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# Conservation Easements and Urban Parks: From Private to Public Use

## ABSTRACT

*Urban parks provide numerous benefits for city dwellers, from increasing access to physical fitness to raising adjacent property values. Yet after seeing them fall into disfavor with the rise in suburban neighborhoods, the pendulum has shifted the other way as cities across the nation undertake park revitalization projects. Similarly, the use of conservation easements has increased exponentially in the last two decades as a flexible and permanent method to restrict land use in perpetuity for public benefit. Although conservation easements have primarily been used by private landowners, cities can easily take advantage of this conservation tool to create and protect urban park spaces, especially mixed-use developments that need the flexibility only a conservation easement can provide. Yet very few cities have tried this approach. This article examines why conservation easements should be used by local governments as a way to protect into perpetuity the growing number of urban revitalization projects, and how two recent urban revitalization projects—Shelby Farms Park in Memphis, Tennessee, and the Railyard Park + Plaza in Santa Fe, New Mexico—successfully used conservation easements to forever protect city-owned land.*

“The less of our landscape there is to save, the better our chances of saving it.”<sup>1</sup>

—William H. Whyte, *The Last Landscape*

## INTRODUCTION

New York’s Central Park is iconic in the American landscape—and a testament to great urban planning—in which 843 acres of green space at the heart of this urban metropolis was set aside for the enjoyment of all.<sup>2</sup> Few cities are so lucky. Despite the vast urban growth of the

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1. WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 2 (1968).

2. This acreage includes 250 acres of lawns, 150 of waterbodies, and 136 acres of woodlands visited by 35 million people a year. *General Information, FAQ, CENTRAL PARK CONSERVANCY*, <http://www.centralparknyc.org/visit/general-info/faq/> (last visited Feb. 5, 2011).

past century, creating or preserving urban green space failed to be a high priority for most municipalities.<sup>3</sup> Recently, this trend has been shifting.<sup>4</sup> In the last two decades, innovative urban planners are once again looking at new ways to preserve urban green space, with a rare few cities accomplishing it through a popular yet unconventional method: the conservation easement. The idea is simple. Rather than relying on traditional regulatory approaches that often take the form of a city-council approved ordinance or resolution<sup>5</sup> to create urban parks, a small number of local governments have created conservation easements, applied them to city-owned land, and set aside in perpetuity some of the last undeveloped parcels within their urban perimeters.

The same principles apply regardless of whether a conservation easement encumbers privately held or government-owned land. Yet conservation easements offer city governments something that more conventional land-use planning methods cannot: the assurance that generations from now, city councilors will not change their minds and allow once seemingly protected park areas to be rezoned and developed to enrich city coffers.

This article explores how conservation easements can play a pivotal role in the creation—and protection—of urban green spaces. Part I examines why cities should capitalize on urban green spaces, as parks have consistently been shown to increase quality of life as well as improve a city's cultural character, raise property values, and anchor revitalization projects. Part II establishes the basic principles of conservation easements, which have been used with increasing frequency by private landowners over the last two decades. Finally, Part III explores how local

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3. From the Great Depression through most of the twentieth century, spending on city parks has declined. Paul M. Sherer, *The Benefit of Parks: Why America Needs More City Parks and Open Space* 10 (The Trust for Public Land, White Paper, 2006), <http://conservationtools.org/libraries/1> (search “the benefit of parks: why america needs”; then follow the article hyperlink).

4. *Id.* at 10–11 (noting that, since the 1990s, many cities and towns required developers to add open space to their projects, which coincided with the shift in urban planning away from automobile-centered developments).

5. See, e.g., Res. 2009-53, City of Santa Fe, NM (2009), available at <http://nm-santafe.civicplus.com/archives/168/2009-53.pdf> (adopting a community garden program). See also, Orange County's Great Park, a similar major urban, mixed-use revitalization project to the two examined in this article, is governed by a board of directors and is an example of a zoning-approved park project that was also approved by public referendum. *Board of Directors*, ORANGE COUNTY GREAT PARK, <http://www.ocgp.org/about/board-of-directors/> (last visited June 14, 2011) (identifying the governance structure and board members); *History of the Land*, ORANGE COUNTY GREAT PARK, <http://www.ocgp.org/learn/history/> (last visited Aug. 1, 2011) (explaining the public referendum process). However, if a public referendum approved the project, so, too, can one take it away. A resolution is even easier to overturn, usually requiring a majority of city councilors' votes to pass.

governments can use conservation easements to preserve urban, mixed-use parks to ensure that these projects are protected in perpetuity, even in the face of future political pressure to redevelop land. This Part also includes examples of two cities that have used conservation easements for recent urban revitalization projects as models of this approach.

### I. URBAN REVITALIZATION AND THE ROLE OF URBAN PARKS

Eighty-five percent of all Americans today live in cities and metropolitan areas.<sup>6</sup> No longer are the majority of us connected to nearby open space or farmland as most people were just a few generations back. Yet even though most of us reside in urban settings, park spaces are often few and far between. For instance, only 30 percent of Los Angeles's residents live within walking distance of a nearby park, while Atlanta has no public green space larger than one-third of a square mile.<sup>7</sup> City life does not have to be this way.

Urban parks once were an integral part of urban planning, especially in the second half of the nineteenth century when areas like New York's Central Park and San Francisco's Golden Gate Park redefined the burgeoning cityscape.<sup>8</sup> As early American metropolises grew, so did the calls by visionary planners to include parks within them, in which urban parks were viewed as a way to improve city life and public health and to create democratic, community areas where all social groups could mingle.<sup>9</sup> Yet, by the early twentieth century, as the Great Depression stymied the nation's economy, so, too, did it scale back city park expenditures.<sup>10</sup>

On the heels of World War II, the urban landscape suffered its most profound change. With the automobile as an affordable, ubiquitous mode of transportation, the 1950s post-war American dream turned away from life in the big city to life in the new-fangled suburban neighborhood. Instead of traditional mixed-use areas with houses, corner stores, and nearby Main Street commercial centers, expansive develop-

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6. Sherer, *supra* note 3, at 6 (including suburban areas as metropolitan and is based upon data from Frank Hobbs & Nicole Stoops, *Demographic Trends in the 20th Century*, in CENSUS 2000 SPECIAL REPORTS 33 (Nov. 2002), available at <http://www.census.gov/prod/2002pubs/censr-4.pdf>).

7. *Id.*

8. Sherer, *supra* note 3, at 6, 10 (although some of the country's parks were created as early as the 1600s, including Boston Common (1634) and Charleston's Marion Square (1680)). Santa Fe's Plaza was created in 1821. See *The Oldest City Parks*, THE TRUST FOR PUBLIC LAND (Dec. 10, 2010), <http://cloud.tpl.org/pubs/ccpe-largest-oldest-most-visited-parks-4-2011-update.pdf>.

9. Sherer, *supra* note 3, at 6.

10. *Id.* at 10.

ments on a city's outskirts became the norm, with suburbanites dependent upon their cars for mobility. As one author notes about this shift toward segregated, suburban living: "[S]tores separated from houses and schools and with offices separated from recreation areas . . . and the art of creating effective mixed-use and mixed-income living and working environments was largely lost by the 1960s."<sup>11</sup> With this rise of suburbia, many urban parks, including Central Park, fell into decay;<sup>12</sup> city gathering spaces were replaced by big back yards<sup>13</sup> and urban flight took infrastructure dollars along with it.<sup>14</sup>

The past few decades have seen the pendulum shift the other way. Propelled by environmental concerns, the increased time spent commuting, and the decay of older suburbs and city centers, urban planners have been looking to capitalize on city infrastructure through the principles of smart growth<sup>15</sup> and urban revitalization projects. In the past two decades, cities and citizens groups have been working to renew blighted areas, create mixed-use living and commercial areas, restore greenways along riverfronts, convert once-used railroad lines to walking or biking trails, and make room for community gardens.<sup>16</sup> The economic good fortunes of the 1990s also helped finance this shift away from an automobile-based suburbia to urban renewal projects intended to benefit and engage the community.<sup>17</sup>

Yet rebuilding and rethinking urban areas is not easy. Unfortunately, many localities mistakenly expect that money can be made from property taxes on new subdivisions, often ignoring the true cost of public infrastructure including schools, roads, police, water, and stormwater management, leaving taxpayers on the hook to pay the difference. In

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11. Geoffrey Anderson & Harriet Tregoning, Urban Land Institute, *Smart Growth in Our Future?*, in SMART GROWTH: ECONOMY, COMMUNITY, ENVIRONMENT 5 (1998).

