

CONSERVATION EASEMENTS AND PERPETUITY: TILL LEGISLATION DO US PART

RICHARD BREWER*

I

INTRODUCTION

Although conservation easements have many appealing features, their drawbacks have caused some observers to see the heavy reliance on them by land trusts as a weakness with possibly serious consequences. First, relative to fee acquisition, conservation easements may more often lead to defects in the conservation quality of land protected, the level of protection provided, and the adequacy of stewardship.¹ A second broad category of defect is the uncertain durability of the protection provided by conservation easements. The protection provided may be fragile or, at least, of unproven dependability.² The loss of a parcel thought to be conserved also involves a loss of the time, energy, and money spent on locating the land, negotiating the deal, documenting conservation values, and monitoring and stewarding the land for as long as it remains under protection.

Although a broad consideration of both categories of potential defects would be valuable, the discussion here is narrow, focused mainly on the implications for conservation-easement durability that may be derived from a particular legislative action in Michigan in 2009 through 2010 concerning the Colony Farm Orchard. The case involves the introduction, and eventual passage, of a bill stripping a restriction requiring that the land be used for public

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* Professor Emeritus, Department of Biological Sciences, Western Michigan University, Kalamazoo, MI. The author thanks Mark A. Hoffman for providing information on the history of Colony Farm lands and comments on the manuscript, Katy Takahashi for comments, and all other persons who provided information as personal communications.

1. Duncan Greene, *Conservation Easements vs. Fee Simple Acquisitions: Part 2 (Conservation Tools Report)*, NW. LAND MATTERS (Oct. 6, 2010), <http://www.northwestlandmatters.com/conservation-easement-series-part-2---conservation-tools/>; see George Wuerthner, *The Problems with Conservation Easements*, COUNTERPUNCH (May 8, 2008), <http://www.counterpunch.org/wuerthner05082008.html> (identifying positive and negative attributes of conservation easements); Nancy A. McLaughlin, *A Constructive Reformist's Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE (Aug. 31, 2005), available at <http://ssrn.com/abstract=1520646> (arguing for reforms to maximize conservation-easement utility).

2. RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 169–75 (2003).

park, recreation, or open space. The claimed purpose of removing the servitude was to allow expansion of Western Michigan University's (WMU) nearby Business Technology Research (BTR) Park, which would involve selling the Colony Farm Orchard land as lots to private tenants. The servitude was not cast in the form of a conservation easement, though it may have met the requirements under the Applicability section of the Uniform Conservation Easement Act,³ as well as Michigan's conservation easement enabling statute.⁴ Be that as it may, the case illustrates a vulnerability to legislative action that could extend to standard conservation easements.

The following section sets out the background of the Colony Farm Orchard case, including the first attack upon the Orchard's restrictions. Section III describes the second attack, the Colony Farm Orchard case. Section IV analyzes the conditions that allowed this attack to succeed and that may set the stage for future attacks on conservation easements. Section V discusses ways the legislative process can defeat the perpetual nature of conservation easements. Section VI explains what can be done to make land protection durable in the increasingly changing world in which we now live. Those readers primarily interested in the underlying analysis of the legal challenges to conservation easements may wish to read Section IV or V first.

II

SETTING OF THE COLONY FARM ORCHARD CASE

A. What was the Colony Farm?

The Colony Farm was an agricultural outpost of the Michigan Asylum for the Insane (later Kalamazoo State Hospital). It was established just beyond the southwest corner of the city on a 324-acre farm and adjoining parcels purchased by the state in the late 1880s. Patients and employees were housed in several large brick "cottages." The operation was self-sufficient and also provided food for the main hospital three miles away in the city. Products included the whole range typical of an early twentieth-century farm.⁵

Although the farming operation was a success agriculturally and therapeutically, it was phased out in the 1950s for economic reasons. By 1969, operations at the site were terminated, and soon thereafter, furnishings were auctioned off and the buildings demolished.⁶ Over the next several years, land

3. UNIF. CONSERVATION EASEMENT ACT § 5 (2007), available at http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.pdf.

4. MICH. COMP. LAWS ANN. § 324.2140 (1994).

5. Larry B. Massie, *Report on the Historic Use of the Property Commonly Known as the Kalamazoo State Hospital Colony Farm, the Michigan State University Agricultural Experiment Orchard and the Lee Baker Farm*, W. MICH. UNIV. ASYLUM LAKE PRESERVE (Feb. 9, 1991), <http://www.wmich.edu/asylumlake/social/Larrie%20Massie%20Report%20Frame.pdf>.

6. *Id.*

declared surplus to the operations of the Department of Mental Health was transferred to other state agencies or sold.⁷

B. The Orchard, the Baker Farm, and Asylum Lake

The Colony Farm Orchard is one of three adjacent Colony Farm properties transferred to WMU⁸, whose main campus is in Kalamazoo. The first of the three parcels to come to WMU was the Lee Baker Farm (henceforth Baker Farm). It had been purchased to grow crops for livestock food.⁹ Its approximately 320 acres were transferred without restrictions to WMU in 1959 under Public Act 269.¹⁰

The Asylum Lake property of 274 acres was transferred to WMU by Public Act 316 on December 22, 1975.¹¹ This land lies north of the Baker Farm (across Parkview Avenue) and east (across Drake Road) from the Colony Farm Orchard. Landscape features include Asylum Lake of about 50 acres, Little Asylum Lake, about ten acres, and a 40-acre stand of relict oak savanna.

The Colony Farm Orchard (henceforth the Orchard) lay west of what is now Drake Road. Unlike the Asylum Lake property and most of the Baker Farm, which are in the city of Kalamazoo, the Orchard is in Oshtemo Township. Parts of the land had been cultivated as orchard and vineyard while still in private hands, and this use continued under hospital operations. Various other farm and hospital operations were also situated on the parcel. Originally about seventy-three acres, the Orchard gained and lost acreage over the years, eventually reaching its current size of fifty-three acres. The Orchard was transferred to WMU in 1977 by Public Act 158.¹²

The transfers of both the Asylum Lake Area and the Orchard were shepherded through the Michigan legislature by two Kalamazoo brothers, Senator John (Jack) A. Welborn and Representative Robert A. Welborn. They included in both pieces of legislation the following restriction, which became the pivot around which many later events turned:

The conveyance shall provide that Western Michigan University may utilize the property solely for public park, recreation, or open space purposes, except that the

7. Mark A. Hoffman, *Asylum Lake Preserve and Colony Farm Orchard (Kalamazoo County, Michigan): The History, Legislative Intent, and Analysis of their Conveyances from the Michigan Department of Mental Health to Western Michigan University 122–38* (project paper in partial fulfillment for the Degree of Master of Public Administration 2007) (on file with author).

8. Kathy Jessup, *Western Michigan University Looks to Expand Business, Technology, Research Park*, MLIVE.COM (Feb. 24, 2009, 1:30 PM), http://www.mlive.com/news/kalamazoo/index.ssf/2009/02/western_michigan_university_lo.html.

9. WILLIAM A. DECKER, *ASYLUM FOR THE INSANE: A HISTORY OF THE KALAMAZOO STATE HOSPITAL 114* (2008).

10. Mark A. Hoffman, *Asylum Lake Preserve and Colony Farm Orchard: A Legislative and Decision Making Timeline for the Former Kalamazoo State Hospital Properties* (2008) (unpublished manuscript).

11. *Id.* at 6.

12. Hoffman, *supra* note 7, at 135–40; *see* Massie, *supra* note 5.

legislature, by statute, may authorize Western Michigan University to utilize the property for some other public purpose.¹³

Besides the restriction of open space and public use, the Orchard was encumbered by a lease granted in 1973 by Public Act 168 to Michigan State University (henceforth MSU). For one dollar annually, the Department of Entomology was allowed to use the property for research on orchard pest insects. The lease was to continue as long as the Entomology Department “conduct[ed] experimental fruit pest research thereon.”¹⁴

C. Original Vegetation

Prior to European settlement, the vegetational matrix of the immediate area of the Colony Farm was oak opening (a Midwestern savanna type in which oaks are the wide-spaced trees set in lower herbaceous and shrubby vegetation).¹⁵ White oak (*Quercus alba*) was the leading tree species. Herbaceous vegetation would have been diverse, depending on elevation, slope, soil, and the openness of the tree canopy. The tree canopy and soil would have been strongly influenced by time since the last fire.¹⁶ Within the oak-opening matrix, lower elevations were occupied by marsh and shrubby wetlands. These vegetation types fringed the two lakes, occupied the lowlands connecting them, and continued downstream from Little Asylum Lake.

Two other original vegetation types occurred mostly on the Orchard and the northwestern part of the Baker Farm. These were tall grass (mesic) prairie and bur oak (*Quercus macrocarpa*) plain (savanna). Genesee Prairie, one of eight tall grass prairies in Kalamazoo County, occupied about 400 acres centered about 0.4 mile west of Drake Road.¹⁷ A narrow fringe of bur oak plain, with similar herbaceous vegetation, bordered the prairie.¹⁸

D. The First Attack

After being conveyed to WMU, the Baker Farm was retained in hay and row crops, except for a forty-five-acre biology research area where, among other studies, natural succession of the brome grass (*Bromus inermis*) hayfield was followed.¹⁹ The Asylum Lake and Orchard areas were used for WMU class field-trips mostly in biology and geology, research by faculty and students, and

13. Hoffman, *supra* note 7, at 148.

14. *Id.* at 134.

15. THOMAS W. HODLER ET AL., PRESETTLEMENT VEGETATION OF KALAMAZOO COUNTY, MICHIGAN (map) (1981); see generally DENNIS A. ALBERT & PATRICK J. COMER, ATLAS OF EARLY MICHIGAN'S FORESTS, GRASSLANDS, AND WETLANDS (2008).

