Third-Party Enforcement of Conservation Easements

by Jessica E. Jay

The subject of this article is fully developed, along with specific case-law discussion, supporting citations and footnotes, in the Vermont Law Review article of the same name posted on LTAnet.

Section 1.170A-14(c)(1) of the U.S. Treasury Regulations states (and the Internal Revenue Service has recently reminded all of us) that the holders of donated conservation easements "must have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restriction." Though the Treasury Regulations clarify that easement holders are not required to "set aside funds" for the purpose of easement enforcement, land trusts nonetheless must possess the resources to enforce and defend the conservation easements they hold.[1]

As individual land trusts and the land trust community strive to identify, establish and grow their enforcement resources, a question inevitably arises as to whether third-party enforcement will satisfy the foregoing legal requirement. This question would be framed, for instance, when a land trust lacks the full resources needed to enforce the easement directly but another person, category of persons, or entity stands ready to enforce the easement on the land trust's behalf. Even assuming this would meet the letter of the Treasury requirement (still an open question), then how does a land trust determine whether such a third-party right of conservation easement enforcement exists, is available, or welcome in its state per se, and who is qualified to stand in its shoes to enforce its conservation easement?

The obvious persons, category of persons, and entities eligible to enforce conservation easements on a holder's behalf likely include any of the easement's co-holders, parties to the original easement transaction, and parties identified in the conservation easement deed as having an enforcement right in lieu of, in addition to, or as backup for, the holder's own enforcement right. But who else has the authority or standing to enforce a conservation easement? The answer to this question varies from state to state, and is guided by each state's conservation easement enabling legislation, common law doctrines, case-law and other statutory laws.

The Uniform Conservation Easement Act (UCEA) provides the framework for many states' conservation easement enabling legislation. The drafters of the UCEA believed its adoption by state legislatures would facilitate enforcement of conservation easements in the public interest, and in furtherance of this goal, the drafters provided for an express "third-party right of enforcement" of conservation easements to be created within the language of the easement deed itself, and acknowledged as well a right of enforcement in "a person authorized by other law."

Of the states with conservation easement enabling statutes, about half are entirely silent on the subject of third-party standing to enforce conservation easements, while the other half have adopted the UCEA's provision allowing "a person authorized by other law" to bring an action affecting a conservation easement. If the enforcement right is not expressed within the easement deed itself, the UCEA defers the question of third-party enforcement to each state's statutory or common law. Comment to Section 3 of the UCEA explains by way of example that "a person authorized by other law" includes the

right of attorneys general to enforce conservation easements pursuant to the charitable trust doctrine.[2]

Does your state's enabling legislation, or statutory or common law application of the charitable trust doctrine provide for attorney general enforcement?

A charitable trust is defined as "a fiduciary relationship with respect to property arising as a result of a manifestation of intention to create it," evidenced by the document creating the trust and "subjecting the person who holds the trust property 'to equitable duties to deal with the property for a charitable purpose.'" The existence of at least three components based on the principles of fiduciary duty and property held in trust are necessary for the creation of a charitable trust: the "intention to create a trust, trust property, and a charitable purpose" that benefits the public in general or "a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." The express or implied intent of the trust's creator in creating the charitable trust is of paramount importance to the qualification, protection and perpetuation of that charitable trust.[3]

Because a charitable trust is recognized as a vehicle to hold trust property for the general public's benefit, it typically is enforceable by a state's attorney general, who is empowered to oversee a state's public charities and to act as the general public's representative to oversee gifts to public charities and charitable activities in general. Notwithstanding that the trust property is held for the benefit of the general public, the charitable trust doctrine's grant of enforcement power generally is limited to state attorneys general or to "a person who has a special interest in the enforcement of the charitable trust" and does not extend to potential beneficiaries or individual members of the general public. Although it is called the "charitable trust doctrine," the principle applies to public charities of all types, including trusts, associations or nonprofit corporations.

