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Conservation Easements for Green Urban Spaces

*Matthew Olhausen**

Many California cities are struggling to keep up with the state's high demand for new housing, and the resulting rush to build has resulted in a decreasing green space per household. As development pressures increase and the cost of land continues to rise, cities should consider new ways to preserve and create urban parks. In addition to traditional land use tools, conservation easements can provide cities with a solution to create urban parks in urban areas that lack green space.¹ Conservation easements are incredibly flexible and protect public use of land perpetually, which insulates community parks from changing political winds. To effectuate this, cities may be able to avoid the high cost of land acquisition in up-and-coming neighborhoods by working with private developers, ensuring that residents will have convenient access to city parks, and providing residents with higher quality of life. Part I briefly chronicles the historical development of city parks and discusses the importance of creating new urban green spaces, even as California faces a housing crisis. Part II outlines the fundamental requirements of conservation easements under federal and state law. Part III explores how conservation easements might be used to create urban parks—focusing in large part on how Emerald Park, which was created when a private developer donated a conservation easement to the San Francisco Parks Alliance.

* Matthew Olhausen, UC Hastings College of the Law, Class of 2018. Thank you to William Hutton and Misti Schmidt for sharing their vast knowledge of conservation easements and for helping me understand the intricacies of the Internal Revenue Code. Thank you to Alyxandra Vernon for her feedback and continued support while I wrote this paper during the first weeks of my summer clerkship. Thank you to Dave Owen and David Takacs for fueling my passion for environmental law. Most of all, thank you to my mother and father for inspiring me every day.

1. Importantly, this paper is potentially useful for only donative conservation easements, for which specific requirements are elaborated in Section 170(h) of the Internal Revenue Code. This paper is mostly irrelevant to conservation easements that are exacted through the development process, as mitigation or in settlement of litigation. Since these easements are not donated, a tax deduction cannot be claimed.

I. Urban Revitalization: The Importance of Green Space

How Urban Parks Are Created Under Traditional Land Use Models

In 1857, the New York Legislature used its eminent domain power to acquire entire neighborhoods to establish New York's Central Park.² Not to be outdone, San Francisco pursued a great park of its own—designed by the same famous landscape architect, Frederick Olmstead. In 1866, the California Legislature passed the “Outside Lands Act.” This conveyed all land west of Divisadero Street to the city and ultimately created Golden Gate Park.³ At 1,017 acres, Golden Gate Park is actually twenty percent larger than the 843-acre Central Park in New York.⁴ Large tracts of sparsely inhabited land close to urban centers are increasingly rare. Further, such sweeping legislation is no longer a viable option because of the population density of modern cities and the subsequent problems inherent in displacing entire neighborhoods or industries.

Instead, most cities now set aside space for parks by using comprehensive planning and imposing development restrictions through

2. Ashleigh G. Morris, *Conservation Easements and Urban Parks: From Private to Public Use*, 51 NAT. RES. J. 357, 363 (2011) (citing TRUST FOR PUBLIC LAND, MEASURING THE ECONOMIC VALUE OF A CITY PARK SYSTEM (2009), <https://perma.cc/XSP2-9WFH>) ((citing Elizabeth Blackmar & Roy Rosenzweig, *The Park and the People: Central Park and Its Publics: 1850-1910*, in BUDAPEST AND NEW YORK: STUDIES IN METROPOLITAN TRANSFORMATION, 1870-1930, 108, 111–13 (Thomas Bender et al. eds., 1994))). Modernly, Central Park's 843-acres are managed by the Central Park Conservancy (CPC). This private nonprofit group was founded in 1980 to manage the park under a contract with the New York City Department of Parks & Recreation. The CPC's annual fee is based on a formula that requires the CPC to raise private funds that support approximately eighty-five percent of the park's \$27 million annual operating budget. *Id.*

3. Arnold Woods, *The Battle for the Outside Lands*, S.F. W. HIST. (Newsl. of W. Neighborhoods Project, San Francisco, CA.), Jan.–Mar. 2016, at 5.

4. GARY KAMIYA, COOL GREY CITY OF LOVE 206 (2013). What is the greatest park? “In one crucial respect, Golden Gate Park is inferior to certain other great city parks. New York's Central Park, London's St. James's Park, and Paris's Luxembourg Gardens all offer a sublime contrast between city and nature . . . The fact that you can look up and see the Dakota Apartments through the branches of elm trees deepens the drama of Central Park. You never entirely escape the city, and that urban presence illuminates the park . . . But Golden Gate Park's weakness is also its strength. For it possesses a quality none of the above mentioned parks do . . . it feels wild. There are places in it so hidden away and hard to find that few people have ever set foot in them.” *Id.*

zoning requirements. Zoning, the process of systematically dividing a city into districts with varying building and use regulations, was pioneered in Frankfurt, Germany in 1891.⁵ After the turn of the century, New York City introduced zoning to the United States with its 1916 City Ordinance.⁶ Zoning rapidly spread west, helped along by Congress during the Hoover administration, in which the Standard Zoning Enabling Act was passed to assist states in drafting zoning regulations. By 1930, thirty-five states passed zoning enabling acts modeled after the Standard Zoning Enabling Act.⁷ This new era of zoning posed unique legal questions. State courts queried that zoning fell outside the states' traditional police powers and thereby violated Due Process. This prompted the Supreme Court to conclusively rule in the seminal case *Village of Euclid v. Amber Realty*, that zoning was generally consistent with the Fourteenth Amendment.⁸ Now, zoning and comprehensive planning serve as the bedrocks of urban planning, and cities look to these tools to create livable urban environments.

