

**LAND TRUSTS AND CONSERVATION EASEMENTS ALONG THE HUDSON:
HOW FEASIBLE IS PERPETUITY?**

A Final Report of the Tibor T. Polgar Fellowship Program

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Nielson, N. K. and K. H. Hirokawa. 2012. Land Trusts and Conservation Easements Along the Hudson: How Feasible is Perpetuity? Section I: 1-42 pp. *In* S.H. Fernald, D.J. Yozzo and H. Andreyko (eds.), Final Reports of the Tibor T. Polgar Fellowship Program, 2010. Hudson River Foundation.

ABSTRACT

Conservation Easements along the Hudson River and within its watershed are a well established property interest. Ownership of these conservation easements, constituting tens of thousands of encumbered acres, rests largely with privately held land trusts. Authorized by New York State statute yet subject to common law property doctrines, conservation easements represent a relatively new and novel interest in land. In order to achieve the explicit and specific intended conservation purposes, land trusts are charged with complex annual monitoring requirements in addition to fulfilling the daily responsibilities and obligations of their organizational mission. There is an increasing proclivity on the part of landowners to donate these property interests in order to benefit from the substantial state and federal tax incentives. Qualification of donated easements for tax purposes also requires that the easement restrict the use of property to meet the conservation purpose in perpetuity. The issue of holding and protecting these interests within the expanse of forever is subject to circumstances of changed conditions, which may serve to modify or terminate the conservation easement. Provisions in the statute acknowledge and identify that forever is a long time, and that on a case-by-case, fact specific basis, there may in fact be a need to terminate the easement interest. The statute's acknowledgement of this reality and flexibility in application may provide the most realistic approach to what is otherwise intended to be perpetual. More challenging to the perpetual nature of conservation easements however, is the organizational capacity of the land trusts that are charged with their enforcement. Because many land trusts in the Hudson Valley are heavily reliant on volunteerism, they are subject to concerns about their ability to exist in the long term to be able to enforce the intended purposes of the

conservation easements they hold. This project seeks to analyze the purposes, strengths, and challenges, as well as anticipate future issues concerning easements along the Hudson through the administration of a survey to easement-holding entities. Survey results illustrate the interdependence between the easements themselves and the entities charged with their enforcement.

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INTRODUCTION

The Hudson River

The Hudson River corridor enjoys a considerable open space inventory. Grand estates, religious retreats, non-profit centers, parkland, and residences characterize significant stretches along the Hudson. When valued in terms of economic development, these properties represent an undeveloped economic asset. Yet keeping the properties undeveloped may also yield substantial conservation benefits, both in the form of what is prevented (impermeable surfaces, water pollution, scarred landscapes and habitat destruction) and what is protected (habitats and species, viewsheds, and water quality).

Conservation easements¹ are proving to be an emerging and effective mechanism for preventing development while preserving land in private ownership. Tens of thousands of acres are currently subject to private conservation restrictions along the Hudson and within its watershed, representing a significant portion of the constituent land trusts' portfolio of properties. The popularity of the conservation easement is likely due both to its use as an economical mechanism for private control over the particular restriction and its status as a property interest. Land trusts² act as stewards of the easements that are intended to protect a broad range of conservation interests, including ecosystem services, viewshed and working farmland. Once easement interests are acquired, land trusts are charged with (and entitled to) the duty of monitoring and

¹ A conservation easement is a "voluntary agreement between a private landowner and a municipal agency or a qualified not-for-profit corporation to restrict the development, management or use of the land." John R. Nolan, *WELL-GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH* 295 (2001).

² "[A] land trust is a local or regional not-for-profit organization, private in nature, organized to preserve and protect the natural and man-made environment" *Id.*

enforcing these interests with a substantial level of technical and professional expertise to evaluate the effectiveness of the intended easement purpose. On the other hand, although conservation easements are an established property interest in the Hudson and its watershed, over time the challenge for the continued protection of these interests may be the availability of resources to provide the necessary monitoring and expertise to detect violations and ensure enforcement.

Property and Conservation Easements

Property law has developed as a framework for the enforcement of privileges and rights to use that accompany ownership. This is often characterized as the property owner's "bundle of sticks"³(Hylton, et al. 2007). Each stick in the bundle represents a separate right, i.e. time, space, use, which can be separated from the others.⁴ On property's usufractory⁵ side, use and enjoyment of a property interest may be limited to the extent that it creates a nuisance by interfering with others' use and enjoyment. Limitations on such use have come into effect through common law through the doctrines of trespass, which protects physical boundaries from intrusion and nuisance, and which prohibits unreasonable interference with an owner's possession.⁶ A more recent development concerns property use limitations effected under the police power, which

³ J. GORDON HYLTON, ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 83 (3rd ed. 2007).

⁴ *Id.*

⁵ "[T]he right of using and enjoying property belonging to another provided the substance of the property remained unimpaired." BLACK'S LAW DICTIONARY 1684 (9th ed. 2010).

⁶ Hylton, *supra*, note 3 at 102. Common law property is ever mindful of the maxim, *Sic utere tuo ut alienum non laedus*, meaning that the right to enjoy one's own property is limited to the extent that it interferes with the rights of another.

authorizes the state to determine the types of uses that are protected as property, as well as the types of land uses that threaten the health, safety and welfare of the community.⁷

An easement is a non-possessory interest in real property and is generally granted for a specific use or to prevent a specific use of property.⁸ A grantor may execute a positive easement to a neighbor for access to the grantee's property across the grantor's property.⁹ In contrast, a negative easement might be granted to protect a view across the granting owner's land by preventing the granting landowner from building over a particular height.¹⁰ Easements need not benefit a specific land: in gross, easements benefit a third party in a way that may not be connected to the grantee's property.¹¹ Essentially, the required elements of an easement include the (1) intent to bind current (and if expressed, future) owners of the property to the terms of the agreement, (2) restrictions applied to the use of the entire property, and (3) a period of time that conveys permanence.¹²

Although conservation easements are borne from its predecessor forms of easements, they are justifiably thought of as a new form of ownership¹³ (Tapick, 2002).

⁷ *Id.* at 133.

⁸ Warren's *Weed* New York Real Property § 40.03. Easements may be granted to an adjacent landowner (appurtenant) or for the entire property (in gross). Conservation easements are granted in gross.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Common law easements in gross are not necessarily assignable to subsequent parties, and the courts are split on whether to enforce such interests when at least one of the original parties to the agreement no longer exists.

¹² *Id.*, *Millbrook Hunt, Inc. v. Smith*, 249 A.D.2d 281, 282—83, 670 N.Y.S.2d 907, 908—09 (2d Dep't 1998) (holding that easements in gross require expressly identifying the intent of the grant is as an easement, a definite, period of time that conveys permanence and notice that the interest exists in order to be enforceable against a subsequent owner).

¹³ Jeffrey Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM J. ENVTL. L. 257, 266—72 (2002) (arguing that conservation easements do not qualify as a negative easement because it is not one of the four recognized areas where such term applies, nor covenants because equitable remedies are not available for enforcement of covenants, only monetary damages that do not support the

The majority of conservation easements involve easement deeds intended to encumber the allowable uses in perpetuity, preventing specific activities¹⁴ (Laitos et al. 2006). These instruments create conservation property interests in the transferee, a third party which is typically a land trust, although other eligible entities include municipal governments and qualified non-profit agencies.¹⁵ As a function of the easement, the right to use property remains substantially that of the traditional and mainstream view of a private owner, with the easement holder gaining the right to restrict types of uses of the property “to preserve the servient¹⁶ land in an undeveloped or natural state”¹⁷ (Bruce and Ely, 2001). The separation of the property interests, and the allocation of different rights (monitoring, maintenance, enforcement, etc.) to multiple parties may find support in the framework of easement law, but the conservation easement also challenges the previous scheme because the entities involved include a third party organization whose priorities and organizational capacity is subject to change. This fluidity often constitutes a challenge to effect the purpose of conservation easements.

requirements of conservation, nor servitudes because they do not satisfy the requirement that the interest “touch and concern” the land).

¹⁴ JAN G. LAITOS, ET AL., NATURAL RESOURCES LAW 706–07 (2006) the requirement for conservation purposes does not need to include access, and environmental stewardship is in and of itself a public conservation interest that can be protected; See, Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 Idaho L. Rev. 453, 460—68 (2002) in JAN G. LAITOS, ET AL., NATURAL RESOURCES LAW at 719, arguing that protection of biodiversity is provided by the existence of a conservation easement because it connects people with nature, providing a comprehensive approach to long term preservation, and “casts a much wider net of land protections than is found in more targeted land conservation programs....” *Id.* at 720.

¹⁵N.Y. Envtl. Conserv. Law §49-0305(3)(a) (1983) (As not-for-profit organizations, land trusts, municipal governments and other non-profits are authorized to accept an interest in a conservation easement). Occasionally the land trusts acquire fee simple title to a whole or part of the parcel, but the recent trend involves conveyance of a mere easement in which the owner retains the right to continue to use the land, including conveyance by sale.

¹⁶ The servient property is the one “subject to an easement,” the property that is in servitude to the owner of the easement. BLACK’S LAW DICTIONARY 1491 (9th ed. 2010).

¹⁷ JON W. BRUCE AND JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND 12.2 (2001).

Project Goals

This project seeks to quantify the easements along the Hudson, including their intended purposes, discuss the strengths and challenges of this new property framework, and identify issues for future research. The project process created and administered a survey to easement-holding entities along the Hudson, the results of which function to illustrate the interdependence between the easements themselves and the entities charged with their enforcement.