A simplified (perhaps overly so) analysis of the charitable trust doctrine could yield an argument that the doctrine supports attorney general standing to enforce conservation easements when and if a conservation easement is characterized as property held in trust for the public's benefit, akin to any other property of a charitable trust. For this analogy to be deemed viable by a reviewing court, several parts of the analogy would have to be deemed comparable. First, the land trust holding the conservation easement would have to fit the definition of a public charity or charitable trust. Second, a conservation easement grantor's intent in perpetually protecting his or her property through use of a conservation easement would need to suffice as, or be substituted with, the trust creator's intent to create a charitable trust. Under this analogy, the easement grantor's intent would be honored and protected by the holder land trust and by any other person empowered to enforce the grantor's intent and conservation easement, in the same manner that a charitable trust creator's intent is deemed worthy of enforcement by a state's attorney general.

Application of the charitable trust doctrine varies significantly from state to state because each trust must be interpreted and enforced consistent with that state's common law and statutory construction of the doctrine, as well as the intent of its creator, its own unique creation document, and the facts and circumstances surrounding the trust property. States such as California grant their attorneys general broad authority to oversee

public charities pursuant to the charitable trust doctrine by defining the public charities as "any corporation . . . which has accepted property to be used for a particular charitable [corporate] purpose as distinguished from the general purposes of the corporation."[4]

Massachusetts grants standing not only to its attorney general, but also to additional persons having "special interest" in the performance of a charitable trust, permitting them to partner with the attorney general to enforce the trust, provided that the person's interest is "distinct from [that] of the general public." And Tennessee recently revised its enabling legislation to foreclose third-party enforcement by citizens and to create a limited right for its attorney general to enforce conservation easements when the holder no longer exists and no other third-party right is identified in the easement document itself.[5]

Where application of the charitable trust doctrine as a means of creating or recognizing enforcement in a state's attorney general is less well or not defined, such application will depend upon a variety of factors: your state's specific public charity statutory or common laws involving charitable trust property, the easement grantor's intent, and the property subject to the purported "trust," and the terms of the conservation easement itself. In the absence of specific statutory language or case law relating to applicability of the charitable trust doctrine to conservation easement enforcement, a court might grant an attorney general standing to enforce a conservation easement if such enforcement is shown by the attorney general clearly to be in the public's interest and if the facts and circumstances surrounding the conservation easement, its grantor's intent, and its holder all support the conservation easement being held in charitable trust for the public's benefit.

The attorney general's willingness to enforce conservation easements will be a key factor here and will likely also vary from state to state and region to region. It is notable that when a Wyoming court extended an offer to its state's attorney general to represent the public interest in an enforcement case brought by a citizen, the attorney general declined to be involved on the public's behalf or otherwise.[6] Compelling facts and persuasive legal arguments, public outcry or support for, and little opposition from either the easement holder or the landowner subject to the easement might prove to be the necessary ingredients for a court to determine that a conservation easement is held in trust for the public's benefit and to grant an attorney general the power to enforce that conservation easement absent any other guiding language in your state's enabling legislation or the easement deed itself.

Does your state's enabling legislation, or statutory or common law application of the public trust doctrine provide for attorney general enforcement?

Another potential platform for an attorney general to enforce conservation easements as "a person authorized by other law" is the public trust doctrine. Not to be confused with the charitable trust doctrine, even though property subject to conservation easements is sometimes characterized as being held in the "public's trust," the public trust doctrine is wholly distinct from the charitable trust doctrine. The trust property itself and the standing requirements for the public trust doctrine, among other issues, distinguish it from the charitable trust doctrine. Where the charitable trust doctrine provides standing for the attorney general, and in certain circumstances, for persons with a special interest in enforcing a conservation easement, the public trust doctrine

potentially provides standing for attorneys general, citizens, the general public or any beneficiaries of the "public trust" to enforce conservation easements, provided that the conservation easement at issue covers property defined by the doctrine as "public trust" property.