While zoning restrictions are often easy to enact, they are subject to change with the political winds. In May 2016, California Governor Jerry Brown proposed sweeping statewide legislation that provided \$400 million in affordable housing subsidies and allowed developers to bypass local regulatory approvals "as of right."⁹ Ultimately, Governor Brown's 2010 plan to reshape California's housing landscape failed to secure legislative approval.¹⁰ In September 2017, Governor Brown signed fifteen housing bills that aim at addressing California's housing affordability crisis. Among them, Senate Bill 35 bypasses local planning processes and forces cities that have failed to keep pace with state home-building targets to approve housing

5. Thomas H. Logan, *The Americanization of German Zoning*, 42 J. AM. INST. PLANNERS 377, 379–80 (1976).

6. David W. Dunlap, *Zoning Arrived 100 Years Ago. It Changed New York City Forever*, N.Y. TIMES (July 25, 2016), <https://perma.cc/NN6D-HQ7U>.

7. Anon, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1434–35 (1978).

8. *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

9. Roland Li, *So Long, NIMBYs? Gov. Brown's Housing Proposal Could Mean Sweeping Bay Area Changes*, S.F. BUS. TIMES (May 17, 2016), <https://perma.cc/M6ME-N569>.

10. Jim Miller & Anshu Siripurapu, *Affordable Housing Proposal 'Dead' For Year, Assembly Leader Says*, THE SACRAMENTO BEE (Aug. 18, 2016), <https://perma.cc/QKT6-GBVJ>.

projects that comply with existing zoning.¹¹ Local governments do not benefit from any constitutional separation of powers; because local authority is derived from the state, the state government can unilaterally impose development requirements. Additionally, even at the local level, a majority vote by a city council is generally all that is needed to alter a zoning ordinance and re-designate an existing park for development. Conservation easements, unlike zoning, present a unique opportunity to control development and ensure that restrictions remain perpetually in place, thus preserving public parks and other urban green spaces.

Housing Trends: California's Problem

Rising populations and increasing economic growth creates pressure to develop land. Both California's economic and population growths have outpaced other states.¹² Thus, housing in California has long been more expensive compared with other states. Beginning around 1970, the gap between home prices in California and the rest of the country began widening. Between 1970 and 1980, California's home prices rose from 30% to more than 80% above U.S. levels.¹³ Today, the average California home costs \$459,000, which is about two-and-a-half times the average national home price.¹⁴ Additionally, Californians pay roughly \$1,240 in rent per month—50% higher than the rest of the country.¹⁵ However, construction of new homes has seriously lagged behind demand. For example, between 2005 and 2015, permits were filed for 21.5 units of housing for every 100 new

11. Liam Dillon, *Gov. Brown Just Signed 15 Housing Bills. Here's How They're Supposed to Help the Affordability Crisis*, L.A. TIMES (Sept. 29, 2017), <https://perma.cc/SW7R-EXQB>.

12. Over the 20th century, California accounted for one-sixth of population growth in the United States. See FRANK HOBBS & NICOLE STOOPS, *Demographic Trends In the 20th Century*, CENSUS 2000 SPECIAL REPS.-U.S. CENSUS BUREAU 9 (Nov. 2002), <https://perma.cc/BA3W-M438>; see also Reuters, *California Passes France as World's Sixth Largest Economy*, FORTUNE MAG. (June 17, 2016), <https://perma.cc/H5JS-MY2E> (stating that in 2016 California surpassed France as the world's sixth largest economy. "The most populous U.S. state has outpaced the rest of the country on job growth. . . . Gross state product was \$2.46 trillion in 2015, with 4.1% of growth in real terms, it added."); Payne, *10 States With the Fastest Job Growth in 2016*, KIPLINGER (2016), <https://perma.cc/CV3E-SK33> (stating that in 2016, California had the tenth fastest job growth among all states).

13. MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., CALIFORNIA'S HOUSING COSTS: CAUSES AND CONSEQUENCES (2015), <https://perma.cc/E3MX-PWLT>.

14. *Id.*

15. *Id.*

residents of the state.¹⁶ In sum, housing in California is incredibly expensive and in dire need of additional stock. Californians are finding home ownership increasingly unattainable, with many middle and lower income earners being priced out of the state entirely.¹⁷ As California turns to higher density, urban housing to solve the current housing crisis, city parks become increasingly valuable to residents who do not own private yards or have convenient access to public open space.

The general lack of housing in California is further compounded by gentrification trends in certain metropolitan centers. During the 2000s, the population of suburbs in the 100 largest U.S. metropolitan areas grew by fourteen percent—a rate almost tripling that of corresponding central cities.¹⁸ It is not surprising that suburban growth outpaces urban population growth, given the comparative availability and cost of developable land. However, population growth alone does not tell the entire story. America is also experiencing a “back to the city” movement. In California particularly, the lack of housing capacity has spurred new development in traditionally lower income neighborhoods of central cities. Consider the revitalization of downtown Los Angeles, San Diego’s Barrio Logan, or San Francisco’s Hayes Valley. Given its relatively tiny size of “forty-nine square miles surrounded by reality,” San Francisco has become a ground zero for urban infill. In December 2015, the University of California, Berkeley’s Urban Displacement Project released a report detailing the scale of displacement in the city. Its maps show that huge swaths of San Francisco are now out of reach for median-income residents.¹⁹ In sum, California’s major cities are faced with ever-increasing pressure to provide housing—particularly high-density housing.

