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Book Review

The Conservation Easement in California. By Thomas S. Barrett and Putnam Livermore. Covelo, California: Trust for Public Land, Island Press, 1983.

by

Joel Cutler

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BOOK REVIEW

THE CONSERVATION EASEMENT IN CALIFORNIA. By Thomas S. Barrett and Putnam Livermore. Covelo, California: Trust for Public Land, Island Press, 1983.

*Reviewed by Joel Cutler**

California's continuing economic growth and the concomitant ever-outward sprawl of its cities have combined to produce a serious threat to the state's farm and open lands. As one of the country's most populous states, California's growth has been fuelled in part by the state's bountiful natural resources.¹ If improperly managed, however, this growth could pose a true threat to the survival of these resources. This danger has prompted Thomas S. Barrett and Putnam Livermore to write *The Conservation Easement in California*,² a timely, concise and informative guide to the use of conservation easement as a conservation tool.

Focusing on the plight of California's natural resources, Barrett and Livermore present both a strong argument for the use of conservation easements as environmental safeguards and a practitioner's guide to their implementation in California. This well researched book is divided into four chapters. The first chapter summarizes the development and the current status of the state's easement legislation. Chapter two discusses pertinent state and federal tax law. Chapter three takes the practitioner step by step through the process of perfecting a conservation easement. The fourth chapter concludes the book by presenting alternative devices that, depending upon the practitioner's particular conserva-

* Staff member, Boston College Environmental Affairs Law Review.

¹ T. BARRETT & P. LIVERMORE, *THE CONSERVATION EASEMENT IN CALIFORNIA* 1 (1983) [hereinafter cited as BARRETT & LIVERMORE].

² *Id.*

tion goals, may be preferable to the easement. After discussing the nature of easements generally and conservation easements in particular, this review examines each of the book's chapters in turn.³

I. CONSERVATION EASEMENTS DEFINED

In general terms, an easement is an "interest in land in possession of one other than the owner which limits or restricts the possessory rights of the owner and is enforceable at law."⁴ Although one may be created in other ways, an easement is often purchased from a landowner.⁵ The existence of the easement is usually documented in a formal agreement between the landowner and the easement holder.⁶ This agreement may entitle the easement holder to use the property in specified ways or obligate the owner to maintain the property in a certain condition.⁷ Such an agreement creates a conservation easement if it limits the power of the landowner to commercially develop the property.⁸ In essence, a conservation easement is "a transfer of development rights not for the purpose of using them elsewhere, but rather for the purpose of not using them at all."⁹ The attachment of a conservation easement to open or farm land thus virtually guarantees that it will remain undeveloped.¹⁰

II. CALIFORNIA LEGISLATION

The common law has historically been hostile to interests in land, such as conservation easements, that sharply reduce the potential uses of real property.¹¹ This stance has been statutorily

³ This review focuses on California's use of conservation easements. For more general discussions of this subject, see Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVTL AFF. L. REV. 513 (1981) [hereinafter cited as Kliman]; Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL AFF. L. REV. 105 (1983) [hereinafter cited as Madden]; Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

⁴ Kliman, *supra* note 3, at 513; see generally R. POWELL, REAL PROPERTY § 405 (1981).

⁵ *Id.*

⁶ Madden, *supra* note 3, at 113.

⁷ *Id.* at 113-18; see also RESTATEMENT OF PROPERTY, §§ 451, 452 (1944).

⁸ BARRETT & LIVERMORE, *supra* note 1, at 4; Madden, *supra* note 3, at 118-22.

⁹ BARRETT & LIVERMORE, *supra* note 1, at 4.

¹⁰ *Id.* Naturally, the easement grantee assumes the responsibility of insuring that the easement conditions are maintained. See *infra* text and notes at notes 33-34.