LITERATURE REVIEW

The literature review yielded information about legal issues and controversies relating to conservation easements.¹⁸ Property law, which provides the legal framework governing conservation easements, is based on common law that has developed over centuries as a non-linear story of rights to own, transfer, possess, use and exclude others from what is owned¹⁹ (Hylton et al. 2007). American courts have moved towards allowing property to be alienable, disallowing indeterminate restrictions of ownership and use.²⁰

¹⁸ *Herman v. Comm’r of Internal Revenue*, 98 T.C.M. (CCH) 57931, 2009 Tax Ct. Memo LEXIS 209 *30(2009) (holding that perpetuity in the context of conservation easements requires a “limitation that would survive the sale... to a bona fide purchaser who might not share... subjective intentions.”).

¹⁹ J. GORDON HYLTON, ET AL., *PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS* 75 (3rd ed. 2007) (explaining that while there have always been some limitations restricting property use, as imposed the first time the property was transferred from sovereign to private ownership. These restrictions are not clear, and often require adjudication for clarification of the rule.)

²⁰ *Id.* at 407–09.

Conservation easements are relatively new, having first emerged in the late nineteenth century.²¹ However, this form of easement was not routinely used until the availability of the Uniform Conservation Easement Act after 1981²² (Smith 2010). The New York State Legislature has adopted statutory provisions for conservation easements and definitions of use.²³ The state's adoption of statutory mechanisms to create this expressly acknowledges the availability and legitimacy of easements in the State and establishes standards for interpreting language and implementation of the instruments that purport to create them.

Creation of a Conservation Easement

Recently, there has been an increase in the level of conservation easement donations, which has been correlated to the availability of tax credits²⁴ (Paden 2010). The tax credit requires that the easement be donated, as opposed to purchased or exacted, and that the

²¹ Ann Harris Smith, Note, *Conservation Easement Violated: What Next? A Discussion of Remedies*, 20 FORDHAM ENVTL. L. REV. 597, 600–02 (2010), citing Richard R. Powell, Powell on Real Property § 34A.02(1987)(courts were reluctant to address the existence of conservation easements until the 1930s because there was no privity between properties or parties, and the common law did not recognize conservation as a legitimate conservation purpose); see also, Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 126 (2010).

²² *Id.* the Uniform Conservation Easement Act, developed by the National Conference of Commissioners on State Laws, is model legislation; Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 305—307 (2004) (the earliest conservation easement statute were Massachusetts in 1956 and California in 1959, with the former allowing non-profits to hold the easements beginning in 1969).

²³ N.Y. Envtl. Conserv. Law §§ 49-0203, 52-0905, 54-0907, 56-0309, 49-0301 (1983); The New York State Department of Agriculture has adopted a standard easement and strongly urges its use for those seeking funds toward easement purchase, http://www.agmkt.state.ny.us/RFPS_archive.html

²⁴ Peter R. Paden, Presentation at the New York State Bar Association Continuing Legal Education Seminar: Planning, Drafting & Administration of Conservation Easements (June 4, 2010) (NYS has property tax credit given on state income tax for easements that apply in perpetuity, in addition to the federal credit for charitable donation purposes. . Average size of a conservation easement donation is valued at \$400k, compared to an average stock donation of \$50k and an average large donation of \$10k.); see also, Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 137 (2010), Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 38—39 (1989).

donation be granted explicitly in perpetuity.²⁵ There is no state or Federal statute requiring that the assessed value of the property be automatically reduced once a conservation easement is conveyed. The property owner must demonstrate, as any other owner grieving an assessment, that the easement in and of itself restricts the property value.²⁶ Because there are many qualified public interests for which the tax credit is available, conservation easements are granted for reasons that are inclusive of conservation purposes other than strictly environmental, e.g. educational, open space, recreational, viewshed²⁷ (Paden 2010). Land use planning and personal wealth management factor in to the reasons that people choose to make easement donations.²⁸ The significance of the tax credit and the need to adhere to IRS regulations has resulted in

²⁵ <http://www.renstrust.org/information-for-landowners/conservation-easement-tax-credit>, (accessed Aug. 11, 2010) (“The New York State Conservation Easement Tax Credit (CETC) offers NY taxpayers whose land is restricted by a conservation easement an annual NY State income tax credit of up to 25% of the school district, county and town real estate taxes paid on the restricted land , up to an annual maximum of \$5,000 per taxpayer. Unlike a tax deduction, which is an adjustment to taxable income, a tax credit offsets a taxpayer's tax liability on a dollar-for-dollar basis. The CETC is a REFUNDABLE income tax credit, which means that if a landowner's tax credit exceeds the amount he or she owes in state income taxes, the landowner gets a check for the difference. The CETC is available to individual landowners, estates, trusts, partnerships and certain corporations as long as the land they own is restricted by a perpetual and permanent conservation easement as defined in Article 49 of New York's Environmental Law.”); see also, <http://www.landtrustalliance.org/community/northeast/ny-tax-credit> (accessed Aug. 11, 2010).

²⁶ *Gibson v. Gleason*, 20 A.D.3d 623, 626—27, 798 N.Y.S.2d 541, 544—45(Sup. Ct. 3rd Dep't 2005) (holding that a conservation easement does not per se reduce property value assessment but if the owner can demonstrate reduced value by evidence of restriction on highest and best use, reduction is available. Further, the court found that a conservation easement prohibiting subdivision requires assessment of the property as a whole, individual parcel); *See also, Adirondack Mountain Reserve v. Bd. of Assessors of Town of N. Hudson*, 471 N.Y.S.2d 703, 704, 99 A.D.2d 600, 601 (3d Dep't 1984) (holding that easements granted by land trust to State of New York did not decrease the property value, and that assessor benefits from presumption of validity of evaluation of property value); *Luca v. Lincoln County Assessor*, 2003 WL21252488 *8 (Or. Tax Magistrate Div.) (finding that highest and best use of property restricted by a conservation easement was single-family residential, which was a higher value than open space, because existing single-family residences on the property had a right to be replaced, rebuilt or subdivided).

²⁷ Peter R. Paden, *Planning Conservation Easements*, in PLANNING, DRAFTING & ADMINISTRATION OF CONSERVATION EASEMENTS 1, 11 (New York State Bar Association Continuing Legal Education, 2010) (The intent of the easement can factor in what entity will hold the easement, as some land trusts have specific areas of focus); Jessica Owley Lippman, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1094 (2006) (arguing that the availability and accessibility of conservation easements provides many public benefits ancillary to improved ecosystem services, such as keeping property on the tax rolls, which benefits schools and local governments.)

²⁸ Paden, *supra*, note 37 at 6–9 (New York State Bar Association Continuing Legal Education, 2010)

an increase in the level of scrutiny on land trust agencies themselves.²⁹ The Land Trust Alliance has created a program to provide for accreditation of local land trusts, to ensure compliance with IRS requirements and provide a more transparent process of determining the authenticity and legitimacy of the donation.³⁰

An otherwise unlimited conservation easement “runs with the land” (meaning that its restrictions survive transfers of ownership of the underlying land) and can be formed in three ways: by donation, purchase or exaction.³¹ The prevailing intention, which is required for a donation to qualify as tax deductible according to Federal Internal Revenue Service code, is that the easement be enforceable in perpetuity³² (Covington 1996). However, perpetuity, the concept of “forever,” can come to an end.³³ This termination of perpetuity essentially constitutes an issue of enforcement distinct from an enforcement action, the latter is brought to enforce a provision of the easement agreement to protect the intended purpose, without questioning or challenging whether the easement itself

²⁹ *Id.*

³⁰ <http://www.landtrustalliance.org/learning/accreditation/accreditation>, (accessed Aug. 11, 2010) (The Accreditation program is substantial rigorous, with only 105 land trusts completing the process nationally since 2008. Criteria include responsible governance, ethical considerations, compliance with federal and state regulations, accountability and protection of the public interest. In the Hudson Valley, six Hudson Valley focused organizations including Scenic Hudson, The Hudson Highlands Land Trust, the Dutchess Land Conservancy, Rensselaer Land Trust and Westchester Land Trust, and the nationally focused Open Space Institute have achieved accreditation.)

³¹ Peter R. Paden, *supra*, note 27 at 1; Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 294—295 (2004) (discussing the emergence of exacted easements, which are non-voluntary agreements that convey an easement interest as a mitigation effort, in exchange for permission to do something that changes the property). *Smith v. Mendon*, 4 N.Y.3d 1, 822 N.E. 2d 1214 (2004) (A property restricted by zoning that required an Environmental Protection Overlay District for development was further required to grant the municipality a conservation easement as a condition of obtaining a development permit because the restriction did not diminish the value of the property and impose an unfair financial burden)

³² George M. Covington, *Conservation Easements: A Win/Win for Preservationists and Real Estate Owners*, 84 ILL. B. J. 628, 629 (1996), citing Internal Revenue Code §170(f)(3)(B)(iii) (the easement must be granted to a qualified charitable organization and granted in perpetuity, but the grantee does not have to budget funds towards enforcement in perpetuity); 34A Am. Jur. 2d *Federal Taxation* §143,900.3 (West 2010) (IRS tax credits become part of an estate, but are subject to specific provisions).

³³ Restatement (Third) of Property: Servitudes §7.11 (2000).

should continue to exist, as discussed below. Analysis of enforceability necessarily includes identification of what resources are available to enforce the provisions of the easement.

Termination Under the Common Law

In general, the common-law has developed tools to limit the duration of property interests, and these rules apply to conservation easements. Specifically, easements may be subject to termination despite evidence of an intent to create a perpetual interest within the conveyance instrument. Because easements restrict use in perpetuity, they are disfavored. The “policy against encumbrances” discourages the infinite restrictions on use that a conservation easement represents.³⁴ An easement can terminate by its own terms, i.e. it was never intended to exist in perpetuity, or a condition for termination is met,³⁵ changed conditions,³⁶ condemnation³⁷ or by merger.