16. Elijah Chiland, *Here’s How Serious California’s Housing Shortage Has Gotten*, L.A. TIMES (Mar. 4, 2015), <https://perma.cc/E8NT-U4XS>. Also, the studies by Beacon Economics found that, “in 2014, California ranked a miserable 49th in homeownership rates among states, with less than 54 percent of homes occupied by their owner. The state also finished dead last in overall affordability.” *Id.*

17. NEXT 10, EMPLOYMENT BY INCOME: A COMPARATIVE ANALYSIS (2016), <https://perma.cc/X86E-LNWX>.

18. William H. Frey, *Population Growth In Metro America Since 1980: Putting the Volatile 2000s In Perspective*, BROOKINGS INST. METROPOLITAN POL’Y PROGRAM (2012), <https://perma.cc/72N9-RZK5>.

19. U.C. URBAN DISPLACEMENT PROJECT, EXECUTIVE SUMMARY 2 (2016), <https://perma.cc/92YQ-AXH8> (Regionally, the Bay Area has experienced a net gain in 94,408 low-income households between 2000 and 2013. However, a concurrent loss of almost 106,000 naturally occurring affordable housing units has occurred over the same period of time—calculated as units where low-income people pay 30% or less of their income on rent.).

When cities run out of room to grow out, growing up becomes a necessity. San Francisco is constrained by water on three sides. Other major cities like Sacramento and Los Angeles have already experienced decades of rampant outward growth. Since 1950, Los Angeles has grown more than any major metropolitan region in the high-income world except for Tokyo.²⁰ But expanding outwards has limitations. Following the 2010 Census, the U.S. Census Bureau released a report showing that the nation's four most densely populated urbanized areas are all in California—Los Angeles was America's densest city, with New York City coming in fifth.²¹ Cities in California sustain dense populations over very large areas, which leaves little room for new growth in well-established residential neighborhoods.²² As a result, newer, high-density housing growth is occurring in historically industrial and commercial districts. Of the twenty high-rises currently under construction in San Francisco, sixteen are located to the south of Market Street (SOMA), a historically commercial and industrial area.²³ Looking at only residential development in San Francisco—either planned or under construction—the vast majority of new construction is occurring in SOMA.²⁴ Significantly, SOMA and the Tenderloin neighborhoods—which comprise most of Supervisorial District 6—also have the smallest and fewest parks of any district in San Francisco.²⁵ As high-density urban infill reclaims commercial and downtown areas of California cities, local governments are faced with a critical challenge:

20. Wendell Cox, *The Evolving Urban Form: Los Angeles*, NEW GEOLOGY (Aug. 8, 2011), <https://perma.cc/H7CC-UFS2>.

21. Tom Fudge, *For Population Density Think LA, Not New York*, KPBS (Apr. 9, 2012), <https://perma.cc/3A8H-5KUM>. These census figures come from analysis of the 2010 numbers, and they do not tell the entire story: "Knowing the population of an urbanized area depends on where you define its boundaries, and east-coast inner cities tend to be more dense than what's found in the west." *Id.*

22. Josh Stevens, *Parsing California's Density Bombshell In 2010 Census Data*, CAL. PLAN. & DEV. REP. (Mar. 29, 2012), <https://perma.cc/7CUG-5FGR>.

23. Adam Brinklow, *Mapping the 20 High-Rise Towers Under Construction In San Francisco*, CURBED S.F. (Apr. 27, 2017), <https://perma.cc/P9ER-FUR8>

24. See S.F. BUS. ASS'N, RESIDENTIAL DEVELOPMENT PIPELINE MAP (2016), <https://perma.cc/9ZD9-UH9T>.

25. Joshua Sabatini, *SF Looks to Buy New South of Market Half-Acre Site for \$10 Million*, S.F. EXAMINER (July 6, 2016), <https://perma.cc/WM2M-X67Z> (Supervisor Jane Kim in 2016: "District 6 has the smallest and fewest parks in The City. Yes, we need more housing but in order to plan and build more complete neighborhoods we must plan for open space and recreation as well.").

transforming concrete jungles into livable spaces and balancing quality of life with housing demands.

A city can use its power of eminent domain to convert private property to a public use to create new parks. However, to do so, the Fifth Amendment of the U.S. Constitution requires that the private property owner receive “just compensation” from the government.²⁶ Both case law interpreting the Fifth Amendment and California statute require cities to pay fair market value.²⁷ Given the aforementioned high cost of real estate in California’s major cities, paying fair market value can be prohibitively expensive for local governments. For example, the City of San Francisco is currently in the process of spending \$10.1 million to purchase low-rise commercial space in the park-poor SOMA neighborhood and create a half-acre public park.²⁸ The Recreation and Park Commission’s Open Space Acquisition Fund receives an estimated \$2.6 million each fiscal year from property tax revenues to fund such purchases.²⁹ However, the \$10 million only accounts for the cost of acquisition; the price does not include the cost of tearing down existing structures and building a park. Los Angeles’s revitalized downtown district is experiencing its largest construction boom since the 1920s, which has driven up the cost of acquiring potential park space.³⁰ As the city’s downtown residential population increases, Los Angeles only provides one city park for every 10,000 children.³¹ In sum, purchasing land and creating new park space can be a prohibitively expensive endeavor for major California cities.