¹¹ See Madden, *supra* note 3, at 115-16; BARRETT & LIVERMORE, *supra* note 1, at 28.

altered, however, in California where the legislature has expressly endorsed conservation easements as a means to promote state environmental protection.¹² The conservation easement legislation consists primarily of two statutes: the Open Space Easement Act¹³ and the California Conservation Easement Act.¹⁴ Although the Acts differ in scope, they both encourage the use of conservation easements to prevent commercial development of farm and open land.¹⁵

The California legislature was prompted to enact these statutes by the dwindling of the state's farm and open lands caused by the rapid, outward sprawl of its cities and suburbs.¹⁶ Undeveloped and agricultural lands contiguous to expanding population centers became the subject of increased market demand, thus inflating dramatically the lands' market value.¹⁷ Because the California Constitution had required that property tax assessments be based on the highest and best economic use of land, a direct consequence of this value inflation was a corresponding increase in landowners' tax burdens.¹⁸ This tax increase served as a strong incentive to develop commercially open or agricultural land where more financially remunerative uses appeared to be available.¹⁹ This problem was partially remedied in 1966 when the California Constitution was amended to permit the legislature to designate that certain lands be taxed on the basis of their present use value rather than their highest economic use value.²⁰ The problem was further alleviated when the legislature passed the Open Space Easement Act,²¹ qualifying lands for this preferential tax treatment when burdened by a locally approved conservation

¹² See, e.g., The Open Space Easement Act of 1974, Cal. Gov't. Code §§ 51070-51097 (West 1983).

¹³ *Id.*

¹⁴ Cal. Civ. Code §§ 815-816 (West 1982). Other California statutes geared toward protecting farm and open land through the use of negative restrictions upon the land have been developed over the years as well. See, e.g., Land Conservation Act of 1965, Cal. Gov't. Code §§ 51200-51295 (West 1983) (contractual relationship created to compensate fee holder for not developing land); see generally BARRETT & LIVERMORE, *supra* note 1, at 34-35.

¹⁵ See *infra* text and notes at notes 23-46.

¹⁶ BARRETT & LIVERMORE, *supra* note 1, at 1-8.

¹⁷ *Id.* at 9-10.

¹⁸ *Id.* at 14-15, 36-37.

¹⁹ *Id.* at 9-10.

²⁰ CAL. CONST. ART. XIII, § 8; BARRETT & LIVERMORE, *supra* note 1, at 36-37.

²¹ Cal. Gov't. Code §§ 51070-51077 (West 1983).

easement, and the California Conservation Easement Act,²² authorizing private conservation groups to perfect conservation easements.

A. *The Open Space Easement Act of 1974*

The Open Space Easement Act²³ provides that a local government or a qualified non-profit conservation organization²⁴ may obtain a conservation easement on farm or open land²⁵ and thereby entitle the landowner to use related, rather than market value, property tax assessments.²⁶ To qualify under the Act, an easement must be granted for at least ten years,²⁷ run with the land,²⁸ and be approved by the local governing body in consultation with its planning commission as being both in the public interest and consistent with a locally adopted open space plan.²⁹ If these requirements are met, the city or county may not issue building permits for any structure impermissible under the easement,³⁰ and the easement holder, whether government entity or private interest, must seek to enjoin any site activity in violation of the easement.³¹ If the city eschews its obligation to enforce, a cause of action is conferred on any local resident or landowner.³² If the private enforcement action is successful, the plaintiff may recoup his costs of suit, including attorney's fees.³³

B. *The California Conservation Easement Act*

Due to the historical hostility of the common law to negative easements,³⁴ the validity of conservation easements created out-

²² Cal. Civ. Code at §§ 815-816 (West 1982).

²³ Cal. Gov't. Code §§ 51070-51097 (West 1983).

²⁴ *Id.* at § 51075(d) & (f) (West 1983).

²⁵ *Id.* at § 51075(a) (West 1983).

²⁶ *Id.* at § 51096 (West 1983) (lands subject to open space easements are thus declared to be "enforceably restricted" under CAL. CONST. ART. XIII, § 8 and are entitled to preferential tax treatment). *See also* BARRETT & LIVERMORE, *supra* note 1, at 26-27.

²⁷ Cal. Gov't. Code § 51081 (West 1983).

²⁸ *Id.* at § 51075(d) (West 1983).

²⁹ *Id.* at §§ 51083-51085 (West 1983).