12. Sherer, *supra* note 3, at 11.

13. *Id.* at 6.

14. *Id.* at 11; see also David C. Petersen, Urban Land Institute, *Smart Growth for Center Cities*, in SMART GROWTH: ECONOMY, COMMUNITY, ENVIRONMENT 46-47 (1998) (discussing the pent-up purchasing demand following the Great Depression and World War II that fueled suburban growth).

15. Smart growth may vary by community but is usually defined by the central concepts of limiting sprawl, rebuilding urban areas, promoting pedestrian-friendly and public-transit oriented cities, and encouraging mix-uses by combining commercial, residential, and live-work spaces. See SMART GROWTH ONLINE, <http://www.smartgrowth.org/about/default.asp> (last visited June 14, 2011).

16. Sherer, *supra* note 3, at 6.

17. *Id.* at 11.

fact, studies show that taxpayers end up subsidizing these suburban developments at a loss to already established city centers.<sup>18</sup>

Cities are also burdened by the popular method of Euclidean zoning, which groups similar land uses (like residences in one area and commercial/business in another) and inherently segregates city activities that could—and should—coexist.<sup>19</sup> In fact, revitalization projects that have succeeded—and many have not—have done so, not because the city separated uses, but because it did exactly the opposite.<sup>20</sup> As one author describes it, successful revitalization projects share three characteristics: the right combination of “mix, mass, and mesh,” which means bringing together sufficient mixed uses (including retail, business space, cultural activities, residences, and entertainment activities) with enough of the population to provide regular patronage (mass) and in an area that is meshed, or connected, to the city.<sup>21</sup>

Regardless of the impediments, several major cities have been able to maintain healthy and robust city centers. Those consistently attracting investment are built around a “multipurpose destination,” meaning one that encourages walking traffic to multiple facilities within a five- or ten-minute radius.<sup>22</sup> This type of re-urbanization, because it is based on walkable downtowns, has numerous collateral benefits, including a reduction in regional pollution and energy consumption per capita.<sup>23</sup> Parks should be an integral part of this planning.

Not only do city parks provide much-desired access to open space, they also provide numerous recreational activities, from walking and biking trails to basketball courts, playgrounds, and soccer fields and even more elaborate offerings like amphitheaters, community centers, and interpretive stations. In addition to this increased physical activity,<sup>24</sup> parks provide numerous other benefits. First, they have consistently

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18. Rand Wentworth, *Economic Benefits of Open Space Protection*, LAND TRUST ALLIANCE, 1 (2008), <http://www.landtrustalliance.org/conservation/documents/economic-benefits.pdf>.

19. Don H. Pickrell, Urban Land Institute, *Smart Transportation for Smart Growth*, in SMART GROWTH: ECONOMY, COMMUNITY, ENVIRONMENT 17 (1998).

20. David C. Petersen, Urban Land Institute, *Smart Growth for Center Cities*, in SMART GROWTH: ECONOMY, COMMUNITY, ENVIRONMENT 53–54 (1998) (comparing how Atlanta’s Underground has failed because the retail complex lacks proximity to “a critical mass of urban activities and pedestrian traffic” while Baltimore’s transformation of its blighted waterfront thrives because of the “uses, activities, and people nearby”).

21. *Id.*

22. *Id.* at 48.

23. *Id.* at 48–49 (noting that 86 percent of all trips in the United States are taken in a private vehicle as opposed to no more than 50 percent of trips in Europe).

24. Sherer, *supra* note 3, at 6–7, 14.

been shown to increase adjacent property values.<sup>25</sup> A survey by the National Association of Homebuilders found that new homebuyers value trails and natural areas above any other amenity, and that adjacent protected lands, including parks, often increase a home's value some 10 to 20 percent.<sup>26</sup> Second, park and recreational amenities also influence corporations when choosing where to locate new facilities.<sup>27</sup> Third, they also become key marketing tools for cities to attract tourists and help shape a destination's identity, like Baltimore's Inner Harbor and San Antonio's River Walk.<sup>28</sup> Fourth, green urban areas help the environment, with trees reducing air pollution, keeping cities cooler, and helping filter particulates from storm water runoff that would be lost to concrete sewers.<sup>29</sup> Last but not least, urban parks instill a sense of community. They provide gathering spaces where people can interact with their neighbors—a rarity in today's world. Some studies even link access to parks and recreational facilities to reductions in the crime rate and reduced juvenile delinquency.<sup>30</sup> For all these reasons, city planners are once again looking at ways to rebuild, re-green, and reconnect underutilized spaces—and conservation easements serve as an invaluable method to make these projects a reality.

## II. CONSERVATION EASEMENTS: PUBLIC BENEFITS IN PERPETUITY

Not all parks are created equal. Central Park was created when the New York State Legislature authorized the City of New York to exer-

25. *Id.* at 7, 16 (One study, in Boulder, Colorado, showed that the increase in property value of one neighborhood near a greenbelt added \$5.4 million to the total property values of that neighborhood. The greenbelt generated \$500,000/year in additional property taxes—enough to cover the greenbelt's \$1.5 million purchase price in three years.). See also Peter Harnik & Ben Welle, *Measuring the Economic Value of a City Park System*, TRUST FOR PUBLIC LAND (2009), <http://www.8-80cities.org/Articles/Measuring%20Economic%20Value%20City%20Park%20System.pdf>.

26. Wentworth, *supra* note 18.

27. Sherer, *supra* note 3, at 7, 17 (noting that after the 1992 revitalization of New York's Bryant Park, once dubbed a "needle park" because of its numerous drug traders, rent for commercial office spaces increased between 41 and 73 percent).

28. *Id.* at 17 (noting that San Antonio's River Walk park, created for \$425,000, has outpaced the Alamo as the most-popular attraction in the city's \$3.5 billion tourism industry).

29. *Id.* at 7, 18 (noting the U.S. Forest Service estimates that one tree, over its 50-year lifetime, generates more than \$30,00 in oxygen, \$62,000 in air pollution control, recycles \$37,000 worth of water, and controls \$30,000 worth of soil erosion).

30. *Id.* at 7, 21 (a midnight basketball program in Fort Worth, Texas, positively correlated to a 28 percent drop in crime within a one-mile radius around those community centers while in others, crime rose 39 percent during that same period; additionally, building a basketball court is also far cheaper than building a prison block).

cise its power of eminent domain,<sup>31</sup> which ultimately displaced whole neighborhoods in a way that seems unthinkable today. Instead, many cities set aside park space or impose development restrictions through zoning requirements.<sup>32</sup> However, these regulatory powers, while often easy to enact, are also “subject to change with the political winds.”<sup>33</sup> Usually, all that is needed to change a zoning restriction is a majority vote by city council.<sup>34</sup>

But there is another way to restrict development and to ensure those restrictions last forever: the conservation easement.<sup>35</sup> As one scholar notes, “Where [city] planning regulations or restrictive covenants are too weak and fee simple [direct] acquisitions are impossible or infeasible, the sound device of conservation easements may be the most pragmatic option.”<sup>36</sup> The following section examines conservation easements, first by providing an overview and then, by looking at several issues regarding an easement’s on-the-ground implementation.

### A. Conservation Easements: An Overview

From a legal perspective, a conservation easement is a non-possessory property interest severed from the underlying ownership of a

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31. BUDAPEST AND NEW YORK: STUDIES IN METROPOLITAN TRANSFORMATION, 1870–1930, at 111–13 (Thomas Bender et al. eds., 1994). The park was originally managed by an 11-person board of commissioners appointed by state lawmakers, not by the City of New York. The commissioners hosted a design competition, and, from 32 conceptions, chose the “Greensward” plan prepared by English-born architect Calvert Vaux and Park Superintendent Frederick Law Olmsted, whose goal was to clearly insulate the park from the rest of the city. Today, the 843-acre park, which includes 150 acres of lakes and streams, is managed by the Central Park Conservancy (CPC), a private, nonprofit group founded in 1980 that manages the park under contract with the New York City Dept. of Parks & Recreation. Under the agreement, the CPC receives an annual fee based on a formula that requires the CPC to raise and spend private funds for the park and provides approximately 85 percent of the park’s \$27 million annual operating budget. *Id.*

32. WHYTE, *supra* note 1, at 35–47.

33. Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REV. 10223, 10232 (2004) (discussing wetlands protections strategies under the Clean Water Act versus conservation easement actions).