16. Kim Alan Chapman & Richard Brewer, *Prairie and Savanna in Southern Lower Michigan: History, Classification, Ecology*, 47 MICH. BOTANIST 1, 22–26 (2008).

17. HODLER, *supra* note 15.

18. Chapman & Brewer, *supra* note 16.

19. Richard Brewer, Arlo Raim & Jerome D. Robins, *Vegetation of a Michigan Grassland and Thicket*, OCASSIONAL PAPERS OF THE C.C. ADAMS CENTER FOR ECOLOGICAL STUDIES 17–23, number 18 (Feb. 4, 1969).

passive recreation by the Kalamazoo community, such as hiking, cross-country skiing, bird-watching, and other types of nature study and enjoyment.²⁰ And of course, the 650 acres were participating in global biogeochemical cycles, sequestering carbon in the form of increased living and dead biomass in wood and soil, and furnishing a great variety of ecological services for southwest Michigan and the biosphere.²¹

The first serious attack on the Colony Farm land occurred from 1990 through 1993 in the form of a WMU effort to develop a research and business park. The Orchard was to be developed as the first stage of the plan.²² The proposal generated widespread public opposition that came to be led by a new organization, the Asylum Lake Preservation Association (ALPA).²³ Neighborhood associations, environmental groups, local citizens, and college students—especially those enrolled in environmental studies—put up a spirited defense to retain the Asylum Lake property, including the Orchard, in its semi-natural condition.

A local legislator introduced House Bill 4184, which would have amended the original 1977 conveyance to add “research and business park” as an allowable public use.²⁴ The bill and final plan for development were favored by the Kalamazoo City Commission, local booster organizations, and many businesses, but were otherwise widely opposed.

The bill quickly passed the House. It did not fare well, however, in an April 1993 hearing of the Senate Committee. Many of the committee members seemed doubtful that the proposed development qualified as public use as required by the servitude.²⁵ Also, Jack Welborn, still a member of the Senate though not of the relevant Senate committee, spoke against the bill saying, “This is a matter of trust, commitment, credibility, and fairness to the people” If the bill made it to the floor, he said, “I intend a full-court press to defeat it.”

Two weeks after the hearing, WMU president Diether Haenicke and the WMU Board announced that they were suspending efforts to build a research and business park in Kalamazoo.²⁶

20. Craig J. Simon, *Asylum Lake Synthesis* (Dec. 8, 1994) (unpublished manuscript) (on file with author).

21. See BREWER, *supra* note 2, at 62–65; GRETCHEN C. DAILY, *NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* (1997).

22. Tom Haroldson, *WMU Research Park Gets Consultant’s OK*, KALAMAZOO GAZETTE, Apr. 27, 1990, at A1.

23. Hoffman, *supra* note 10, at 7.

24. Hoffman, *supra* note 7, at 156–57.

25. Comments on and quotations from the Committee meeting are based on a transcript of the proceedings prepared by Mark A. Hoffman, who attended the meeting. The transcript was made from the Senate audiotape.

26. A Joint Statement by WMU Board Chairman James S. Brady and President Diether H. Haenicke on the WMU Research & Business Park (May 8, 1993) (unpublished statement); see also Earlene McMichael, *WMU Halts Park Plan*, KALAMAZOO GAZETTE, May 9, 1993.

E. A Compromise

In the following years while the land abided, various interest groups floated proposals to take Colony Farm land either toward development or toward conservation.²⁷ In 1998, President Haenicke retired. Later that same year, the new president, Elson Floyd, and the city of Kalamazoo agreed on a compromise proposal by which the Baker farm would be developed as a BTR park, and the Asylum Lake property would be preserved for passive recreation. The proposal was similar to a compromise put forward by ALPA in April 1992 but ignored at that time. The deal was finally signed in February 1999.²⁸

A focus group assembled by WMU, which included representatives from other stakeholders in the community, was able to reach consensus on the future use of the Asylum Lake property after a long series of discussions.²⁹ The group produced, and the WMU board approved, two documents: a Declaration of Conservation Restrictions and a Management Framework.³⁰

One loose end remained. Conservationists considered the Orchard to be part of the Asylum Lake Preserve. They regarded the compromise as establishing that the land south of Parkview Avenue—the Baker Farm—was for the BTR Park; the land north of it, including the land west of Drake—the Orchard—was the Asylum Lake Preserve. The WMU administrator running the focus group had rejected any inclusion of the Orchard in the group's deliberations on the grounds that the February 1999 agreement was between WMU and the city.³¹ The Orchard, it will be recalled, is in Oshtemo Township.

While the focus group worked, construction proceeded at the BTR Park. The development included a new campus for the WMU College of Engineering and Applied Sciences. By 2001, the first two for-profit occupants had been recruited, and the BTR Park had been designated a SmartZone, the Michigan brand of tax-increment financing.³²

27. See, e.g., Barbara Walters, *New Nature Preserve Proposed*, KALAMAZOO GAZETTE, Mar. 12, 1996, at A1; Linda S. Mah, *WMU Planning Soccer Complex in the Asylum Lake Area*, KALAMAZOO GAZETTE, Mar. 16, 1996, at A1; Mickey Ciokajlo, *WMU Looking at Asylum Lake for New Golf Course*, KALAMAZOO GAZETTE, Apr. 3, 1998, at A1.

28. Ed Finnerty, *Asylum Lake Future Secured*, KALAMAZOO GAZETTE, Feb. 6, 1996, at A1.

29. Ken Dahlberg, *Asylum Lake Focus Group Chronology of Meetings 8* (Feb. 19, 2003) (unpublished manuscript) (on file with author).

30. Archive of Asylum Lake Framework Documents, *Declaration of Conservation Restrictions*, W. MICH. UNIV. ASYLUM LAKE PRESERVE (Nov. 17, 2005), <http://www.wmich.edu/asylumlake/Aslum%20Lake%20Framework%20Documents/Declaration%20Conservtion%20Restrictions%20Frameset/Declaration%20Conservation%20RestrictionsFrameset.htm>; Archive of Asylum Lake Framework Documents, *The Asylum Lake Preserve Management Framework*, W. MICH. UNIV. ASYLUM LAKE PRESERVE (Nov. 17, 2005), <http://www.wmich.edu/asylumlake/Asylum%20Lake%20Framework%20Documents/Management%20Framework%20Frameset/framew-orkframeset.htm>.

31. E-mail from Ken Dahlberg, to author (Dec. 7, 2010) (on file with author); e-mail from Mark A. Hoffman, to author (Dec. 3, 2010) (on file with author).

32. *WMU Plays Critical Role in Two Michigan SmartZones*, W. MICH. UNIV. OFF. UNIV. REL. (Apr. 11, 2001), <http://www.wmich.edu/wmu/news/2001/0104/0001-268.html>.

For eight years, harmony prevailed. The BTR Park grew. Thousands of visitors hiked the trails of Asylum Lake Preserve, where the lakes and relict oaks were protected and some of its formerly agricultural areas were being restored to prairie and savanna. The Orchard also was visited by naturalists, wild asparagus hunters, photographers, snow-shoers, and artists.³³ A nearby island to the Asylum Lake Preserve's mainland, the Orchard enriched and stabilized the preserve.³⁴

III

THE NEW ATTACK, 2009–2010

A. From First Notice to House Passage³⁵

The first signal of the second attack was in July 2009, when the WMU administration was authorized to terminate the MSU lease for pest research. But ending the lease would take three years and cost WMU \$985,000. A WMU vice president also commented that WMU was trying to get the open-space and public-use restrictions on the Orchard “changed.”³⁶

On July 16, Representative Robert B. Jones (D-Kalamazoo) introduced House Bill 5207, which removed the restriction in the original conveyance that dedicated the land to public use for park, recreation, or open-space purposes. The first public mention of the bill was two weeks later in a *Kalamazoo Gazette* (henceforth *Gazette*) article.³⁷

House Bill 5207 provided that the state pay WMU one dollar for the Orchard land. The state would then convey the land back to WMU for one dollar with a new restriction that the property “be used exclusively for the purpose of expanding and improving the business technology and research park located on [W]estern Michigan [U]niversity’s parkview campus”³⁸ The public-use, open-space restriction would be gone.

Even though July and August are months of low campus population and a traditional vacation time for many townspeople, the news spread quickly by

33. See, e.g., *Colony Farm Orchard Art by Lad Hanka and Others at KNC*, RICHARDBREWER.ORG (Feb. 2, 2010), at <http://richardbrewer.org/2010/02/06/colony-farm-orchard-art-by-lad-hanka-and-others-at-knc/>.

34. RICHARD BREWER, *THE SCIENCE OF ECOLOGY* 627–29 (1994); see Kent Holsinger, EEB 5310—Conservation Biology, *Theory and Design of Nature Preserves* (2009), <http://darwin.eeb.uconn.edu/eeb310/lecture-notes/reserves.pdf>.

35. Information to supplement this abbreviated account is available in a series of posts from July 15, 2009 to February 14, 2010 at <http://richardbrewer.org/>.

36. Paula M. Davis, *WMU Plans Expansion in Colony Farm Orchard*, KALAMAZOO GAZETTE, July 3, 2009, at A1.

37. Paula M. Davis, *Bill Aimed at Expansion of Business Park to Colony Farm*, KALAMAZOO GAZETTE, Aug. 1, 2009, at A1.

38. H.B. 5207, 95th Leg., Reg. Sess. (Mich. 2009), available at <http://www.legislature.mi.gov/%28S%28h3lq2x55kmmu45vaub5r45%29%29/mileg.aspx?page=GetObject&objectName=2009-HB-5207>.

word-of-mouth, e-mail, blog posts, and letters to the editors of the *Gazette* and *Western Herald*. The enterprising *Herald* produced a full-page article on the situation. The chairman of the WMU Board, a local businessman, was quoted as saying, "That property isn't really being utilized now. [A development] will be for the benefit of the community."³⁹ Letters directed to both papers ran heavily against developing the Orchard.