³⁰ *Id.* at § 51086 (West 1983).

³¹ *Id.* at § 51086(a) (West 1983) (county or city as enforcement body), § 51086(b) (private non-profit organization).

³² *Id.* at § 51086(a) (West 1983).

³³ *Id.* at § 51086(c) (West 1983).

³⁴ *See supra* note 11.

side the Open Space Easement Act was problematic.³⁵ As a result, landowners and conservation organizations were often reluctant to use conservation easements where local governmental approval was impractical or unavailable.³⁶ In 1979, the legislature remedied this problem with the passage of the California Conservation Easement Act.³⁷ The Act establishes that: (1) a conservation easement is an enforceable property interest notwithstanding the lack of local governmental approval;³⁸ (2) it is freely alienable among qualified holders to effect conservation purposes;³⁹ (3) it is to be deemed to run with the land and thus bind a landowner's successor-in-interest;⁴⁰ (4) it is enforceable notwithstanding lack of privity of contract, lack of any benefit to particular land or absence of a deed provision providing that it is to run with the land;⁴¹ and (5) it is enforceable by injunction.⁴² Thus clothing the conservation easement's conceptual skeleton with substantial legal muscle, the Act effectively removed the common law obstacles to its enforcement.

To ensure that conservation easements would be obtained only by organizations genuinely interested in conservation, the legislature stipulated that an easement holder must be a federally tax-exempt non-profit organization⁴³ whose "primary purpose [is the] preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use."⁴⁴ This important legislation thus clears the way for "nonprofit organizations to be as active in the conservation easement field as their energy and resources permit."⁴⁵ Qualified

³⁵ BARRETT & LIVERMORE, *supra* note 1, at 27-28.

³⁶ *Id.*

³⁷ Cal. Civ. Code §§ 815-816 (West 1982).

³⁸ *Id.* at §§ 815.1, 815.2(a) (West 1982).

³⁹ *Id.* at § 815.2(a) (West 1982).

⁴⁰ *Id.* at § 815.1 (West 1982).

⁴¹ *Id.* at § 815.7(a) (West 1982).

⁴² *Id.* at § 815.7 (West 1982).

⁴³ *Id.* at §§ 815.3(a) & (b) (West 1982). Thus, any non-profit organizations qualifying for tax-exempt status under the Internal Revenue Code, 26 U.S.C. 501(c)(3) (1982), that have stated a "primary purpose" of carrying on conservation activities, are qualified to hold conservation easements. Cal. Civ. Code § 815.3(a). Moreover, state and local governments are qualified holders of conservation easements so long as they are authorized to hold real property titles and the easement is voluntarily conveyed. *Id.* at § 815.3(b).

⁴⁴ Cal. Civ. Code § 815.3(a) (West 1982).

⁴⁵ BARRETT & LIVERMORE, *supra* note 1, at 19; see also Fenner, Randee, Gorin, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039 (1980) (description of, and proposals for use of, land trusts).

private organizations are currently capable of gathering a significant number of conservation easements in their attempts to preserve California's scenic and agricultural landscapes.⁴⁶

III. TAX CONSIDERATIONS IN THE DONATION OF CONSERVATION EASEMENTS

Pertinent California legislation does not complete the conservation easement picture in the state. Three important tax related developments must also be noted. First, in 1978, the California electorate passed Proposition 13, which reduced and placed a ceiling on state tax rates. The referendum thereby significantly lessened the burden of property taxation and the attractiveness to landowners of property tax relief programs for land conservation.⁴⁷ The referendum also reduced the funding which local governments had to devote to conservation efforts. The efforts of private conservation organizations, charities, and trusts under the easement acts thus became much more significant. Second, in 1980, Congress adopted a federal income tax deduction for the donation of a qualified conservation easement.⁴⁸ Third, in 1982, California adopted a similar tax deduction to its own internal revenue code.⁴⁹ Since the enactment of the federal income tax deduction impacts the use of conservation easements the most strongly of these three developments, the federal tax relief is given especially careful consideration by Barrett and Livermore.