Property and contractual doctrines provide some relief where changed circumstances interfere with the intent of encumbrances. One such doctrine is the Doctrine of Merger, also known as Unity of Title, whereby if a property encumbered with an easement is

³⁴ *Huggins v. Castle Estates, Inc.*, 36 N.Y.2d 427, 431–33, 330 N.E.2d 48, 52–53, 369 N.Y.S.2d 80, 85–87 (1975) (if not unequivocally and explicitly included in the deed, court will not interpret in favor of restriction.); *Turner v. Caesar*, 291 A.D. 2d 650, 651, 737 N.Y.S.2d 426, 428 (3rd Dep’t 2002) (“The law favors the free and unencumbered use of real property and, to that end, the courts strictly construe restrictive covenants against the party seeking to enforce them.”); *Kramer v. Dalton Co.*, 235 Or. App. 494, 502, (Or. Ct. App. 2010) (holding that the covenant restricted residential properties to single-family dwellings located on subdivided lots because of the clear language and location of the restriction in the deed).

³⁵ JAN G. LAITOS, ET AL., *NATURAL RESOURCES LAW* 713 (2006) citing Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1087—93 n1 (1996) (the Uniform Conservation Easement Act states that a court retains the power to modify or terminate a conservation easement in accordance with the principles of law or equity, Unif. Conservation Easement Act §3(b), 12 U.L.A. 177 (1996)).

³⁶ Frederic Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

³⁷ Richard B. Collins, *Alienation of Conservation Easements*, 73 DENV. U. L. REV. 1103, 1106 (1996).

subsequently purchased or acquired in fee-simple³⁸ ownership by the owner of the easement, the easement is extinguished³⁹ (Hylton et al. 2007). If at a later point in time, the owner wants to separately convey an easement, a new one must be created, transferred and recorded.

Conservation easements conveyed to a land trust must serve a public purpose, but such public purposes can be widely disparate and may even be mutually exclusive.⁴⁰ The Doctrine of Changed Conditions⁴¹ is one whereby circumstances anticipated or intended at the outset of the conveyance have changed to the point that enforcement of the original agreement is no longer pragmatic or desirable and so a court may choose to extinguish the easement⁴² (McLaughlin 2005). Because of the relative novelty of conservation easements, the actual implementation of conservation easements, particularly their

³⁸ “The estate in fee simple is the largest estate known to the law” BLACK’S LAW DICTIONARY 691 (9th ed. 2010).

³⁹ J. GORDON HYLTON, ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 530 (3rd ed. 2007).

⁴⁰ N.Y. Envtl. Conserv. Law §49-303 (1983), authorizes conservation easements as an “Interest in real property, created under and subject to the provisions of this title which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property in a manner consistent with the public policy.”; *County of Colusa v. Cal. Wildlife Conservation Bd.*, 145 Cal. App. 4th 637, 652, 52 Cal. Rptr. 3d 1, 26 (3rd Dist. 2006) (where conservation purposes are adverse to each other, as with an easement that prohibits agricultural use in order to protect wetlands and habitat, and agricultural production is a keystone of the local and state economy, the court allowed modification of the easement to allow agricultural production as an important public interest).

⁴¹ Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HAST. L. J. 1187 (1989); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 441—42 (1984) (discussing what constitutes a conservation purpose and how to weigh one conservation purpose against another); see also, AMY KASTELY, ET AL., CONTRACTING LAW 659 (4th ed. 2006) (This doctrine is founded in contract law, and specifies that when conditions have changed over time so that the original intent is substantially or entirely no longer in existence, the restriction on the property, here the easement, can be extinguished via petition and court decision).

⁴² Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 471—77 (2005) (noting that charitable donations do not require efficiency but must convey a community benefit and when the benefit is such that there is little public benefit offered or an absence of public support for continued enforcement, the court may choose to modify or extinguish the easement under *cy pres*, the doctrine of reform).

enforcement in perpetuity, includes many situations where the law has not been challenged.

Termination Under Statutory Considerations

New York's authorizing statute contemplates that perpetuity is subject to many of the existing common-law doctrines, by identifying mechanisms for termination of a conservation easement.⁴³ However, the application of these doctrines and how the court chooses to balance donor intent in the context of changed conditions or other common law doctrines for modification or termination has not yielded significant caselaw.

Enforcement

Successful enforcement requires diligence from the inception of the easement.⁴⁴ Before the easement is conveyed to the land trust, baseline data must be gathered and consensus on accuracy must be reached.⁴⁵ The property owner must acknowledge and

⁴³ N.Y. Envir. Conserv. Law §49-0307 (1984)(an easement may be modified or extinguished by its own terms, by eminent domain, necessity of public utility or (N.Y. Real Prop. Acts. Law §1951 (1962)) when the benefit intended is not actual or substantial, has already been achieved or changed circumstances dictate); Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 140 (2010) (noting that merger may include financial risk of sanction or loss of tax exempt status "if the merger is found to confer private benefits on the fee owner.")

⁴⁴ Maryanne McGovern, Presentation at the New York State Bar Association Continuing Legal Education Seminar: Planning, Drafting & Administration of Conservation Easements (June 4, 2010) (In order to achieve the conservation objectives and interests of all parties in perpetuity, success begins at the beginning with easements that specifically address the property, the conservation values protected and places restrictions that are within the capacity of the land trust to monitor); Ann Harris Smith, Note, *Conservation Easement Violated: What Next? A Discussion of Remedies*, 20 FORDHAM ENVTL. L. REV. 597, 633 (2010) (arguing that easement drafting is key to enforcement, and provisions should be included related to the remedies for violations, as well as an agreement for collection of attorney's fees in case of enforcement action, to encourage lawsuits for enforcement).

⁴⁵ McGovern, *supra*, note 44.; Interview with Seth McKee, Land Conservation Director, Scenic Hudson, Inc. (June 10, 2010) (Baseline documentation is necessarily detailed, and must include not only written descriptions, accurate maps and photos and important landmarks, but each piece of documentation must be signed off on by the landowner and the grantee. Annual monitoring visits are required, and the level of precision and agreement in the baseline documentation facilitates the ability to monitor and enforce the easement over time, beyond the tenure of the original persons involved in the transaction. The level of

validate the baseline data submitted before the easement can take effect.⁴⁶ Issues of enforcement are typically noted during annual monitoring visits. If, in the monitoring process, an issue of violation of the easement is found, enforcement action can be brought in court. Enforcement actions related to easements require standing⁴⁷ for a court to recognize the party bringing the action, which is standard in civil rules of procedure.⁴⁸ The entity identified as the holder of the easement has standing because of the fact that they hold ownership of the easement⁴⁹ (Pennington and Rosenberg 2010). Even though conservation easements are granted for conservation purposes that benefit the public, the general public cannot unequivocally obtain standing for enforcement action.^{50,51}

professional expertise is not necessarily a credentialed one at this point, but requires a team of specialists who understand the purpose of the easement as well as the property itself in order to assess its efficacy.)

⁴⁶ *O'Mara v. Town of Wappinger*, 9 N.Y.3d 303, 310—11, 879 N.E. 2d 148,152, 849 N.Y.S. 2d 9, 13 (N.Y. 2007) (holding that while all work to approve the easement had been done, an actual conveyance was not made because the title company hired by the purchasers did not identify the property restriction and the surveyor did not reference the easement in the property description, rendering subsequent attempt at enforcement moot.)

⁴⁷ Standing is “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right” it is essentially the legal ability to bring a lawsuit in court. BLACK’S LAW DICTIONARY 1536 (9th ed. 2010).

⁴⁸ Restatement (Third) of Property: Servitudes §8.1 (2000).

⁴⁹ Mark C. Pennington and Steven Rosenberg, *Conservation Easement Administration*, in PLANNING, DRAFTING & ADMINISTRATION OF CONSERVATION EASEMENTS 39, 48 (New York State Bar Association Continuing Legal Education, 2010) (only the parties to the easement and those designated with a third party right of enforcement may bring enforcement actions. Individuals such as neighbors and adjacent landowners may not enforce the provisions of the easement).

⁵⁰ *Hicks v. Dowd*, 157 P.3d 914, 920 (Wyo. 2007) (“The mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust.”); Jessica Owley Lippmann, *Exactd Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 337, 339—42 (2004) (with exacted easements for habitat conservation purposes authorized under the Endangered Species Act, there is ambiguity in who has the right of enforcement to protect the paramount concern of endangered species protection as the parties to the easement contract may not have been involved in the formation of the easement in any way and the easement owner may choose or not choose enforcement for strategic reasons. The Attorney General may be vested with discretionary power to bring an enforcement suit. California permits property owners and local landowners the right of enforcement for open space easements but does not address exacted conservation easements.)

⁵¹ Interview with Seth McKee, *supra* note 45.

METHODS

This research adopted a multi-faceted approach to analyze conservation easements and their enforceability. Beginning with a literature review focused primarily in legal journals and case law, the search extended to the perspectives and interdisciplinary analyses found in the social sciences literature. Because there is very limited case law and virtually no published opinions regarding the Hudson River and its riparian lands, the search included jurisdictions nationwide. Although the courts of other states do not generally bind property law in New York, an examination of law in other jurisdictions does indicate how this relatively nascent property right should be considered as part of the context of how these rights exist and are utilized. Concurrent with the literature review, outreach and informal interviews with local land trust stakeholders were conducted. These interviews were informational in nature and provided anecdotal context as to the state of conservation easements along the Hudson itself.

Additionally, a brief survey was developed and submitted to all thirty-two land organizations listed on the Land Trust Alliance⁵² website⁵³ located within the Hudson River valley between New York Harbor and the Troy Dam. Excluded were organizations that focused only on community gardens in the boroughs of New York City. The selected organizations ranged from those with a small geographical focus to those with a national presence. Six organizations that did not have any easement holdings listed on

⁵² <http://www.landtrustalliance.org> is a national policy and advocacy organization that collectively represents the interests of land trusts, serves as a resource and network, and provides accreditation and education.

