CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

NO GOOD DEED GOES UNPUNISHED: OBSTACLES AND IRONIES IN DEDICATING CONSERVATION LAND IN CALIFORNIA

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Requirements to dedicate land for habitat or open-space purposes, as mitigation for development impacts, have become a much more common feature of California real estate development in recent years. California's natural beauty and the rich diversity of life found in its wild areas make preservation of open space and habitat an almost intuitive value that few would disagree with. Determining how much to conserve and who should pay for it, however, inevitably leads to controversy. As urban areas continue to grow, the race to preserve natural areas while striking the appropriate balance between conservation and property rights presents ever more compelling challenges.

Most of the financial burden of open-space dedication in recent years has been placed, rightly or wrongly, on private residential developers. Given the skyrocketing value of residential real estate in most parts of California, many developers have been willing to agree to the somewhat Faustian bargain of dedicating substantial amounts of land to obtain approval for their developments.

Yet a significant irony has arisen over the past few years—developers attempting in good faith to comply with land dedication requirements often find that *transferring* conservation property can be just as difficult as negotiating the original requirements. Conservation easements, which were supposed to provide a simple vehicle for land dedication, are becoming increasingly difficult or impossible to implement due to impasses among the agencies involved.

The following discussion will explore this development and offer possible solutions, with reference to the author's experiences in Southern California (notably in several large master-planned communities in San Marcos, Escondido and Carlsbad and the Rancho Santa Fe area in San Diego County) and anecdotal evidence from other areas of the state.

The Context of Mitigation and Conservation Easements

Sources of Mitigation Requirements

The obligation to dedicate mitigation property can arise from a number of sources, most of which involve conditions of permits for development of real estate where natural habitat will be impacted. A § 404 Permit issued by the U.S. Army Corps of Engineers (Corps) pursuant to the Clean Water Act can require mitigation as a condition of the permit, as can a biological opinion issued by the U.S. Fish and Wildlife Service (FWS) as part of its "consultation" role in connection with other permits. Additional mitigation transfer requirements can be imposed in connection with Streambed Alteration Agreements from the California Department of Fish and Game (DFG), as well as Clean Waster Act § 401 water quality certifications issued by the local Regional Water Quality Control Board. Lastly, mitigation requirements may also be imposed by cities and counties in order to facilitate the assembly of natural preserves under habitat conservation programs and similar mechanisms—for example the Multiple Species Conservation Program (MSCP) in the City and County of San Diego.

Conservation Easements

The developer or owner of mitigation land is often required to enter into a conservation easement to

ensure development will be prevented from occurring on the property in perpetuity. California Civil Code § 815 authorizes the creation of conservation easements in California, and § 815.1 defines them in part as:

> any limitation … in the form of an easement, restriction, covenant, or condition … to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

Section 815.2(b) requires the easement to be perpetual in duration, while § 815.3 requires the easement holder (grantee) to be a state or local governmental entity or non-profit which has land preservation as its primary purpose. As described below, the contents of a conservation easement (*e.g.*, the nature of the development or use restrictions imposed) can vary considerably.

Mitigation Requirements and Endowments

The level of mitigation imposed—particularly, the amount of land that must be acquired and provided for conservation purposes, usually by means of a conservation easement—is typically negotiated by the developer with the responsible state, federal and local agencies through a fairly lengthy process involving compromise for all parties. This typically involves sacrifice for the developer, who may be required to dedicate and/or buy most or all of the mitigation property at issue and provide a substantial endowment, often in the range of thousands of dollars per acre, to a fund for managing and maintaining the property. The amounts required for such funds are often the subject of heated controversy.

Yet however painful such negotiations may be, the process of actually transferring the land can be equally difficult and time consuming. The following sections explore some of the difficulties encountered and suggest a few alternatives.

Issues in Structuring Mitigation Property Ownership and Conservation Easements

Some of the main problems with structuring transfers of mitigation property and conservation easements are as basic as identifying what restrictions should be imposed, who is to own the land and who is to be granted the rights to protect it—seemingly simple matters that are very difficult to resolve in practice. These structural issues are further described below.