34. Heidi A. Anderson et al., *Conservation Easements in the Tenth Federal Circuit*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 434 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter PROTECTING THE LAND] (noting “zoning codes can and do change”).

35. For purposes of this article, conservation easements are considered to operate in perpetuity. For more on why conservation easements offer permanent protections, see Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009).

36. John B. Wright, *Reflections on Patterns and Prospects of Conservation Easement Use*, in PROTECTING THE LAND, *supra* note 34, at 498.

piece of land that outlines the specific ways in which the property can be used.<sup>37</sup> By creating a conservation easement, a private landowner limits future land use according to provisions of the agreement while still retaining ownership, and often, use of the parcel.<sup>38</sup> A conservation easement is created by a deed and is executed with the same formality associated with any contractual real estate conveyance.<sup>39</sup>

Many factors make conservation easements popular. First, to create a conservation easement, a landowner often works with a land trust<sup>40</sup> to draft a deed of conservation easement and then donates the easement to the land trust, which then holds and enforces it, with the landowner receiving federal and state tax deductions for undertaking the conservation.<sup>41</sup> Second, conservation easements are entered into voluntarily; meaning conservation is accomplished without any sort of direct, government regulation imposed upon a property owner.<sup>42</sup> Third, conservation easements are extraordinarily flexible,<sup>43</sup> limited only by the imaginations and drafting skills of the participants. This flexibility allows conservation easements to be tailored to preserve anything from undeveloped land in its natural state to allowing farming on traditional agricultural lands.<sup>44</sup> As noted by the Nature Conservancy, one of the nation's largest, nonprofit land conservation groups, "Conservation easements are one of the most powerful, effective tools available for the permanent conservation of private lands in the United States."<sup>45</sup> These easements allow landowners to dictate how future generations will use their land and do so by targeting specific conservation values they want to pro-

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37. Jeff Pidot, *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform*, 17 LINCOLN INST. LAND POL'Y 2, 5 (2005).

38. See *Conservation Easements*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/conservation/landowners/conservation-easements> (last visited June 14, 2011).

39. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in PROTECTING THE LAND, *supra* note 34, at 14.

40. A land trust is often defined as a private, nonprofit charitable organization that operates to protect land for conservation purposes through a variety of means, including the acquisition of conservation easements. See Nancy McLaughlin, *Conservation Easements: Why and How?*, CONSERVATION EASEMENTS IN THE WEST 22 (Rocky Mtn. Min. Law Inst. ed., 2005).

41. Pidot, *supra* note 37.

42. Gustanski, *supra* note 39, at 15.

43. Pidot, *supra* note 37.

44. *Id.*

45. *Private Lands Conservation: Conservation Easements*, THE NATURE CONSERVANCY, <http://www.nature.org/aboutus/privatelandsc Conservation / conservationeasements/index.htm> (last visited June 14, 2011).

tect—including limited uses like ranching or timber harvesting—to fulfill this vision.<sup>46</sup>

Journalist William H. Whyte first developed the concept in the late 1950s.<sup>47</sup> Since then, conservation easements have become “the conservation tool of choice”<sup>48</sup> for the nation’s growing number of land trusts. From a mere 53 local, state, and regional land trusts in 1950,<sup>49</sup> that number has increased to more than 1,500 in 2003, with some 5 million acres of land encumbered.<sup>50</sup> Because of the public benefit requirement, legislatures are able to pass conservation easement-enabling statutes that overcome the common law prohibition against permanent, or “dead hand,” control over land.<sup>51</sup>

Use of these easements began picking up steam in 1964, when the IRS authorized a federal charitable income tax deduction for the donation of a conservation easement protecting scenic land adjacent to a federal highway.<sup>52</sup> Nearly a decade later, Congress passed permanent tax deductions to encourage conservation easement donations.<sup>53</sup> States soon followed, with most passing similar easement-enabling statutes, many modeled after the Uniform Conservation Easement Act (UCEA), and amending their state tax codes to provide state tax benefits for easement donations.<sup>54</sup>

Similar to the principles set out in the UCEA, for a donation to qualify for federal tax benefits, the easement must be: (1) donated to a charitable organization or government entity, (2) made in perpetuity, and (3) limited to preserving the land in one of four ways: (a) for outdoor recreation, (b) as a natural habitat, (c) as open space with public benefit,

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46. *Conservation Easements: Conserving Land, Water and a Way of Life*, THE NATURE CONSERVANCY, 2–3 (2003), [http://www.nature.org/aboutus/privatelandscnservation/conservationeasements/conserving\\_a\\_way\\_of\\_life.pdf](http://www.nature.org/aboutus/privatelandscnservation/conservationeasements/conserving_a_way_of_life.pdf).

47. See WHYTE, *supra* note 1.

48. ELIZABETH BYERS & KARIN MARCHETTE PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7 (2d ed. 2005).

49. See McLaughlin, *supra* note 40.

50. Nancy A. McLaughlin, *Conservation Easements: A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 49 (2005).

51. Pidot, *supra* note 37, at 5 (noting that the forebears of today’s conservation easements first happened in the 1930s, when the federal government allowed permanent protections of scenic landscapes along portions of the Blue Ridge Parkway because of the public benefit these protections bestowed).

52. Cheever & McLaughlin, *supra* note 33, at 10, 225 (citing I.R.C. Rev. Rul. 64-205, 1964-2 C.B. 62).

53. *Id.*

54. Pidot, *supra* note 37, at 5; UCEA § 1(1) (1981), available at [http://www.law.upenn.edu/bll/archives/ulc/ucea/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm); see also UNIFORM LAW COMMISSION: NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, <http://www.nccusl.org> (last visited June 14, 2011).

or (d) for historic purposes.<sup>55</sup> Although perpetuity is required to qualify for these tax benefits,<sup>56</sup> conservation easements often include provisions allowing for amendment or modification; however, amendment or modification happens only with the easement holder's approval and only if the changes are consistent with the conservation purposes of the easement.<sup>57</sup>

New Mexico is an example of a state that passed an enabling statute modeled after the UCEA when it enacted the Land Use Easement Act in 1991.<sup>58</sup> In 2003, the New Mexico Legislature addressed conservation easement donations via the tax code by passing the Land Conservation Tax Incentives Act, which offers income tax credits to donors of conservation easements encumbering land within the state.<sup>59</sup> That act provides up to \$100,000/year in a tax credit for the donation of a conservation easement as long as certain criteria are met.<sup>60</sup> These tax benefits appear to be working: By 1997, 258,452 acres in New Mexico had been placed under easement protection, with the state leading others within the federal Tenth Circuit in acres preserved by land trusts.<sup>61</sup> This voluntary, from-the-ground-up nature of the conservation easement, coupled with its contractual flexibility and tax benefits, makes it an effective and popular way to set aside land in perpetuity, benefitting the public by increasing land conservation in nearly unlimited circumstances.

## B. Conservation Easements: Some Realities

As demonstrated above, conservation easements promote voluntary land conservation with built-in flexibility. Their application can be infinitely variable,<sup>62</sup> ranging from the preservation of scenic coastlines to restrictions on the use of historic properties. Yet regardless of the type of

55. Cheever & McLaughlin, *supra* note 33, at 10, 225 (citing I.R.C. § 170(h)(4)).

56. Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, PROB. & PROP. 52-54 (July/Aug. 2009).

57. *Id.* at 55.

58. Land Use Easement Act, N.M. STAT. ANN. §§ 47-12-1 to -6 (2010) (Historical and Statutory Notes).

59. N.M. STAT. ANN. §§ 75-9-1 to -6 (2010).

60. N.M. STAT. ANN. §§ 7-2-18.10, 7-2A-8.9 (2010) (providing that the conveyance be for "the purpose of open space, natural resource or biodiversity conservation, agricultural preservation or watershed or historic preservation as an unconditional donation in perpetuity by the landowner or taxpayer to a public or private conservation agency eligible to hold the land and interests therein for conservation or preservation purposes").

