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Legal and Economic Issues in Private Land Conservation

When a big-box store is built on a nice piece of land, those of us who live nearby feel like we have lost a little something. Formerly scenic space, such as farmland or a grove of trees, may be converted to the house we live in, stores where we shop, or restaurants where we eat. Increased concern about land development is resulting in more actions being discussed and implemented to encourage continued farming and preserve scenic views, wildlife habitat, and other amenities associated with agricultural land. The pressure to preserve land is not so much from farmers, who can choose to farm or not, but from urbanites who wish to observe farming and enjoy benefits provided by undeveloped lands. Much of the action taken in response to this pressure can be categorized as either political or market-driven.

Either through majority vote or legislative edict, the regulatory actions of political institutions can dictate land use decisions. For example, growth boundaries can push development into pre-determined locations.¹ Or, a change in zoning or endangered species habitat designation can impose restrictions on some property owners without their consent.²

Such regulatory instruments have at least three shortcomings. First, decisions made by politicians will favor some constituents at the expense of others.³ For example, because growth boundaries benefit landowners allowed to develop their property, we expect the delineation to be highly political.⁴ Responding to unforeseen and unknowable

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1. Portland's Urban Growth Boundary is America's most prominent and is lauded by some urban planners as an archetype design for controlling development. See, e.g., Arthur C. Nelson, *Oregon's Urban Growth Boundary Policy as a Landmark Planning Tool*, in *PLANNING THE OREGON WAY: A TWENTY YEAR EVALUATION* 25 (Carl Abbott et al. eds., 1994). For a less favorable evaluation, see generally John Charles, *Lessons from the Portland Experience*, in *A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS* (Jane S. Shaw & Ronald D. Utt eds., 2000).

2. See generally Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land-Use Planning*, 14 TUL. ENVTL. L.J. 95 (2000); Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997).

3. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT, LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

4. When elected officials forbid development on open land, adjacent landowners see a windfall increase in their property value. In contrast, owners of undeveloped land subjected to the restrictions lose some property value. And renters and future residents will probably pay more for housing. See Richard L. Stroup, *Planning Versus Market Solutions*, in

contingencies in the future is cumbersome, as parties with stakes in the status quo will not passively allow policy amendments. This is problematic because there is no assurance that present day land use rules are optimal for future generations. Second, land use regulations can have adverse and unintended consequences. For example, landowners facing Endangered Species Act restrictions have incentives to harm the very species supposedly being protected.⁵ Growth restrictions in some locales can raise urban housing prices and actually encourage sprawl.⁶ Third, the political process will not be disciplined by forces that signal where open space preservation is most appropriate given the values of alternative land uses.⁷ Because political opportunists are exempt from bearing the costs of restricting uses of property owned by others, they have weak incentives to think carefully about the relative costs of preserving different tracts of land.

Market-driven institutions and instruments are more dynamic mechanisms that rely on voluntary exchanges by those willing and able to pay, to determine the use of space in a community.⁸ Clearly defined property rights enable demanders of open spaces to compete with demanders of developed land. When faced with the full opportunity cost of a development project, demanders of open space are likely to carefully choose which parcels to target because decisions to preserve a parcel come at the expense of conserving open space elsewhere. If forced to bid against demanders of open space, developers will be less apt to build on tracts of land that are most desired as open space. The parties bidding for land will also speculate on the future availability of substitute land and consider the complementary effects of developing or not developing. They will be cautious about binding their hands if they expect that current decisions will be costly to reverse. Contrary to stereotypes of the recklessness of unfettered markets, players in the market who bear the full costs of their decisions will be less cavalier than their political counterparts.⁹

A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS 17 (Jane S. Shaw & Ronald D. Utt eds., 2000); Gerard C.S. Mildner, *Regionalism and the Growth Management Movement*, in SMARTER GROWTH: MARKET BASED STRATEGIES FOR LAND USE PLANNING IN THE 21ST CENTURY (Randall G. Holcombe & Samuel R. Staley eds., 2001).

5. See Michael J. Bean & David S. Wilcove, *The Private-land Problem*, 11 CONSERVATION BIOLOGY 1 (1997); Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).

