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Kansas Natural Resource Coalition

1st Annual Conservation Easement Summit

CONSERVATION EASEMENTS?
IT DEPENDS

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Overview

- ▶ IRS v. Local Control
- ▶ Perpetuity
- ▶ Public Access
- ▶ Quality v. Quantity
- ▶ Transparency
- ▶ Property Rights
- ▶ Attorneys' Fees

The IRS v. Local Control

- ▶ Conservation easements must meet state requirements
- ▶ IRS requirements must be met to be deductible for federal income tax purposes
- ▶ What does the IRS know about land use or local needs? NOTHING!
- ▶ IRS regulations require PERPETUAL easements

Kansas Requirements

- ▶ Differs from Uniform Conservation Easement Act- if document does not specify, easement is NOT perpetual (Uniform Act) but “ ”limited in duration to the lifetime of the grantor and may be revoked at grantor’s request”
- ▶ May be perpetual, if specified

Perpetuity

- ▶ Land use planning
- ▶ Adaptive management
- ▶ Changing circumstances- population, development, habitats all change
- ▶ Farmland under perpetual easements are particularly problematic
 - What happens when operation is no longer profitable?
 - What happens when agriculture changes and practices that are not allowed under the easement are required?
 - Wind turbines? Solar panels? Agri-tourism?

Public Access

- ▶ Public access not required for most conservation easements
- ▶ Historic easements require property to be open to the public for at least 2 days per year, but requirement not generally enforced
- ▶ Value to the public is often minimized without public access
- ▶ Most landowners would not grant conservation easements if public access were allowed

Quality v. Quantity

- ▶ The United States Congress used such terms as “rare” and “unique” in describing conservation easements eligible for the federal income tax deduction when the legislation was first proposed
- ▶ “More is better” is now the attitude
- ▶ “It will be extremely difficult to commit the sin of choosing too much open space in getting started (or at almost any other time, for that matter), and any planner who can't think now of some land worth saving ought to get into another line of work.” William Whyte (1959)
- ▶ Net conservation benefit v. gross conservation benefit
- ▶ Some counties in Virginia are now 20%, 25% and more under conservation easement

Transparency



- ▶ Land trusts assert that conservation easements are “private contracts”
- ▶ But, the public pays for the easements and easements create huge land use impacts in a community
- ▶ Other land use actions require a public hearing and notice to adjoining landowners, why not conservation easements?

Property Rights

- ▶ Conservation easement advocates assert that their property rights include the right to impose a conservation easement
- ▶ However, some advocates also assert that a conservation easement on one parcel of land imposes obligations on the owners of adjoining or nearby properties to preserve conservation values
- ▶ Nuisance?

Attorneys' Fees

- ▶ *The Nature Conservancy v. Sims* (6th Cir. Ct. App. 2012)

Kentucky farmer filled sinkhole on property in enable to farm the property more efficiently

Easement contained a provision that allowed farming, but another that prohibiting altering the topography of the property

Farmer loses, must pay TNC \$77,337 in attorneys' fees and \$22,000 in costs (including \$14,000 for a geologist)

- ▶ Recent Connecticut case: landowner ordered to pay \$350,00 in damages and \$300,000 in attorneys' fees for easement violations (landscaping the property)
- ▶ Land Trust Alliance insists that land trusts include clause in easements granting the land trust attorneys' fees in such cases, but not including a reciprocal provision for landowners

Long Green Valley Association v. Belleview Farms

- ▶ Maryland case involving several lawsuits
- ▶ Dairy farmer places conservation easement on property that allows the continuation of farming
- ▶ Farmer converts the dairy to organic and starts a creamery on the property
- ▶ Neighbors object, claiming that conservation easement and land use regulations prohibit creamery, and multiple lawsuits are filed against the farmer
- ▶ After five years of litigation, including appeals, case finally ends in 2012
- ▶ Early in the process, the farmer reported that he had already spent \$200,000 in attorneys' fees

Vermont Dairy Farmer



- ▶ In 1975, Farm has \$120,000 in operating debt and sells 100 acres to pay debt
- ▶ In 1990, Farm has \$120,000 in operating debt and sells development rights to pay debt
- ▶ In 2005, Farm has \$120,000 in operating debt and sells cows and milking equipment to pay debt
- ▶ No longer a farm
- ▶ Caused marital discord among some of the family members

Legislative Proposals

- ▶ Give incentives for term easements- get the IRS out of the state and local government's business
- ▶ Set a maximum term for conservation easements in the state (20 years?) and require state approval
- ▶ Give local governments the option to require full disclosure, notice and a public hearing before a local body for the approval or disapproval of conservation easements
- ▶ Give local governments the option to require that conservation easements be consistent with local land use comprehensive plans and regulations (if any) to protect all property rights in the area
- ▶ Require that conservation easements contain reciprocal attorneys' fees provisions
- ▶ Encourage funds devoted to conservation easements be used to purchase lands with public access



THANK YOU!

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