61. Heidi A. Anderson et al., *Conservation Easements in the Tenth Federal Circuit*, in PROTECTING THE LAND, *supra* note 34, at 432 tbl.26.2. New Mexico ranks first, as compared to 156,197 acres in Colorado, 128,200 acres in Wyoming, 3,260 acres in Utah, 1,612 acres in Kansas, and 145 acres in Oklahoma. *Id.*

62. Pidot, *supra* note 37, at 6.

land being protected, one thing remains constant: A charitable land trust, by becoming the legal holder of a conservation easement that is based on a public benefit, also takes on a fiduciary duty to the public.<sup>63</sup> That duty means the land trust, as the easement holder, must monitor and protect the easement, even when the easement creates long-term and costly stewardship responsibilities.<sup>64</sup> This stewardship duty raises several issues, including monitoring and enforcement, amendment, and interpretation of conservation easements, each of which is discussed in turn below.

### 1. *Monitoring and Enforcement*

In order for a conservation easement to actually protect the land it encumbers, monitoring and enforcement is required—forever. Federal and state tax benefits require conservation easements to last in perpetuity,<sup>65</sup> with the perpetuity requirement presenting its own, inherent challenges. However, because of the relatively recent history of the conservation easement, this perpetual aspect has yet to be rigorously challenged in the courts. Nonetheless, an easement holder should consider the perpetual nature of its stewardship responsibilities before agreeing to hold an easement.<sup>66</sup> Ironically, to date, no state requires a charitable land trust to demonstrate the necessary adequate financial resources before undertaking this responsibility *ad infinitum*.<sup>67</sup>

To ensure that an easement is being followed, an easement holder must monitor use of the property.<sup>68</sup> To achieve this goal, baseline documentation is essential.<sup>69</sup> This baseline information, usually prepared by the easement holder, should include all pertinent property information at the time the easement was created, from architectural reviews of the condition of a historic building to ecological assessments of a critical habitat and any other property features affected by the easement's terms.<sup>70</sup> This information is then used to compare use of the property over time, including subtle changes that may not have been intended at the time of the easement's creation.

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63. *Id.* at 4.

64. *Id.* at 6.

65. Cheever & McLaughlin, *supra* note 33, at 10, 225.

66. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in *PROTECTING THE LAND*, *supra* note 34, at 40.

67. *Id.*

68. *Id.* at 31.

69. BRENDA LIND, *LAND TRUST ALLIANCE, THE CONSERVATION EASEMENT STEWARDSHIP GUIDE: DESIGNING, MONITORING, AND ENFORCING EASEMENTS* 17 (1991).

70. *Id.* at 18.

Effective monitoring also means the easement holder must be willing to enforce the easement, should its terms be violated. In New Mexico, this responsibility to enforce is even weightier as the state's enabling statute does not default to third-party enforcement (often, the state attorney general) as recommended by the UCEA, but instead adds that "[n]o party shall have any third-party enforcement right unless that right is expressly provided for in a land use easement."<sup>71</sup> However, both on-the-ground monitoring and legal enforcement require financial resources, which some critics note can be in short supply for these nonprofit groups.<sup>72</sup> While the protection of millions of acres of critical lands is left to numerous land trusts, some national, some regional, and some local, the reality is that most of these trusts are "newly created, underfunded, and in a weak position to commit to this kind of permanent stewardship."<sup>73</sup>

Monitoring and enforcement reform efforts are underway, which include developing standards of uniformity across the nonprofit land trust industry to pooling resources of these trusts into legal defense funds. Recently, the Land Trust Alliance, the land trusts' national umbrella organization, launched a conservation easement defense initiative, which includes creating a defense insurance fund that will help cover legal costs should a trust need financial help in mounting a legal enforcement challenge.<sup>74</sup> While the realities of monitoring and enforcement in perpetuity can present difficulties for land trusts and the third-party nonprofits required to hold conservation easements, this flaw can be overcome. Nonetheless, the issue does create a special problem as to how perpetual land-use restrictions will be enforced over the long haul.

## 2. Amendments

Another issue facing conservation easements is that, despite being perpetual in nature, circumstances are bound to change. Some of these changes may seem innocuous; for example, protected farmland may need more outbuildings over time. Others may conflict directly with the easement's intent, for instance, if the easement's terms fail to address the reality of actual use. Nonetheless, conservation easements can be amended, usually with the provision that the grantor and grantee agree on the proposed changes, which can include everything from clarifying

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71. *Id.* at 50; see also Land Use Easement Act, N.M. STAT. ANN. § 47-12-2(C) (2010).

72. Pidot, *supra* note 37, at 18.

73. *Id.*

74. *Conservation Defense Insurance*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-insurance> (last visited Apr. 13, 2011).

vague language, correcting a drafting error, or changing restrictions that might no longer advance any conservation purposes.<sup>75</sup> However, the question is still open as to whether a conservation easement can be amended in a manner *not consistent* with the easement's initial purpose.<sup>76</sup>

Federal tax benefits for conservation easements address the issue of change. Under federal law, a donated easement qualifies for a charitable tax deduction *only if* easement parties agree that, if the easement is later extinguished, the donee will receive a portion of the proceeds from the now-unencumbered land roughly equal to the value of the easement, and that those funds shall be used in a manner consistent with the conservation purposes of the original donation.<sup>77</sup> By enacting such a requirement, not only did the federal government recognize that some easements might fail due to changed circumstances, but also, in those events, the public's investment "in the form of foregone tax revenue would not be lost."<sup>78</sup> While amending a conservation easement may not be practical in all circumstances, amendment provisions do provide a means for conservation easements to adapt over time.

### 3. Interpretation

As with any contract, the issue of interpretation can also affect a conservation easement. When interpreting an easement, courts generally look to the plain language of the deed and give its words their ordinary and unusual meaning as judged by a reasonable person.<sup>79</sup> Failing the ordinary meaning approach, the courts will use traditional rules of contract construction.<sup>80</sup> But when it comes to the question of how courts will treat remedies for conservation easement enforcement, the jury is still out. Few cases have tested this new conservation tool.<sup>81</sup> However, litigation will undoubtedly be coming over the horizon as the tensions inherent in conservation easements can be difficult to balance. As one scholar notes, easements must be designed so that they "are fair, flexible and strong, amendable when necessary, but stout enough to dissuade overaggressive landowners from trying to retrieve development rights already for-

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75. McLaughlin, *supra* note 40 (explaining that a changing condition would be a no-burn restriction on forested land being amended to allow for controlled burns that ecologically improve the land).

76. *Id.* at 28.

77. Cheever & McLaughlin, *supra* note 33, at 10231 (citing Tres. Reg. §1.170A-14(g)(6)).

78. *Id.*

79. McLaughlin, *supra* note 75, at 25 (citing *Racine v. United States*, 858 F.2d 506, 507 (9th Cir. 1988); *Lamb v. Wyo. Game & Fish Comm'n*, 985 P.2d 433 (Wyo. 1999)).

80. *Id.*

81. Pidot, *supra* note 37, at 9; *see also* McLaughlin & Machlis, *supra* note 56, at 54.

gone.”<sup>82</sup> While the interpretation of a conservation easement could certainly be problematic, the issue should be no more a problem than it is with interpreting any type of contract.

Regardless of these growing pains, conservation easements provide an increasingly important tool to conserve and protect land. Their flexibility allows application across a variety of circumstances, often capitalizing on a grassroots-level movement to limit development while allowing a landowner to still enjoy or use a parcel of land. As one land trust president put it: “Conservation easements are the best tool we have to protect the scenic, natural, and recreation values of the land and still retain some of its economic value.”<sup>83</sup>

### III. CONSERVATION EASEMENTS: PROTECTING URBAN PARKS

Despite the rapid growth of conservation easements, the large majority of applications have been to privately held land.<sup>84</sup> But that does not mean the land has to remain in its natural state to be protected by a conservation easement. Many conservation easements have been applied to the built environment, including protection of textile mills in North Carolina and the historic barns and fencing styles that characterize Kentucky horse farms.<sup>85</sup> In fact, “the recognition that preservation of historic places may require the preservation of agricultural land, open space, and forestland brings the missions of conservation easement holders and preservation easement holders into closer alignment.”<sup>86</sup>

Some land trusts, like the regional Montana Land Reliance, have used conservation easements to successfully protect agricultural and ranching lands from development, with approximately 440 easements encumbering more than 400,000 acres.<sup>87</sup> In Marin County, California, just north of San Francisco, the Marin Agricultural Land Trust protects both agricultural lands and open space, holding easements to more than 29,000 acres.<sup>88</sup> These are but a few examples of successful applications of conservation easements in a non-traditional setting, albeit in the private sphere.<sup>89</sup>

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82. Wright, *supra* note 36, at 504.