6. See Mildner, *supra* note 4.

7. See Louis DeAlessi, *Private Property Rights as the Basis for Free Market Environmentalism* (Peter J. Hill & Roger E. Meiners eds., 1998); Morriss & Meiners, *supra* note 2.

8. See Donald Boudreaux et al., *Talk Is Cheap: The Existence Value Fallacy*, 29 ENV'T. L. 765 (1999); Morriss & Meiners, *supra* note 2.

9. Morriss & Meiners, *supra* note 2.

Of course, market outcomes under a clear rule of property law are more complex to achieve than the simple elements just portrayed. The purpose of this set of papers is to address many of the difficult legal, economic, and political issues at play in attempting to satisfy desires to protect land from development. Those who insist that coercive measures must be taken because we are a nation at risk of unending vistas of cookie-cutter houses and shopping malls also proffer a nightmare vision too simplistic to be accepted as the basis for policy actions. Here we attempt to offer some analyses that help us grapple with a set of difficult issues.

As Terry L. Anderson describes in *Viewing Land Conservation Through Coase-Colored Glasses*, markets for open space fall short of nirvana expectations because of demand and supply side transaction costs. On the demand side, free riders are difficult to exclude from consuming amenities like scenic views. Private parties are said to underproduce open space because they cannot capture its value to others. On the supply side, the major transaction cost lies in monitoring agents to ensure that they will act on behalf of beneficiaries of open space amenities. Anderson notes that this can be difficult when the open space product is vague or when the link between principal and agent is ill defined.

It is tempting, and often politically expedient, to "solve" the problems identified by Anderson with "corrective" taxes and land use regulations. In *When Are Environmental Amenities Policy-Relevant?*, David D. Haddock questions the extent of the real-world problems that Anderson reviews. According to Haddock, too many situations, especially in the environmental area, are asserted to suffer from underprovision of amenities because of the pervasiveness of high transaction costs that supposedly prevent the most efficient solution from emerging. Haddock bases his argument on classic articles by Nobel laureates Ronald Coase and James Buchanan that deal with the problem of externalities and transaction costs. From that foundation, Haddock demonstrates that free riding does not necessarily mean that the private sector will provide fewer environmental amenities than optimal given demand and cost conditions. On the contrary, Haddock's model shows that private decision makers often do provide the amount most desired by voluntary actors. Even when beneficial amenities are underproduced, the costs of corrective responses in a less-than-perfect world of public decision makers must be weighed against the costs of doing nothing.

The trend "toward the collectivization of development in the name of enhancement of environmental amenities," as described in

Steven J. Eagle's response to Haddock,¹⁰ suggests that policy makers are uncomfortable doing nothing. Collectivization, argues Eagle, is advocated by beneficiaries of environmental regulations and is becoming "institutionalized" by recent changes in property law. According to Eagle, states have expanded the scope of the public trust doctrine, localities have used ad hoc and unconstrained methods to meter development, and courts have invoked the concept of "givings recapture" as a justification for restricting private property rights to provide environmental amenities.

It is unlikely that any of these institutionalized, corrective schemes will dynamically optimize the preservation or protection of various lands. We cannot, of course, "reform" government decision making in such a way that eliminates politicians' incentives to cater to well organized special interest groups.¹¹ The question then is, can the market process be relied upon to do the job better than a special interest driven political process? Drawing on the property-rights approach pioneered by Ronald Coase, Anderson argues that there is good reason to believe the market process, under a rule of law that allows creative reductions in transaction costs, may indeed take us further than commonly assumed. Rising environmental values, he notes, motivate environmental entrepreneurs to devise solutions for problems previously thought intractable.

Private management is often not politically feasible, especially when land has been historically held in public ownership. In such cases, public entrepreneurship can take place through experimentation with quasi-market features. Sally K. Fairfax, Lauren Gwin, and Lynn Huntsinger examine two special federal land designations.¹² The Presidio in California is associated with the National Park Service (NPS) and the Valles Caldera in New Mexico is associated with the U.S. Forest Service (USFS). Although the management of each area differs in substantive ways, these special designations are managed similarly when compared to general NPS and USFS land. Some authority is devolved to local parties and management mandates are modestly narrower.

10. Steven J. Eagle, *Environmental Amenities, Private Property, and Public Policy*, 44 NAT. RESOURCES J. 425, 443 (2004).

