorporate land-use planning considerations. Some include land-use planning reviews for the initial placement of the easement, some for termination of easements, and some in both situations. Table 1¹⁰⁵ summarizes these eight state enabling statutes with respect to the manner in which land-use planning is incorporated.

These statutes provide possible frameworks for other states to incorporate land-use planning considerations into conservation easements. State enabling statute provisions can only go so far, however. Internal Revenue Code provisions and supporting regulations contain a number of requirements that conflict with sound land-use planning.

103. *Id.* § 10.1-1010(E).

104. *Id.*

105. See *infra* at p. 108.

VI

THE IMPACT OF THE INTERNAL REVENUE CODE AND REGULATIONS

A. Introduction

Federal and state tax incentives drive much of the growth in the use of conservation easements. Section 170(h) of the Internal Revenue Code (I.R.C.) allows a federal income tax deduction for donation of a “qualified conservation contribution,” which includes donated conservation easements that meet the requirements of the code and the regulations.¹⁰⁶ In 2003, federal taxpayers deducted a total of \$1.49 billion for contributions of perpetual conservation and historic easements.¹⁰⁷

The Internal Revenue Code and Regulations contain requirements, separate from any state enabling code requirements, for conservation easements to qualify for the income tax deduction. Many states also allow a deduction for state income tax purposes and some grant state income tax credits for donations of conservation easements.¹⁰⁸ Local real property taxes may be reduced due to the lower value of the property.¹⁰⁹ These state and local government tax benefits are often linked to the requirements of the Internal Revenue Code and Regulations for conservation easements.¹¹⁰

The federal income tax requirements for the deductibility of the donation of conservation easements often provide incentives for conservation easements that contradict sound land-use planning. Although the requirements include some reference to land-use planning, these criteria either consist of alternative or optional provisions, or confound appropriate land-use planning.

B. The Perpetuity Requirement

Perhaps most importantly, any “qualified conservation contribution” must be perpetual to qualify for federal income tax benefits.¹¹¹ The Regulations allow the deduction if the easement is terminated due to changed conditions that “make impossible or impractical the continued use of the property for conservation purposes”¹¹² The restrictions must be terminated by a court proceeding, however, and the proceeds from the sale of the property that go to

106. I.R.C. § 170(h)(4)(A)(iii) (2006).

107. Janette Wilson & Michael Strudler, *Individual Noncash Charitable Contributions* 60 (2003), available at <http://www.irs.gov/pub/irs-soi/03inccart.pdf>.

108. Nicole Sitko, *State Income Tax Deductions for Conservation Easements* (2008) (unpublished manuscript, on file with author); Debra Pentz, *Conservation Resource Center, State Conservation Tax Credits: Impact and Analysis* 9 (2007), available at <http://www.taxcreditexchange.com/documents/StateConservationTaxCreditsImpactandAnalysis.pdf>.

109. Korngold, *supra* note 7, at 365.

110. Pentz, *supra* note 108.

111. I.R.C. § 170(h)(2)(C) (2010); *id.* § 170(h)(5)(A); Treas. Reg. § 1.170A-14(b)(2) (as amended in 2009).

112. Treas. Reg. § 1.170A-14(g)(6)(i).

the donee must be used “in a manner consistent with the conservation purposes of the original contribution.”¹¹³

Consequently, the vast majority of conservation easements are perpetual. Many state enabling acts allow amendment or termination of conservation easements based on relatively liberal standards.¹¹⁴ However, the perpetuity requirement makes relatively easy termination risky for qualification for the federal tax benefits. Therefore, many conservation easements contain amendment and termination provisions that mirror the federal income tax requirements.¹¹⁵

The extreme difficulty in amending or terminating conservation easements conflicts with land-use planning. Most comprehensive plans look twenty years into the future. Land use, like nature, is dynamic. In contrast, the static nature of conservation easements prevents the flexibility and adaptability required for sound land-use planning and regulation.¹¹⁶