⁵³ <http://www.landtrustalliance.org/community/falt>. Information on the website was last officially collected through an organizational census in 2005. Some organizations have updated their contact information and statistics, but others have not. As such, a cross-reference check with the organization websites was conducted. The 2010 census is currently in process.

the Land Trust Alliance website directory were nonetheless invited to participate because the information on their own websites indicated they hold easements. None of these six chose to participate. Of the thirty-two identified organizations in the watershed area, four had a national or statewide presence and one had a Hudson Valley regional focus. The survey, administered via surveymonkey.com, sought to identify the types and quantities of conservation easements and other property interests held in the Hudson River and its watershed, when and how they were obtained, purposes of easements, issues of enforcement, and staffing and legal support resources. The survey was administered during June 2010.

The New York State Department of Environmental Conservation (DEC) is directed by statute to provide a place for recording all conservation easements once conveyed. This project included contact with the DEC to identify easements along the Hudson.⁵⁴ Other resources accessed include the New York State Bar Association, which held its first Continuing Legal Education (CLE) seminar on conservation easements this summer,⁵⁵ the Land Trust Alliance generally, as well as the conservation easement listserv, and the websites of local land trust organizations, many of which include a “Frequently Asked Questions” page that is written in a manner accessible to the general public.⁵⁶

⁵⁴ N.Y. Envtl. Conserv. Law §49-0305(4) (1983) requires a deed conveying the easement to be duly recorded in the county where the easement is located, and a copy forwarded to the Department of Environmental Conservation for file purposes.

⁵⁵ New York State Bar Association Continuing Legal Education, Planning, Drafting & Administration of Conservation Easements, attended June 4, 2010

⁵⁶ See, Mohawk Hudson Land Conservancy, <http://mohawkhudson.org/faqs.htm>; Scenic Hudson, <http://www.scenichudson.org/whatwedo/landconservation/privatelandowners>; Agricultural Stewardship Association, http://agstewardship.org/index.php?option=com_content&view=category&layout=blog&id=15&Itemid=34; Rensselaer Land Trust, [http://www.renstrust.org/information-for-landowners/land-preservation?start=2](http://www.renstrust.org/information-for-landowners/land-preservation?start=2;);

RESULTS

The survey was sent to thirty-two organizations all identified as Land Trusts holding easements in the Hudson Valley.⁵⁷ Eleven respondents completed the survey yielding a 34% response rate. One respondent declined to participate because his organization does not hold any conservation easements in the Hudson or its watershed, and three respondents communicated their intent to complete the survey in ongoing email discussion, but did not actually complete it. Of the twenty-one who did not complete the survey or decline to participate, fifteen are listed on the Land Trust Alliance website as having no full-time staff, and limited volunteer staff. Among the additional three organization representatives who intended to complete the survey but did not, the reason cited universally was that staff time was needed to attend to the deadline related work of the organization. Extending the survey for those individuals did not yield participation. Of the twenty who did not respond, six were listed on the Land Trust Alliance website as not holding easements, but their individual websites indicated that they might hold easements at this time. As such, the results are limited in their application, but do provide information indicating areas for further research, including the future viability of the necessary monitoring of properties and interests within the land trusts' portfolios. The fact that 75% of those not responding do not have staff is indicative in and of itself of the limitations of volunteer land trust organizations.

Columbia Land Conservancy, <http://clctrust.org/faq.htm>; Mohonk Preserve, <http://mohonkpreserve.org/index.php?howweprotectland>; Wallkill Valley Land Trust, http://www.wallkillvalleylt.org/index.php?option=com_content&task=blogsection&id=3&Itemid=28; Dutchess Land Conservancy, <http://www.dutchessland.org/landprotection.htm>; Hudson Highlands Land Trust, <http://hhlt.org/faq.html>; Orange County Land Trust, <http://orangecountylandtrust.org/options.htm#easement>; Westchester Land Trust, <http://www.westchesterlandtrust.org/easements-qa>.

⁵⁷ http://www.ltanet.org/landtrustdirectory/state.tcl?state_id=newyork36 (accessed Aug. 11, 2010).

The DEC database is compiled on a county level and as such, challenging to search for geographic correlations between the easements themselves and the Hudson River and watershed location.⁵⁸ According to Timothy Reynolds, who maintains the database, prior to 2006, compliance with the statutory requirement for filing an easement with the DEC was sporadic at best.⁵⁹ In 2006, when the tax credit went into effect, DEC saw a significant increase in recording of easements.

The DEC itself holds five easements along the Hudson: two in Dutchess County, one purchased with Environmental Quality Bond Act grant funding in 1985, constituting three parcels and 99.01 acres and the second consisting of 26.37 acres of waterfront granted in 1989, two in Ulster County, both easements conveyed by Scenic Hudson to the DEC in 1990, consisting of 6.97 and 12.93 acres, and one riverfront parcel in Westchester consisting of 50.11 acres, conveyed in 2001. These easements, as is typical, specify that the DEC has the right of enforcement, as well as the right of limited access to monitor.

Although there are many tools for protecting property, the primary mechanisms of land acquisition employed along the Hudson and within the watershed are conservation easements encumbering use but retaining private ownership, or fee simple ownership of the parcel (Figure 1). Covenants are a “formal agreement or promise . . . to do or not do a particular act.”⁶⁰ Land Trusts acquire these types of interest to protect property because they can be less expensive, but are also not intended in perpetuity and are a lesser interest

⁵⁸ Please note that the DEC database is not publicly accessible and searches of this database are subject to staff availability.

⁵⁹ Telephone Interview with Timothy Reynolds, Conservation Easement Database Manager, NYS Department of Environmental Conservation (June 30, 2010).

⁶⁰ BLACK’S LAW DICTIONARY 419 (9th ed. 2010).

than conservation easements.

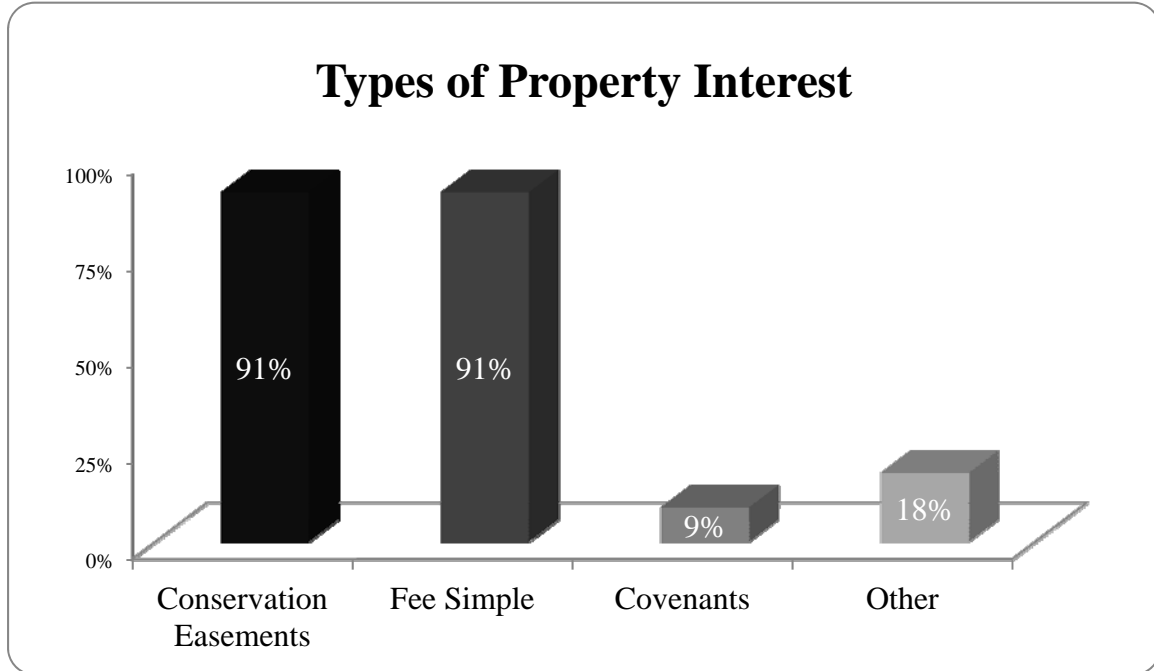


Figure 1 - Types of Property Interests held by the Land Trusts. ***Note that the question asked respondents what types of property interests the Land Trust holds. Land trusts can hold a portfolio of different types of property interests and as such, the interests do not add up to 100%.

For each easement owned, annual monitoring by the easement holder is required.⁶¹ As such, with a mean number of easements of 47.7, and a median of 15.5, this represents a significant workload (Figure 2). Monitoring begins with comprehensive baseline reporting, and annual reporting that requires site visits, assessing status in relation to the encumbered interest and analysis of potential violations.

⁶¹26 I.R.C §170 requires that charitable organizations, of which Land Trusts are a qualifying member, must evaluate and report all assets on an annual basis. Easement interests are considered a charitable asset and are therefore subject to annual monitoring regardless of how the interest was acquired. This is distinct from the requirement of conservation purpose that provides a public benefit that is required for the landowner donating the easement to meet in order to qualify for state and federal income tax deductions.

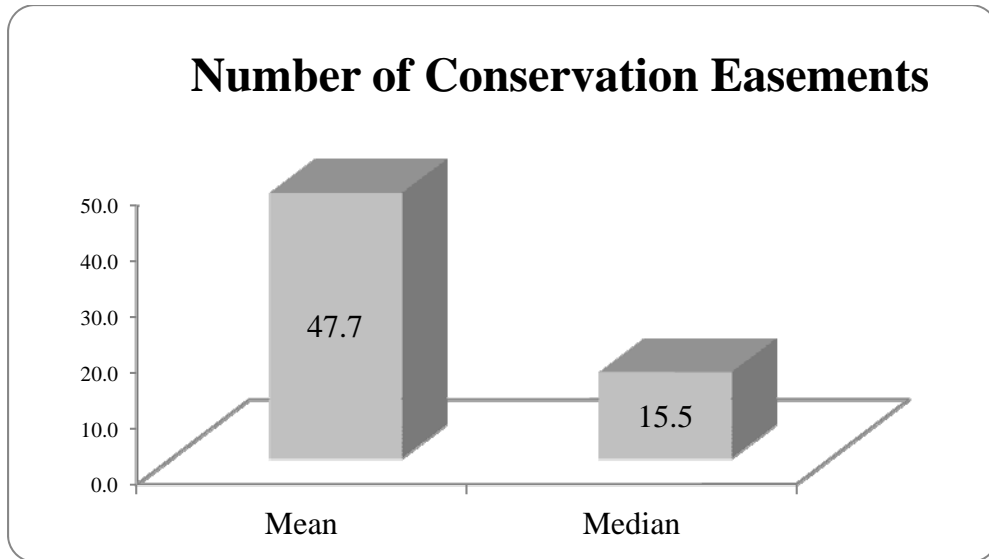


Figure 2 - Number of Conservation Easements. This chart represents the mean and median number of easements held by each organization participating in the survey.