Broadly stated, the public trust doctrine provides that a state holds "public trust lands, waters and living resources . . . in trust for the benefit of all of the [citizens of the state], and establishes the right of the public to fully enjoy public trust lands . . . for a wide variety of recognized public uses." Because the state holds these certain public lands in trust for its citizens, the state and its attorney general, as its agent, are charged with the affirmative duty "to hold and use the [trust] property for the exclusive benefit of the beneficiary, and where that benefit involves conservation objectives, the government [and its attorney general] must act affirmatively to achieve its realization."[7]

Much has been written about the application of the public trust doctrine to matters of environmental law and the protection of natural resources beyond navigable waters. Nonetheless, expansion of the doctrine remains limited as it relates to the enforcement of conservation easements, even though the public trust doctrine arguably creates standing for both the attorney general and members of the public to enforce conservation easements as third parties, and not just those who have a special interest, or an interest distinct from the general public (as with the charitable trust doctrine), but also citizens, residents or taxpayers. While some courts remain circumspect about expanding standing requirements under the public trust doctrine to apply to the public in general, others are less hesitant.

The Illinois Supreme Court, for example, granted standing to a group of citizens challenging the state's management of the public trust in two parks, even though the court found the citizens to have no special interest in the parks. As discussed hereafter, in addition to providing this broad common-law enforcement right pursuant to the public trust doctrine, Illinois also creates a specific statutory right of enforcement of conservation easements for landowners within 500 feet of conservation easement property.[8] Even so, the extent of the expansion of the doctrine as applied to conservation easement enforcement remains limited, based in part on the unlikely classification of all conservation easement lands as public trust lands to support an interpretation consistent with creating standing to enforce a conservation easement.

And yet, there exists the rare statute that explicitly applies the public trust doctrine to properties protected by conservation easement. In New Hampshire fee simple land and conservation easements purchased through a particular state funding program are declared to be held in public trust by the state.[9] In the rare circumstance that land is held in the public trust due to its waterfront location or public use prior to being subjected to a conservation easement, it will remain so after the imposition of a conservation easement, and therefore continue to be available for enforcement by the public and the attorney general—a result that stems not from the conservation easement itself, but from the land's status as being held in the public trust prior to the conservation easement grant.

These unusual circumstances aside, broad application of the public trust doctrine to create standing in third parties for attorneys general and citizens in enforcement of conservation easements remains unlikely. Much like the application of the charitable trust doctrine to conservation easements, one might surmise that the facts, circumstances, public outcry and legal arguments would have to be significant and persuasive to compel

a court to find a conservation easement property not previously designated as such to be public trust property eligible for third-party enforcement by the attorney general or the public. Notwithstanding what appears to be a fairly limited third-party enforcement right under the public trust doctrine and what may be perceived by the easement holders as uninvited and unwanted third-party enforcement of conservation easements, it is not unreasonable to speculate that members of the general public, including citizens and neighbors, may yet attempt to establish standing pursuant to this doctrine.

Does your state's enabling legislation, or statutory or common law permit citizen or neighbor enforcement of conservation easements?

Examination of state conservation easement enabling statutes and common law suggests that in the vast majority of instances, neither citizens nor neighbors have been given standing to enforce or challenge conservation easements as third parties. With the significant exception of Illinois, state enabling statutes either remain silent as to third-party standing to enforce conservation easements, or adopt the basic UCEA framework. In those states adopting the UCEA framework as enabling legislation, citizens and neighbors likely will not fall into the first three categories of Section 3 of the UCEA as eligible to bring judicial actions to enforce, modify, terminate or otherwise affect conservation easements, or as the fourth category of "persons having a third-party right of enforcement," which are defined by the UCEA as governmental entities or charitable organizations eligible to be the holder of the conservation easement at issue. While the drafters of the UCEA acknowledge that parties to a conservation easement can create a third-party right of enforcement in persons who are not the owners or holders of the easement by incorporating them into the easement as third-party enforcers, the drafters likely intended to limit this enforcement right to use by governmental entities and charitable organizations. The question becomes whether a citizen or neighbor falls into the UCEA category of "a person authorized by other law" to bring such an action.[10]

While the drafters acknowledge in the Comment to Section 3 of the UCEA that the phrase "authorized by other law" may confer upon attorneys general standing to enforce conservation easements through the charitable trust doctrine, and some arguments have been made that the same might be true under limited circumstances pursuant to the public trust doctrine, this same language does not necessarily confer standing to citizens or neighbors seeking the right to enforce conservation easements. The Comment makes no mention of the charitable trust doctrine's provision for enforcement by persons with a special interest in enforcement of the trust, or the public trust doctrine per se or as providing for enforcement rights in persons other than the attorney general, although arguably, certain rights exist for citizens with special interests in charitable trusts, or for citizen-beneficiaries of "public trust" conservation easements.