C. Conservation Purpose

Further, conservation easements must contain a valid conservation purpose as defined in I.R.C. section 170(h)(4) to qualify for the federal income tax deduction.¹¹⁷ The criteria for qualifying conservation easements as holding a valid conservation purpose, contained in I.R.C. section 170(h)(4) and Treasury Regulations section 1.170A-14, fail to adequately consider land-use planning considerations. I.R.C. section 170(h)(4)(A) defines conservation purpose as including preservation of land for outdoor recreation, education, habitat for fish, wildlife, or plants, and open-space or historic value.¹¹⁸ Open space must be for the scenic enjoyment of the general public, or pursuant to a governmental conservation policy and yielding a “significant public benefit.”¹¹⁹

Treasury Regulations section 1.170A-14(d)(4)(ii)(A) lists factors to be considered in gauging “scenic enjoyment” for open-space easements donated for that purpose. Four of the eight listed factors could be construed as relating to land-use planning: “[t]he compatibility of the land use with other land in the vicinity”;¹²⁰ “[t]he openness of the land (which would be a more significant

113. *Id.*

114. *See, e.g.*, NEB. REV. STAT. § 76-2,113 (2010) (allowing release of a conservation by holder with approval of the local governing body, or, in some instances, approval of the state, state agency, or political subdivision who is the holder).

115. *See, e.g.*, Land Trust Alliance, *Amending Conservation Easements: Evolving Practices and Legal Principles, Research Report* (August 2007), 24–26.

116. *See* John Echeverria & Jeff Pidot, *Drawing the Line: Striking a Principled Balance Between Regulating and Paying to Protect Land*, 39 ENVTL. L. REP. 10,868, 10,874 (2009) (discussing the tendency for conservation easements to permanently lock up land).

117. I.R.C. § 170(h)(1)(C) (2006).

118. *Id.* § 170(h)(4)(A).

119. *Id.* § 170(h)(4)(A)(iii).

120. Treas. Reg. § 1.170A-14(d)(4)(ii)(A)(1) (as amended in 2009).

factor in an urban or densely populated setting or in a heavily wooded area)”;¹²¹ “[r]elief from urban closeness”;¹²² and “[t]he degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area.”¹²³ Two other factors relate to a “scenic identification program” or “landscape inventory,” but not land-use planning.¹²⁴ Another factor, “[t]he harmonious variety of shapes and textures”¹²⁵ could be construed as relating to aesthetics, but the meaning is unclear.

Treasury Regulations section 1.170A-14(d)(4)(iii)(A) explains the open-space-easement factor of a “governmental conservation policy.” This policy could include the local comprehensive plan. The Regulations fail to mention local comprehensive land-use plans, however, instead specifically referring to a policy to preserve wild and scenic rivers and a flood prevention policy.¹²⁶

Treasury Regulations section 1.170A-14(d)(4)(iv)(A) lists eleven factors to consider in ascertaining whether a “significant public benefit” exists. Five of the factors could be construed as relating to land-use planning: “[t]he intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development)”;¹²⁷ “[t]he likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area”;¹²⁸ “[t]he importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area”;¹²⁹ “[t]he population density in the area of the property”;¹³⁰ and “[t]he consistency of the proposed open-space use with a legislatively mandated program identifying particular parcels of land for future protection.”¹³¹

One factor for determining “significant public benefit” specifically refers to the local comprehensive (or general) plan. Treasury Regulations section 1.170A-14(d)(4)(iv)(A)(3) refers to

[t]he consistency of the proposed open space use with public programs . . . for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a *government approved master plan* or land management area.¹³²

121. *Id.* § 1.170A-14(d)(4)(ii)(A)(3).

122. *Id.* § 1.170A-14(d)(4)(ii)(A)(4).

123. *Id.* § 1.170A-14(d)(4)(ii)(A)(6).

124. *Id.* § 1.170A-14(d)(4)(ii)(A)(7)–(8).

125. *Id.* § 1.170A-14(d)(4)(ii)(A)(5).

126. *Id.* § 1.170A-14(d)(4)(iii)(A).