Level of Use Restrictions

Due to considerable variation in the restrictions included in conservation easements, the developer should seriously consider the appropriate level of restrictions during negotiation. The standard forms offered by the agencies essentially preclude all uses of the subject land, but that may not be necessary in all cases to provide the required mitigation. Certain terms can sometimes be negotiated to allow for temporary or ongoing uses, which can range from allowing trails, parks, other recreational uses, water quality feature or temporary impacts associated with project construction. These issues are particularly critical when mitigation land lies adjacent to the project site. The restrictions themselves can also lead to other issues—for example, a property owner agreeing to restrict all use of pesticides/herbicides could be liable if mosquito control to prevent West Nile virus or other vector abatement cannot be conducted on the property.

Title to Land: Identity of Conservation Easement "Grantor"

Finding an appropriate entity to hold title to conservation land can be fraught with difficulty, as the benefit of such ownership is usually far outweighed by the liabilities. The terms of the conservation easement often prohibit development of the land, agriculture, and most other economically productive uses, and potential liabilities of ownership include future assessments for maintenance and fire districts, obligation to conduct brush management and fire clearing, tax liabilities and possible lawsuits resulting from accidents or other issues related to the property. These liabilities appear particularly burdensome given that conservation land must be maintained "in perpetuity"—in other words, forever.

All of the above makes ownership of the property a "hot potato"—no one wants to own a potential liability forever. Nevertheless, some of the potential owners and the issues associated with their ownership are described below.

• **Project Developers/Homeowners' Associations**

The developer of a project responsible for dedicating conservation land will generally not want to own the fee interest, given the liabilities described above. The project developer is often a single-purpose entity that will soon be dissolved, and its affiliated entities will not want or be able to remain in the business of owning conservation property.

On some projects, fee title to mitigation property has been given to a homeowners' association (HOA) or equivalent entity responsible for nearby residential property, and the potential future liabilities of owning the property are then added to the HOA's responsibilities and shared among the homeowners. (Some developers may of course be reluctant to increase the homeowners' costs for this purpose.) Although agencies often do not want to allow the HOA to have any management oversight over the mitigation area (noting that the HOA may lack the necessary expertise and may not be reliable over the long term), they may allow the HOA to hold the title so long as management responsibilities are given to a trusted conservation non-profit through an easement or separate agreement. (Some of the problems with this are discussed below.)

• **Governmental Entities**

In some cases—mainly in the past—cities, counties and other governmental agencies have been willing to accept a fee interest in property dedicated for conservation purposes. Occasionally, local governments can still be persuaded to hold title where they will have ongoing management responsibilities for certain features of the mitigation land, such as parks, detention basins or other water quality features. The City of San Diego, for example, accepts fee title from individual homeowners who wish to dedicate the portion of their property within the Multi-Habitat Planning Area established by the MSCP or property that is contiguous to existing city parkland. The city is usually unwilling, however, to accept ownership of larger tracts of property required by conditions of other agency permits, given the liabilities described above.

The County of San Diego and other cities within it are typically even less willing to have continuing involvement with the property, and sometimes go to great lengths to avoid any association with it. For a recent project requiring numerous conservation easements, the City of San Marcos made clear to our developer client that it would not even allow the city's name to be *mentioned* in the conservation easements (as a third-party beneficiary or otherwise), or in any of the related acquisition documents, in order to minimize the likelihood of the city being "tagged" with any conceivable liability associated with the properties.

In some areas of the state, particularly northern California and Riverside County, certain other public districts such as the Western Riverside Resource Conservation Authority or the Riverside/Corona Resource Conservation District have proven willing to accept the ownership of conservation property.

• **Non-Profit Entities**

Given the problems with the above options, an increasingly common method of providing for ownership and management of mitigation land is for the developer to transfer all of its interest in the property to a specialized conservation entity (usually a non-profit) with a negotiated endowment sufficient to pay for maintenance on the property. Non-profit conservation entities which have served as owners and managers of mitigation land in Southern California include the Center for Natural Lands Management (CNLM), the Trust for Public Lands, the Nature Conservancy among others. Until its recent bankruptcy, The Environmental Trust held a large portion of the conservation land dedicated in San Diego (see further discussion under "Funding" below).

Granting property to a non-profit, however, creates a structural problem. Regulatory agencies still typically require that a conservation easement also be granted, primarily to serve as a "check" on the non-profit's management of the land. A non-profit fee owner cannot also serve as grantee of the conservation easement, and another grantee must be found—which creates significant additional headaches, as further described below.

Grantee of Conservation Easement

The grantee (holder) of a conservation easement is the entity that will have primary rights to enforce restrictions contained in the easement. Finding the appropriate grantee can be as difficult as finding the right entity to hold fee title to the property. Frequently, permit conditions are worded vaguely enough that there is some latitude in making this choice—for

example, permits often state the property must be made subject to a conservation easement in favor of an "acceptable" entity approved by the applicable agencies. Civil Code § 815, as above, also allows a range of entities to perform this function. However, as described below, none of the options are free of problems.