The conservation easement is an alternative to eminent domain, and can provide public green spaces. Conservation easements allow private

26. U.S. CONST. amend. V (The Just Compensation Clause provides: “nor shall private property be taken for public use, without just compensation.”).

27. CAL. CODE OF CIV. PROC. § 1263.320(a) (2017). The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

28. Joshua Sabatini, *supra* note 25.

29. *Id.*

30. Andrew Khouri, *Downtown LA Hasn't See This Much Construction Since the 1920's*, L.A. TIMES (Jan. 8. 2017), <https://perma.cc/747S-NPKN>.

31. Billi Gordon, *Why We Need More Green Space, Now*, L.A. TIMES (Nov. 13, 2015), <https://perma.cc/MY9H-6Q8M>.

developers to secure valuable tax benefits in exchange for leaving a portion of a parcel undeveloped and providing the public with a right of entry.

If California is Facing a Housing Crisis, Then Why Create More City Parks?

Cities often face a difficult decision in choosing between open spaces and housing infill. For every available city parcel that is dedicated to open space, less land is available for constructing new, higher density housing. The limited supply of available land close to urban cores creates pressure on both cities and developers to do away with green spaces in favor of increased housing. A conservation easement is perhaps an even more extreme commitment to public green spaces than a city park; a conservation easement must be perpetual under California law³² and eligible to qualify for a federal tax break. Therefore, some might argue against acquiring public green space as a matter of public policy amid California's housing crunch. However, parks are critical to any thriving urban center because they make cities more livable.

In addition to providing individuals with access to open space, city parks provide numerous recreational facilities like walking and biking trails, basketball courts, playgrounds, or soccer fields. Parks also provide several communal benefits to the city as a whole. First, parks consistently have shown the ability to increase neighboring property values.³³ A survey by the National Association of Homebuilders found that new homebuyers value trails and natural areas above any other amenity, and that adjacent parks often increase a home's value by ten to twenty percent.³⁴ In a report detailing the economic benefits of parks in San Francisco, the San Francisco Parks Alliance and Trust for Public Land found that property sales values in 2013 increased by \$122.5 million for properties located within 500 feet of a

32. However, provisions are available for terminating a conservation easement. See CAL. CIV. CODE § 815.2(b) ("A conservation easement shall be perpetual in duration."). Compare California to other states that allow for conservation easements that are only temporary in nature.

33. Ashleigh G. Morris, *Conservation Easements and Urban Parks: From Private to Public Use*, 51 NAT. RES. J. 351 (2011) (citing TRUST FOR PUBLIC LAND, MEASURING THE ECONOMIC VALUE OF A CITY PARK SYSTEM (2009), <https://perma.cc/MN6D-SSAZ>).

34. Rose Quint, *What Home Buyers Really Want*, NAT'L ASS'N OF HOMEBUILDERS SURVEY (2013) (Based on the 2012 study, three community features would seriously influence the purchase decision of at least half of all buyers: walking/jogging trails (sixty percent), a park area (fifty-four percent), and an outdoor swimming pool (fifty percent)).

park.³⁵ Second, parks become key marketing tools for cities to attract tourists and help shape a city's identity. Consider data from the San Diego Convention and Visitors Bureau and the California Travel and Tourism Commission, which found that San Diego's collective benefit from park-based tourism was over \$40 million in 2006.³⁶ In 2013, San Francisco businesses benefited from \$431.1 million in park-related tourism, which generated \$46.9 million in local tax revenue.³⁷ Third, city parks and recreational amenities influence corporations when choosing where to locate new facilities.³⁸ Suburban office parks and corporate campuses "look increasingly like dinosaurs," as corporate America downsizes and chases a younger millennial workforce back into city centers.³⁹ In the last U.S. census, sixty-four percent of college-educated twenty-five to thirty-four-year-olds said they only looked for a job "after they chose the city where they wanted to live."⁴⁰ In competing for the best workforce, corporations are forced to adapt to worker preferences, and city parks are highly valued by Millennials.⁴¹

35. PETER HARNIK, *THE ECONOMIC BENEFITS OF SAN FRANCISCO'S PARK AND RECREATION SYSTEM* 5 (2014), <https://perma.cc/2B4S-2K3K>.

36. PETER HARNIK & BEN WELLE, *MEASURING THE ECONOMIC VALUE OF A CITY PARK SYSTEM* 4 (2009), <https://perma.cc/DTE9-SVT5> (Twenty-two percent of San Diego park visitors came because of the parks . . . just under five percent of San Diego tourism in 2007 was due to the city's parks—835,000 overnights and 522,000 day visitors.).

37. HARNIK, *supra* note 35.

38. Paul M. Sherer, *The Benefit of Parks: Why America Needs More City Parks and Open Space*, *THE TRUST FOR PUBLIC LAND* 7 (2006), <https://perma.cc/WWK6-FNTR>.