83. BYERS, *supra* note 48, at 10.

84. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Land*, 41 NAT. RESOURCES J. 373, 377 (2001).

85. BYERS, *supra* note 48, at 219.

86. *Id.* at 220.

87. Morrisette, *supra* note 84, at 399.

88. *Id.* at 406.

89. Corresponding with a representative of Orange County’s Great Park, a major mixed-use urban park project created on a former military base (see <http://www.ocgp.org>).

Conservation easements can—and should—do more. They could easily be applied to another important public benefit: the creation of urban parks.<sup>90</sup> Considering the financial investments cities are making in urban revitalization projects, those funds would be better spent on a project that will exist in perpetuity rather than on one that can change with the political winds. Plus, local governments gain political clout by committing resources to a project meant to last in perpetuity. Knowing that a costly revitalization project is not a twenty-first century fad, but a long-term undertaking, may also help citizens accept the financial burdens it will impose. By contrast, a project protected via zoning pales in comparison with the commitment to one set aside forever. In addition, urban park projects often create nonprofit stewardship groups to oversee management and raise operating funds. These conservancy groups make even more sense when the public understands a government's commitment is for the long run—and not simply a short-term promise. Lastly, no legal impediments appear to exist that would hinder a local government from attaching a conservation easement to land it owns.<sup>91</sup>

Despite these benefits, an extremely small number of cities have used conservation easements to encumber city-owned land,<sup>92</sup> and the few conservation easements used by cities have typically been used to preserve city-owned land in its natural state.<sup>93</sup> But the idea of creating

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org), the representative argued the reason that a conservation easement was not considered for Orange County's Great Park was because conservation easements are primarily used by private landowners to preserve land in its natural state. However, this traditional approach to conservation easements should not preclude their application in urban settings so long as the goals and provisions meet all of the legal requirements. E-mail from Public Information Officer, Orange County's Great Park Design Studio, to Ashleigh Morris (May 18, 2010) (on file with author) (rec'd May 19, 2010).

90. This article does not address a city government's use of mitigating conservation easements, in which, for every "x" amount of land that is developed, a corresponding percentage of land must be set aside for park space or a corresponding amount of money must be paid into a mitigating fund that is then used to purchase land for park space, all of which is used to offset the current development project. *See also* BYERS, *supra* note 48, at 258–60.

91. *See, e.g.*, Conservation Easements, 01-02 N.M. Op. Att'y Gen. (2001) (holding that a county, like any local government, can own valid conservation easements "since counties are otherwise authorized by law to own, use or transfer valid property interests").

92. My research led only to the Railyard Park + Plaza in Santa Fe, New Mexico, and Memphis, Tennessee's Shelby Farms Park as examples of mixed-use urban revitalization projects on city-owned land protected by conservation easements.

93. Rex Springston, *Most of James River Park Protected in Perpetuity*, RICHMOND TIMES, May 30, 2009, [http://www2.timesdispatch.com/rtd/news/local/article/PARK30\\_20090529-220635/270741/](http://www2.timesdispatch.com/rtd/news/local/article/PARK30_20090529-220635/270741/) (For example, the James River Park in Richmond, Virginia, was created by the city in what was the state's first use of a conservation easement to create an urban park system. Although the easement restricted any development of 280 acres of riverfront

mixed-use urban parks through conservation easements is catching on. To date, only two cities have embarked on major urban revitalization projects using conservation easements, and both have garnered national attention: Shelby Farms Park in Memphis, Tennessee,<sup>94</sup> and the Railyard Park + Plaza, in Santa Fe, New Mexico.<sup>95</sup> Both are examined in depth below as they illustrate the successful use of conservation easements to create urban park space as well as possible pitfalls for those wanting to follow their lead.

### A. Shelby Farms Park, Memphis, Tennessee

Just four years ago, Shelby County and the Land Trust of Tennessee placed a conservation easement on 4,500 acres of urban green space in the heart of Memphis, Tennessee.<sup>96</sup> In the mid-nineteenth century, the land was home to the Nashoba Experiment that educated slaves for their future freedom.<sup>97</sup> In 1928, Shelby County acquired 1,600 acres to create a model penal farm, and, by 1942, the farm was expanded to 5,000 acres as a national model of prison reform.<sup>98</sup> However, by the 1960s, the county determined the penal farm was no longer viable and closed it.<sup>99</sup> What followed was decades of debate over what to do with the acreage. Numerous companies offered development plans but public outcry for the city to keep the land in its natural/recreational state ultimately prevailed.<sup>100</sup> In response to these development pressures, a permanent easement was proposed as a means to protect the park in its entirety, which was approved by the Shelby County Commission in 2006.<sup>101</sup> Specific lan-

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with recreational trails, the area is primarily natural and not mixed-use in the sense of commercial and retail space interspersed with the natural park areas).

94. See SHELBY FARMS PARK CONSERVANCY, <http://www.shelbyfarmspark.org> (last visited June 14, 2011).

95. See RAILYARD STEWARDS, [www.railyardpark.org](http://www.railyardpark.org) (2011). The other recent urban park of note is Orange County's Great Park. However, this revitalization project was done using zoning and public referendum and not through a conservation easement. ORANGE COUNTY GREAT PARK, <http://www.ocgp.org> (2011).

96. SHELBY FARMS PARK CONSERVANCY, SHELBY FARMS PARK MASTER PLAN REPORT 22 (2008), <http://www.shelbyfarmspark.org/sfpc/view-master-plan> [hereinafter SHELBY FARMS PARK MASTER PLAN] (prepared by Field Operations Landscape Architecture + Urban Design); see also Grant of Conservation Easement from County of Shelby & Shelby County Agricenter Commission to The Land Trust for Tennessee, Inc. (Feb. 1, 2007) [hereinafter Grant of Conservation Easement], available at [http://www.shelbyfarmspark.org/sfpc/files/Shelby\\_Farms\\_Easement.pdf](http://www.shelbyfarmspark.org/sfpc/files/Shelby_Farms_Easement.pdf) (Instrument # 07021070, Register of Deeds, Shelby County, Tenn.).

97. SHELBY FARMS PARK MASTER PLAN, *supra* note 96, at 20.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

guage in the deed of conservation easement calls for the development of a Master Plan to outline future management of the entire area, in addition to permitted and prohibited uses of the area.<sup>102</sup>

The expansive urban park is an intricate intersection of mixed-uses, with an art center, public gardens, community center and sports field, arboretum, and horse stables, as well as a trail system, some 20 bodies of water, and vast acres of green space.<sup>103</sup> The park also comes under mixed control: 780 acres are protected within the Lucius Burch State Natural Area while another section—approximately 300 acres known as Area 10—includes the county prison, county office buildings, the new county humane society center, and a future 911 call center.<sup>104</sup> Through the terms of the easement, Shelby Farms Park Conservancy, a 501(c)(3) nonprofit, was created and anointed with the mission to develop the Master Plan, manage that plan, and oversee the day-to-day operations of the park, with the Area 10 portion excluded.<sup>105</sup>

Shelby County's goal for the revitalization project was clear:

It is more than just a place of recreation. It is Memphis's green heart—a place that is engaged in a variety of uses and activities related to health, exercise, play, nature, food, energy, ecology, research, and education. This combination of programs is exceptional. It positions Shelby Farms Park and Memphis at the forefront of 21st Century sustainable growth and civic development.<sup>106</sup>

To reach these goals, the park's conservation easement prohibits any development that is not park- or recreation-related.<sup>107</sup> None of the park land may ever be bought or sold.<sup>108</sup>

Following a longstanding community design tradition reaching back to the creation of New York's Central Park, Shelby Farms Park Conservancy held the Shelby Farms Park Innovative Design Competition, in

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102. *Id.* at 20, 22; see also Grant of Conservation Easement, *supra* note 96, at 2–7.

103. SHELBY FARMS PARK MASTER PLAN, *supra* note 96, at 13.

104. *Id.* at 20; see also *About the Park*, SHELBY FARMS PARK CONSERVANCY, [http://www.shelbyfarmspark.org/sfpc/park\\_info](http://www.shelbyfarmspark.org/sfpc/park_info) (last visited June 14, 2011).