House Bill 5207 was approved by the House Commerce Committee, which Representative Jones chaired. On the House floor, on September 17, House Bill 5207 was read a second time, placed on third reading, placed on immediate passage, read a third time, passed, and given immediate effect (Yeas: 105, Nays: 2). The title was amended, and the bill was transmitted to the Senate.⁴⁰

By this time, the new restriction that the land be used to expand WMU's BTR Park had disappeared. The only restriction remaining was that any Indian arrowheads or other aboriginal antiquities found belonged to the state.⁴¹

B. The Arguments: Pro and Con

In letters to WMU, politicians, and newspaper editors, opponents argued that (1) stripping the restriction and developing the Orchard was a betrayal of a public trust, (2) the land should be preserved for its conservation value, and (3) expansion of the BTR was not necessary but, if it became so, somewhere else would be better.

Points (1) and (2) were never addressed by proponents of the Orchard conversion, but a 640-word "Viewpoint"⁴² by President John Dunn⁴³ appeared in the *Gazette* on September 23, 2009. Up to this time, the president had not publicly addressed the issue, leaving it almost entirely to two vice presidents who had restricted their comments to a few talking points. The Dunn Viewpoint followed the same talking points, and a similar discipline prevailed throughout the course of the dispute.

A summary of WMU's case is provided in the following quotations from the Dunn Viewpoint.⁴⁴ Opponents' rebuttals follow.

39. Fritz Klug, *Arrested Development for BTR?*, WESTERNHERALD.COM (Sept. 13, 2009), <http://www.westernherald.com/news/arrested-development-for-btr/>.

40. H.B. 5207, 95th Leg., Reg. Sess. (Mich. 2009) (Bill History), available at <http://www.legislature.mi.gov/%28S%28h3lq2x55kmhmmu45vaub5r45%29%29/mileg.aspx?page=GetObject&objectName=2009-HB-5207>.

41. H.B. 5207, 95th Leg., Reg. Sess. (Mich. 2009) (as passed House, Sept. 17, 2009), available at <http://www.legislature.mi.gov/documents/2009-2010/billengrossed/House/htm/2009-HEBH-5207.htm>.

42. John M. Dunn, *Western Michigan University Remains Committed to Jobs and Green Space*, KALAMAZOO GAZETTE, Sept. 23, 2009, available at http://docs.newsbanl.com/s/InfoWeb/aggdocs/AWNB/12AE94D368E8B7A0/0D0CB4F32A21A855?p_multi=ZOOB&s_lang=en-US/.

43. Dunn had become president July 1, 2007. See *John Dunn Named Eighth President of WMU*, W. MICH. UNIV. OFF. UNIV. REL. (Apr. 27, 2007), <http://www.wmich.edu/wmu/news/2007/04/075.html>.

44. Dunn, *supra* note 42.

1. Argument: “Our park is vibrant and full.”

Rebuttal: Three undeveloped, unoccupied parcels are available. Existing buildings have vacancies. Also, a twenty-acre temporary soccer installation is available for expansion.⁴⁵

2. Argument: “More than 1,300 jobs have been directly or indirectly created.”

Rebuttal: The most frequently cited figure by WMU for the number of direct jobs (within the BTR Park) is 645.⁴⁶ Estimates of indirect jobs depend on assumptions and specific techniques used,⁴⁷ so a claimed figure of 682 is of uncertain significance.

A larger question is how many of these jobs, direct or indirect, were “created?” How many already existed elsewhere around the Kalamazoo area, or were jobs that, even if the BTR Park were not available, would still have been located somewhere in the area?⁴⁸

Six-hundred-forty-five jobs is substantial, but the BTR Park opened near the beginning of one of the biggest booms in U.S. history. Between 2001—when ground had been broken and two area firms had committed to the park—and 2007, the Dow Jones Industrial Average went from below 10,000 to over 14,000.⁴⁹

Around 200 of the BTR jobs came from a pool of research scientists laid off or scheduled for transfer in 2003, in the aftermath of the acquisition of Pharmacia (formerly Pharmacia and Upjohn) by Pfizer. Some of these scientists preferred to remain in Kalamazoo and found a place in a new business incubator, or Innovation Center, at the BTR Park (though originally on the WMU main campus). It was a fortunate combination of circumstances, aided by a large infusion of tax money as well as private donations.⁵⁰ The BTR Park’s designation as a vehicle for tax-increment financing (SmartZone) also provides advantages over most purely private locations in Kalamazoo. A large fraction of taxes paid by businesses owning property in the park is returned to the park to

45. Fritz Klug, *BTR Aims to Work with WMU Students, Faculty*, WESTERNHERALD.COM (Dec. 10, 2009), <http://www.westernherald.com/news/btr-park-aims-to-work-with-students-faculty/>.

46. Paula B. Davis, *WMU’s Colony Farm Plan Advances*, MLIVE.COM (Feb. 14, 2010), http://www.mlive.com/news/kalamazoo/index.ssf/2009/08/wmus_colony_farm_plan_advances.html.

47. See Michael D. LaFaive & Dr. Michael J. Hicks, *MEGA’s Track Record*, MACKINACENTER.ORG (Apr. 12, 2005), <http://www.mackinac.org/7096>.

48. See, e.g., *Information Technology Firm Moves to BTR Park*, W. MICH. UNIV. OFF. UNIV. REL. (Mar. 28, 2006), <http://www.wmich.edu/wmu/news/2006/03/090.html>; *Software Development Company is New BTR Park Partner*, W. MICH. UNIV. OFF. UNIV. REL. (Mar. 13, 2008), <http://www.wmich.edu/wmu/news/2008/03/034.html>.

49. Dow Jones Indexes, *Dow Jones Industrial Average* (2010), http://www.djindexes.com/mdsidx/downloads/brochure_info/Dow_Jones_Industrial_Average_Brochure.pdf.

50. Ron Kitchens, *Community Capitalism*, 6 ECON. DEV. J. 33, 35 (2007).

help finance infrastructure, reimburse some of WMU's investment, and cover a portion of operating costs of the park, the Innovation Center, and the city.⁵¹

3. Argument: "More needed jobs could be . . . created if we add acreage to our BTR Park."

Rebuttal: Not many jobs and not soon. The figure heard most often from WMU vice presidents for beginning development was three years,⁵² which corresponds to the time said to be needed for MSU to switch their pest-insect research elsewhere.⁵³ Hence, no jobs would come on line sooner than 2013. About fifty-three acres are available on the Orchard. The current BTR Park is 265 acres. On these 265 acres, 645 jobs have accumulated. This occurred from approximately 2001 through 2009, roughly eight years. A ballpark estimate of how many jobs might be expected from the development of the Orchard can be obtained from the following proportionality: $X \text{ jobs}/645 \text{ jobs} = 53 \text{ acres}/265 \text{ acres}$. Hence $X = 129 \text{ jobs}$, starting in 2013 (that is, in three years) and running to about 2021 (that is, eight years later). A larger site with a larger future carrying capacity would be a better idea.

4. Argument: This specific land should be used because "it is land already owned by WMU and it is adjacent to the current BTR Park."

Rebuttal: It is doubtful that the Orchard would be the best place for BTR Park expansion.

First, the parcel is too small; at best, it would be a small annex to the current park.

Second, numerous alternative sites are available, including several owned by WMU without restrictions or an existing MSU lease. One such site, about the same size as the Orchard, is three miles away from the entrance of the current BTR Park.⁵⁴ The most socially and environmentally appropriate site for the expansion would be one of the many local brown-field sites undergoing remediation.⁵⁵

Third, the Orchard itself may need remediation for agricultural pesticides. Use of the insecticide Paris Green (copper acetoarsenite) is recorded historically at the Colony Farm.⁵⁶ Judging from prevailing agricultural practice, the Orchard was almost certainly treated with lead and arsenic compounds from

51. Rachel Weber & Laura Goddeeris, *Tax Increment Financing: Process and Planning Issues* 32 (Lincoln Inst. Land Policy Working Paper No. WP07RW1, 2007).

52. Klug, *supra* note 45, at 6.

53. Davis, *supra* note 37.

54. *Trustees Authorize Property Purchase for Soccer Facility*, W. MICH. UNIV. OFF. UNIV. REL. (Sept. 18, 2000), <http://www.wmich.edu/wmu/news/2000/0009/0001-048.html>.

55. See Joyce Pines, *Deed Restrictions on Colony Farm Orchard in Kalamazoo Must Remain Intact*, MLIVE.COM (July 23, 2009, 12:34 PM), http://blog.mlive.com/readreact/2009/07/deed_restrictions_on_colony_or.html; see also CITY OF KALAMAZOO BROWNFIELDS, http://www.kalamazooocity.org/portal/business.php?page_id=734 (last visited Feb. 26, 2011).

56. Massie, *supra* note 5.

before 1887, when it was acquired by the State Hospital, through approximately 1948, when DDT and other chlorinated hydrocarbons came into general use.⁵⁷

Testing for lead, arsenic, and DDT contamination would be required, perhaps followed by remediation depending on levels detected. Remediation typically consists of removing several inches of soil within an orchard, trucking it to a toxic-waste dump, and bringing in clean soil.⁵⁸ One set of studies has shown that arsenic and lead in the soils of old orchards are nearly immobile as long as the land remains undisturbed.⁵⁹

5. Argument: “The most important benefit is that wise development of that 53 acres might have a positive environmental impact on Asylum Lake [by serving] as an effective buffer between the Asylum Lake property and U.S. 131 [and providing] space for retention ponds” to keep phosphorus out of the lake.