The total number of acres amassed under easement is 30,606 (30,461 acres reported in the survey, plus an additional 145 acres reported by the DEC)⁶² (Paden 2010). The variation in mean and median acres under easement demonstrates that there is a high degree of variation amongst land trusts (Figure 3).

⁶² Peter R. Paden, *Planning Conservation Easements*, in PLANNING, DRAFTING & ADMINISTRATION OF CONSERVATION EASEMENTS 1, 5 (New York State Bar Association Continuing Legal Education, 2010) (“according to unofficial tabulation of data by the New York LTA office, as of November 2008, 11 Land Trusts in the greater Hudson Valley reported holding 904 conservation easements on approximately 78,000 acres of land.); As such, the limitations of the survey should be clear, accounting for well under half of the total reported just eighteen months ago.

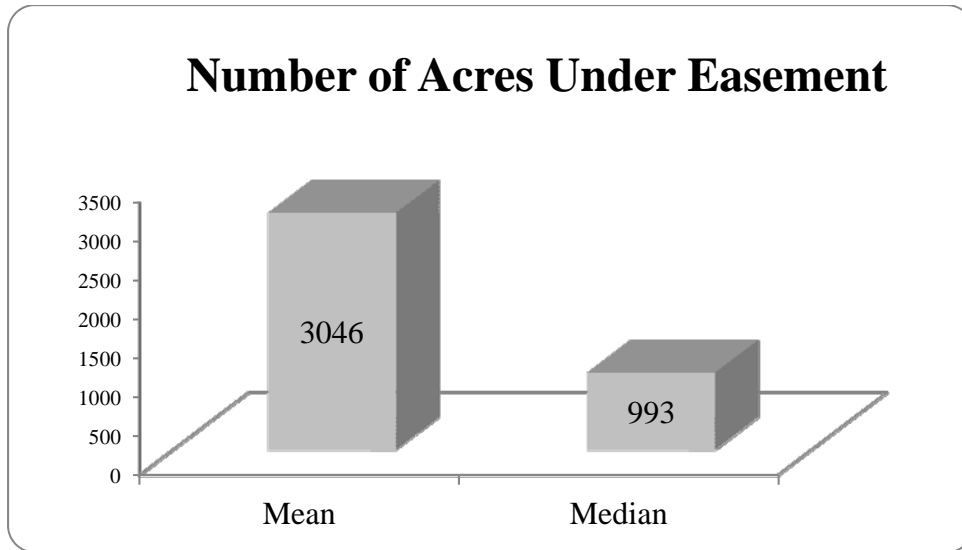


Figure 3 - Number of Acres Under Easement. This chart represents the mean and median numbers of acres under easement held by each organization participating in the survey.

In fact, the number of acres within an individual land trust’s easement portfolio varies from a low of 13.3 acres to a high over 10,879 acres. Two land trusts hold the bulk of the easements, accounting for nearly 22,000 acres between them. Additionally, the character of land use in the Hudson Valley, and the northeast in general, has developed in a manner that allows even small parcels to be subdivided and developed. The average size of easements, with a mean of 57.3 acres and a median of 30 acres, further illustrates this point that the relative size of properties under easement reflects an overarching pattern of land use (Figure 4).

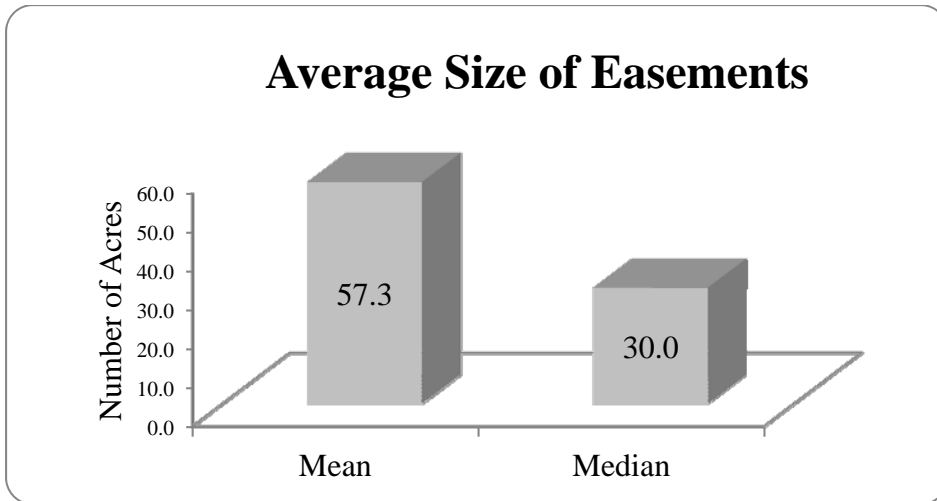


Figure 4 - Average Size of Easements. This chart represents the mean and median number of acres constituting individual easements held by organizations participating in the survey.

Despite discussion and anecdotal reports of the dramatic increase in donated conservation easements following the tax credit, the decade in which the easements were obtained is fairly proportional in the past three decades (Figure 5).

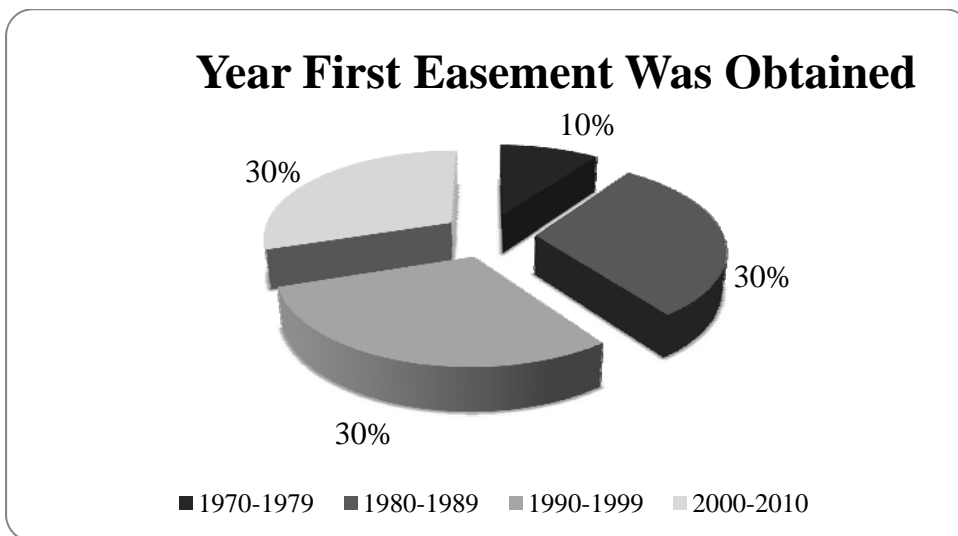


Figure 5 - Year First Easement Was Obtained. This chart represents the percent of total easements held by the decade in which they were obtained.

This statistic looks at the use of conservation easements by land trusts in the Hudson Valley as a whole and does not identify the proportion of donated vs. purchased vs. exacted easements.

Because easements must be donated for a conservation purpose, each property must be encumbered with specific intent to achieve that purpose. Along the Hudson, easements are granted for a variety of purposes but overwhelmingly constitute intentions of ecological/ environmental protection (Figure 6).

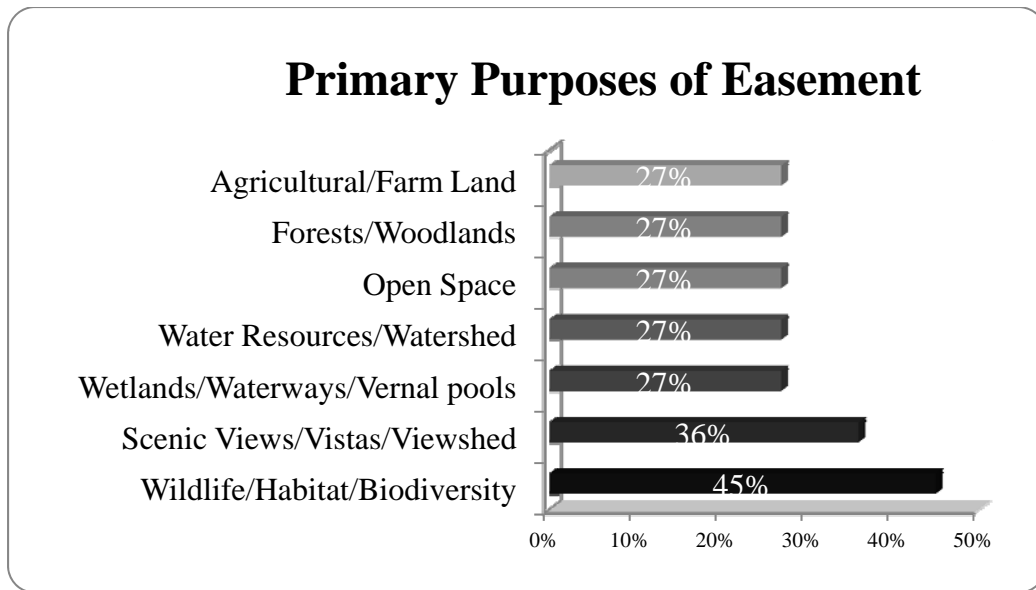


Figure 6 - Primary Purpose of Easement. Though easements must be granted with an intended purpose, there is often more than one reason cited as the “primary” purpose.