With several exceptions, few state conservation enabling acts or other statutes relevant to conservation easements shed much light on or even address the question of citizen or neighbor standing to enforce conservation easements. Illinois creates explicit standing for enforcement of conservation easement in persons owning land within 500 feet of a conservation easement property, and when Tennessee's conservation easement enabling statute recently was interpreted to create standing for all its state's residents as beneficiaries to enforce conservation easements within its state, it was promptly amended to define third-party enforcers as (1) an owner of an interest in the real property burdened

by the easement; (2) a holder of the easement; (3) a person having third-party right of enforcement; (4) the attorney general if the holder is no longer in existence and there is no third-party right of enforcement; or (5) a person authorized by other law.[11]

Section 8.1 of the recently revised Restatement (Third) of Property: Servitudes, a widely recognized authority on common law application of conservation easements, provides, consistent with the UCEA, that: "A person who holds the benefit of a servitude under any provision of this Restatement has a legal right to enforce the servitude." The Restatement points out that beneficiaries may be identified expressly or by implication in the transaction that created the servitude and additional enforcement rights may be created by statute. Section 8.5 of the Restatement specifically addresses the enforceability of conservation easements, providing "coercive remedies" and "other relief" intended to support and sustain the purpose of the conservation easement. The Comment to Section 8.5 commences with the rationale for the section, identified as the strong public interest in conservation easements. The statutory note to Section 8.5 makes reference to the UCEA's enforcement provisions, but no mention of the validity of third-party enforcement of conservation easements, and acknowledges that both the UCEA "and most other statutes leave the matter of remedies to the general remedial law of the state" and the language of the easement itself.[12]

Although the parties to a conservation easement rarely, if ever, identify or intend citizens or neighbors to be beneficiaries of the conservation easement (and sometimes drafters go so far as to state there shall be no third party or other beneficiaries to any conservation easements), what would happen if and when the parties to a conservation easement do explicitly identify citizens or neighbors as the beneficiaries of the easement? Would the parties have thereby created a right to enforce the easement in those beneficiaries as well? What if the parties identify citizens or neighbors explicitly as third-party enforcers in the easement document? Would the citizens and neighbors qualify as properly structured into the transaction as "persons with third-party enforcement rights," even if they were not anticipated as such by the UCEA or state's enabling legislation? Would a court recognize citizens or neighbors as beneficiaries with third-party rights of enforcement in reliance on the easement language, or in the absence of easement language, on the charitable trust doctrine, the public trust doctrine, or enabling legislation statutory interpretation? Citizens or neighbors not identified in or by the conservation easement may bolster their right to enforce by espousing a close relationship with and benefit from the protected property, or by proving that the easement in question is a charitable or public trust and that they are persons with a special interest in enforcing the charitable trust, or that they are constituents or beneficiaries of a public trust that includes the easement-encumbered property.

Several citizens and citizen groups have attempted to enforce conservation easements pursuant to the UCEA's "other law" provision included in many states' enabling legislation by using arguments that merge the public benefit of conservation easements and the public interest in seeing conservation easements enforced with a non-federal application of the citizen suit theory. The term "citizen suit" refers to the type of legal action authorized by many federal and state environmental statutes passed in the early 1970s. Such provisions have been effective in ensuring that statutes enacted for the public's and the environment's benefit are enforced when government regulators lack the resources or the willingness to take action, and the same approach has been borrowed

successfully in a few citizens cases brought to enforce conservation easements.[13] Although citizen suits to enforce conservation easements are largely untested in state courts, several reported cases do exist where these arguments were made. (See full article for case discussion.)