Rebuttal: It is unlikely that developed land would be as effective a buffer as the dense vegetation currently there. Instead, the development during construction and in operation would increase noise and light, and additional traffic would also add other unfavorable effects.⁶⁰

Most of the phosphorus coming into the lake is in storm water coming from streets and a strip mall nearby to the north.⁶¹ The suggestion that development of the Orchard is needed for retention ponds is a red herring. A better site is a parcel directly north of the Orchard. This land is currently owned by the WMU Foundation⁶² and is unrestricted. Retention-pond construction could begin immediately.

C. The Payoff

On September 30, the Senate Appropriations Committee voted seventeen to one to send House Bill 5207 to the full Senate. Kalamazoo’s senator, Tom George, a Republican and a member of the committee, told the *Gazette* that “job creation” was the reason he supported the bill.⁶³ The single “nay” vote was from an Ann Arbor senator with strong environmental credentials.

Kalamazoo was by now fully mobilized. A documentary movie, *The Colony Farm Orchard: Here We Go Again*, had been produced, shown on public access,

57. FRANCIS J. PERYEA, HISTORICAL USE OF LEAD ARSENATE INSECTICIDES, RESULTING SOIL CONTAMINATION AND IMPLICATIONS FOR SOIL REMEDIATION 2 (1998).

58. *Id.*

59. See generally Carl E. Renshaw et al., *Impact of Land Disturbance on the Fate of Arsenical Pesticides*, 35 J. ENVTL. QUALITY 61 (2006).

60. See Ian F. Spellerberg, *Ecological Effects of Roads and Traffic: A Literature Review*, 7 GLOBAL ECOLOGY & BIOGEOGRAPHY LETTERS 317, 320–24 (1998).

61. Kieser & Associates, LLC, Water Quality Evaluation of Asylum Lake and Little Asylum Lake with Management Recommendations 17–18 (unpublished report prepared for Western Michigan University Asylum Lake Policy and Management Council) (on file with author).

62. Hoffman, *supra* note 7, at 146.

63. Paula M. Davis, *Senate Panel Votes to Lift Colony Farm Rules*, KALAMAZOO GAZETTE, Oct. 1, 2009, available at http://docs.newsbank.com/s/InfoWeb/agdocs/AWNB/12B96B9B5441D250/0D0CB4F32A21A855?p_multi=ZOOB&s_lang=en-US/.

and posted on YouTube;⁶⁴ links were provided to legislators, the governor, and WMU board members. WMU environmental studies students jumped into the battle by setting up a Facebook page, “Save the Enchanted Forest.”⁶⁵ Later, acting under the official Environmental Studies student group Students for a Sustainable Earth, WMU students circulated a pro-Orchard petition, handed out informational leaflets, put on an Enchanted Forest costume dance party, and organized an evening hike into the Orchard.⁶⁶ They, along with ALPA members and many other townspeople, produced—in letters, phone calls, faxes, and e-mails to the politicians in Lansing as well as the WMU administration and board—an outpouring of grassroots sentiment that every civics class teaches is an essential part of our system of government.

From October through most of December, the Senate, deluged by calls and letters, did not bring House Bill 5207 to a vote. Then, on the night of December 18, shortly before Christmas recess, the Senate passed the bill, thirty to one.⁶⁷ No Democratic senators voted against the measure, eleven voted for it, and five were excused and did not vote, including the environmental senator from Ann Arbor who had voted against the bill in committee. Governor Jennifer Granholm held the bill until January 5, 2010, and then signed it.⁶⁸ She made no reported comment at the signing and has made no known response to communications about the Orchard from concerned citizens.

IV

HOW DID THE TERMINATION OF PROTECTION OF THE COLONY FARM ORCHARD HAPPEN?

There are nuances and side issues, but the plain fact of the Orchard case is that the Michigan legislature stripped a servitude from a piece of land dedicated in clear language as open space for public use. This was done at the behest of a university that had accepted the land with the servitude attached, but had other ideas about what to do with the land.

The legislature’s willingness to take such action is obviously worrisome to anyone interested in government-owned or controlled conservation lands, but it may have even broader implications. It is useful to ask (1) what factors contributed to this loss of dedicated public open space, (2) what conditions may contribute to legislative action to weaken or terminate conservation easements,

64. Matthew Clysdale, *The Colony Farm Orchard: Here We Go Again*, YOUTUBE (Nov. 9, 2009), http://www.youtube.com/watch?v=cDKmo_iAYoE.

65. *Save the Enchanted Forest!*, FACEBOOK.COM, <http://th-th.facebook.com/group.php?gid=138374947738> (last visited Feb. 26, 2011).

66. Fritz Klug, *SSE Advocates Orchard Property Preservation*, WESTERNHERALD.COM (Nov. 30, 2009), <http://www.westernherald.com/news/sse-advocates-orchard-property-preservation/>.

67. H.B. 5207, 95th Leg., Reg. Sess. (Mich. 2009) (Bill History); *See also* Mickey Ciokajlo, *WMU gets state OK on Colony Farm*, KALAMAZOO GAZETTE, Dec. 21, 2009, at A1.

68. Paula M. Davis, *Colony Farm Bill OK'd*, KALAMAZOO GAZETTE, Jan. 6, 2010, at A1.

(3) what forms might such actions take, and (4) what steps might conservationists take to try to avoid or counteract such situations.

A. Conservation in Eclipse

It is astonishing that only three votes were cast against House Bill 5207, two in the House and one in the Senate. All were by Republicans. Only the Senate vote was based on conservation. It was cast by Alan Cropsey, a friend of Jack Welborn, who was involved in the original conveyance. Cropsey's protest against the bill's passage contained these words:

Years ago when the land was first transferred to Western Michigan University, it was understood that the land would be used as a green space for that area

I find it ironic that after a couple of decades that now the use is being changed dramatically. Green space is going away. I just want this body to know that at least there is one true ardent environmentalist left in this august body who is going to stand up and speak out for the plants and animals that are so desperately needed in our urban centers.⁶⁹

The current low priority of land conservation is shown by the Conservation Scorecard for 2009 through 2010 prepared by the Michigan League of Conservation Voters (MLCV).⁷⁰ The organization chose eighteen pieces of legislation to rate Michigan House members and ten to rate Michigan Senators. The MLCV was able to give thirty-two (of 110) representatives and twelve (of thirty-eight) senators scores of 100% based on their voting records on these bills. All were Democrats and Representative Jones was included in that number.

But House Bill 5207 was not among the bills chosen by MLCV for its calculations. Of the bills it chose, a few could be construed as having a definite conservation connection, but most had to do with chemicals affecting human health or legislative attempts to weaken regulatory rules of state agencies. If House Bill 5207 had been included, no legislator would have had a perfect score; every Democratic legislator either voted for stripping the Orchard's protection or did not vote.

The low priority given to land conservation is not restricted to Michigan⁷¹ and, in part, is a return to a view of land once widely held in England. In Neolithic times, England was largely forested.⁷² Ninety percent had been cleared

69. Senate J. No. 105, 95th Leg., Reg. Sess. 2496 (Mich. 2009), available at [http://www.legislature.mi.gov/\(S\(tzss3a552rncqn45cjfa021\)\)/documents/2009-2010/Journal/Senate/pdf/2009-SJ-12-18-105.pdf](http://www.legislature.mi.gov/(S(tzss3a552rncqn45cjfa021))/documents/2009-2010/Journal/Senate/pdf/2009-SJ-12-18-105.pdf).

70. MICH. LEAGUE OF CONSERVATION VOTERS, MICHIGAN ENVIRONMENTAL SCORECARD 2010, at 11–13 (2010), available at http://www.michiganlcv.org/sites/default/files/2009-2010%20Scorecard_final.pdf.

71. Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 335–42 (2001).

72. W.G. HOSKINS, *THE MAKING OF THE ENGLISH LANDSCAPE* 19–20 (1955).

by the time the earliest immigrants to America set sail.⁷³ The settlers arrived in a land where natural processes dominated, covered by a mosaic of vegetation, predominantly wooded, with a great variety of plants and wildlife, and also more or less fully occupied by a native human population.⁷⁴

If some of the settlers marveled at the beauty and complexity of the land, that was not the dominant reaction. In *Wilderness and the American Mind*, Roderick Nash noted William Bradford's comments about the Pilgrim's arrival at Plymouth.⁷⁵ "What could they see but a hideous and desolate wilderness, full of wild beasts and wild men?" Bradford wrote in 1620, "The whole country, full of woods and thickets, represented a wild and savage hue."⁷⁶ The value of the land to the new arrivals lay in what it could be turned into—"reclaimed" and turned toward human ends—planted as a garden, say, or a city upon a hill.⁷⁷

This principle—that converting wild land to agricultural, residential, commercial, or industrial functions is desirable for the good of the people or the nation—prevailed in American law into the mid-twentieth century. Alternative views began to be commonly expressed in the 1960s.⁷⁸ In the foreword to Russell Brenneman's 1967 monograph *Private Approaches to the Preservation of Open Land*, he wrote, "I assume a great need today to insure the dedication of a significant proportion of our unused land as open space. I assume that today the main focus has shifted in our United States from quantity to quality in living; I assume that to recover the relationship between man and nature we must have open land."⁷⁹

But such ideas, the ideas of H. D. Thoreau, Aldo Leopold, Ian McHarg, Stewart Udall, and their partners-in-ethics, did not take with everyone.⁸⁰ It may have been inevitable that WMU's Colony Farm land would become a repeated target for forces that considered the land "not utilized."