127. *Id.* § 1.170A-14(d)(4)(iv)(A)(2).

128. *Id.* § 1.170A-14(d)(4)(iv)(A)(5).

129. *Id.* § 1.170A-14(d)(4)(iv)(A)(7).

130. *Id.* § 1.170A-14(d)(4)(iv)(A)(10).

131. *Id.* § 1.170A-14(d)(4)(iv)(A)(11).

132. *Id.* § 1.170A-14(d)(4)(iv)(A)(3) (emphasis added).

Although the specific reference to the comprehensive (or master) plan provides a link between the federal income tax deductibility of conservation easement donations and land-use planning, the factor is just one of many. The regulations provide no guidance on application of the factors. Conservation easements could qualify for the deduction without any consistency with the local comprehensive plan.

One of the illustrations with respect to significant public benefit further clouds the issue. The example states that placing a conservation easement on a “vacant downtown lot” does not necessarily produce a public benefit, but preserving the lot as a “public garden” generally results in a significant public benefit.¹³³ From a land-use planning perspective, a “public garden” may be appropriate in certain circumstances, but inappropriate in others. The Regulation presumes that the public benefits of a “public garden” outweigh the public benefits of development on that particular parcel. In reality, the public benefits depend on spatial and other land-use planning factors that the Regulations fail to consider.

In other words, the Regulations seem to treat any development as contrary to the public good. For example, Treasury Regulations section 1.170A-14(d)(4)(v) disallows a deduction for easements that allow “a degree of . . . future development that would interfere with the essential scenic quality of the land. . . .”¹³⁴ The Regulations also set out examples of appropriate conservation purposes that further illustrate the Regulations’ almost exclusive focus on aesthetic considerations: allowing development that cannot be seen from a public park, but not development visible from said park.¹³⁵

D. Valuation of Conservation Easements

Finally, the value of the donation of the conservation easement for federal income tax purposes relies on the fair market value of the land for development, not conservation values.¹³⁶ The Regulations state that the value is generally determined by calculating the fair market value of the property without the conservation easement less the fair market value of the property with the conservation easement.¹³⁷

This valuation encourages the donation of conservation easements on the land that is most valuable (and most appropriate) for development. Since the

133. *Id.* § 1.170A-14(d)(4)(iv)(B).

134. *Id.* § 1.170A-14(d)(4)(v).

135. *Id.* § 1.170A-14(f). Example 3 describes a 900-acre parcel with woodlands, pasture, and orchards clearly visible from a nearby park. The highest and best use of the parcel under present zoning is a subdivision with 40-acre lots. The example states that allowing even 10 homes (one per 90-acres) on the parcel would destroy the scenic nature of the view and would not be permissible under the provisions. Example 4, however, assumes the same facts, except that a portion of the parcel is not visible from the park. An easement allowing 20 homes in clusters on the portion of the property not visible from the national park qualifies for the deduction. *Id.*

136. *Id.* § 1.170A-14(h)(3).

137. *Id.*

restrictions on development within the conservation easement result in greater loss in value to land that is most appropriate for development, and zoned to allow that development, the deduction will be large also. The deduction for the donation of a conservation easement on a parcel that is not desirable for development, on the other hand, yields little or no income tax deduction. In addition, if a small portion of property contains significant environmental, cultural, historical, or archeological features, the income tax provisions encourage the landowner to donate an easement on the entire parcel, contravening sound land-use principles.

E. Conclusions

The Internal Revenue Code and Regulations provisions relating to the federal income tax deduction for conservation easements reflect a lack of understanding of land-use planning. The provisions provide perverse incentives for the donation of conservation easements that stymie effective land-use planning and promote sprawl.

Conservation easements fail to affect the rate or amount of development within a region. Easements merely affect the spatial distribution of development and open space.¹³⁸ The development that a conservation easement prevents on one parcel does not magically disappear. Instead, the development occurs on a different parcel in the immediate area.¹³⁹ This effect may promote or contradict the public good, depending upon many land-use planning factors.