It is unsurprising that several courts recently have confronted arguments of citizens and neighbors stating that if conservation easements provide such obvious benefits to the public, why not allow those members of the public who are most interested in protecting them, such as environmentally conscientious citizens or watchful neighbors, the right to enforce them on the public's behalf? Until recently, few such arguments passed muster with courts. The unwritten rule that neighbors lack standing to enforce or challenge conservation easements has been upheld in the several instances in which the issue was litigated, although if combined with a persuasive charitable trust doctrine argument and, in certain specific cases, a public trust doctrine argument, a neighbor's argument might begin to carry more weight in a conservation easement enforcement case. The weight of such argument would be further enhanced if the neighbor could prove she is a person with a special interest in enforcing a conservation easement covering her own property, her neighbor's property, or both, or if she is a constituent or taxpayer of the public trust that includes the conservation-easement-encumbered property. We have yet to see such a confluence of events, facts or arguments, but several cases reveal some success of neighbor attempts to enforce conservation easements against their neighbors. (See full article for case discussion.)

Several general observations grow out of the scant case-law and statutory references to citizen and neighbor standing to enforce conservation easements available for review. First, citizen suits and citizen or neighbor arguments for standing may be more persuasive if the conservation easement at issue is held on the public's behalf and if the conservation easement states expressly that it is established "for the benefit of the general public." Second, standing for citizens to enforce conservation easements is more likely to be granted if the public has a stake in the enforcement of the conservation easement, such as if it is donated in exchange for tax deductions or credits subsidized by the public taxpayer, purchased directly using public funds, or if it allows public access. Finally, citizen suits seem likely to have better odds of success when the state enabling statute is either silent on the issue of standing or contains the broad "person authorized by other law" language that arguably might permit citizens or neighbors to enforce conservation easements, and provided that the same legislation does not specify that an enforcing party be qualified to hold the conservation easement at issue.

If the goal is to discourage suits by citizens or neighbors to enforce conservation easements, one could argue that conservation easements not explicitly held on the public's behalf and granted "for the benefit of the general public," subsidized by tax benefits associated with donating a conservation easement, purchased with private funds, and that prohibit public access, ought not to be considered eligible for enforcement by citizens or neighbors in their own or the public's interest. A state or conservation community responding to a constituency wanting to foreclose citizen or neighbor conservation easement enforcement opportunities would be well advised to take a cue from Tennessee and explore explicitly defining in its state enabling legislation who has a third-party right to enforce conservation easements, whether those rights are pursuant to a charitable or public trust doctrine, and either excluding, or more narrowly defining, the

"person authorized by other law" language of the enabling legislation, if such language exists.

Conclusions about third-party enforcement of conservation easements by your state's attorney general, citizens or neighbors.

It is possible that under certain circumstances, a third-party right to enforce conservation easements when the easement holder is unavailable or unwilling to do so may exist or be recognized for your state's attorney general, citizens or even neighbors. The potential for an attorney general, citizen or neighbor's third-party enforcement right can be determined by 1) carefully reviewing your state's conservation easement enabling legislation to determine if third parties are explicitly or implicitly permitted to enforce conservation easements, and, if so, determining how third parties are defined; 2) researching and understanding the common law or statutory application of the charitable trust and public trust doctrines as empowering the state's attorney general, citizens or neighbors to enforce trusts that may include conservation easements; and 3) for those seeking to either expressly provide for, or in contrast, expressly foreclose third-party rights to enforce conservation easements, looking to the legislation of Illinois, Maine, Mississippi, Massachusetts, Tennessee and California for guidance on how to structure state statutes to either create or foreclose third-party rights of enforcement for attorneys general, citizens or neighbors.

Third-party enforcement may provide a powerful, invaluable opportunity for land trusts to protect the very resources they are charged with preserving perpetually, or may represent an unwanted intrusion into a private process. Better understanding this tool, opportunities for its use or foreclosure of the same, and addressing challenges, criticisms, or ambiguity related thereto in advance of any specific need, use, or perhaps unwanted claim of right may, at the most, provide the land trust community with certain of the enforcement resources it is required to possess, and at the least, prepare it for aspects of conservation easement enforcement likely to confront it in the not too distant future.