39. Joel Rose, *Developers Recycle Suburban Office Parks For New Age*, NPR (June 14, 2016, 4:30 PM), <https://perma.cc/P7ZK-KU5K>; *see also* Chris Weller, *Millennials Are Forcing America's Largest Corporations to Kill Traditional Suburban Office Parks*, *BUS. INSIDER* (Mar. 6, 2017, 10:03 AM), <https://perma.cc/F7BA-X4AP>.

40. Ania Wieckowski, *Back to the City*, *HARV. BUS. REV.* (May 2010), <https://perma.cc/88RD-H262> ("Both young workers and retiring Boomers are actively seeking to live in densely packed, mixed-use communities that don't require cars—that is, cities or revitalized outskirts in which residences, shops, schools, parks, and other amenities exist close together.").

41. ABODO Apartments, *Living the Millennial Dream* (June 1, 2016), <https://perma.cc/54L4-VT5E> (2,000 individuals surveyed ranked parks fourth out of the "Top 20 Qualities Millennials Want in a City"); *see also* *Millennials Prefer Cities to Suburbs, Subways to Driveways*, NIELSEN (Mar. 4, 2014), <https://perma.cc/7G7A-JRCA> ("new communities are simultaneously pedestrian- and transit-friendly, environmentally conscious, and incorporate

Fourth, urban green spaces provide important environmental benefits. Trees purify the air by removing gases and pollutants that cause respiratory problems and corrode buildings; trees also keep cities cooler, control flooding, and filter toxic particulates from storm water runoff that would be lost to concrete sewers.⁴² In coastal areas, parks also protect vulnerable coastal and flood zone areas, reducing the loss of property value and life during storms and surges. Lastly, and perhaps most difficult to measure, parks instill a sense of community and provide psychological benefits to residents.⁴³ For all these reasons, major California cities should prioritize building “more complete” neighborhoods by creating new parks, even at a time when housing demand has never been higher. Conservation easements present one potential opportunity to make public green spaces a reality.

II. Conservation Easements: Public Parks in Perpetuity

The Fundamental Requirements of a Conservation Easement

A conservation easement is an agreement between a landowner—donor—and a private not-for-profit conservation organization or government agency—donee—that protects the land by restricting the landowner’s future use. A non-possessory property interest is severed from the underlying ownership of the parcel, and the property owner still retains ownership and, usually, limited use of the land. Therefore, a conservation easement is a conveyance of a partial interest in the land. These easements are created by deed and are executed with the same formality associated with any contractual real estate transfer.⁴⁴ Journalist William H. Whyte first developed the concept of conservation easements in the late 1950s, and the

mixed housing types (single-family, townhomes and apartments) and public parks for community gathering”).

42. COLO. TREE COAL., *Benefits of Trees in Urban Areas*, <https://perma.cc/89ZB-DE9V> (citing U.S. Dep’t of Agric., Forest Service Pamphlet #R1-92-100 (The U.S. Forest Service estimates that one tree, over its fifty-year lifetime, generates more than \$30,00 in oxygen, \$62,000 in air pollution control, recycles \$37,000 worth of water, and controls \$30,000 worth of soil erosion.)).

43. Sandra Bogar & Kirsten M. Beyer, *Green Space, Violence, and Crime: A Systematic Review*, 17 TRAUMA, VIOLENCE & ABUSE J. (2016).

44. U.S. DEP’T OF AGRIC., HEALTHY FORESTS RESERVE PROGRAM CONSERVATION EASEMENT (2017) (*see* sample conservation easement deed from the USDA Natural Resource Conservation Service).

usage of these easements has increased steadily.⁴⁵ As of 2015—the date of the last National Land Trust Census—local, state, and national land trusts have conserved fifty-six million total acres of land in the United States, including over sixteen million acres under easements.⁴⁶ According to the California Conservation Easements Database, over two million acres are protected by 11,870 separate easements in California.⁴⁷

Conservation easements likely became increasingly prevalent because of the federal tax benefits associated with partial interest donations. Under the Tax Reform Act of 1969, Congress limited the deductibility of partial interest donations to two specific situations—donations of remainder interests in a personal residence or farm and undivided interests.⁴⁸ The Tax Reform Act of 1976 created a third exception—the conservation easement—and in 1980, that category was substantially expounded upon to provide the roadmap of rules now codified in section 170(h) of the Internal Revenue Code (IRC or the Code).⁴⁹ After Congress enacted permanent tax deductions for conservation easements, individual states followed by passing easement enabling statutes, many modeled after the Uniform Conservation Easement Act (UCEA), and providing state tax benefits for easement donations.⁵⁰ Similar to the principles outlined in the UCEA, a conservation easement donation must meet the following requirements to qualify for federal tax benefits. The easement must (1) be donated to a charitable organization or government entity,⁵¹ (2) in perpetuity,⁵² and (3) have a “conservation

45. Morris, *supra* note 2, at 365; *see also* LAND TRUST ALLIANCE, 2015 NATIONAL LAND TRUST CENSUS REPORT, <https://perma.cc/68DH-28TL>. (56 million acres are currently conserved by national, local and state and trusts. From 2010 to 2015, the total number of acres preserved grew by 9 million acres.)