As a general proposition, gifts of partial fee interests are non-deductible under the Federal Internal Revenue Code (the "Code").⁵⁰ Certain gifts of conservation easements, however, are an exception to this rule.⁵¹ In order to qualify under the Code, the contribution must be "(A) of a qualified real property interest, (B) to a qualified organization, [and] (C) exclusively for conservation purposes."⁵² Section 170(h)(2) of the Code defines "qualified real property interest."⁵³ Section 170(h)(3) states that only a govern-

⁴⁶ BARRETT & LIVERMORE, *supra* note 1, at 19-20.

⁴⁷ CAL. CONST. art. XIII A (June 6, 1978); *see* BARRETT & LIVERMORE, *supra* note 1, at 19-20, 77-78.

⁴⁸ I.R.C. §§ 170(f)(3)(B), § 170(h) (1982).

⁴⁹ Cal. Rev. & Tax Code §§ 17214.2, 17214.7 (individuals as donors); § 24357.2, 24357.7 (banks and corporations as donors).

⁵⁰ I.R.C. § 170(f)(c)(A) (1982).

⁵¹ *Id.* at § 170(f)(3)(B)(iii) (1982).

⁵² *Id.* at § 170(h)(1)(A), (B), & (C) (1982).

⁵³ I.R.C. § 170(h)(2) defines "qualified real property interest" as any of the following interests in real property:

ment, or a publicly supported charity⁵⁴ with the "commitment and the resources"⁵⁵ to enforce such an interest, is a "qualified organization," and section 170(h)(4)(A) defines "conservation purpose."⁵⁶ Unfortunately, the Code and the regulations are somewhat vague as to the precise nature of a qualifying "conservation purpose." By discussing the policy considerations underlying the deduction, Barrett and Livermore provide a clearer definition of this term and thereby render valuable guidance as to the scope of this deduction.⁵⁷ The authors also explain how the value of the donated easement should be assessed to determine the size of the applicable deduction, as well as other important considerations in obtaining the deduction.⁵⁸ In this chapter, the authors thus walk the reader through the steps necessary to obtain this deduction.

In their explanation of the federal tax deduction, Barrett and Livermore point out that California's easement legislation does not neatly mesh with the federal legislation.⁵⁹ As noted by the authors, an example of this inconsistency is the classification of qualifying organizations under California law and under the Internal Revenue Code.⁶⁰ In some instances, federal law defines

- (A) the entire interest of the donor other than a qualified mineral interest;
- (B) a remainder interest; and
- (C) a restriction (granted in perpetuity) on the use which may be made of the real property.

⁵⁴ *Id.* at § 170(h)(3) (1982).

⁵⁵ S. Rep. No. 1007, 96th Cong. 2d Sess. 13 (1980). See BARRETT & LIVERMORE, *supra* note 1, at 49.

⁵⁶ I.R.C. § 170(h)(4) provides:

- (4) Conservation purpose defined
 - (A) In general

For purposes of this subsection, the term "conservation purpose" means

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland and forest land) where such preservation is —
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (iv) the preservation of an historically important land area or a certified historic structure.

⁵⁷ BARRETT & LIVERMORE, *supra* note 1, at 52-58.

⁵⁸ *Id.* at 58-68 (discussing topics such as condemnation, abandonment and perpetuity).

⁵⁹ *Id.* at 63-66.

⁶⁰ See *supra* text and notes at notes 36-49.

qualifying organizations more narrowly; in other instances, the converse is true.⁶¹ For example, under the Conservation Easement Act, *any* non-profit federally tax exempt organization⁶² whose "primary purpose" is land preservation may hold a conservation easement.⁶³ Under federal tax law, however, *public* charities are the only non-governmental conservation organizations permitted to receive deductible donations.⁶⁴ Conservation organizations supported by private donations, who may qualify under California law, are thus not covered by the federal approach which is more restrictive in this regard.⁶⁵ The federal approach, however, is more expansive in other respects. For example, in order to meet the federal requirements, an organization need not have an express conservation purpose stated in its charter;⁶⁶ as long as the recipient organization is publicly supported, the deduction for a conservation easement donation is allowed, regardless of the organization's stated purpose.⁶⁷ Under both the Open Space Easement Act and the Conservation Easement Act, however, a conservation purpose must be stated in the charter to qualify the organization under the acts.⁶⁸ Although Barrett and Livermore note that conflicts such as these arise between the California and federal laws, they also stress that careful drafting can solve such problems.⁶⁹ They emphasize that these laws present "no unavoidable conflict."⁷⁰