These explicit and recorded intentions are an important part of providing ecosystem services that enhance the Hudson and its watershed.

In the Hudson Valley and its watershed, the survey indicates that donation is the overwhelming mechanism for obtaining the easement (Figure 7).

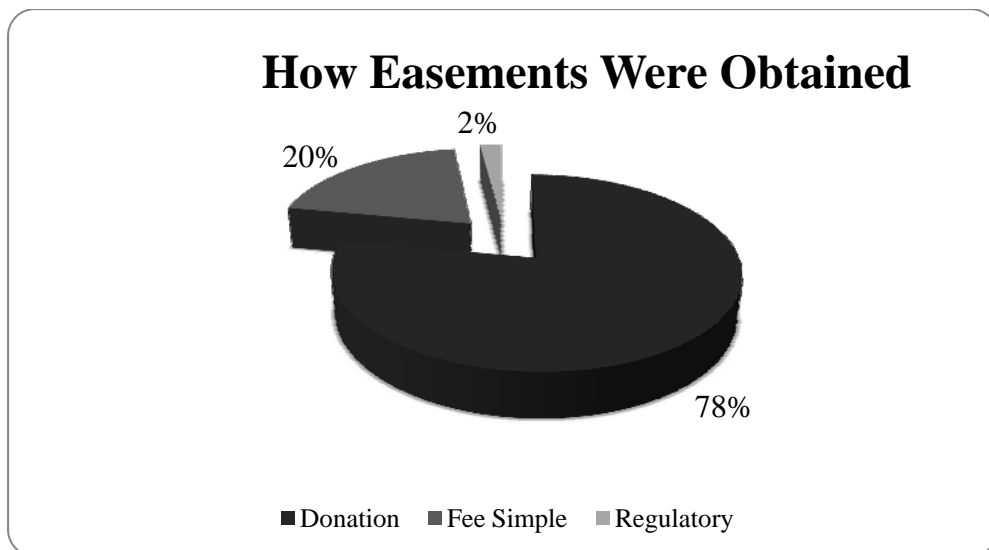


Figure 7 - How Easements Were Obtained. This chart represents the percentage of easements by the mechanism through which the easement was obtained.

Because donation is often tied directly to the availability of the tax credit, the willingness of landowners to provide this property protection may change if the tax credit is reduced and/or discontinued.

The need to enforce easements is evident from the statistic that forty-five percent of conservation easements had a reported violation and an additional twenty-two percent required intervention to prevent a violation (Figure 8). The enforcement provisions suggest that easements will be subject to issues and will need to be enforced in some manner. Such enforcement requires sufficient resources on the part of the land trust organization.

Anecdotally, easements have been enforced when land trust monitoring has found a violation but do not always require court action. For instance, where a property owner cut trees on a parcel with an easement granted to protect the viewshed, and the missing trees adversely affected the viewshed, the land trust required immediate replanting of indigenous species mature enough to effect the goals of the easement, as well as a

significant punitive fine that was paid to the land trust and used to further organizational conservation efforts. The owner complied with the enforcement requirements and legal action was not necessary. Enforcement set strong precedent with this particular easement.⁶³

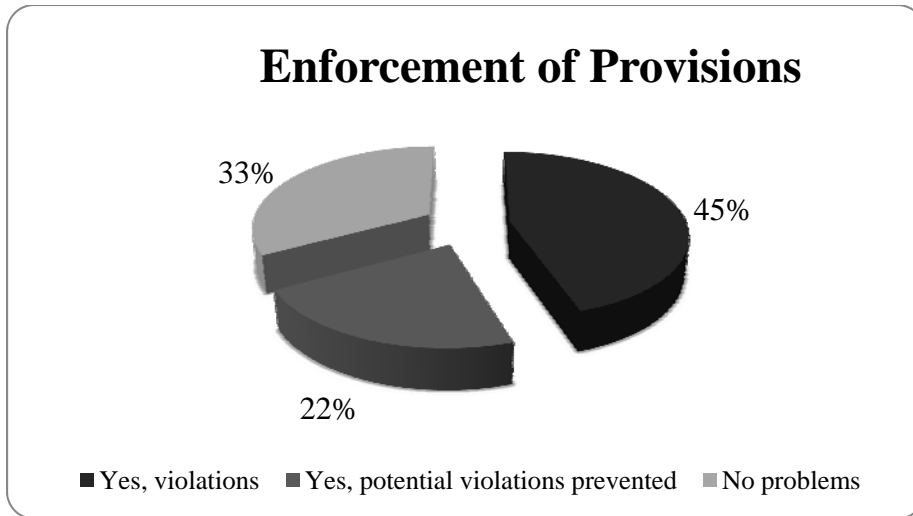


Figure 8 - Enforcement of Provisions. This chart represents the percentage of violations of the easement provisions of the total number of easements held.

Modifications to easements constitute slightly less than a quarter of easements (Figure 9). This is a drain on resources given the fact that any modification in essence requires a new deed (inherently involving legal counsel) and authorization by the board to approve the modification as consistent with the organizational goals.

⁶³ Interview with Seth McKee, *supra*, note 45.

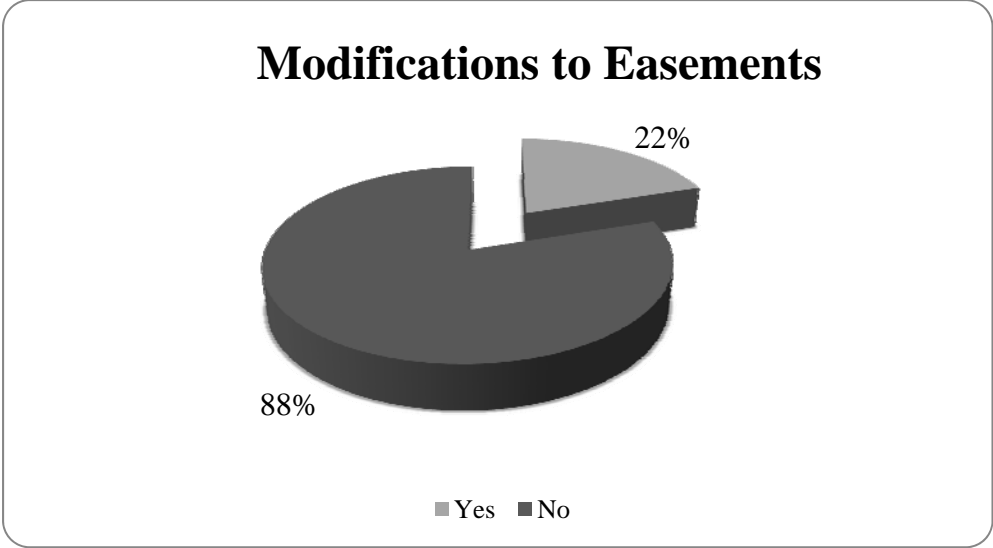


Figure 9 - Modification to Easements. This chart represents the percentage of easements held that have been modified as compared to the percentage that have not been modified.

The organizational structure of land trusts in the Hudson Valley is highly reliant on volunteers. Staff is limited and usually includes full and part time personnel. (Figure 10).

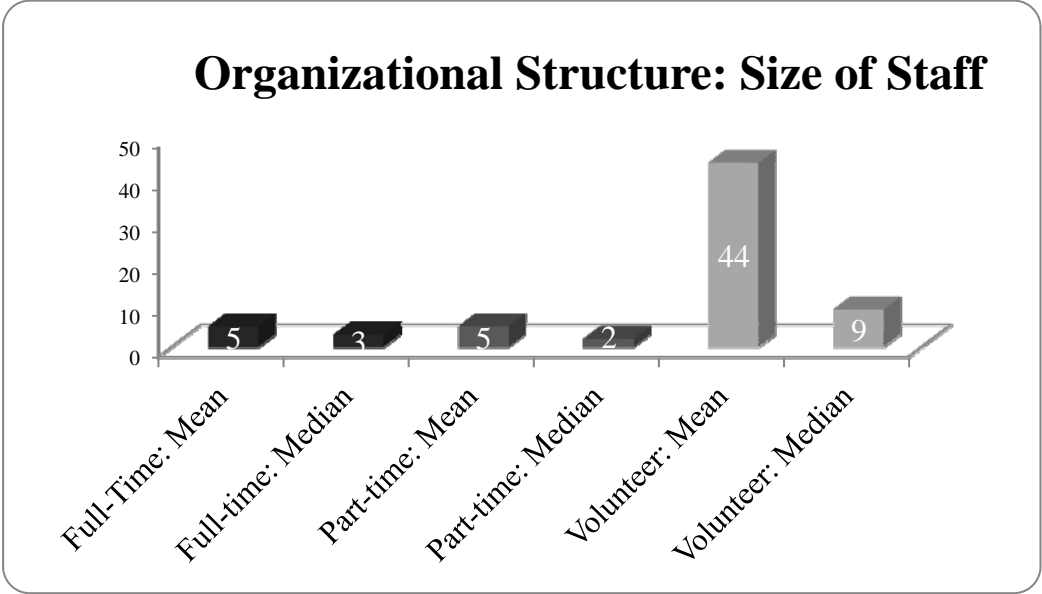


Figure 10 - Organizational Structure: Size of Staff. This chart represents the mean and median number of staff who were full-time, part-time or volunteer from all easement holding organizations participating in the survey.

Only eighteen percent of those completing the survey had legal counsel on staff, and an additional thirty-six percent had counsel on retainer, while eighty-two percent sought counsel as needed (Figure 11). This indicates that there is no exclusive mechanism for providing legal counsel, and though there may be an attorney on staff, others will be consulted depending on the particular situation. One land trust has an attorney in the position of executive director, though they also access outside counsel as necessary. As such, there is a wide range of available legal counsel for land trust organizations.