46. LAND TRUST ALLIANCE, 2015 NATIONAL LAND TRUST CENSUS REPORT (2015), <https://perma.cc/RFF3-K4PN>.

47. Cal. Conservation Easement, CCED *Statistics* (CCED Project Working Paper Dec. 15, 2016), <https://perma.cc/D8FA-ABVV> (The CCED database contains data about California easements over both public and private property. More than 2 million acres of land are now inventoried in CCED. This total is made up of nearly 12,000 separate easements managed by 215 government agencies, non-profits, and other organizations.)

48. I.R.C. § 170(f)(3)(B).

49. Interview with William T. Hutton, Partner, Coblenz Patch Duffy & Bass LLP (Mar. 1, 2017).

50. UCEA § 1(1) (1981), <https://perma.cc/8Q6M-Y5QQ>.

51. *See* I.R.C. 170(h)(2)(B). (For a donation to be tax deductible, it must be made to a “qualified organization.” The category includes both “government units” and public charities, which are defined as organizations

purpose” to preserve the land in one of four ways: (a) use for outdoor recreation or education, (b) natural habitat protection, (c) open space protection, or (d) historical preservation.⁵³

Conservation easements provide benefits to developers in addition to tax breaks. First, conservation easements are flexible. An individual landowner can work with a government agency or a qualified organization to draft a deed that restricts uses in the manner that best suits the individual developer. Applications of conservation easements have been incredibly varied; from preserving historic structures, to creating public access open spaces, to restricting access to pristine coastlines. Conservation easements can even be accomplished through a bargain sale, blending features of a standard sale of land to fit specific circumstances at a discounted purchase price. Conservation easements may also be amended, if the modification is consistent with the overall conservation purpose of the easement.⁵⁴ Additionally, tax-deductible conservation easements are voluntary, meaning they are accomplished without the top-down government regulation associated with traditional land use controls.

Challenges Associated with Perpetuity

Despite myriad benefits, implementing conservation easements can present challenges, both for a private developer who restricts property and any organization that chooses to receive an easement. As previously mentioned, federal law requires the conservation easement be endured in perpetuity. Thus, when an encumbered parcel is conveyed, the easement runs with the land.⁵⁵ Over time, difficulties might arise if certain issues were not anticipated at the time of drafting. Alternatively, a new owner may wish to alter or use the property in a way that conflicts with the proscription within the easement.

Therefore, the holder of the conservation easement must actively monitor the property owner and potentially take action to enforce easement restrictions. As Professor William Hutton notes, “there is a peculiar disjuncture between the mandatory perpetuity clause and the power of the IRS to enforce that requirement.”⁵⁶ Even though federal law requires perpetuity, the general statute of limitations for income, gift, and estate tax

that “normally receive a substantial part of . . . support from one or more government units or the general public.”).

52. I.R.C. § 170(h)(2)(C).

53. I.R.C. § 170(h)(4)(A).

54. Many easements explicitly include provisions that allow for modification and future amendments.

55. I.R.C. § 170(h)(2)(C).

56. Hutton, *supra* note 49.

purposes is only three years.⁵⁷ As a result, practically speaking, enforcement of the conservation easement is entirely up to the donee land trust after three years. Upon accepting a conservation easement, the holder must consider the perpetual nature of stewardship responsibilities and determine how the monitoring and enforcement of the easement will be financed over time often requiring a stewardship endowment to be funded by the donor. It can be very challenging to plan decades ahead, but at a minimum, the donee must gather all relevant baseline documentation at the time of the easement's creation. This information is then used to compare the property over time and serve as a basis to measure the effectiveness of the restrictions years into the future.⁵⁸

A developer should also be aware that it is possible to amend or even terminate an easement. While conservation easements are perpetual, circumstances can change. For this reason, conservation easements are amendable, usually with the provision that both the grantor and grantee agree on proposed changes, and subject to the Code's requirement that the perpetual protection of the property's conservation values not be affected. Changes can include everything from clarifying vague language to changing restrictions that might no longer advance any conservation purposes.⁵⁹ IRS regulations "implicitly recognize that perpetuity may not mean forever."⁶⁰ An easement may be extinguished by judicial proceeding if there is an "unexpected change in the conditions surrounding the property . . . [which make] impossible or impractical the continued use of the property for conservation purposes."⁶¹ If the donee joins with the property holder to sell the encumbered property, the donee will be entitled to a share of the proceeds that is proportionate to the value of the easement, as compared to the entire value of the property at the time of sale.⁶² In theory, this requirement exists to ensure that the public's investment in the form of tax revenue will not be lost. Upon termination, a land trust would be able to recoup the public's initial investment and put those dollars toward other conservation efforts.

57. I.R.C. § 6501(a).

58. See Brenda Lind, *The Conservation Easement Stewardship Guide: Designing, Monitoring, and Enforcing Easements*, LAND TRUST ALLIANCE 17 (1991).

59. Morris, *supra* note 2, at 369.

60. Hutton, *supra* note 49; see also LAND TRUST ALLIANCE, *Amending Conservation Easements: Evolving Practices and Legal Principles 2nd Edition* (2017) (The reports outlines seven definitive amendment principles that should guide all easement amendment decisions and provides questions to help land trusts evaluate amendment requests and potential risks.).

61. 14 TREAS. REG. § 1.170A-14(g)(6) (2009).

