Cultural Heritage Conservation Easements: The Problem Of Using Property Law Tools For Heritage Protection

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CULTURAL HERITAGE CONSERVATION EASEMENTS:
HERITAGE PROTECTION WITH PROPERTY LAW TOOLS

ABSTRACT: Conservation easements are quickly becoming a favored tool for protection of cultural heritage. Perpetual encumbrances on the use of private land, most cultural heritage conservation easements are held by private conservation organizations known as land trusts. With minimal public oversight, land trusts decide which lands to protect in perpetuity and what the rules regarding use of those lands should be. A variety of concerns arise when protection of cultural heritage resides with private organizations. First, as governments abdicate cultural heritage protection to private organizations, the public’s role in site protection shifts. When private organizations and landowners negotiate which properties to protect and how to protect them, some culturally important sites go unprotected. Privatizing protection of cultural sites may reduce the ability of some members of the public to become involved in the decision of what to protect as well as hamper public oversight and enforcement of land-use restrictions. It may even reduce overall protection as public entities remove themselves from the cultural heritage protection game, ceding the territory to land trusts. Second, private perpetual restrictions problematize the balance between intergenerational rights and present responsibilities. Reverence of past cultural events and properties may hamper future growth as users of conservation easements restrict properties in perpetuity without enabling communities to revisit or modify the restrictions. Third, conservation easements may be protecting sites that were not in danger of exploitation. In such cases, conservation easements subsidize landowners with questionable public benefits. Finally, using conservation easements to protect sacred sites commoditizes cultural heritage. Paying people to protect cultural heritage could degrade cultural heritage or civic responsibility.

KEYWORDS: conservation easements; cultural heritage; land trusts; privatization

HIGHLIGHTS:
1 Introduction

The use of property law tools to protect important sites is not new (Fairfax, et al. 2005). However, the use of conservation easements (CEs) to protect cultural property has played second fiddle to efforts to protect environmentally important properties until recently.\(^1\) CEs are quickly becoming one of the most popular mechanisms to protect important properties (Cheever & Owley 2015). CEs are nonpossessory rights in land that seek to yield conservation benefits. The most common conservation easements (and those chiefly used for heritage protection) are perpetual but most states allow nonperpetual CEs (McLaughlin 2005). While most CEs preserve land for ecological goals, the use of the tool to protect historic, cultural, and archaeological sites is growing. Most state laws identify such uses as valid, and the federal government provides tax incentives to promote the use of CEs as a protector of cultural heritage (Katz 1986). While national and subnational governments hold many CEs, most cultural heritage CEs are held by private conservation organizations known as land trusts (Chang 2011). With minimal public oversight, these land trusts (working in the context of state and federal law governing charitable organizations) wield great power in deciding which lands to protect in perpetuity and what the rules regarding use of those lands should be.

A variety of concerns arise when protection of cultural heritage resides with private organizations. First, when private organizations and landowners negotiate which properties to protect and how to protect them, important sites may receive little acknowledgement or support. Privatizing protection of cultural sites may reduce the ability of the public to become involved in the decision of what to protect as well as hamper public oversight and enforcement of land-use

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\(^1\) The earliest conservation easements protected public parks and other environmental amenities. The Fens is Boston is a great example (Morris 2008). Early private land conservation also protected cultural sites, including battlefields and historical homes like Mount Vernon (Fairfax, et al. 2005). Generally, however, such sites were protected with fee simple ownership, not with conservation easements or other nonpossessory property rights.
restrictions (Owley 2012b). Second, private perpetual restrictions problematize the balance between intergenerational rights and present responsibilities (Thompson 2004). Reverence of past cultural events and properties may hamper future growth as users of CEs restrict properties in perpetuity without enabling communities to revisit or modify the restrictions. Third, CEs may be protecting sites that were not in danger of exploitation. In such cases, CEs subsidize wealthy landowners with little public benefit. The result is overuse of the tool and an inappropriate strain on the public fisc.