• The DFG as Traditional Grantee

Traditionally, the California Department of Fish and Game was the grantee of choice for conservation easements, and some permit conditions specify that the DFG *must* "hold" the easement. Also, the other agencies involved (the FWS and the Army Corps of Engineers) usually strongly prefer that a governmental entity with experience in the area, such as the DFG, hold easements. However, in the last several years, in the face of serious state budget shortfalls, the DFG has grown increasingly reluctant to serve as the grantee of the easement. Developers in both Northern and Southern California have had the experience over the last few years of working through lengthy negotiations over mitigation property requirements, preparing easements on the previously approved forms, complying with all related documentation and payment requirements, *etc*.—only to have the DFG respond that it will not accept the final signed easement for recordation or, worse, simply fail to respond to the submittal of the easement in any manner.

This phenomenon has been most apparent in San Diego, Ventura, Santa Barbara and San Luis Obisbo counties, along with several Bay Area jurisdictions. It often places the developer into legal limbo, in which it cannot confirm that its permit requirements have been satisfied, even though it has done everything possible to satisfy them. For numerous parties required to grant conservation easements in these areas, this uncertain state has continued for several years, with no resolution in sight.

• The DFG's Objections

From the DFG's point of view (as expressed in various conversations with the DFG's representatives and consultants working closely with them), the requirement to hold a conservation easement as grantee essentially constitutes an "unfunded mandate"—an additional burden upon its already-stretched staff without additional compensation. The FWS' form of conservation easement (one of the forms commonly used) requires the grantee to the easement to perform periodic monitoring of the owner's compliance with easement requirements (*e.g.*, preventing all development and other damage to the property), as well as initiating enforcement actions where necessary. But even when these obligations are removed from the easement form (as has sometimes been done to facilitate getting the easement recorded), the DFG's representatives have still expressed concern that they could be sued in the event of a dispute concerning the property.

• Non-Profit or Government Grantees

Given the flexibility noted above for determining the grantee, a conservation non-profit could easily serve as grantee of the easement, with the wildlife agencies being named as third-party beneficiaries. This will not work, however, if the non-profit will also hold the title to the conservation land—requiring it to be both grantor and grantee of the easement. (Put simply, one cannot grant an easement to oneself.) The non-profits, which need to have an established track record with the agencies before they will be approved to hold conservation easements, are in some cases reaching the point where they do not have the capacity to hold additional easements and conduct necessary oversight.

• The Current Impasse

As a result of the foregoing, until the DFG is again able to accept conservation easements, developers are in a bind. If a conservation non-profit will own fee title to the property, it becomes very difficult to find a grantee for the easement, given the DFG's reluctance to assume this role. For the non-profit to serve as grantee of the easement, the developer or related entity would have to continue holding title to the land and with it, the significant potential liability and administrative burden. Moreover, most agencies strongly prefer that an experienced governmental entity remain substantially involved with oversight and obligated to take action if problems develop with the property. On several recent projects, continued interagency wrangling over these issues has ground to a halt the entire process of granting conservation easements to protect the land.

Funding for Maintenance/Management

The problem of obtaining adequate funding is closely tied in with the grantee issues described

above, and the amount of money the developer must pay for management/maintenance of mitigation property is often subject to controversy.

• **Endowment Amounts and Responsibilities**

Endowment amounts are typically determined through negotiation between the developer, non-profit and agencies with reference to the "property assessment report" (PAR) mechanism developed by the Center for Natural Lands Management. Startup and ongoing maintenance costs are used to determine the principal amount needed to generate adequate annual interest to fund ongoing management. The amount usually totals several thousand dollars an acre, but can vary widely depending on the responsibilities involved. For large projects, endowments can be well in excess of $1 million. These responsibilities include: maintenance of fencing, removal of exotic/invasive plants, preparation of reports to the wildlife agencies, paying and/or contesting future assessments or taxes on the property, brush management (if required due to the property's location in a high fire danger zone) and potential defense of lawsuits.

• **Adequacy of Endowments**

Adequacy of endowments paid has been a critical issue since the recent bankruptcy of The Environmental Trust (TET), a large environmental non-profit in San Diego. Discussions with former TET officers and others reveal that one of the main problems leading to TET's downfall was its continued acceptance of perpetual management of properties while failing to charge enough in endowments to cover its management expenses, and in underestimating many future contingent liabilities.