11. See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (arguing that small pressure groups with homogeneous interests are successful in getting subsidies and payments funded by larger voting blocs with more dispersed interests).

12. Sally K. Fairfax et al., *Presidio and Valles Caldera: A Preliminary Assessment of Their Meaning for Public Resource Management*, 44 NAT. RESOURCES J. 446 (2004).

James L. Huffman anticipates that these features will help to create better incentive structures for managers, noting that “there are potential efficiency gains even where so-called private approaches are really only decentralized public entities.”¹³ Gains may be realized because the transaction costs of making informed decisions are likely to fall, and because interest groups without a local presence will have less influence on land management. While the actual effects of these arrangements remain to be seen, the experiments described by Fairfax et al. provide opportunities for learning how to improve public land management.

Land trusts have emerged as the dominant institution for preserving and enhancing environmental amenities on private land. They have two primary instruments by which to do so: conservation easements and full ownership of land. Dominic P. Parker asks whether land trusts treat easements as merely a cheaper substitute for full ownership of land.¹⁴ Using economic analysis, Parker suggests that a more complicated explanation is warranted. He concludes that trusts generally prefer the easement instrument in cases where the arrangement is easy to monitor and enforce, or when potential gains from landowner specialization are high. In contrast, trusts looking to enhance environmental amenities for beneficiaries (e.g., trail building, constructing wetlands, etc.) will prefer full ownership of land. The broader implication of Parker’s position—that land trusts weigh the long-term economics of managing easements against land ownership—may be that self-regulation and the sharing of training resources are helping to promote cost-effective strategies among land trusts.

Bruce Yandle critiques various aspects of Parker’s argument.¹⁵ He points out that “conservation” may have widely different meanings from different areas of the country and that this may complicate Parker’s effort to use data aggregated from trusts around the nation. Yandle also suggests that we instead view landowners as the decision makers and land trusts as passive acceptors of donated land rights. Taking this view allows land use regulations imposed by government to influence whether land or easements are donated to land trusts. This factor, argues Yandle, may partially explain the phenomenal growth of land trusts in recent years.

13. James L. Huffman, *Limited Prospects for Privatization of Public Lands: Presidio and Valles Caldera May Be as Good as It Gets*, 44 NAT. RESOURCES J. 475, 481 (2004).

14. Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483 (2004).

15. Bruce Yandle, *Comments on Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 519 (2004).

While Parker and Yandle focus on the tradeoffs land trusts face when choosing conservation easements, Christopher S. Elmendorf contemplates alternative contracting instruments.¹⁶ Elmendorf asks whether a land trust can engage in active management on land the trust does not own given the exposure to opportunistic behavior (considering that the trust may not wish to own the land for economic or political reasons). The land trusts' exposure is high, argues Elmendorf, because their investments in ecological restoration are generally not salvageable. Potential holdouts exacerbate the problem when the land trust tries to restore the ecological function of a fragmented landscape of many parcels. Elmendorf lays out two strategic responses to opportunistic behavior, the most promising of which he considers to be "collective contracting" through supermajoritarian special districts.

Susan F. French, however, finds greater potential in Elmendorf's proposal of structuring long-term servitudes in ways that reduce the land trusts' and landowners' exposure to opportunistic behavior. Such strategies include "stretching out payment over the life of the project and providing for a process for the trust to acquire additional use restrictions in the future...."¹⁷ With the inclusion of these provisions, according to French, a conservation servitude could substitute for fee simple ownership and provide a land trust with some assurance to invest in ecological restoration.

The next articles of the collection ask whether conservation easements should be perpetual, a requirement of the federal tax code that is lauded by most environmentalists. Julia D. Mahoney attacks the logic of perpetual easements on several fronts. She maintains that "policy makers are wrong to assume that reversing choices to conserve land will necessarily prove cheaper and easier than revisiting decisions to develop."¹⁸ According to Mahoney, many development decisions are in fact not irreversible. Yet future generations cannot change the use of lands encumbered by easements unless they are able to overcome institutional obstacles put in place to prevent development. This is a problem, she argues, because our conception of "development" may be different in the future. Because circumstances and preferences change, Mahoney argues for flexibility and greater thought as to how conservation decisions might be reconsidered.