105. See *About SFPC*, SHELBY FARMS PARK CONSERVANCY, <http://www.shelbyfarmspark.org/sfpc/about> (last visited June 14, 2011); see generally THE OFFICIAL WEBSITE OF CENTRAL PARK, [centralparknyc.org](http://centralparknyc.org) (2010). Nonprofit conservancy groups charged with stewardship of urban parks are modeled after the Central Park Conservancy for New York's Central Park. *Id.*

106. SHELBY FARMS PARK MASTER PLAN, *supra* note 96, at 36.

107. See *Frequently Asked Questions*, SHELBY FARMS PARK CONSERVANCY, <http://shelbyfarmspark.org/sfpc/public-exhibition> (last visited June 14, 2011).

108. *Id.*

which international teams could compete to design the park.<sup>109</sup> And, as part of its guiding principle to create a space for the public at large, the Conservancy reached out for public input when making the design team selection.<sup>110</sup>

In addition to overseeing the design of the park, Shelby Farms Park Conservancy has had to deal with another critical task: raising public and private money to fund portions of the Master Plan to supplement funds it receives from the county.<sup>111</sup> Revenue-generators include the horse stables, paddleboats, and facility rentals as well as traditional fund-raising methods.<sup>112</sup> No park entrance fees are charged.<sup>113</sup>

By protecting Shelby Farms Park through a conservation easement, the community recognized the benefits of supplementing a southern cultural and commercial center already known for the blues, Elvis, and Dr. Martin Luther King, by making a bold statement about its future. "With the new design for Shelby Farms Park, Memphis can add to its unique culture and a fertile business environment, as well as offer a one-of-a-kind amenity that can position Memphis as a national and international talent magnet through the exceptional quality of life the City can provide."<sup>114</sup> This innovative move by the City of Memphis illustrates how foresight and on-the-ground involvement allowed a community to transform a former penal farm into a community park that is protected from development forever.

## B. Railyard Park + Plaza, Santa Fe, New Mexico

A similar conservation easement/urban revitalization combination occurred in Santa Fe, New Mexico, although on a considerably smaller scale than in Memphis when, in 1995, the City of Santa Fe purchased a 50-acre tract of land known as the Railyard. This vacant land, a 10-minute's walk from Santa Fe's historic eastside Plaza, also went through numerous reincarnations before achieving its conservation easement protections.

### 1. Reincarnation of the Railyard

A stretch of land on Santa Fe's southwest perimeter became known as the Railyard when, in 1880, the long-awaited Atchison, Topeka

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109. See *Master Plan Design Competition*, SHELBY FARMS PARK CONSERVANCY, <http://www.shelbyfarmspark.org/sfpc/master-plan-design-competition> (last visited June 14, 2011).

110. *Id.*

111. See *Frequently Asked Questions*, *supra* note 107.

112. *Id.*

113. *Id.*

114. SHELBY FARMS PARK MASTER PLAN, *supra* note 96, at 16.

& Santa Fe Railroad (AT&SF) built its northern terminus and depot near Montezuma and South Guadalupe streets.<sup>115</sup> In the years following, a few warehouses and businesses were built in the area. However, expectations for the Railyard—that Santa Fe’s railroad terminal would transform this section of town—failed to materialize, especially since the railway ended up being just an 18-mile spur line from Lamy (rather than a direct line to Santa Fe from Atchison, Kansas, as initially planned).<sup>116</sup> Instead, for more than a century, the vast Railyard remained largely vacant, “a nowhere land on the fringes of a growing town, playing the lonely sister to the prettier, more popular Santa Fe Plaza.”<sup>117</sup>

By the early 1980s, a century after its humble beginnings, city leaders began discussing plans for the area, with the University of New Mexico initiating the Guadalupe Gateway Plan to assess possible uses.<sup>118</sup> In 1987, the Trust for Public Land (TPL), a national nonprofit land conservation organization,<sup>119</sup> backed by the interest of several local residents, approached then-Mayor Sam Pick about purchasing the parcel.<sup>120</sup> Mayor Pick had other ideas: He envisioned the area as the site for a new convention center and pushed the city to make initial steps to acquire the property.<sup>121</sup> In June 1987, the city moved forward with the plan, declaring the Railyard blighted and working with the Metropolitan Redevelopment Commission to develop a master plan.<sup>122</sup> Regardless of Pick’s high hopes, the city council failed to approve the purchase.<sup>123</sup>

By 1994, the Catellus Development Corporation, AT&SF’s real estate arm, expressed an interest in developing the property, hoping to build a large Smith’s grocery store and parking lot on the Baca Street portion.<sup>124</sup> Public outcry brought that—and several other proposals by Catellus, including a six-story hotel—to a halt.<sup>125</sup>

115. *A Short History*, RAILYARD STEWARDS, <http://www.railyardpark.org/home/railyard-park-plaza-a-definitive-history/> (2011) [hereinafter *Railyard History*].

116. Jason Silverman, *On the Right Track*, SANTA FEAN MAG. 1, Jan./Feb. 2008. One building, the Santa Fe Builders Supply Co., or Sanbusco, still exists as an anchor store in the Sanbusco retail complex at Guadalupe and Montezuma streets. *Id.*

117. Silverman, *supra* note 116, at 1.

118. *Railyard History*, *supra* note 115.

119. *About Us*, THE TRUST FOR PUBLIC LAND, <http://www.tpl.org/about/> (2011) (noting “The Trust for Public Land (TPL) is a national nonprofit that conserves land for people to enjoy as parks, gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come”).

120. *Railyard History*, *supra* note 115.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*; Silverman, *supra* note 116, at 1.

125. *Railyard History*, *supra* note 115; Silverman, *supra* note 116, at 1.

Santa Feans had other plans. They wanted the area devoted to open space, affordable housing, mixed-use live/work spaces, and more pedestrian-friendly developments.<sup>126</sup> Fueled by this public support, then-mayor Debbie Jaramillo, along with Santa Fe's city council and TPL, approached Catellus about buying the Railyard property.<sup>127</sup> By December 1995 the deal was done: Santa Fe purchased the entire 50-acre parcel—with the exception of Tomasita's restaurant and parking lot—at a reduced rate, with the promise that a minimum of 10 acres would be set aside as park space under a conservation easement with TPL as the holder.<sup>128</sup>

With the land now under city control, the next 10 years would be spent in a community-involvement planning process to determine how the Railyard should be designed, developed in part, and revitalized. A few core principles quickly emerged: keep the historic railroad line to the depot but also create Santa Fe's equivalent of New York's Central Park, combined with protection for local businesses and a new community arts and culture district, while maintaining the area's historic gritty, industrial look.<sup>129</sup>

During this lengthy planning process, the city realized that overseeing a project of this size and complexity was beyond its capabilities.<sup>130</sup> As the twenty-first century dawned, so did the city's urban park project, as Santa Fe ultimately selected TPL to design, fund, and construct the 13 acres of open space for a project that would ultimately cost \$14 million.<sup>131</sup> In turn, TPL formed the volunteer Railyard Stewards to assist with maintaining the area after the project's completion, while the nonprofit Santa Fe Railyard Community Corporation (SFRCC) was designated by Santa Fe's city council to act as the lessor and property manager for the design and construction of the Railyard's infrastructure and buildings.<sup>132</sup> In total, the city committed \$125 million to the revitalization project.<sup>133</sup>

By 2002, SFRCC released a 150-page Master Plan, produced at a cost of \$300,000, which outlined the project's proposed goals and its architecture and open-space requirements.<sup>134</sup> Even for a city as progressive as Santa Fe, the concept was revolutionary:

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126. *Railyard History*, *supra* note 115.

127. *Id.*

128. *Id.*; see also Interview with Jenny Parks, former N.M. state director, The Trust for Public Land (Jan. 27, 2010) [hereinafter Parks Interview] (on file with the author).

129. *Railyard History*, *supra* note 115.

130. Silverman, *supra* note 116, at 1.

131. *Railyard History*, *supra* note 115.