The TET's collapse has caused significant problems for the wildlife agencies and other parties involved, throwing into uncertainty the ability to continue maintaining properties TET had managed without additional funds being contributed. Agencies, developers and local jurisdictions now apply far greater scrutiny to the finances and management of non-profits accepting mitigation property—and non-profits in turn have begun charging more for their services. Such appropriate responses nevertheless increase the already-high costs associated with conservation property.

With a View towards Solutions

Assuming funding issues can be resolved or minimized in most cases, conservation non-profits will likely remain the entity of choice for holding title to and managing mitigation property in perpetuity. This does not solve the problem, however, of finding an appropriate grantee for conservation easements, to clear the logjam resulting from the DFG's refusal to accept them. Potential solutions to this impasse are outlined below.

Transferring Funds to the DFG

Certain DFG concerns might be alleviated by transferring to it a portion of the endowment funds set aside for maintenance of the mitigation property. Unfortunately, there is no readily available statutory mechanism for doing this. Also, the conservation non-profit would likely not be willing to transfer any significant par of the endowment to the DFG (as it will feel these funds are needed for property maintenance), and developers would almost certainly balk at increasing endowment amounts for this purpose. Transferring money to the DFG poses its own concerns, including the fear that money earmarked for maintenance / management could be diverted to the DFG's general funds, or to the State to alleviate its budget crisis, leaving the DFG as vulnerable and unwilling to act as before.

Advocacy/Legislation Regarding the DFG's Role

Certain developers that have been unable to get their conservation easements recorded by the DFG have begun advocating within the upper management of the DFG (and its oversight arm, the California Resources Agency) to encourage the DFG's various regional offices to uphold their responsibilities and record conservation easements, which have been delivered to them. These efforts, however, have been unsuccessful to date. Legislative action may well be required to address the problem in this regard—either by allocating additional funds to the DFG (unlikely in a time of budget cuts), or allowing/requiring the DFG to accept a small portion of endowment funds in exchange for serving as grantee of the conservation easements. Unfortunately, there do not appear to be any immediate prospects for such legislative action at the state level.

Restrictive Covenants and Other Unilateral Structures

Given the continued refusal of the DFG to record conservation easements, the lack of other parties to serve as grantee, and the lack of permanent protection for the land if the easement is not recorded, certain agencies and developers have begun seeking alternate solutions. In particular, the Corps has allowed developers in certain instances to satisfy conditions of the Corps' permits (in some cases with the acquiescence of other agencies) by using a "restrictive covenant" document rather than a conservation easement. Under this structure, the developer or nonprofit that owns the land would execute and record the covenant by itself, without need for another party serving as grantee. The covenant, recorded on title to the property, would provide a permanent restriction on uses allowed in terms similar to those of a conservation easement (e.g., no development, agriculture or other disturbance of natural areas).

The main advantage of using a restrictive covenant lies in its simplicity (no need for a third party to hold an easement as grantee), and in the fact that the broad language of Civil Code § 815 authorizes their use. The main disadvantage from the agencies' point of view is there will be no grantee to enforce compliance with the restrictions. This can be partially mitigated, however, by naming the agencies as third-party beneficiaries to the document, giving them the right but not the obligation to enforce its terms.

Another difficulty from the developer's point of view may be that the terms of its permits may specifically require that conservation easements be granted, rather than restrictive covenants be recorded, which may force the developer to have its permits amended—an often lengthy process. In the future, permit conditions may need to be drafted with sufficient flexibility in the first place to allow various types of conservation structures—conservation easements, restrictive covenants, and/or other appropriate structures yet to be determined.

Conclusion

Structuring and documenting the transfer and protection of conservation property is a convoluted and difficult endeavor, even once the underlying requirements have been agreed to. Some of the problems can be addressed through up-front drafting and negotiation (such as allowing the use of a restrictive covenant rather than a conservation easement). The broader underlying problems of responsibility for enforcement and adequacy of funding, however, may ultimately require high-level negotiation among the agencies involved, State legislative action, or a combination of the two.

Despite the challenges, action at the administrative agency or legislative level would appear necessary to ensure that the legacy of the conservation easement statutes and other habitat planning efforts is continued. Reaching agreement on these issues will have a substantial long-term benefit in preserving conservation property in California.

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