73. BRYAN DONAHUE, *THE GREAT MEADOW: FARMERS AND THE LAND IN COLONIAL CONCORD* 91 (2004).

74. David R. Foster, *Insights from Historical Geography to Ecology and Conservation: Lessons from the New England Landscape*, 29 *J. BIOGEOGRAPHY (SPECIAL ISSUE)* 1269, 1272–73 (2002).

75. RODERICK NASH, *WILDERNESS & THE AMERICAN MIND* 26 (4th ed. 1973).

76. WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION 1620–1647* ch. 9 (1952).

77. William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* 69 (William Cronon ed., 1995), available at http://www.williamcronon.net/writing/Trouble_with_Wilderness_Main.html.

78. See STEWART L. UDALL, *THE QUIET CRISIS* viii (1963); Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 *REAL PROP. PROB. & TR. J.* 540, 554–55 (1979); Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 *HASTINGS L.J.* 1187, 1203 (1989).

79. RUSSELL L. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* vii (1967).

80. Steven J. Eagle, *Environmental Amenities, Private Property, and Public Policy*, 44 *NAT. RESOURCES J.* 425, 436–44 (2004).

B. “Crisis” as Opportunity

Another important factor in the action of the university and the response of the legislature was the recession of December 2007 through June 2009 and the accompanying unemployment. In July 2009, Michigan unemployment was 15%, compared with 6.7% a year earlier.⁸¹ WMU’s claim that stripping the public-use and open-space restriction from the Orchard would produce jobs, though misleading, was a successful tactic.

Using a crisis as the opportunity to achieve an agenda that might be unpopular in better or calmer times is a well-worn device. For example, many ecologically valuable forest tracts were cut for the “war effort” during World War II, including those holding the last verified colonies of the Ivory-billed Woodpecker.⁸²

C. Influence of Powerful Interests

Support for expansion of the BTR Park was strong among prominent business and political elements, many with connections to WMU. In favoring the BTR Park, the local power structure and WMU shared an agenda. Representative Jones was a popular politician, who, prior to being elected to the House, served four terms as mayor of Kalamazoo. In his two terms in the House, he was a dutiful agent, promoting not just the BTR Park, but other items of the shared agenda.⁸³

D. Legislative Deficiencies

One factor in the easy passage of Bill 5207 was behavior that might best be called home-district sovereignty, a variety of logrolling involving uncritical acceptance of one member’s bill dealing with a situation pertaining to his or her district.

Another legislative-related issue in Michigan is the fact that all legislators are inexperienced. An amendment to the Michigan constitution (effective from 1993 elections forward) limits representatives to no more than three terms (two years each), and senators to no more than two terms (four years each).⁸⁴

These two weaknesses do not fully explain the almost universal lack of interest on the part of the legislators, and the governor, in learning why the protective covenant should have been retained or why the Colony Farm Orchard deserved protection. It appeared that their votes came either from an

81. Daniel Workman, *US States with Highest Unemployment Rates*, SUITE101.COM (Sept. 13, 2009), <http://www.suite101.com/content/us-states-with-highest-unemployment-rates-a148076>.

82. JEROME A. JACKSON, *IN SEARCH OF THE IVORY-BILLED WOODPECKER* 60–61, 144–47 (2004).

83. Mickey Ciokajlo, *Kalamazoo’s State Rep. Jones Amasses Largest Political Fund Among Michigan’s Freshman Lawmakers*, KALAMAZOO GAZETTE, Aug. 16, 2008, available at http://blog.mlive.com/kzgazette/2008/08/kalamazoo_through_his_politica.html.

84. *Term Limits*, PUBLIC SECTOR CONSULTANTS, INC. (1998), available at www.michiganinbrief.org/edition06/text/issues/issue-59.htm.

unexamined acceptance of WMU's claim that removing the restriction would create jobs, or, more likely, from a dread of being accused of voting against jobs. The crisis—recession and unemployment—which had provided an opening for WMU's agenda, again played a role, this time as cover for the legislators and governor.

E. Privatization and Corporatization of Public Universities

Important here, but probably least important from a broad conservation standpoint, were the changes in the nature of public universities in the past thirty years. Financial support from taxes has declined drastically. One result is that operating funds are sought elsewhere—from the students, of course, in the form of higher tuition and fees, but also from corporate grants and contracts and donations from local (or distant) moneyed interests.⁸⁵ This has resulted in mission shift. At WMU, mission statements of the past emphasized education, research, and public service. These three purposes remain, but others have been added, notably “contribut[ion] to technological and economic development.”⁸⁶

In this atmosphere, the notion that land bought by the state with taxpayer dollars and transferred free to WMU could be sold for business development was perfectly acceptable. A 2004 appraisal set the market value of the Orchard at \$310,000.⁸⁷ But sold as lots in a BTR Park, the land might realize some multiple of that. A WMU vice president told a *Herald* reporter that lots in the existing BTR Park had been sold at \$80,000 through \$100,000 per acre.⁸⁸

Although the traditional expectation is that this money would go to the state, the removal of the restriction eliminated that requirement. WMU was free to make what it could off the land.

V

LEGISLATIVE ACTION DESTRUCTIVE TO CONSERVATION EASEMENTS

A. A Crisis is Useful

Factors, such as those leading to the removal of the conservation covenant on the Orchard, could coalesce into other efforts to diminish or terminate conservation easements. The efforts could single out particular preserved sites, as in the Orchard, or could attack conservation easements broadly through changes in the enabling statute or other statutes and regulations that interact with conservation easements.

85. Sam Dillon, *At Public Universities, Warnings of Privatization*, N.Y. TIMES, Oct. 26, 2005, at A12.

86. *Mission and Goals*, W. MICH. UNIV., <http://www.wmich.edu/about/mission/> (last visited Feb. 26, 2011).

87. Senate Fiscal Agency, H.B. 5207 Legislative Bill Analysis 2 (2009), available at <http://www.legislature.mi.gov/documents/2009-2010/billanalysis/Senate/pdf/2009-SFA-5207-F.pdf>.

88. See Klug, *supra* note 45.

These attempts might have an ideological basis. If so, the most probable ideology might be some form of libertarian thought in which any restraint on property rights is unacceptable and shrinkage of government is prized. Direct animosity toward environmental protection is often a quieter partner to these two. Another possibility is that impetus will come from a combination of profit-motive on the part of developers, landowners, or both, and the eagerness of government to accommodate them.

An accompanying crisis is useful, but its reality is optional. Even if factually shaky, it can serve as an excuse for those who will gain and as cover for politicians.

As one example of a situation that might be cited as necessitating drastic revision of conservation easements, consider the following: In one or two townships around the state, a high percentage of the land area is developed with upscale houses and commercial strips. The only remaining large parcels are a few farms of 80 to 300 acres on prime agricultural land. Some of the farms are restricted by perpetual conservation easements. Suppose that boom times and the market for high-priced housing return. Some of the farmers might want to continue farming, but, with the farms now isolated, it has become difficult to bring in the necessary equipment. Housing developments on these properties would bring profits to the developers and the farmers and an enlarged tax base to the township (though perhaps higher taxes to the residents).⁸⁹

Bad times were the excuse for removing protection from the Colony Farm Orchard, but good times will also serve. The crisis in this example is a claimed shortage of developable land. Under these circumstances, a local legislator might cheerfully agree to seek a revision—for the good of the state. “People have to have a place to live,” the legislator would explain to the press.

B. The Vogue of Conservation Easements

The current widespread use of conservation easements by land trusts was facilitated by removing common-law impediments to enforcement and by expanding eligibility to hold easements to private conservation organizations. These changes were accomplished by statute in most states by the late 1970s.⁹⁰ The results are seen all around us; the conservation easement has become quantitatively the preferred method of conserving land.

Although seemingly desirable, these legislative actions have brought another kind of vulnerability to land conservation, especially private land conservation. Politics has been added to the equation in the power of legislatures to draft and amend enabling statutes and related laws and regulations.

89. BREWER, *supra* note 2, at 68–72.

90. Netherton, *supra* note 78, at Tables 1 and 2.

As a commentator on the nation's conservation easement enabling statutes warned, legislative attention can cut both ways.⁹¹ Certain changes may enhance the effectiveness, convenience, or durability of conservation easements; others may be detrimental.

C. Old Moody Farm: A Case in Point

This case is an example of a legislative attempt to remove the restriction on an individual property, a situation parallel to the termination of the restriction on the Colony Farm Orchard.

In 1976, Mary Moody Northen, a wealthy resident of Galveston, Texas, donated a conservation easement on about eighty acres of old farmland in Chesterfield County just outside Richmond to the Virginia Outdoors Foundation (VOF).⁹² The VOF is a state-supported body with functions similar to a land trust. When Northen died in 1986, the title to the land went to the Mary Moody Northen (MMN) Endowment.⁹³

By 2003, the farmstead, which included a Moody family graveyard with Civil War graves,⁹⁴ was “an island of green amid a suburban sea of homes, stores, and gas stations,” according to the *Richmond Times-Dispatch*. The farm, valued at \$35,000 as restricted, was worth about \$7 million unrestricted.⁹⁵

The MMN Endowment devised a trade in which a conservation easement located in Giles County, a rural county bordering West Virginia, would be swapped for the Chesterfield easement.⁹⁶ Although the MMN Endowment had not made a formal request to the VOF board to release the easement,⁹⁷ a senator and a house member introduced bills in the Virginia General Assembly that would divert the land in Chesterfield County from designated open-space use and provide the Giles County land as a substitute under the Open Space Land Act. The proposed Giles County open-space land was about 260 acres at Mountain Lake.⁹⁸

Senator John Watkins, who introduced the bill, was quoted by the *Times-Dispatch* as saying that the Old Moody Farm land was “just sitting there

91. Robert H. Levin, *A Guided Tour of the Conservation Easement Enabling Statutes*, LAND TRUST ALLIANCE 5 (2010), available at <http://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf>.