Consequently, the positive conservation benefits gained from preventing development on one parcel must be balanced against the negative consequences arising from development on another parcel.¹⁴⁰ In other words, gross conservation benefit differs greatly from net conservation benefit. The net conservation benefit may be negative if the conserved parcel was more appropriate for development than the parcel to which the development was diverted. The Internal Revenue Code provisions on the income tax deduction for donations of conservation easements fail to consider these issues.

138. See Richardson, Jr., *supra* note 91 (“Some localities with a large percentage of land under easement . . . may successfully push development out to other jurisdictions through the use of conversation easements. These effects promote sprawl and other detrimental effects.”).

139. See *id.* (“However, this development, instead of magically ‘disappearing,’ occurs on another, relatively nearby, parcel.”).

140. *Id.*

VII

INCORPORATING CONSERVATION EASEMENTS INTO LOCAL ZONING
ORDINANCES

A. Introduction

Provisions in state enabling statutes linking conservation easements to land-use planning provide a good start towards maximizing the public benefits arising from appropriately placed conservation easements. Given the perverse incentives provided by the Internal Revenue Code and Regulations, however, a more direct link between land-use planning and conservation easements must be provided. Local government implementation of land-use policies relating to conservation easements is the logical next step.

Few examples of such implementation exist, but the simplest method would be for local governments to directly incorporate conservation easements into comprehensive plans and zoning ordinances. By requiring that conservation easements comply with local land-use requirements, local governments could correct the deficiencies of the Internal Revenue Code and Regulations and state enabling authority with respect to land-use planning and conservation easements.

A primary form of land-use regulation is the zoning ordinance. Some may question whether a “conservation easement” qualifies as a “land use.” Land use involves the actions of people that produce, change, or maintain land cover.¹⁴¹ This definition covers all activities on land except perhaps where the land is allowed to evolve naturally, with absolutely no human intervention. Similarly, the American Planning Association defines land use as the conducting of any activity on land—including, but not limited to, the continuation of any activity the commencement of which constitutes development.¹⁴² This definition includes any human intervention on the landscape and encompasses maintaining the land in the natural state.

B. Open-Space Zoning

Conservation easements seek to maintain open space. “Open-space zoning” attempts to achieve the same goal. Open-space zoning severely limits structures on regulated land.¹⁴³ These regulations generally allow agricultural and forest uses, use of the property as wildlife habitat, and other passive uses.¹⁴⁴ Like all

141. Food and Agric. Org. of the United Nations, *Terminology for Integrated Resources Planning and Management* 34 (Keya Choudhury & Louisa J.M. Jansen eds., 1998), available at <http://www.mpl.ird.fr/crea/taller-colombia/FAO/AGLL/pdfdocs/landglos.pdf>.

142. Am. Planning Ass’n, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Mgmt. of Change* § 8-101, at 8–22 (Stuart Meck ed., 2002).

143. Jon A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN. L. REV. 1, 5 (1972).

144. *Id.*

forms of zoning, open-space zoning prevents nuisances and promotes aesthetic values by grouping similar conservation uses together.¹⁴⁵

Zoning districts that classify land as open space withstand judicial scrutiny so long as the purpose falls under the police power and the restrictions fail to effectuate a taking of private property for public use without just compensation.¹⁴⁶ Open-space zoning, due to the severe limitations on building, are more likely than other zoning provisions to be found to be a taking.¹⁴⁷ The potential for takings claims limits the stringency of open-space zoning provisions.

C. Open-Space Zoning with Conservation Easements

Incorporating conservation easements into zoning creates a different type of open-space zoning. This alternative design of open-space zoning avoids the threat of takings claims and improves on traditional open-space zoning. This proposed type of zoning includes classifications that restrict development, and allows conservation easements as a permitted use. Other zoning districts prohibit conservation easements. Finally, some zoning districts allow conservation easements only through a conditional-use permit.