62. *Id.*

III. Using Conservation Easements to Create Urban Parks

Despite the possibility of unanticipated circumstances down the road, conservation easements offer a flexible approach to creating and protecting green spaces in California cities. While the number of conservation easements has greatly increased over the years, conservation easements have predominantly been used by land trusts to set aside relatively natural habitat and agricultural land. Application to urban parks is a relatively novel concept. The *Natural Resources Journal* highlights two specific instances of cities using conservation easements in urban settings: 4,500-acre Shelby Farm in Memphis, Tennessee and fifty-acre Railyard Park in Santa Fe, New Mexico.⁶³ The primary benefit identified by Morris is perpetuity—considering the financial investments required for urban revitalization projects, city funds would arguably be better spent on a project that is not subject to change with political winds.⁶⁴ However, local governments—Shelby County and the City of Santa Fe—already owned the land used to create both parks.⁶⁵ In some instances, a city may not own land in the first place in a neighborhood in dire need of an urban park, which means the city would have to absorb the cost of land acquisition.⁶⁶ Alternatively, the city may lack the financial resources needed to create a new park on a city-owned parcel. In rapidly growing neighborhoods, these realities mean that ideal locations for urban green space might be entirely built up before the city can act to acquire the land. Conservation easements can help remedy these issues to some extent by providing tax incentives for private developers to unilaterally create public green spaces.

Emerald Park Case Study

Consider the example of Emerald Park, which sits adjacent to San Francisco's Rincon Green Apartments. In 2013, San Francisco-based Emerald Fund completed a 326-unit rental housing complex on Rincon Hill—located just north of the San Francisco-Oakland Bay Bridge onramp. Shortly after completion, Emerald Fund entered into a conservation agreement with the San Francisco Parks Alliance to preserve half-acre Emerald Park.⁶⁷ The conservation easement solved a frustrating problem for

63. Morris, *supra* note 2, at 372.

64. *Id.* at 371.

65. *Id.*

66. See S.F. Plan. Dep't Map of Publically Owned Land By Supervisorial District, at <https://perma.cc/S6HD-ZPA4>, for non-city land.

67. John Wildermuth, S.F. *Developer, Park Alliance Present Park to City as A Gift*, S.F. CHRON. (July 25, 2013), <https://perma.cc/XT48-6WP4>.

both the city and the developer. As part of the 2009 construction agreement for the apartment complex, Emerald Fund was required to set aside one-third of developable land for sale to the City, which would create what was then set to be called Rincon Hill Park.⁶⁸ In 2010, the city estimated the property value for the park site at \$6 million, with another \$1.9 million for construction and improvement of the fenced-off facility.⁶⁹ However, San Francisco was never able to come up with the funding needed to acquire the land or construct a park.⁷⁰ Emerald Fund Chairman Oz Erickson posited that the property was likely worth “double that” at the time of the conservation easement.⁷¹ The conservation easement between the developer and the Parks Alliance solved this problem. Under the agreement, residents of the 326-unit development will pay modest annual maintenance costs, and the Parks Alliance will hold and enforce the conservation easement to ensure that the park remains open to the public. Emerald Park is specifically mentioned in the Rincon Area General Plan, which also calls upon new developments to “help fund additional new services and amenities, including parks and community facilities.”⁷²

Other developers might attempt to replicate the successful Emerald Fund easement. In terms of meeting the statutory requirements of IRC 170, Emerald Park serves as an excellent example. First, the San Francisco Park’s Alliance “qualified” as a publically supported 503(c) organization—as required under section 170(h)(2)(B) of the Code. Many major cities have comparable non-profits that seek to promote and preserve park space and could hold a conservation easement. Second, the development restriction on Emerald Park will be perpetual, as is required by both the Code and California’s conservation easement enabling statute.⁷³ Third, the park

68. *Id.*

69. *Id.*

70. *Id.*

71. Wildermuth, *supra* note 68.

72. San Francisco General Plan, *Public Open Space System*, <https://perma.cc/6XT7-VY4L> (see the section titled “Public Open Space System” regarding current parks like Emerald Park and “Developer Contributions to Open Space” and Policy 4.7 regarding developer contributions.)

73. See I.R.C. § 170(h)(2)(C); CAL. CIV. PROC. CODE § 815.2(b). The perpetuity requirement stands as a bar to other more temporary uses of the conservation easement, such as to protect urban farming. Theoretically, owners of vacant lots could enter into term conservation agreements with urban farmers. The benefit here would be to provide urban farmers with the security to invest in farming the parcel, while allowing the owner to retain the ability to sell the land for full value at a later date. However, an owner

requires the preservation of land “for outdoor recreation by, or the education of, the general public,” which is consistent with the conservation purposes required by section 170(h)(4)(i) of the Code. In this case, a conservation easement was implemented to solve a problem with no definite end in sight, given the city’s inability to acquire or even commit to maintaining the park space. The conservation easement resulted in a win-win solution—one in which the public gained a park and Emerald Fund gained valuable tax benefits.

Potential for Future Developments

Emerald Park arose out of unique set of circumstances, but the experience can serve as a roadmap. In park-poor neighborhoods, developers have a shared interest in providing residents with livable spaces. As previously mentioned, parks are assets that increase surrounding property values.⁷⁴ However, developers are also likely to suffer from a collective action problem because each developer’s primary incentive is to maximize profits. Rarely will a developer unilaterally shoulder the burden of setting aside valuable real estate to preserve neighborhood open space through a conservation easement.