92. Rex Springston & Meredith Fischer, *Old Moody Farm: Protected Property?; Group Wants to Sell Land for Development*, RICH. TIMES DISPATCH, Jan. 24, 2003, at A1.

93. MARY MOODY NORTHEN ENDOWMENT, <http://www.northenendowment.org/> (last visited Apr. 16, 2011).

94. Baltimore Civil War Roundtable, *How Safe is Protected Land? Virginia Asked to Overturn Easement on Historic Property*, “OLD LINER” NEWSL., Jan. 29, 2003, at 2, available at http://bcwrt.nalweb.net/civil_war_news_february_2003.pdf.

95. Springston, *supra* note 92.

96. Baltimore, *supra* note 94.

97. Personal communication from Tamara Vance, Deputy Director Va. Outdoors Foundation, to author (Nov. 16, 2010).

98. Springston, *supra* note 92.

empty.”⁹⁹ He opposed protection in perpetuity because “that says to generations yet to be born that we know more about everything they are going to face than they ever will, and we ought to control it.”¹⁰⁰

The relevant Virginia statute requires that conversion or diversion of designated open-space land must be essential to the orderly development and growth of the locality and in accordance with the comprehensive plan. It also requires that the substituted land must be of at least equal fair-market value, of greater value as permanent open-space land, and of equivalent usefulness and location as open-space land.¹⁰¹

Faced with resistance from the VOF, neighbors of the farm, and conservationists around the state, the legislators withdrew the bills. The MMN Endowment indicated that they would renew the request at a later time, but that has not yet occurred.¹⁰²

A review of legislative-branch powers to modify or terminate individual conservation easements, such as the Old Moody Farm easement, indicated that based on established trust-law principles, “the legislature’s power to modify or terminate established conservation easements is limited.”¹⁰³ Whether conservation easements are automatically qualified as charitable trusts, however, is not yet settled.¹⁰⁴

D. Legislation with Teeth: Termination Powers Included in Constitutions or Statutes

The people of Massachusetts are more conservation-minded than most. About 160 land trusts are in operation in this small state.¹⁰⁵ Every town and city has a conservation commission that can acquire and hold land and easements.¹⁰⁶ Amendment 97 of the Massachusetts constitution declares as rights the following: clean air and water, and the natural, scenic, historic, and esthetic qualities of the environment. Protection of the people in their right to the conservation of natural resources is given as a public purpose.¹⁰⁷

99. *Id.*

100. *Id.*

101. VA. CODE ANN. § 10.1-1704 (2010) (Diversion of property from open-space land use; conveyance or lease of open-space land).

102. Personal communication from Tamara Vance, Deputy Director Va. Outdoors Foundation, to author (Nov. 16, 2010).

103. Clemens Muller-Landau, *Legislating Against Perpetuity: The Limits of the Legislative Branch’s Powers to Modify or Terminate Conservation Easements*, 29 J. LAND RESOURCES & ENVTL. L. 281, 306 (2009).

104. C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009).

105. *Land Trust Alliance Member Land Trusts Operating in Massachusetts*, LAND TRUST ALLIANCE, http://findalandtrust.org/states/massachusetts25/land_trusts#local (last visited Feb. 27, 2011).

106. MASS. ASS’N CONSERVATION COMMISSIONS, http://www.maccweb.org/about_commissions.html (last visited Feb. 27, 2011).

107. MASS. GEN. LAWS ANN. CONST. AMEND. art. 97 (West 2011) (amending art. 49).

Amendment 97 ends with this sentence: “Lands and easements taken or acquired for such [natural resource] purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch [of the state legislature].”¹⁰⁸

Although couched in terms of protecting land, the amendment also provides a clear path to terminating easements. According to a 2004 white paper prepared by the Massachusetts Audubon Society, government units were “frequently turning to land set aside for conservation or parkland as building sites Article 97 votes have become routine legislative business, with nearly every land transfer proposal brought up for vote approved unanimously.”¹⁰⁹

Proposals to convert conservation land to non-conservation uses do not go directly to the legislature. With some variation depending on the particular circumstances, a proposal is considered by the local conservation commission and board of selectmen or city council, then the state Executive Office of Environmental Affairs, and then the legislature.¹¹⁰ The process seems rigorous, if each step involves critical and independent review.

Nevertheless, a compilation of Article 97 land transfers¹¹¹ showed that at least sixty such conversions were authorized by the 2005 through 2006 legislature, and at least eighty-three by the 2007 through 2008 legislature. About half the parcels were owned by cities or towns, and half by the state. The most frequent actions were release or abandonment of a conservation easement and transfer of title. Some conversions have involved lands without conservation restrictions or other formal designation, though they may have been intended as or historically considered conservation land.¹¹² Most of the transfers (sixty-seven percent) did not include a requirement for replacement land.

No similar compilation of the end uses of released natural-resource lands seems to exist. Anecdotal lists include utility corridors, roads, parking lots, housing, schools, memorials, runways, water supply, recreational facilities, and private development.¹¹³

In 2005, State Senator Pam Resor introduced a bill, “An Act to Protect the Natural and Historic Resources of the Commonwealth,” designed as a remedy to the anti-conservation effect of Amendment 97. The cure prescribed was mitigation—“no net loss” of protected acreage. Senator Resor’s bill did not pass and its future seems dim,¹¹⁴ despite heavy support from the conservation community. Local governments tend to regard conservation land as “unused,” a

108. *Id.*

109. MASSAUDUBON, AN ACT TO PROTECT THE NATURAL AND HISTORIC RESOURCES OF THE COMMONWEALTH 1 (2004) (white paper), available at <http://www.massaudubon.org/PDF/advocacy/leg0506/Article97-2005-2006.pdf>. Personal communication from Robert Levite (Nov. 4, 2010).

110. Personal communication from Robert Levite, to author (Nov. 4, 2010).

111. Article 97 Land Transfers, PROTECTMASSENVIRONMENT.ORG, http://www.protectmassenvironment.org/article_97_land_transfers.htm (last visited Feb. 26, 2011).

112. Personal communication from Robert Levite, to author (Nov. 4, 2010).

113. Land Transfers, *supra* note 111; MASSAUDUBON, *supra* note 109.

114. Personal communication from Jack Clarke, to author (Nov. 16, 2010).

kind of land bank for future development.¹¹⁵ Legislators have been reluctant to cut off local government, especially the local government of their district, from what is seen as a source of free land.

Much of what the Resor bill would have mandated is already written policy of the Executive Office of Environmental Affairs. And apparently, Governor Deval Patrick's current administration is committed to enforcement of the no-net-loss requirement.¹¹⁶

The procedures in Massachusetts for dealing with conservation easements are highly regarded.¹¹⁷ Nevertheless, for persons wishing to assure that at least some categories of conservation easements need not be perpetual, the Article 97 framework seems to be an effective model.

Article 97 demonstrates that requirement of a supermajority is no impediment to conversions—another example of the power of home-district sovereignty. Another important issue is the attempted correction by mitigation, or “no net loss.” Mitigation is a popular regulatory device that allows development where current development demand is. It might, if properly done, moderate the damage to land protection from easement conversion. Mitigation has been widely used in wetland conservation efforts, but has rarely been seen as successful. The main reason seems to be lack of compliance, resulting from lack of oversight and enforcement.¹¹⁸

Besides this technical failure of mitigation, environmentalists have often made the point that conservation lands are not fungible. Many, perhaps most, dedicated natural lands were preserved because some person or group wanted to preserve a particular piece of land—not simply because the land was representative or held a characteristic set of species, but also because of unique features of that specific parcel such as setting and history.¹¹⁹

Strong opinions abound on how an easement can be properly terminated, but because of lack of clarity in the statutes and related sources, few parties agree on the answer. The two examples cited probably represent only a narrow range of options that could be employed to overturn an existing easement, or to make most—or all—easements easier to escape. If wholesale escape from easements becomes highly advantageous financially, we may see a burst of legislative ingenuity on a scale rarely encountered in the history of the Republic.

115. Land Transfers, *supra* note 111; see personal communication from Irene Del-Bono, to author (Nov. 2, 2010).

116. See Commonwealth of Massachusetts Executive Office of Environmental Affairs, EOEa Article 97 Land Disposition Policy 1 (1998), available at www.mass.gov/Eoea/docs/eea/dcs/DCSarticle97.pdf; see personal communication from Irene Del-Bono, to author (Nov. 16, 2010).

117. Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 153–56 (2010).

118. See generally Stephen C. Brown & Peter L.M. Veneman, *Effectiveness of Compensatory Wetland Mitigation in Massachusetts, USA*, 21 WETLANDS 508 (2001).

119. BREWER, *supra* note 2, at 156–60.

E. Features of Statutes that Potentially Lower Usefulness or Durability of Conservation Easements

Various provisions of existing state laws serve as impediments to land conservation, whether or not that was the original intent. Some of these may provide a starting place for other states that want to pass provisions to slow the growth of conservation acreage. A promising possibility for one of these new provisions is interference with tax benefits.

North Dakota has not been friendly to conservation easements, perhaps partly in reaction to the U.S. Fish and Wildlife Service's accumulation of easements in the 1960s and 1970s. The purchased easements were for a worthy cause: to protect waterfowl nesting habitat. The state objected to the process but lost in federal court and on appeal.¹²⁰

North Dakota law limits easements to ninety-nine years. This has no effect, however, on easements held by federal agencies. Also, the statute does not necessarily prevent conservation easements from being of "perpetual" duration; the easement document can be written to allow refiling with identical provisions every ninety-nine years.¹²¹ The North Dakota statute does, however, prevent donors from claiming a federal charitable income-tax deduction. It may also bring other unfavorable federal tax consequences.¹²² North Dakota is the only state without a single homegrown land trust.¹²³ In this lack may be evidence of the power that eliminating perpetual conservation easements has to discourage private land protection.