Like zoning in general, the incorporation of conservation easements into zoning serves to prevent nuisances. More particularly, without linking conservation easements with zoning, a parcel of land conserved with an easement may be adjacent to land used in a manner that would interfere with the conservation use. For example, a large housing development adjacent to conserved land may interfere with wildlife habitat or scenic values.

Additionally, the “reciprocity of advantage” that generally accrues with comprehensive zoning applies equally with the incorporation of conservation easements. “Reciprocity of advantage” refers to the concept that most laws confer both advantages and disadvantages to the landowner. Zoning is a classic example. A zoning ordinance restricts a landowner, conferring a burden. The fact that the ordinance restricts a neighboring property owner, however, confers a benefit. The benefit is shared between the neighbors.¹⁴⁸

Reciprocity of advantage is cited by courts to indicate that there has been no taking. For example, in *Pennsylvania Coal Co. v. Mahon*,¹⁴⁹ the United States Supreme Court distinguished an earlier case¹⁵⁰ that “secured an average reciprocity of advantage that has been recognized as a justification of various laws.”¹⁵¹ The earlier case had addressed a regulation that applied broadly,

145. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 12.3 (2010).

146. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); MALONE, *supra* note 145.

147. MALONE, *supra* note 145.

148. *See, e.g.*, *Agins v. Tiburon*, 447 U.S. 255, 260–63 (1980) (describing how a zoning ordinance will both burden and benefit appellant).

149. 260 U.S. 393 (1922).

150. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914).

151. *Pennsylvania Coal*, 260 U.S. at 415.

thereby generating reciprocity of advantage.¹⁵² The regulation at issue in *Mahon*, on the other hand, placed the burden on a small part of the population, did not display reciprocity of advantage, and was not, therefore, a taking.¹⁵³ The restriction in *Plymouth Coal Co.* required coal companies to take steps that not only protected the safety of its employees, but also the safety of employees of other coal companies. In *Mahon*, the restrictions benefited only the homeowners on the surface and conferred no benefit on the coal companies.

Like zoning, conservation easements benefit adjacent lands by restricting uses. Similarly, the eased land is benefited by a restriction on the adjacent lands. For example, a landowner could engage in a noxious use of land adjacent to conservation easement land that protects endangered species habitat. The effects of the noxious use could spill over to the conservation easement land. Incorporating conservation easements into zoning would prevent conflicts of this nature.

Incorporating conservation easements into zoning also promotes smart growth. A conservation easement on land designated for future development promotes leapfrog development and deflects development to parcels more appropriate for conservation.¹⁵⁴ By including conservation easements into zoning ordinances, local governments prioritize the parcels desirable for conservation.

The ordinance may include provisions allowing narrowly tailored conservation easements to protect specific conservation values in areas designated for future growth. Since the Internal Revenue Code and Regulations base income tax benefits on the difference in the value of the property with the easement and without the easement, however, landowners have an incentive to place the easement on large swaths of property. This incentive exists even if the particular resource occupies only a small portion of the property. For example, if a cave with unique geologic features and endangered species occupies two acres of a 200 acre parcel, the landowner is likely to donate the easement on the entire 200 acres to maximize income tax benefits. This result may contradict sound land-use planning.

D. Existing Zoning Ordinances That Incorporate Conservation Easements

Some pre-existing zoning ordinances already incorporate these principles. For example, the Town of Cave Creek, Arizona includes “Open Space Conservation” and “Open Space Recreational” as zoning districts in the town’s zoning ordinance.¹⁵⁵ Permitted uses in the Open Space Conservation district are “undeveloped natural land,” “hillside lands designated as open space through a

152. *Id.* (describing the law as relating to the safety of anyone invited into the coal mine and therefore securing an average reciprocity of advantage).

153. *See id.* (distinguishing from the Court’s prior decision in *Plymouth Coal*).