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Endnotes

1 Treas. Reg. §1.170A-14(c)(1).

2 Unif. Conservation Easement Act, 12 U.L.A. 163 (1996) [hereinafter UCEA]; UCEA §§3, 3(a)(4), 3 cmt. Although states with enabling legislation generally do not expressly deny nor grant attorneys general third-party standing to enforce conservation easements, several exceptions are worth noting in Mississippi, Illinois and Maine. See Miss. Code Ann. §89-19-7 (Supp. 2004); 765 Ill. Comp. Stat. Ann. 120/4 (West 2001); Me. Rev. Stat. Ann. tit. 33, §478 (West Supp. 1999).

3 Restatement (Second) of Trusts §§348, 375 (1959); (quoting Restatement (Second) of Trusts §348 (1959)). While it is not the purpose of this article to provide a thorough analysis of the charitable trust doctrine's application to conservation easements, it is the purpose of this inquiry to examine whether third parties might use the doctrine as a means to establish standing to enforce conservation easements.

4 Cal. Gov't Code §12581 (West 1992) §12582 (West Supp. 2005).

5 Restatement (Second) of Trusts §§2, 391, 391 cmt. a (1959); see also Mass. Gen. Laws Ann. ch. 12, §8 (West 2000); Weaver v. Wood, 680 N.E.2d 918, 922–23 (Mass. 1997); Tennessee Code Annotated Title 66, Chapter 9, Part 3 §66-9-303, 307.

6 Hicks v. Dowd, No. 2003-0057 (4th Jud. Dist. Wyo. July 2, 2003).

7 The Institutes Of Justinian 2.1.1 (J.B. Moyle, ed., Clarendon Press 5th ed. 1913); Serena M. Williams, Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine? 10 S.C. Envtl. L.J. 23, 37 (2002); Coastal States Org., Inc., Putting The Public Trust Doctrine To Work 3–7 (2d ed. 1997); Edward Berlin et al., Law in Action: The Trust Doctrine, in Law and the Environment 166, 171 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970).

8 Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11, 18 (Ill. 1970); 765 Ill. Comp. Stat. Ann. 120/4(c) (West 2001).

9 N.H. Rev. Stat. Ann. §486–A:13 (2001).

10 UCEA §§1(1), 1(2), 1(3), 1 cmt, 3, 3(a)(4), 3 cmt.

11 765 Ill. Comp. Stat. Ann. 120/4 (West 2001); Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., No. E2003-01982-COA-R3-CV, 2004 WL 419720, at *1 (Tenn. Ct. App. Mar. 8, 2004), appeal denied, (Tenn. Oct. 4, 2004); Tennessee Code Annotated Title 66, Chapter 9, Part 3 §66-9-303, 307.

12 Restatement (Third) of Prop.: Servitudes (2000) §§8.1, 8.1 cmt. a, 8.1 cmt. b, 8.5, 8.5 cmt. a, statutory note.

13 UCEA §3(a)(4); see, e.g., Sierra Club v. Morton, 405 U.S. 727, 733–40 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 678, 686–90 (1973); see, e.g., Allens Creek/Corbetts Glen Pres. Group, Inc. v. Caldera, 88 F. Supp. 2d 77 (W.D.N.Y. 2000).

A Question

Third-party enforcement of conservation easements evokes significant ethical issues that stretch beyond the legality of such enforcement, such as: Should third parties enforce, or be able to enforce, conservation easements held by land trusts?

This ancillary question raises concerns within the land trust community that predictably vary regionally but include: a) whether such enforcement might invite unwelcome government oversight in an ostensibly private process; b) whether enforcement might occur without the land trust's involvement, consent or oversight; c) whether enforcement might contravene the land trust's decision not to enforce, or d) whether enforcement might put the land trust in the unenviable position of defending itself during the enforcement of a conservation easement it holds. The debate over the pros and cons of third-party enforcement will no doubt continue as both the land trust community and law evolve in response to future enforcement challenges.