132. *Id.*

133. *Id.*

134. Silverman, *supra* note 116, at 2.

In an age when most developments hinge on bang-for-buck efficiency and short-term profit, the Railyard's Master Plan reflects Santa Fe's desire for a different kind of urban life, one that celebrates human connection, local history and culture, and even sustainability—seemingly revolutionary concepts in America's modern age, when most people walk out of their houses into their garages, climb into cars, drive into parking lots, ride elevators to cubicles or walk into shopping malls, and then, in reverse order, return home.<sup>135</sup>

After more than 10 years of intense community planning, September 2008 marked the official opening of what is now officially known as the Railyard Park + Plaza, with more than 20,000 residents attending a variety of opening-weekend celebratory events.<sup>136</sup>

Today, Santa Fe's Railyard Park + Plaza can rightfully pride itself as a model of urban reform, transforming a once-blighted industrial and nearly vacant parcel of land into 13 acres of dedicated park space surrounded by another 37 acres of mixed-use live/work spaces, retail centers, restaurants, art galleries, and nonprofit community centers.<sup>137</sup> In addition, the Railyard Park + Plaza still remains a functioning terminal for the AT&SF railroad, complemented by the New Mexico Rail Runner commuter train, which also uses this historic depot.<sup>138</sup> As Santa Fe's current Mayor David Coss has stated: "It's a feather in our cap, a model for how you can do development in concert with the community that is still viable from an economic sense."<sup>139</sup>

## 2. *The Railyard's Conservation Easement*

The Railyard's drawn-out development phase had its benefits: The city's willingness to involve its citizens also resulted in the desire to protect the area forever. As discussed above, in 1995, TPL stepped in to negotiate and acquire the 50-acre Railyard property.<sup>140</sup> The land trust then conveyed the property to the city.<sup>141</sup> As part of the conveyance, a conservation easement was placed on nearly 13 acres of the 50-acre par-

135. *Id.*

136. *Railyard History*, *supra* note 115.

137. THE TRUST FOR PUBLIC LAND, *Santa Fe Railyard Park + Plaza*, <http://www.tpl.org/what-we-do/where-we-work/new-mexico/santa-fe-railyard-park.html> (2011) [hereinafter TPL Railyard History].

138. TPL Railyard History, *supra* note 137.

139. Silverman, *supra* note 116, at 3.

140. *Partners*, RAILYARD STEWARDS, <http://www.railyardpark.org/the-railyard-stewards/partners-in-the-railyard-park/> (2011).

141. *Id.*

cel.<sup>142</sup> The reason: “to assure that the Easement Area will be retained forever as a park, open space, community gathering place, Rail Line corridor, trail corridor and plaza area, and to prevent any use of the Easement Area that will significantly impair or interfere with the conservation values of the Easement Area.”<sup>143</sup> TPL currently holds the conservation easement and, with it, has a fiduciary duty to ensure that the city follows all restrictions encumbering the land.<sup>144</sup>

From TPL’s perspective, the leaders of Santa Fe were smart enough to recognize that political administrations and their priorities shift over time—and ultimately decided they did not want to leave the Railyard’s fate to the whim of future politicians. “City council and citizen groups wanted to see a conservation easement because they didn’t trust future city councils,” says Jenny Parks, the former New Mexico state director of TPL who helped oversee the Railyard’s conservation easement transition.<sup>145</sup> Parks’ comments are prescient in regard to the loss of institutional memory that has already occurred. Attempts to talk with attorneys and representatives from the City of Santa Fe for this article resulted in a limited response: The key attorney responsible for setting up the Railyard’s conservation easement no longer works for the city, and no one on staff was familiar enough with the project to speak with any certainty about its history,<sup>146</sup> despite the fact that the City of Santa Fe purchased the Railyard only 15 years ago and the deed of conservation easement was finalized in October 2004.<sup>147</sup> This loss of institutional memory, coupled with ever-changing political pressures, provide ample reason for creating conservation easements to protect public land: otherwise, politicians and players can forget their motivations as soon as a project is over, leaving these public spaces vulnerable to development pressures in the future.

Not only was the conservation easement a novelty for the City of Santa Fe, it was for TPL as well. The land trust does not usually hold conservation easements; the group primarily helps negotiate the transfer and purchase of private land for public entities.<sup>148</sup> In addition, TPL took

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142. *Id.*

143. *Id.*

144. *Id.*

145. Parks Interview, *supra* note 128.

146. E-mail from Kelley Brennan, Assistant City Attorney, City of Santa Fe, to Ashleigh Morris, (May 17, 2010) (on file with author).

147. Deed of Conservation Easement from the City of Santa Fe to The Trust for Public Land 1 in Santa Fe Railyard Park, Plaza and Alameda Reference Documents for Public Policies and Procedures Vol. II, at 128 (Oct. 1, 2004) [hereinafter Railyard Deed] (Item # 04-0866), available at <http://www.santafenm.gov/DocumentView.asp?DID=4012>.

148. Parks Interview, *supra* note 128.

on the role of overseeing the entire design and construction of the park—and without compensation from the city.<sup>149</sup> “I don’t know how many other cities have handed something like this over to an outside group,” says Parks. “Although it was a very public process and the city council had to approve it, it was amazing: to control a major city park.”<sup>150</sup>

### 3. *Details of the Deed*

Like with any conservation easement, Santa Fe’s Railyard easement follows the basic principles: good drafting, clear purpose, and a baseline report to assist with monitoring and enforcement. For example, the Railyard’s deed of conservation easement states as its purpose:

to assure that the Easement Area will be retained forever as a park, open space, community gathering place, Rail Line Corridor, trail corridor and plaza area, and to prevent any use of the Easement Area that will significantly impair or interfere with the conservation values of the Easement Area. Grantors intend that this Conservation Easement will confine the use of the Easement Area to such activities, including, without limitation, those involving park, recreation, community gatherings and rail uses as are consistent with the purpose of this Easement.<sup>151</sup>

“These are my overarching principles whenever I’m confronted with anything, I go back to this purpose” says Parks, about her days spent overseeing the Railyard easement.<sup>152</sup> That includes examining the explicit grantee’s rights, including “to prevent any activity on or use of the Easement Area that is inconsistent with the purpose of [the easement],”<sup>153</sup> along with prohibited uses,<sup>154</sup> specific permitted uses,<sup>155</sup> a perpetuity provision,<sup>156</sup> and that easement shall conform to New Mexico’s Land Use Easement Act.<sup>157</sup>

The easement includes a standard process for amendments, stating:

If circumstances arise under which an amendment to or modification of this Conservation Easement would be appropriate,

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149. *Id.*

150. *Id.*

151. Railyard Deed, *supra* note 147, at 130 term 1.

152. Parks Interview, *supra* note 128.

153. Railyard Deed, *supra* note 147, at 131 term 2(c).

154. *Id.* at 131–34 term 3.

155. *Id.* at 134–37 term 4.

156. *Id.* at 140 term 12(a).

157. *Id.* at 129 recital G.

Grantors and Grantee are free to jointly amend this Conservation Easement, and any amendment shall not affect its perpetual duration. Any such amendments shall be recorded in the official records of Santa Fe County, New Mexico.<sup>158</sup>

Parks says she was hesitant to invoke any amendments and questions whether doing so would or would not involve approval of the city council.<sup>159</sup> Yet in Railyard's short existence, some legal discrepancies have become apparent although they are relatively minor, including limitations on signage and the installation of several large arbors that may not be technically allowed.<sup>160</sup> Instead of focusing on these ambiguities, Parks says her goal was to maintain consistency with the Railyard's overall purpose and to work within the easement's language.

Critical to any easement, explains Parks, is the need for a baseline report, which documents all aspects of the property at the easement's start.<sup>161</sup> This report is "a reference document for over the years as things change; to look to see if building was there in the beginning, for instance," she explains.<sup>162</sup> In regard to the Railyard, all current structures and improvements have been documented,<sup>163</sup> providing TPL or any other future holder of the Railyard easement the necessary information to monitor the area over time.

Yet one critical aspect differentiates the Railyard's easement from those that are privately owned: the increased human activity inherent in an urban park. For the Railyard, located in a city known as a major art center,<sup>164</sup> this has presented an unusual problem. "What's happened since the opening is we've gotten pressure, from the city, from SFRCC, individuals, even the Stewards, to interpret or modify the terms of the easement to make it more active, including art festivals and booths. But the community clearly stated they didn't want [the Railyard] to be like the [historic Santa Fe] Plaza, with events that you can enjoy," says Parks. On the other hand, "Santa Fe wants to attract big events and there's pressure to expand, to sell commercial stuff, which is not allowed."<sup>165</sup> The two tensions can make for difficult choices: to increase activity at the

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158. Railyard Deed, *supra* note 147, at 140 term 11.