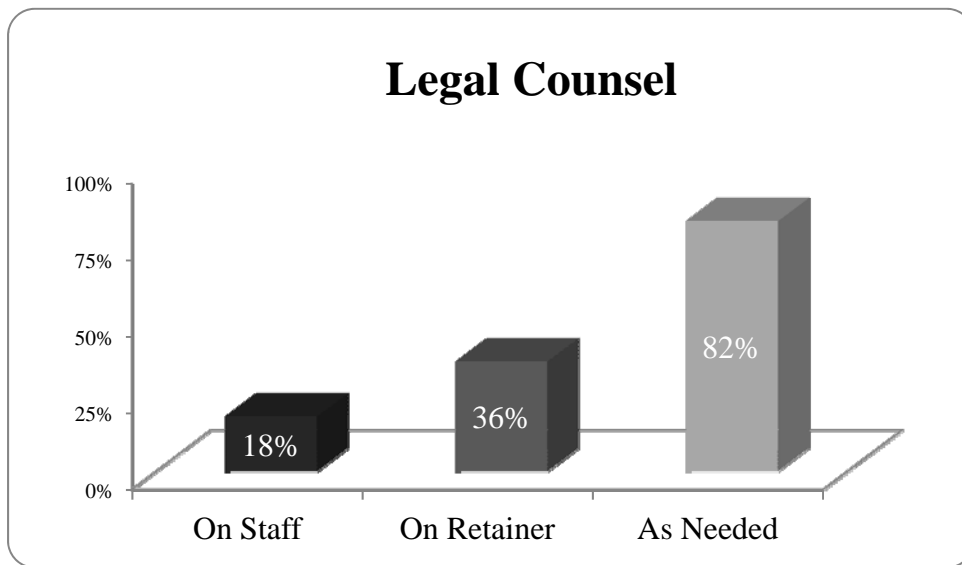


Figure 11 - Legal Counsel. This chart represents the percentage of types of legal counsel arrangements that participating land trusts use.

DISCUSSION

Conservation Easements as an Established Property Interest

Based on the results of the survey, the acquisition of conservation easements as a property right is a substantial part of the portfolio of many local land trusts in the Hudson Valley. Although it is not the only type of interest held, the prevalence of their existence

given the relatively recent use of these tools is indicative of their importance to the Hudson River and its watershed.

The various reasons for granting the easement include explicit protection of the environment. Protection alone implicitly provides an ecological service to the properties protected and their surrounding environs.⁶⁴ However, as a relatively new and somewhat untested property right, conservation easements may be subject to judicial tinkering as conflicts eventually find their way to court⁶⁵ (Bray 2010). At least, courts will be asked to contextualize the intensity of expertise necessary for monitoring and enforcement and the very novelty of the right to enforce this non-possessory interest. Of course, understanding that the property interest could be subject to change may not have been a mystery at the time the statutes were enacted. Moreover, because of their public-private nature, conservation easements may be subject to future challenges for public rights of access and recreation that are not expressly included in the original intent⁶⁶ (Lippmann 2004).

Perpetuity then is the persistent interest in the land, and that interest itself does not have a predetermined termination. Societal, economic, land use and environmental

⁶⁴ Please note that agricultural easements support working farmland and as such, are somewhat distinct from other conservation easements in terms of ecosystem services. Depending on the scope and nature of the farm operations, there can be an inherent tension between the environmental benefits of producing food and the practices by which produce is cultivated. See also, The Glynwood Center, *Land Trusts and Agricultural Land: Protecting Farmland or Farming?*, available at <http://www.glynwood.org/publications-multimedia/land-trusts-and-agricultural-land/> (accessed Aug. 11, 2010).

⁶⁵ Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 137 (2010) (discussing the inefficiency of restrictions without end, and noting that “today’s easements may frustrate future legitimate conservation initiatives”).

⁶⁶ Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 308—09 (2004); see also, Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 163 (2010) (arguing that public access may be a mechanism for sustaining enforcement as it will provide for monitoring compliance without encumbering resources).

considerations all contribute to changed circumstances, which courts will evaluate as to whether or not they are changed sufficiently enough to warrant a modification or termination to the easement. This flexibility is consistent with the interests of conservation purposes, which need to be able to use the property interest as an asset, to best serve the goal of keeping the Hudson viable for the long-term. The Hudson has many functions, of which habitat, industry, commerce, aesthetics and transportation are included. To be able to best serve these divergent purposes, the conservation easement tool must remain as flexible and adaptable as possible over time. Conservation easement proponents must exercise due diligence in ensuring consistency between interests intended to be protected and those actually protected, using the inherent flexibility of the easement as a mechanism to achieve conservation. For example, climate change impacts the environment in ways that are not within the power of a property interest to address. If however, the climate of an easement property, granted to protect the habitat of a particular species, were to change to the extent that the species could no longer persist in that habitat, it may be in the interest of the easement holder to extinguish the easement and allocate resources to other means by which to protect said species. To the extent that the flexibility exists within an easement interest, conservation advocates should recognize it as an asset and understand its potential application as appropriate.⁶⁷

⁶⁷ Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L. J. (In Press), Consider also, the substantial challenges in implementing an easement system that is based on finite terms of interest. Term easements may not be as attractive to donors because they would not necessarily come with tax benefits because the current level of donated easements is in part fueled by its use as a wealth management/ estate planning mechanism. The complexities of dealing with a term that expires may be quite lengthy and expire generations in the future. Courts would also have to consider what injunctive relief would look like if a party could simply wait for a short term easement to expire to conduct an action that was in violation of the intended conservation purpose. This alternative poses a host of new and relevant ambiguities.

Complexity of Land Trust Monitoring and Enforcement of Easement Property Interests

The level of expertise necessary to enforce easements is substantial. Given land trusts' limited resources, the lack of a requirement that funds be dedicated toward the enforcement of the interest⁶⁸ and the significant costs involved in litigation,⁶⁹ the level of expertise needed could easily be outside of the scope of many organizational budgets.⁷⁰ Each donated easement held must be monitored annually.⁷¹ The broad range of property size, the wide variety and complexity of what conservation purposes were intended to be protected and the time commitment by which to monitor the interest annually, document findings, determine if a violation has occurred and then address the violation or negotiate with a landowner prior to bringing an enforcement action requires comprehensive knowledge of the property itself as well as a great range of expertise for which it would be rare that one individual was capable of possessing alone. For land trusts with small conservation easement portfolios, this is not necessarily a significant burden, particularly

⁶⁸ George M. Covington, *Conservation Easements: A Win/Win for Preservationists and Real Estate Owners*, 84 ILL. B.J. 628, 629 (1996) (In order to comply with IRS regulations, there is no requirement that the grantee organization set aside funds for future enforcement); Interview with Seth McKee, *supra*, note 34 (Scenic Hudson has a policy to request property owners to donate a percentage of the value of the easement to a dedicated stewardship fund for ongoing monitoring and enforcement of the interest. However, the donation is not mandatory. For those easements that are not accompanied by a donation, the Land Trust sets aside stewardship funds in an endowment to assure the viability of protecting the interest over time);

⁶⁹ Ann Harris Smith, Note, *Conservation Easement Violated: What Next? A Discussion of Remedies*, 20 FORDHAM ENVTL L. REV. 597, 634 (2010) (analyzing the use of expert witnesses in court cases as effective in securing decisions favoring enforcement based on familiarity with the property as well as significant scientific and historical understandings of particular habitat, species, or historical occurrences necessary to interpret and effect the purpose of the easement).

⁷⁰ Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 315 (2004) (Because many land trusts are new and have few staff, "[i]t is not clear whether these groups have enough capacity to both monitor and enforce complex easements well into the future."); <http://www.landtrustalliance.org/conservation-defense/conservation-defense-insurance/background> (accessed Aug. 11, 2010) ("estimates that the litigation costs would range from \$70,000 to \$100,000 for a typical trial in a typical jurisdiction, \$35,000 for summary judgment motions and \$150,000 for appeal. The average historic cost of all claims was \$38,000 including those that did not go to a full trial.")

⁷¹ IRS Code §170(h) (requiring annual documentation of value of donated conservation easement).

if there are board members or volunteers who can provide consultation where expertise is needed. The results of the survey demonstrate that with an average easement portfolio of 15.5 properties, and a median of nearly 50, that even for the smallest land trust there are substantial staffing and monetary requirements for the ongoing maintenance of these easements. What may be sufficient now may not be enough to secure the resources for future enforcement needs, creating an enforceability problem. Given a trend of increasing the number of easements conveyed, a high probability that the original grantor may convey the possessory interest to a third or fourth party and an intent to keep easements in perpetuity, the burden will increase.⁷²

Legal and Organizational Challenges to the Perpetual Nature of the Easement Property Interest

The legal question of whether conservation easements are enforceable in perpetuity is answered in the affirmative, though individual easement interests are subject to consideration of extinguishing such interest on a case-by-case basis, taking into account the context of statutory requirements and property law. An easement drafted with the intent of perpetuity, authorized as such by statute will still be subject to circumstances that may modify or extinguish it, even though the interest itself continues. While long-term control is often desirable in the marketplace (“Our favorite holding period is forever” ~ Warren Buffet), it is not necessarily realistic (“Do not try to live forever. You will not succeed.” ~ George Bernard Shaw).

⁷² <http://www.landtrustalliance.org/conserves/conservation-defense/conservation-defense-insurance/threats-to-permanence-why-take-action> (accessed Aug. 11, 2010) (“Although land trusts have had relatively few legal challenges, research shows that as property values rise, incentives to disrupt or void easements grow as well, and so does trespass on land trust property.”)