154. Richardon, Jr., *supra* note 91.

155. CAVE CREEK, AZ., ZONING ORDINANCE, ch. 8 (2003), <http://www.cavecreek.org/DocumentView.aspx?DID=117>.

density transfer or the development process,” “unpaved trails or pathways for use by hikers, equestrians and bicyclists,” and “archaeological or historic sites.”¹⁵⁶

The Cave Creek “Open Space Recreational” district permits, by right, “public and private natural wildlife reserves or sanctuaries, and arboretums.”¹⁵⁷ The ordinance allows this use by special use permit in the Open Space Conservation district.¹⁵⁸ Section 8.3 prohibits residential uses and golf courses in either open-space district.¹⁵⁹

In Virginia, Fauquier County includes a Conservation Easement Incentive Overlay District¹⁶⁰ within its zoning ordinance. Overlay zoning creates an additional zoning district that adds restrictions to properties within the boundaries of the overlay district.¹⁶¹ The overlay district is said to “overlay” the standard zoning districts since the boundaries of the overlay district cross traditional zoning district boundaries.¹⁶² “[T]his zoning ordinance tool allows residential density to be increased within certain Service Districts through the special exception process, in exchange for placing conservation easements on the resources to be saved.”¹⁶³ In other words, the developer purchases a conservation easement on land within the overlay zone. In exchange, the developer receives the right to increase development densities on other property.

Overlay districts offer much promise for use in connection with conservation easements. Going beyond the use employed in Fauquier County, overlay districts could also be used to delineate areas where conservation easements may be donated. Landowners with property outside of the overlay district would be prohibited from donating an easement or would be required to obtain a conditional-use permit to donate. In this fashion, local governments could tailor their land-use regulations to ensure that conservation easements are appropriately located within the jurisdiction.

E. Conclusions

Incorporating conservation easements as permitted, prohibited, or conditional uses within local zoning ordinances forms the logical next step in incorporating conservation easements into land-use planning. The zoning

156. *Id.* § 8.1(A).

157. *Id.* § 8.1(B)(4).

158. *Id.* § 8.2(A)(1).

159. *Id.* § 8.3.

160. FAUQUIER COUNTY, VA., ZONING ORDINANCE, art. 4, § 4-800, http://www.fauquiercounty.gov/documents/departments/commdev/pdf/zoningordinance/ART_04.PDF.

161. Douglas Miskowiak & Linda Stoll, University of Washington Extension, Center for Land Education, *Planning Implementation Tools: Overlay Zoning* (Nov. 2005), <ftp://ftp.wi.gov/DOA/public-comprehensiveplans/ImplementationToolkit/Documents/OverlayZoning.pdf>.

162. *Id.*

163. Fauquier County Virginia, *Conservation Easements*, available at http://www.fauquiercounty.gov/government/departments/commdev/index.cfm?action=conservation_easmnts.

ordinance implements the comprehensive plan, which sets out the goals and vision of the community. The goals and vision should include appropriate and inappropriate locations for conservation easements, ideally laid out on the future land-use map.

In addition, adding conservation easements as a use in the zoning ordinance improves upon the traditional concept of open-space zoning by allowing voluntary actions to further community goals. Just as a big-box store or gasoline station impacts local communities, perpetual conservation easements affect land-use patterns. As a use with profound impacts, perpetual conservation easements should conform to local plans and regulations.

VIII

CONCLUSIONS AND RECOMMENDATIONS

“The core principle of use zoning . . . is that everything has its place.”¹⁶⁴ This principle applies equally to perpetual conservation easements. The Internal Revenue Code and Regulations, as well as state enabling authorities, with few exceptions, however, fail to recognize this principle. Although linking conservation easements to land-use planning at federal and state levels would constitute significant steps forward, local implementation—through zoning ordinances—must occur to effectively encourage and allow only those conservation easements that provide significant public benefit.

Although conservation easements should logically conform to local land-use planning and regulations, the static nature of conservation easements often prevents the flexibility and adaptability required for sound land-use planning and regulation.¹⁶⁵ Easier extinguishment and modification of conservation easements would aid in ensuring consistency with local land-use planning. In addition, use of “term easements” (that run for a fixed period), would also enhance incorporation into land-use planning.