Almost any interference with tax benefits might conceivably discourage the use of conservation easements. For example, most states allow a reduction in property taxes for the owner of eased land. Idaho is the only state that prohibits a reduction.¹²⁴

Nevertheless, avoidance of conservation easements in Idaho is not obvious when comparing Idaho land-protection statistics with the six adjoining states.¹²⁵ Idaho land-trust practitioners point out that most conservation easements are

120. Bryan Ohm, Matthew B. Cobb, Julie Ann Gustanski & Larry E. Meuwissen, *Conservation Easements in the Seventh and Eighth Federal Circuits*, in PROTECTING THE LAND 292 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

121. Laurel A. Florio, *Conservation Easements North Dakota* at post to landtrust@indiana.edu (Apr. 5, 2001).

122. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND 26, 42 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

123. LAND TRUST ALLIANCE, <http://findalandtrust.org/states/northdakota38> (2010) (searching each county indicates that no land trust originates in North Dakota).

124. Levin, *supra* note 91 ("[M]arket value shall be computed as if the conservation easement did not exist."); see IDAHO CODE ANN. § 55-2109 (2011).

125. See chart results referring to Idaho, Montana, Nevada, Oregon, Washington, Wyoming, and Utah at *Number of Land Trusts and Acres Protected by Local and State Land Trusts as of December 31, 2005*, LAND TRUST ALLIANCE (2010), http://www.landtrustalliance.org/land-trusts/land-trust-census/data-tables#total_acres.

placed on open lands and agricultural lands, for which the tax rate is low anyway.¹²⁶

Also, for land being assessed at a higher rate, as of 2007 provisions have existed to petition the county assessor for the agricultural rate if the land is being managed under a plan to protect wildlife and wildlife habitat.¹²⁷ This could include land protected by a conservation easement or land protected by a ten-year conservation agreement.¹²⁸ In such ways, one legislature can undo the earnest effort of an earlier one.

It is also possible that land owners in Idaho (and elsewhere) may consider the lack of a property tax break trivial compared with substantial federal tax incentives, especially those that were available from 2006 through 2007.¹²⁹

V

FIGHTING BACK: CONSERVATION EASEMENTS AND THE LAND PRESERVATION ARSENAL

A. Return to Fee

The most obvious solution to current conservation-easement problems is a return to outright ownership by land trusts of conserved land.¹³⁰ There are, of course, good reasons not to discontinue the use of conservation easements. In some cases, the owners of a property of great conservation importance would happily sell or donate an easement but will not willingly give up ownership. In some cases, an expensive parcel of land of modest conservation importance in itself can serve as a buffer and useful extension to a preserve of high conservation value already protected by ownership. Other situations exist in which conservation easements make a useful complement to the other primary conservation tools of ownership in fee and regulatory protection.

William H. Whyte—whose 1959 monograph *Securing Open Space for Urban America: Conservation Easements* got the whole thing rolling¹³¹—would be surprised at the current one-sided approach to land conservation. It is doubtful he would be pleased. In his book *The Last Landscape*, written in 1970 after the

126. Personal communications from Scott Boettger, Wood River Land Trust, and Chet Work, Teton Land Trust, to author (Dec. 14, 2010); personal communication with Babette Thorpe, to author (Dec. 17, 2010) (regarding Idaho statute 63-605).

127. Thorpe, *supra* note 126.

128. IDAHO CODE ANN. § 63-605 (2011) (Land used to protect wildlife and wildlife habitat).

129. Greg Stahl, *Land Trust Could Double Easements by Year's End*, IDAHO MOUNTAIN EXPRESS, http://www.mtexpress.com/story_printer.php?ID=2005118436#1 (last visited Feb. 27, 2011).

130. BREWER, *supra* note 2, at 292; see Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982).

131. William H. Whyte Jr., *Securing Open Space for Urban America: Conservation Easements*, TECHNICAL BULLETIN NO. 36 (Urban Land Institute, Washington, D.C.), Dec. 1959, at 54–56.

use of easements had begun to spread, he wrote, “The point is combination. Alone, any single device is limited; together they strengthen each other.”¹³²

Conservation easements have turned out to be a highly complicated way of saving land—much more so than the early champions might have suspected. The growing legal complexity is obvious. So are the complicated, and fluctuating, rules for federal income tax benefits. These and other intricacies have become increasingly noticeable as the number of conservation easements grows and stakeholders multiply. The stakeholder list no longer consists of the easement donor and the easement holder. It has expanded to include, at a minimum, attorneys, appraisers, legislators and other politicians, IRS regulators, judges, the media, conservation-easement scholars, a variety of conservation groups and anti-conservation groups, and wealthy owners of large land holdings with or without an interest in land conservation.

It is possible that much of the complexity was inherent in the original concept of a conservation easement, in which case the apparent increase is simply a matter of the innate complexity being revealed with increased experience. However, it is also possible that some of the complexity has been manufactured along the way in the interactions among various stakeholders. A manufactured component might be more readily curable. In dealing with complications, land trusts expend time, effort, and money. Fee ownership may have its own problems, but in comparison seems as clear as a sunny day.

Two trends of thought connected with land-trust operations have become evident recently, both prompted mainly by problems with easements. One is that acquisition of conservation property should be coordinated with local, or even state-wide, planning.¹³³ For example, a land trust should think twice before acquiring an easement on a remarkable site of biodiversity if the planning department and zoning board have visions of large single-family houses in that direction.

The second line of thinking is that the gift, and perhaps the sale, of a perpetual conservation easement creates a charitable trust. Hence termination, and perhaps many other actions in relation to the easement, require judicial action.¹³⁴ Thus, the public interest is brought in at both the head and the tail of the conservation easement. Complications are added coming and going.

Of course, private land conservation has had public interests in mind from the beginning. Natural areas should be saved, thought Charles Eliot, founder of the first land trust, not just because they are beautiful, increasingly rare, and deserve saving, but also for the health, edification, and enjoyment of people.¹³⁵

132. WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 114 (1970).

133. See Jeff Pidot, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* 8 (Lincoln Inst. of Land Policy 2005).

134. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 *HARV. ENVTL. L. REV.* 421 (2005); see Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGICAL L.Q.* 673, 673 (2007).

135. CHARLES W. ELIOT, *CHARLES ELIOT: LANDSCAPE ARCHITECT* 316–22 (1902).

In the continued evolution of conservation, Aldo Leopold defined the public interest still more broadly: conservation saves habitat not just for our single species but for our kin in all the biological kingdoms throughout the biosphere.¹³⁶

What private efforts brought to conservation was freedom from some of the shortcomings and inefficiencies of the public process. Land trusts from Eliot on evolved as an alternative to government conservation efforts, able to move when government could not or would not. Many sorts of people have been involved in the land-trust movement, but with respect to real estate, there has always been a strong libertarian component.

The first really successful land trust, The Nature Conservancy, arose from deficiencies both of the public agencies and of the private advocacy groups that tried to influence the agencies in acquisition and stewardship of public lands.

The forerunner of The Nature Conservancy, the Ecologists Union, had been an advocacy group, mostly composed of biological scientists interested in persuading government to preserve the most ecologically significant lands. Richard Pough was the first strong leader of the group after its metamorphosis into The Nature Conservancy. Pough's approach to conservation is represented by the following quotation, "If someone comes to me and complains that a majestic forest is about to be cut down, I [tell them] 'Don't cry about the forest. Go out and buy it!'"¹³⁷

The complexity of conservation easements is a weakness. The increasing variety of complications has lowered the utility of easements and may begin to lower their appeal to land trusts, or even to their customers. However, old myths about conservation easements being a cheap and easy way to protect land die hard.

B. Dealing with "Changed Conditions"

The Uniform Conservation Easement Act affirmed the applicability of the doctrine that privately created restrictions on land may be terminated or modified if they no longer substantially achieve their purpose due to changed conditions.¹³⁸ Accordingly, invoking changed conditions seems to be one of the clearest paths to terminating an easement.

1. Ecology and the Dead Hand

A potential threat to the durability of conservation easements has come from a small segment within the land-trust community. Proponents of the view that perpetual protection is undesirable use several lines of argument. Most are

136. See Aldo Leopold, *The Conservation Ethic*, 31 J. FORESTRY 634, 634–35 (1933); see also Aldo Leopold, *On a Monument to the Pigeon*, in A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 108, 109 (1949).

137. BREWER, *supra* note 2, at 189.

138. UNIF. CONSERVATION EASEMENT ACT § 5 (2007); see Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 40 (1989).

variations on the ancient opposition to “dead hand” control: We cannot know what the future will bring, hence we should not make decisions that bind future generations. The most common alternative suggested is term easements, which, of course, remove any prospect of durability.¹³⁹

One line of argument that has been employed in opposing perpetual easements is ecological. Ecological paradigms have shifted, it is claimed; we therefore should get away from “the old outmoded model of nature as static and unchanging” and “reflect the new paradigm of a dynamic, continually changing world.”¹⁴⁰

The first generation of ecologists in America would have been astonished to hear that they were not dynamic. Much of their early research and thinking involved vegetational change at time scales of years through epochs. The Lake Michigan sand dunes and the prairies of Nebraska were among the earliest sites of ecological study in the late nineteenth century; two more dynamic systems could hardly be found.¹⁴¹ Post-glacial changes in vegetation were being reconstructed using fossil pollen and macrofossils in peat bogs in 1916 in Scandinavia¹⁴² and not much later in the American Midwest.¹⁴³

Frederic E. Clements, one of the first generation of ecologists, wrote in 1916, “An efficient increase in rainfall might well result in the prairie climax being replaced by a pine climax in the present plains area and a deciduous forest climax in the prairie area proper. It is far from improbable that something of the sort has happened in the past.”¹⁴⁴ He and the other ecologists of the era had a better classical education than people generally have today; doubtless most of the early ecologists knew and subscribed to the idea of Heraclitus that change is the only constant.