Zoning requirements are one potential bar to using a conservation easement. To receive any tax deduction, the value of the property must be depreciated by the conservation easement. The Department of Treasury regulations sanction a “before and after” valuation method which must be undertaken in a “qualified appraisal.”⁷⁵ The amount of the gift is measured by the diminution in value of the property that can be attributed to the encumbrance of the easement.⁷⁶ If zoning restrictions already encumber the property, the developer obviously cannot receive a tax benefit for simply leaving a portion of a property undeveloped in line with existing density requirements or for a mitigation conservation easement. However, for developments in dense urban centers, developers may be more likely to include additional green spaces above zoning requirements—to make units more livable for residents and possibly increase overall property values. Private property owners generally possess the fundamental property right to exclude the public. Many developers often already create open spaces,

would never receive a tax benefit for doing so under federal 107(h)(2) requirements, unless the owner could somehow donate an entire undivided partial interest in the parcel, such as a tenancy in common that the grantee later agreed to vacate and return to the owner.

74. Harnik & Welle, *Measuring the Economic Value of a City Park System*, THE TRUST FOR PUBLIC LAND (2009), <https://perma.cc/BMZ9-4GD9>.

75. I.R.C. § 170(f)(11)(E).

76. *See, e.g.*, §§ 1.170A-14(h)(1)-14(h)(2).

whether they are interior patios, or even green roof spaces that may be used by residents. If a developer simply chooses to make an area publically available, perhaps by locating a patio or park in the front of a building, there is potential to reap a tax benefit by conveying a conservation easement to the city.

The Emerald Park conservation easement was an outright gift from the developer to the non-profit San Francisco Parks Alliance. However, a bargain sale of a conservation easement presents another opportunity for developers to work with a donee. As previously mentioned, cities are also qualified organizations because a city is a political subdivision of the state.⁷⁷ If the city is unable to pay fair market value to purchase an open park area that sits adjacent to a completed development or proposed site, the developer might consider selling a conservation easement to a qualified organization at a bargain price. The amount of the charitable deduction—the difference between the fair market value of the conservation easement and the sales price—would likely be unaffected, but the gain for any money received is required to be reported to the extent that the bargain sales price exceeds the amount of the taxpayer's basis by the special allocation-of-basis rule of section 1011(b). In a bargain sale, the allocation rule of section 1011(b) is applied before the reduction rules of section 170(e).⁷⁸ A donor cannot eliminate a gain in a bargain sale simply by selling appreciated property that triggers the reduction rules. Importantly, the thirty percent limit for adjusted gross income does not apply to conservation easements. Instead, the donor may deduct the fair market value of the easement up to fifty percent of the adjusted gross income over the amount of all other allowable deductions.⁷⁹ Further, any qualified conservation contribution can be carried over for up to fifteen years, as opposed to only five years under the previous carryover period.⁸⁰ Alternatively, a developer might explore the possibility of a bargain sale of outright fee title. Bargain sales may not yield as much profit as outright fair-market-value sales.⁸¹ But,

77. I.R.C. §§ 170(h)(1)(B) and 170(h)(3).

78. TREAS. REG. § 1.170A-4(c)(2).

79. I.R.C. § 170(b)(1)(E).

80. *Id.*

81. Hutton, *supra* note 49. (In demonstrating the basic mechanics of a bargain sale (of fee title, not a conservation easement), Professor Hutton explains: "Assume a landowner owns property having a fair market value of \$1,100 and a basis of \$100. Assume further a combined state and federal capital gain tax rate of 20 percent and a 40 percent tax rate on ordinary income. A full-value sale puts \$900 in the landowner's pocket after tax. In a bargain sale in which the land trust [or city] pays 70 percent of fair market value, the landowner receives \$630 of after-tax proceeds plus \$132 of tax

bargain sale options offer a more substantial monetary benefit than an outright charitable gift. Furthermore, a conservation easement providing additional park space to residents can increase the value of the non-encumbered property to the developer. The feasibility of a bargain sale arrangement will depend on the purchaser's unique ability to pay and the degree of the developer-seller's potential benefit when compared to other feasible options.

Conclusion

In addition to providing individuals with access to open space and numerous recreational facilities, city parks also provide communal benefits to the city as whole—from increased economic growth to cleaner air to resiliency during extreme weather events. As California cities struggle to keep up with the state's high demand for new housing and as the cost of land continues to rise, cities should consider new ways to preserve and create urban green spaces for its growing population. In addition to traditional land use tools, conservation easements can provide cities with a potential solution to help create urban parks. Conservation easements are highly flexible and protect public use of the land perpetually, which insulates community parks from changing political winds, as well as changing real estate values. By leveraging federal tax incentives, cities may be able to avoid the high cost of land acquisition in up-and-coming neighborhoods by working with private developers to ensure that residents have access to city parks.

savings. Thus, the aggregate benefit of the bargain sale to the landowner is \$762. On an outright contribution [of the land], provided that the landowner is in a position to enjoy the entire contribution deduction, she enjoys \$440 of tax savings.”) (emphasis added). The table below summarizes the tax implications of a sale, bargain sale, and outright contribution.