IV. THE DRAFTING PROCESS AND ALTERNATIVE CONSERVATION TOOLS

The final two chapters describe the drafting process and alternative conservation tools available to the practitioner. Straightforward in approach, the drafting chapter emphasizes the need for careful drafting of the easement instrument. The authors stress that special care should be given to the drafting of the

⁶¹ BARRETT & LIVERMORE, *supra* note 1, at 63-66.

⁶² I.R.C. § 501(c)(3) (1982) (tax exempt organizations).

⁶³ Cal. Civ. Code § 815.3 (West 1982).

⁶⁴ I.R.C. § 170(h)(3) (1982).

⁶⁵ *Id.* See BARRETT & LIVERMORE, *supra* note 1, at 63-64.

⁶⁶ I.R.C. §§ 501(c)(3), 170(h)(3) (1982).

⁶⁷ *Id.* at § 170(h)(3) (1982). The contribution, however, must still be made solely for conservation purposes. *Id.* at § 170(h)(5) (1982).

⁶⁸ Cal. Gov't. Code § 51075(f) (West 1983); Cal. Civ. Code § 815.3 (West 1982).

⁶⁹ BARRETT & LIVERMORE, *supra* note 1, at 64.

⁷⁰ *Id.*

clause stating the intended purpose of the easement because this clause necessarily will be the touchstone for resolving disputes over the permissibility of future uses of the property.⁷¹ According to Barrett and Livermore, the importance of such seemingly simplistic matters cannot be over-emphasized because only careful drafting can ensure the continued legal vitality of the easement. The final chapter on alternative real property conservation methods stresses that an understanding of such techniques is essential to "encourage a flexible and creative approach" to land conservation.⁷² Presenting a catalog of these alternative measures with a brief description of their characteristics, this chapter offers the attorney helpful guidance to the proper selection of real property conservation techniques.

V. CONCLUSION

During the past several decades, California's farm and open lands increasingly have been threatened with commercial development due to the continuing outward sprawl of the state's cities. Hoping to encourage private landowners to help resolve this problem, the legislature has enacted legislation establishing the legal validity of conservation easements and granting preferential treatment to certain landowners who confer such easements. This state legislation, combined with federal tax legislation allowing a deduction for certain charitable donations of conservation easements, has greatly enhanced the utility of conservation easements as environmental protection tools. A landowner sympathetic to the conservation movement now has an economic, as well as an environmental, rationale for transferring his land development rights in the form of a conservation easement. Realizing this, conservation organizations can now, for the first time, "make a persuasive business-minded case for perpetual land protection."⁷³

These legislatively induced changes are certain to ensure increasingly widespread use of this valuable conservation tool. Analyzing the nature and drafting of conservation easements,

⁷¹ *Id.* at 85. This statement should demonstrate a general charitable motive for conservation of the property in question. Moreover, any other details must be clearly delineated. *Id.*

⁷² *Id.* at 95. Included in this chapter are discussions of trusts, sale and lease back agreements, restrictive covenants and other real property law techniques available to preservation oriented land holders. *Id.* at 95-120.

⁷³ *Id.* at 19.

the pertinent California and federal legislation, and alternative real property conservation tools, *The Conservation Easement in California* will likely play an important role in the proliferation of conservation easements. The book is a comprehensive guide to the use of conservation easements in California. Considering that open and farm lands are threatened with commercial development in many other states, the guidelines articulated in this book deserve thoughtful consideration by persons in other states seeking means to conserve their own state's dwindling natural resources. While the book is a well-presented study demonstrating an important method of preserving California's legislative developments, it nonetheless should be of interest to attorneys and conservationists in other states. The book's analysis of the California legislation could serve as a useful guide for studies of this sort in states other than California.