In short, the claim that ecologists of the first half of the twentieth century saw a world at equilibrium except when perturbed by humans¹⁴⁵ is a straw man, probably coming from a careless reading of textbooks. It is true that ecologists, beginning in the 1970s, became increasingly interested in the role of disturbance in vegetation, but both disturbances on varying scales of space and time, and processes promoting equilibrium, are features of any ecosystem. The plant cover of a region depends on the interplay between the two on different sites.¹⁴⁶

139. Jesse J. Richardson, Jr., *Conservation Easements and Adaptive Management*, 3 SEA GRANT L. & POL'Y J. 31, 54 (2010).

140. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 756 (2002).

141. BREWER, *supra* note 34, at 387–96 (sand dunes); *id.* at 378–79 (prairies).

142. Christer Nordlund, *Peat Bogs as Biological Archives: Lennart von Post and the Development of Pollen Statistics During World War I*, MAX PLANCK INST. FOR HIST. SCI., http://www.mpiwgberlin.mpg.de/de/forschung/projects/DeptII_Nordlund_PeatBogs (last visited Feb. 27, 2011).

143. ROBERT P. MCINTOSH, THE BACKGROUND OF ECOLOGY 98–104 (1985).

144. FREDERIC E. CLEMENTS, PLANT SUCCESSION 109 (1916).

145. Mahoney, *supra* note 140, at 755–56.

146. See BREWER, *supra* note 34, at 400–03.

What does the claimed paradigm shift have to do with conservation in perpetuity? The main points seem to be that (1) changes in the land happen: what we preserve today may be unworthy of preservation in the time of our children; but also (2) tastes in conservation change: the mountains of Europe and the Grand Canyon were once considered unattractive.¹⁴⁷ Perhaps future generations will see no sense in having preserves containing samples of intact, functioning ecosystems.

2. The Development Sink

Let us formally examine the long-term effect of adhering to a less-than-perpetual easement as the primary method of land conservation. Suppose all the parcels of land in a service area are classified into one of three categories: “Preserved” (protected by a twenty-year term easement); “Suitable” (possessing attributes that would make preservation at least minimally desirable); and “Developed” (currently occupied by development or abandoned development land with left-over structures, debris, contamination, or degradation making a return to a plant–animal community of mostly natural composition and function unlikely).

Preserved land can remain in the Preserved category if the easement is renewed. If not, it can move to the Suitable category or, if developed once the easement expires, it moves to the Developed category. Suitable land can remain in the Suitable category, can move to the Preserved category if a term easement is placed on it, or can move to Developed. Developed land is a sink. Developed land stays unsuitable—for a very long time.

In the long run, all land inevitably ends up in the Developed category. Whether the time required is long or short depends on the original distribution and the rates of transfer from one category to another. In any real-life situation, there may be complications, such as nature lovers who keep their land in the Preserved or Suitable categories as long as they can. Eventually though, they, their heirs, or buyers of the land will develop it. (This model ignores government-protected land.)

The only escape would be if Developed land could be returned to the Suitable or Preserved categories. Proponents of term easements argue that business parks can be converted back to meadows. But such remediation is expensive, time-consuming, and rarely reaches the level of restoration necessary to qualify the land for preservation. Rather, it generally cycles land within the Developed category, from impossible for redevelopment to possible. If land escapes the Developed category, it occurs so infrequently as to be inconsequential.

One exception is a certain category of agricultural land development. In fact, a great advance in land conservation would be a provision in farmland easements such that, if use of the land for agriculture becomes impossible or

147. Mahoney, *supra* note 140, at 758–60.

impracticable, the land must be allowed to return to natural successional processes. This would indeed be remediation of developed land.

3. Conservation, Not Termination

The mission of land trusts is conservation, not finding ways around conservation. It may be that occasionally a land trust will give protection to land with little conservation value. This is probably rare except for some types of agricultural land. Even mediocre natural or semi-natural land sequesters carbon and performs ecosystem services, and provides a habitat for organisms from bacteria to mammals. Because the time and money required to protect uninteresting land is not available to protect better land, prioritization in the acquisition process is important. Once the land is protected, the perpetual nature of the protection should be resolutely defended. The conservation value of the uninteresting land can increase absolutely through natural processes and possibly restoration and will also grow in relative terms as unprotected lands slide inexorably toward the Developed sink.

For land that has been protected for its high conservation values, it is hard to imagine many types of events that would change it in a way that would justify abandonment. Possibly a Chernobyl-style nuclear accident would qualify. But, no, the exclusion zone around Chernobyl has become a wildlife sanctuary. Many plant and animal species, especially larger birds and mammals, are more abundant there than in the surrounding countryside still open to human activity. No clear consensus exists on radiation effects on the health and reproduction of the organisms, but the information to be gained from continued research is an additional justification for retention as a sanctuary.¹⁴⁸

The question, of course, is, “When does the restriction no longer achieve its purpose owing to changes that have occurred?” In a technical sense, this depends on how the easement document is written. But before that, it depends on how well the land trust understands its mission in relation to the landscapes and ecosystems of its region.

Almost every piece of land has multiple reasons for protection within the income-tax-regulations list of conservation values. For example, the most striking feature of a site may be that it is one of only two places in the state that the three-birds orchid is still known to occur, but that is unlikely to be the only definable conservation value. In most localities the mature mesophytic forests in which three-birds live are rare, so many other uncommon habitat-specific plants, animals, and fungi of this ecosystem are protected at the same site. These species can be studied and enjoyed. Are some species (such as pollinators, soil fungi, herbivores, and dispersal agents) closely associated with three-birds? Does three-birds depend on these species? Does the existence of

148. See Robert J. Baker & Ronald K. Chesser, *The Chernobyl Nuclear Disaster and Subsequent Creation of a Wildlife Preserve*, 19 ENVTL. TOXICOLOGY & CHEMISTRY 1231, 1231 (2000); J.T. Smith, Comment, *Is Chernobyl Radiation Really Causing Negative Individual and Population-Level Effects on Barn Swallows?*, 4 BIOLOGY LETTERS 63, 63 (2007).

some of these depend on three-birds? Suppose no three-birds plants are seen for five years (its appearance above ground is notoriously erratic). Is it really gone? Can some fairly simple management techniques be tried that might stimulate its reappearance? Suppose thirty years go by without it being detected. Can reintroduction efforts be devised and attempted?

It is hard to imagine that any changes likely to occur in such a site would negate its value for preserving a distinctive community of plants and animals with its scenic beauty, its usefulness as a site of scientific study, its role as an outdoor classroom, and so forth.

If a tornado blows down dozens of trees in the beech woods, an unsightly scene results, but the preserve gains as much in conservation interest as it loses. The soil with its seed-bank, roots, and tubers remains intact. Some formerly uncommon species increase. For example, red-berried elder grows with vigor, producing flowers and fruits; birds visit the forest to eat the berries and spread seeds to other woodlots from which the plant may have been long absent. Tornadoes have happened before. The same processes that went on in the past are repeated, for the education and enjoyment of everyone who visits—the slow decay of fallen trunks and their return to the soil, and the closure of gaps in the canopy by canopy neighbors or by smaller trees from the understory.

Could the coming changes based on global climate change be of a different order of magnitude, so drastic as to cancel any justification for some preserves? Probably the best model for what will happen in the coming centuries is the sequence of vegetational changes in North America following retreat of the Pleistocene glaciers.¹⁴⁹ One clear difference between postglacial time and the present is that today's prevailing landscape contains large stretches of development laced with transportation strips. It is likely that the movements necessary for plants and animals to shift to more-favorable habitats will be slowed. In this developed world, conserved lands will usually offer the most congenial way-stations for the native biota, animal, or plant.

Useful discussions have begun giving information and thought on climate change and possible conservation approaches.¹⁵⁰ It is likely that other contributions in the present symposium will further the discussion.

VI

CONCLUSION

The mission of land trusts is conservation. From Thoreau onward, the heart of conservation has been protection in perpetuity. Land trusts should be aware enough to write easement documents so that most changes occurring in or

149. See generally Margaret B. Davis et al., *Dispersal Versus Climate: Expansions of Fagus and Tsuga into the Upper Great Lakes Region*, 67 *VEGETATIO* 93 (1986); Richard G. Pearson, *Climate Change and the Migration Capacity of Species*, 21 *TRENDS IN ECOLOGY & EVOLUTION* 111 (2006).

150. See generally James L. Olmsted, *Climate Surfing: A Conceptual Guide to Drafting Conservation Easements in the Age of Global Warming*, 23 *ST. JOHN'S J. LEGAL COMMENT* 765 (2008).

around a preserve do not trigger an interruption in protection. Rather, the changes are simply markers in the continued unfolding of ecological functions inherent in the protected land.

Government is an essential component of land conservation, but is not always a steadfast partner. All conservation organizations should make teaching the public, hence the voters, hence their representatives, the necessity of saving land and keeping it saved. Legislative action may, nevertheless, undercut restrictions on protected land, even when the case for protection is clear: Politicians tend to make their decisions based on political considerations. That circumstance is a major reason for the existence of private land protection.

The conservation easement has become an important tool for protecting land and will continue to be so; however, conservation easements are vulnerable to legislative action that lowers or destroys their effectiveness. They also have many other potential vulnerabilities. Land trusts should reduce their dependence on a single device: It is time for a renaissance of protection in fee.