16. Christopher S. Elmendorf, *Securing Ecological Investments on Other People's Land: A Transaction-Costs Perspective*, 44 NAT. RESOURCES J. 529 (2004).

17. Susan F. French, *What's a Poor Land Trust to Do? Alternatives for Dealing with an Opportunistic World*, 44 NAT. RESOURCES J. 563 (2004).

18. Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573 (2004).

Barton H. Thompson is sympathetic to Mahoney's concerns but does not find them quite as troubling. Thompson explains a number of "strong rationales"¹⁹ for adopting perpetual conservation easements and other intergenerational conservancies. For example, intergenerational conservancies economize on the transaction costs of constantly having to negotiate new conservation agreements. In addition, such conservancies can forestall imprudent landowner decisions that are motivated by temporary and fleeting circumstances. Thompson concludes by proposing several reforms to discourage illegitimate use of perpetual easements and intergenerational conservancies.

This collection of articles stands in contrast to much of the literature on private land conservation. As Professor Andrew P. Morriss notes,²⁰ the literature is dominated by authors favoring assorted statist approaches. Only a small part of the literature is devoted to a study of the legal tools available, and in use, for voluntary conservation. Given that the large majority of the land in the United States is privately owned, however, the reality is that voluntary conservation must dominate or little will change. Contrasted to the numerous polemics on the subject of land protection, Morriss shows that there are several noteworthy sources rich in the elements of the law and its application in practice. Some books he reviews concern "ordinary" people going about the business of protecting the land that they love. Rather than hope that a gaggle of politicians will see the light and protect land they desire, people around the country are quietly achieving environmental goals important to them, given the legal constraints they face and the realities of the many tradeoffs that affect complex conservation decisions. The articles in this volume add rich analysis to the issues covered in the books reviewed by Morriss.

In addition, the articles in this collection hint at related issues to examine in future research. For example, Elmendorf, Parker, and Thompson raise questions related to the effects of funding conservation easements through the federal tax code. Elmendorf asks why we should privilege the perpetual conservation easement against alternative contracting instruments, which may in some cases be better suited for the task at hand. Parker argues that tax code funding weakens incentives for land trusts and landowners to minimize the full, long-term costs of conserving environmental amenities. Thompson notes that tax laws may encourage perpetual easements over amenities lacking public good

19. Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601 (2004).

20. Andrew P. Morriss, *Private Conservation Literature: A Survey*, 44 NAT. RESOURCES J. 621 (2004).

characteristics and may unnecessarily hinder the extinguishment of easements of marginal environmental benefit. Given these considerations, a comparative analysis of tax code financing against alternative funding mechanisms seems appropriate.

Yandle alludes to another area that is ripe for future research.²¹ Federal government easement acquisition programs may compete with private land trusts. Funding for the wetland reserve and farmland protection programs, for example, has increased significantly with the passage of the 2002 Farm Bill.²² Augmentation of these programs provides an impetus for investigating the following questions: How will the spending be spatially allocated? Will the acquisitions complement or substitute for private activity? Will the federal easements adapt to local conditions? Will they be monitored and enforced with vigilance?

In conclusion, we would like to thank those who have supported the completion of this volume. Comments from participants at PERC's Forum, *Private Land Conservation: Institution and Instruments*, in Big Sky, Montana, helped to refine the ideas presented herein. In addition to the authors of this volume, forum participants included legal scholars Thomas Merrill and Rob Natelson; economists Richard Stroup, Walter Thurman, and Myles Watts; and land trust practitioners Andrew Dana and William Long. For helping to coordinate the forum, we thank Monica Lane Guenther and Colleen Lane. Finally, this project was made possible by the generous financial support of the Maytag Family Foundation and the Dunn Foundation for the Advancement of Right Thinking. We thank them for investing in this research and hope that these ideas generate tangible results in the form of sustainable institutions and instruments for voluntary conservation of private land.

21. Yandle, *supra* note 15, at 527.

22. Farm Security and Rural Investment Act of 2002. For a summary of the conservation programs authorized or reauthorized by the legislation, see *Conservation Programs* on the website of the USDA's Natural Resource Conservation Service, available at <http://www.nrcs.usda.gov/programs/> (last visited Apr. 30, 2004).