159. Parks Interview, *supra* note 128.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See *The Official Travel Site for Santa Fe, New Mexico*, SANTAFe.ORG, [http://santafe.org/Visiting\\_Santa\\_Fe/About\\_Santa\\_Fe/index.html](http://santafe.org/Visiting_Santa_Fe/About_Santa_Fe/index.html) (last visited Dec. 27, 2010) (explaining that Santa Fe ranks as the country's third-largest art market, with more than 300 galleries and museums).

165. *Id.*

Railyard or remain true to the fundamental principle of a park for the people.<sup>166</sup>

According to Parks, the part of the Deed of Conveyance that has been the most difficult to interpret is subsection (g) of the Specific Permitted Uses section, which states:

The occurrence of community celebrations, outdoor performances and events, fiestas, and markets, as such events fall within the definition of Assembly as defined by the City of Santa Fe ordinances regarding “Events, Including Parades, Public Assemblies, Athletic Activities or Other Special Uses, at or on a Public Place” Shall be permitted in the Park; provided that (i) the Park shall not be used for such purposes more than a total of twenty-eight (28) days from April 1 through October 31 of any year . . . and (ii) no single group or person or entity participating in such activities shall be permitted to use the Park for more than one-quarter (1/4) of the Permitted Days of a calendar year.<sup>167</sup>

“There’s not really anything defined by Santa Fe ordinance,” says Parks about the provision. For instance, does a series of movies in the park count as one event or the number of days the films are shown? And how is it properly balanced if it does violate the number of days but is still a great community event? “It’s subject to interpretation,” says Parks, which can make for difficult choices.<sup>168</sup>

For example, different sections of the Railyard have different management objectives, creating another potential source of conflict. The area roughly north of Paseo de Peralta street is more commercial, whereas, the area south of Paseo de Peralta street is primarily open park space. Often, Parks says she had to turn to the city’s general parks and recreation policies for further guidance, which are not always in accord with the Railyard’s easement. While there may be leeway, that leeway can also be confusing.

However, the greatest challenge with any easement is trying to predict a park’s future use; to foresee problems and implement workable solutions before a project is an actual on-the-ground reality. “You draft [the conservation easement] before the park is built,” Parks says, noting that reaching a balance between preserving values and maintaining flexibility is no easy task.

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166. The Railyard as a place for all Santa Feans stands in stark contrast to Santa Fe’s historic Plaza, which has been criticized for becoming more of a tourist center than city center.

167. Railyard Deed, *supra* note 147.

168. Parks Interview, *supra* note 128.

Also, because TPL does not usually hold conservation easements, money was not set aside for enforcement.<sup>169</sup> “The danger with a land trust is unless they have a legal defense fund, [an easement] will be tough to enforce,” says Parks. The upside, though, is regardless of the resources needed to mount a legal challenge, TPL has experience and resources when it comes to informational campaigns and can certainly influence public opinion.

#### 4. *Lessons Learned*

The Railyard’s conservation easement, although not perfect, illustrates how the issues of perpetuity, amendment, interpretation, and enforcement have played out on the ground, offering insights that other city planners should consider when developing their own easements.

First, by New Mexico and federal law, the Railyard’s conservation easement is in effect for perpetuity, which means the city cannot simply vote on a resolution or re-zone the area to change it from park to commercial development in order to raise funds for city coffers. This important long-term protection helped buoy the project during its tumultuous years of development—and is an aspect planners should consider when garnering public support for these labor-intensive and costly projects elsewhere.

Second, the Railyard’s conservation easement can be amended or modified; however, doing so requires (a) joint agreement of both the grantor and grantee as well as (b) conformity with the purpose of the conservation easement—a much higher standard than an *ex parte* city council vote. Any change, including something as seemingly simple as increasing the number of art festivals and expanded markets, demands more than citizens—or businesses—lobbying city hall to make the change. This aspect provides both the stability and the flexibility necessary for developing multipurpose green space in any urban center.

Third, conflicts over the Railyard’s management objectives may be problematic regardless of whether the park is created as a conservation easement or any other regulatory scheme: Some groups will want greater use of the park, others less. These are the daily conflicts inherent in running a city or a city park. Yet having a conservation easement provides explicit—and hopefully duly considered—contractual language that will serve as a guide in achieving a community’s objectives, rather than a hastily written ordinance or resolution that can be changed by majority vote. Also, like any contract, a conservation easement’s language is subject to interpretation, and provisions within the Railyard’s

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169. *Id.*

deed will need to be reconciled. Nonetheless, Santa Fe's deed of conservation easement provides a model for others to use, with numerous other sample conservation easements readily available for guidance.<sup>170</sup>

Fourth, the long-term enforcement of the Railyard's easement appears promising. In general, legal challenges to conservation easements have been rare, and none have been raised with Santa Fe's to date. Regardless, with TPL as the holder of the conservation easement, the nonprofit has the fiduciary duty to enforce its terms, providing an additional check on the city to honor the easement's provisions. Further, the Railyard's amendment provision gives the conservation easement additional flexibility before litigation ensues. Although the funding of a protracted legal battle for any nonprofit will always be an issue, when it comes to enforcement, TPL also has public support in its corner. Because of the high-profile nature of an urban park like the Railyard, the city should be hesitant to engage in a legal battle over an easement for fear of alienating the public, for whom the park is intended to benefit. Other nonprofits should consider how legal challenges and public support can be used to enforce an easement over the long term.

Despite the potential hazards of these four issues—perpetuity, amendment, interpretation, and enforcement—the Santa Fe Railyard + Plaza illustrates how the benefits outweigh the risks. If a city has the resolve to invest in and create urban parks for future generations, the conservation easement is the best, and surest, way to offer perpetual and flexible protections.

#### IV. CONCLUSION

As William H. Whyte noted in his seminal 1968 work, *The Last Landscape*, a sharp and poignant assessment of our failures as a country to properly plan and build and preserve: "Let's be on with the job as though there were little time left; let's address ourselves to the needs that are pressing, use the tools we have now, and not worry so much over what will be right for A.D. 2000."<sup>171</sup> We have already passed the year 2000 and we still face the same issues he recognized more than 40 years ago: sprawl, the lack of open space, poor city planning, and the increased need for parks and play areas. However delinquent we may be, we should still heed his call.

Conservation easements are a unique land management tool we have at our disposal. Despite their growing pains, they have demon-

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170. See, e.g., BRENDA LIND, *THE CONSERVATION EASEMENT STEWARDSHIP GUIDE: DESIGNING, MONITORING, AND ENFORCING EASEMENTS* (1991) (which includes several sample forms and documents).

171. WHYTE, *supra* note 1, at 353.

strated themselves to be flexible tools in addressing a variety of land conservation goals, all with one common denominator: public benefit. While the vast majority of applications have been with private land owners, conservation easements can also be used to protect urban park spaces and revitalization projects, even complicated ones with mixed-use demands.

Urban revitalization projects are huge undertakings, both in terms of financial resources and community-vested interests. However, their importance will only increase as our population continues to grow by preserving the last remaining urban green spaces before they are developed. By enlisting the aid of a conservation easement, a city can effectively demonstrate its commitment by placing restrictions on these urban parks that will last in perpetuity. Instead of a city passing a simple zoning change or resolution to create a park, with a conservation easement, a city shows it is a serious stakeholder, truly committed to building a better urban setting.

However, as with any conservation easement, monitoring and enforcement are critical. Instead of a land trust being saddled with monitoring thousands of remote acres, the easement-protected cityscape may actually prove itself to be easier to oversee because of its urban locale. Yet, as close proximity provides easier vigilance, so, too must it be matched with the resolve to enforce violations.

Shelby Farms Park and Santa Fe's Railyard Park + Plaza are two success stories of how conservation easements have been applied in the real—and complicated world—of urban revitalization projects. These two mixed-use parks provide on-the-ground success stories, demonstrating that conservation easements are the preferred preservation tool because (1) only conservation easements possess the flexibility necessary to accommodate diverse needs and demands, and (2) only conservation easements provide perpetual protection that will prohibit development even when the political winds shift over time. Local governments should add conservation easements to their land-use planning arsenal, especially when it comes to protecting or revitalizing any last remaining urban green spaces. For, as conservation easements have proven themselves as effective conservation tools in the private landscape, so, too, can they succeed in the public landscape.