Perpetuity presents future challenges because the primary mechanism for enforcement relies on land trusts. Where land trusts are staffed by volunteers and part time personnel,⁷³ there are limited resources to address issues of monitoring and enforcement, in an increasingly technical process that requires the expertise of many different types of professionals (Lippmann 2004). The Land Trust Alliance has developed a program to address this,⁷⁴ but it is not clear that the smaller and more predominately volunteer-based organizations will have the wherewithal to participate, creating a greater disparity in capacity between land trusts⁷⁵ (Snow 1991). The survey indicates that access to legal counsel takes on a myriad of arrangements, from executive director, staff, retainer or as-needed, all of which represent different capacities for the legal approach to easements over time. It is important to note that easement monitoring and enforcement is only one function of a land trust's organizational objectives and responsibilities. Educational programming, fundraising, sustaining other property interests and general organizational operations also require personnel and resources.

The ability to provide long-term protection of ecological resources and meet conservation objectives is the organizational strength of the land trusts. An

⁷³ Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 315, 336 (2004) (discussing the unknown capacity of land trusts and the anticipation of vulnerability if the expertise is insufficient as properties change hands through repeated subsequent ownership.)

⁷⁴ <http://www.landtrustalliance.org/conservation-defense/conservation-defense-insurance> (accessed Aug. 11, 2010) (The Land Trust Alliance has started an initiative to provide insurance that would cover costs associated with litigation in defense of conservation easement enforcement, as well as fee-simple owned properties. Begun in 2009, the initiative required land trusts to commit their entire portfolio to the program, but did not require accreditation for participation. The Alliance will charge a per-parcel premium and anticipates the program will require \$4 million in capital to begin. Currently, over 17,000 parcels from 425 land trusts in 47 states have committed to the program, indicating substantially more interest than was needed to launch the program, which is anticipated to be available in the upcoming year).

⁷⁵ DONALD SNOW, *INSIDE THE ENVIRONMENTAL MOVEMENT: MEETING THE LEADERSHIP CHALLENGE 6* (1991)(Reflective of the history and culture of the environmental movement supported by non-profits and reliant on volunteers. Such organizational underpinnings and charitable reliance is a market reality); *See also*, James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23, 24—25 (2000).

organizational framework that lasts forever has yet to be achieved in any field or institution. Even governments change over time. Collaboration between land trusts that acknowledges and accounts for merger will likely occur over time and is a normal market pattern⁷⁶ (Hempel 1999). Assemblage value of these organizations and their protected properties portfolio, from an ecological standpoint, is probably desirable because the aggregated management alone can serve to more cogently enforce the easement provisions in order to provide ecosystem services.

Long-term strategic planning for such merger and acquisition will allow for the efficient and appropriate management of existing resources as well as identify properties and parcels that will allow the aggregation of benefits, i.e. adjacent parcels.

Questions for Future Research

- Should the ancient property system persist at all, given its assumption that perpetuity exists without limits on its face, in light of the fact that there are different and competing interests?
- What properties remain unencumbered and how should they be protected, including the long-term strategic organizational plans necessary to ensure that interests are protected?
- What is the extent of geographic and intended purpose connectivity between and among encumbered properties? To what extent does proximity or lack thereof affect the ability to effect the intended purpose by which they were granted?

⁷⁶ Lamont C. Hempel, *Conceptual and Analytical Challenges in Building Sustainable Communities*, in TOWARD SUSTAINABLE COMMUNITIES: TRANSITIONS AND TRANSFORMATIONS IN ENVIRONMENTAL POLICY 43, 45 (Daniel A. Mazmanian, Michael E. Kraft eds., 1999).

- What does merger of land trust organizations look like, how does it happen, and what can the Hudson Valley do to prepare for, negotiate and use mergers to best meet conservation objectives?
- How do issues related to public access affect encumbered properties now and in the future?

ACKNOWLEDGEMENTS

The author wishes to thank Professor Keith Hirokawa for his encouragement and support in proposing and developing this project, as well as in editing and critiquing the written report, Seth McKee of Scenic Hudson Land Trust for discussing the issues and his generosity of time, to the late Seymour Gordon, whose work with farmland preservation in the Town of Warwick, mentoring and support with landowners and easements have given me a very practical understanding of implementation of this property tool, Maria Koenig Guyette and Ellen Hamilton Newman for editing, and kt Tobin Flusser of the Center for Regional Research and Education Outreach for her support with statistical analysis and graphical representations.

LITERATURE CITED

- Blackie, J.A. 1989. Conservation easements and the doctrine of changed conditions. *Hastings Law Journal* 40:1187.
- Bray, Z. 2010. Reconciling development and natural beauty: the promise and dilemma of conservation easements. *Harvard Environmental Law Review* 34: 119-177.
- Bruce, J. W. and J. W. Ely, Jr. 2001. *The Law of Easements And Licenses in Land*. West Group, Danvers, MA.
- Cheever, F. 1996. Public good and private magic in the law of land trusts and conservation easements: a happy present and a troubled future. *Denver University Law Review* 73:1077.
- Collins, R.B. 1996. Alienation of conservation easements. *Denver University Law Review* 73:1103-1106.
- Covington, G.C. 1996. Conservation easements: a win/win for preservationists and real estate owners. *Illinois Bar Journal* 84: 628-633.
- Dana, A. and M. Ramsey. 1989. Conservation easements and the common law. *Stanford Environmental Law Journal* 8:38-39.
- Hempel, L.C. 1999. Conceptual and analytical challenges in building sustainable communities. Pages 43-45 in D.A. Mazmanian and M.E. Kraft, editors. *Toward Sustainable Communities: Transitions and Transformations In Environmental Policy*. MIT Press, Cambridge.
- Hylton, J. G., D.L. Callies, D. R. Mandelker and P.A. Franzese. 2007. *Property Law and the Public Interest: Cases and Materials*. LexisNexis, Newark. 3rd edition.
- Kastely, A., D.W. Post and N.Ota. 2006. *Contracting Law*. Carolina Academic Press, Durham. 4th edition.
- Korngold, G. 1984. Privately held conservation servitudes: a policy analysis in the context of in gross real covenants and easements. *Texas Law Review* 63:441-442.
- Laitos, J.G., S.B. Zellmer, M.C. Wood and D.H. Cole. 2006. *Natural Resources Law*. Thomson West, St. Paul.
- Lippmann, J.O. 2004. Exacted conservation easements: the hard case of endangered species protection. *Journal of Environmental Law and Litigation*. 19: 293-355.
- McLaughlin, N.A. 2002. The role of land trusts in biodiversity conservation on private lands. *Idaho Law Review* 38: 460-468.

- McLaughlin, N.A. 2005. Rethinking the perpetual nature of conservation easements. *Harvard Environmental Law Review* 29: 421-521.
- Nolan, J. R. 2001. Well-grounded: Using local land use authority to achieve smart growth. Environmental Law Institute, Washington, D.C.
- Owley, J. In Press. Changing property in a changing world: A call for the end of perpetual conservation easements. *Stanford Environmental Law Journal*.
- Paden, P. 2010. Planning conservation easements. Pages 1-36 in *Planning, Drafting & Administration of Conservation Easements*. New York State Bar Association. Albany.
- Pennington, M.C. and S. Rosenberg. 2010. Conservation easement administration. Pages 37-70 in *Planning, Drafting & Administration of Conservation Easements*. New York State Bar Association. Albany.
- Smith, A.H. 2010. Conservation easement violated: what next? a discussion of Remedies. *Fordham Environmental Law Review* 20:600-602.
- Snow, D. 1991. *Inside The Environmental Movement: Meeting the Leadership Challenge*. Island Press, Washington, D.C.
- Tapick, J. 2002. Threats to the continued existence of conservation easements. *Columbia Journal of Environmental Law* 27: 266-272.

RESOURCES

- Land Trust Alliance – landtrustalliance.org
- Conservation & Preservation Counsel, LLC – landprotect.com
- Hudson Valley Land Trust Sites:
 - Agricultural Stewardship Association – www.agstewardship.org
 - Columbia Land Conservancy – www.clctrust.org
 - Dutchess Land Conservancy – www.dutchessland.org
 - Hudson Highlands Land Trust – www.hhlt.org
 - Mohawk Hudson Land Conservancy – <http://www.mohawkhudson.org>
 - Mohonk Preserve – www.mohonkpreserve.org
 - Orange County Land Trust – www.orangecountylandtrust.org
 - Rensselaer Land Trust – www.renstrust.org
 - Scenic Hudson – www.scenichudson.org
 - Wallkill Valley Land Trust – www.wallkillvalleylt.org
 - Westchester Land Trust – www.westchesterlandtrust.org

APPENDIX 1- SURVEY

Conservation Easements in the Hudson River Estuary

1. How many types of property interests does your land trust acquire or receive? (e.g. conservation easements, fee simple, covenants).

- a. conservation easements
- b. fee simple
- c. covenants
- d. other

2. If known, what is the number of conservation easements held? How many acres are under easement? What is the average size of the easement parcel?

- a. Number of conservation easements
- b. Number of acres under easement
- c. Average size of easement

3. If known, of the conservation easements held, how many (and what acreage) are located on Hudson River riparian land? How many are located within the Hudson River estuary? How many non-riparian easements are held?

- a. Hudson River riparian land
- b. Hudson River estuary riparian land
- c. Non-riparian land

4. Year first conservation easement obtained?

5. What are the primary ecological services/ purposes for which the conservation easements are granted?

6. How were the conservation easements obtained? Please note percentage of easements.

a. Donation Fee Simple

b. Regulatory (i.e. zoning requirement)

c. Other

d. Conservation Easements in the Hudson River Estuary

7. If known, what is the market value of your easement portfolio? What is the tax base of your easement portfolio?

a. Market value

b. Tax base

8. Have you tried to enforce provisions in your conservation easements? What result? Have there been any modifications?

9. Organizational Structure

a. Number of full-time staff

b. Number of part-time staff

c. Number of volunteer staff

d. Legal counsel on staff?

e. Legal counsel on retainer?

f. Legal counsel as needed?

10. Would you be willing to discuss this information further? If so, please identify the best way and time for me to contact you.

Thank you for your participation!