Combining public and private efforts within the comprehensive planning context generally results in more effective land conservation.¹⁶⁶ By incorporating conservation easements into land-use planning and regulation, land conservation better serves community needs and desires. Although mechanisms for accomplishing this coordination exist, the presence of barriers can prohibit the integration of conservation easements into land-use planning.

At present, the Massachusetts model best promotes integration of conservation easements into state and local planning. The required preapproval by both state and local governments ensures quality. In addition, the process

164. JUERGENSMEYER & ROBERTS, *supra* note 10, § 4.1, at 90–92.

165. See Echeverria & Pidot, *supra* note 116, at 10,874.

166. Daniels & Lapping, *supra* note 53, at 320 (“Daniels and Bowers (1997) make the important observation that some of the most effective land preservation programs, such as Sonoma County, California, and Lancaster County, Pennsylvania, are essentially public-private partnerships where public and private land preservation efforts occur within a framework of comprehensive planning.”).

does not appear to add significant burdens or discourage easement donations in this location.¹⁶⁷

To better integrate land-use planning and conservation easements, the federal income tax provisions should be revised to require consistency between easement restrictions and state and local planning goals in order to qualify for the tax benefits. State enabling authority must also be amended to clarify the authority of local governments to guide the conservation easement process.

The requirement of local and state approval of conservation easements before recordation best promotes consistency between conservation easements and local planning goals. In addition, tax benefits should be equally available for conservation easements that last for a period less than perpetuity. Perpetual easements do not necessarily provide the maximum public benefits and may cause public harm in some situations.

More fundamentally, regulating land use through federal income incentives proves to be ineffective and inefficient. Land-use regulation is a local and state concern and should remain in those domains.

If federal income tax benefits continue to be offered for conservation easements, the Internal Revenue Service should track and report the costs of the incentives. In addition, benefits should be extended to term conservation easements, which better fit the dynamic nature of land-use planning. The federal rules should also provide enhanced incentives to conservation easements that provide public access. At present, few conservation easements offer public access, often limiting the public benefit.

Local governments often act according to parochial concerns. To ensure a regional approach, state-wide conservation easement plans should be developed, designating geographic areas within which conservation easements are encouraged, and areas where conservation easements are prohibited. The latter areas would form areas for future development. Planning for conservation easements should consider net conservation benefits and prioritize lands for conservation easements. Land containing low net conservation benefits may be more appropriate for development. The net conservation benefits should be compared to the cost of the easement in terms of cash payments or tax benefits in order to conduct a cost-benefit analysis. At present, taxpayers pay for conservation easements with no ability to ascertain the true value of the easement for conservation purposes. Internal Revenue Code provisions and Regulations also fail to recognize this key distinction.

State plans should also consider the impact of conservation easements on local land-use patterns and housing markets. The impact on affordable housing should be emphasized. Creation of a state agency to oversee conservation easements better enables coordination. State agency approval should be required for any easement donations, amendments, or terminations.

167. JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 17 (Lincoln Inst. of Land Policy 2005).

When Congress created the federal income tax incentives for conservation easements, legislators used terms like “rare” and “unique” to describe easements that would be eligible for federal incentives.¹⁶⁸ Today, the words of William Whyte appear to motivate conservation easement practice: “It will be extremely difficult to commit the sin of choosing too much open space in getting started (or at almost any other time, for that matter), and any planner who can’t think now of some land worth saving ought to get into another line of work.”¹⁶⁹

A return to reserving perpetual easements to rare and unique properties, implemented in part through better integration of conservation easements into state and local land-use planning processes, will benefit the public. The public good must receive more weight in the private conservation easement process than present procedures entail.

Table 1

State	Local government review and approval		Required consultation		Factors for consideration		Conformance with comprehensive plan	
Massachusetts	X	X			X	X		
Michigan					X (PACE)	X (PACE)		
Missouri					X			
Montana			X					
Nebraska	X (Other than state held)		X (State held)					
New Jersey						X		
Tennessee			X		X	X		
Virginia								X

168. S. REP. NO. 96-1007, at 603 (1980).

169. WHYTE, JR., *supra* note 1.