Finally, using CEs to protect sacred sites commoditizes cultural heritage. The appropriateness of putting a dollar value on, for example, the ability of tribes to exercise their religion or carry out cultural ceremonies is questionable (Sandel 2012). Do landowners deserve payment for not destroying the ruins of revolutionary war era buildings or civil war cemeteries? Paying people to protect cultural heritage could degrade cultural heritage or civic responsibility. (Dorfman & Harel, 2013)

2 Conservation Easement Basics

Conservation easements are nonpossessory property interests, meaning the CE holder has a property right in a piece of land but is not the landowner or occupier. Conceptually, a CE is akin to a contract where the holder enters into an agreement with a landowner whereby the landowner agrees to refrain from engaging in an otherwise permissible activity. In exchange for this restriction, the landowner may receive benefits such as a permit to develop, a cash payment, or tax deduction. CEs differ from contracts because the restriction is tied to the land, not the landowner. When the landowner sells her property, the new landowner will be bound by the agreement. CEs are usually, but not necessarily, perpetual (McLaughlin 2007). State law defines who can hold a CE, but usually they can be held by either government entities or land trusts. In
some states this explicitly includes Native American tribes and in other states it implicitly includes them.

By state law, the restriction embodied in a CE must have conservation as its purpose or intended outcome. To qualify for federal tax benefits, conservation easements must be donated in perpetuity to a qualifying organization for a conservation purpose (I.R.C. § 170(h)).

Conservation purposes cover a broad array of goals including preservation of areas for education, recreation, natural habitat, open space, scenic values, and historically important areas (I.R.C. § 170(h)(4)(A)). State CE laws take a broad view of what constitutes “conservation.” Most scholarship on CEs has focused on restrictions that seek to protect open space, scenic, and ecological values (E.g., Cheever 1996; Merenlender et al. 2004). As the broad list of permissible purposes demonstrates, CEs can serve other purposes including protection of working landscapes like forests and farms (Rissman 2011). This Viewpoint examines CEs used to protect cultural heritage. These generally take three forms: historic preservation, archaeological, and cultural.

2.1 Historic Preservation Conservation Easements

Historic preservation CEs seek to maintain historic interiors, façades, or other architectural features. Most CE enabling statutes recognize protection of historic buildings and architectural features as acceptable purposes. For example, the Uniform Conservation Easement Act identifies “preserving the historical, architectural, archaeological, or cultural aspects of real property” as an acceptable purpose (UCEA 1981;§1(1)).

The IRS allows tax deductions when landowners donate historic preservation CEs to a qualifying land trust. Acceptable purposes for deductible CEs include “the preservation of a historically important land area or certified historic structure” (I.R.C. §170(h)(4)(A)(iv)). The code further details special rules for which historic buildings and structures qualify (include a
wide buildings, structures “or land areas” listed in the National Register as well as buildings in historic districts. (I.R.C. §170(h)(4)(B) & (C)). In exchange for agreeing to maintain their buildings’ historic façades, landowners can claim a tax deduction for the value of the CE as a charitable contribution. The value of the contribution is determined by subtracting the fair market value of the property with the CE from the fair market value of the property without the CE. In many jurisdictions, if the CE reduces the property value, property taxes will also be reduced.

2.2 Archeological Conservation Easements

Many states allow CEs for protection of archaeological sites. States that have adopted the UCEA explicitly allow archaeological CEs. In other states, it is less clear. For example, California permits CEs that have the purpose of retaining “land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition” (Cal. Civil Code §815). Archaeological CEs may fall under natural or historical but it depends on the property. New York’s law is more generous, explicitly recognizing the purposes of “of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property…” (N.Y. Env. Conserv. §49-0303). New Mexico is the only state whose CE statute specifically addresses archeological and cultural CEs. The New Mexico Cultural Properties Preservation Easement Act protects “structure[s], place[s], site[s] or object[s] having historical, archaeological, scientific, architectural or other cultural significance deemed potentially eligible for inclusion in the national register of historic places” (N.Mex Stat. Ann. § 47-12A-2). Note, the law does not indicate who determines whether sites are “potentially eligible for inclusion in the national register.” The eligibility criteria for listing in the national register are readily available (National Park Service 2015), but the statute does not indicate who will review the criteria and determine whether the site fits the bill. Many states
have additional statutes regarding historic preservation easements alongside their general
conservation easement enabling act. These preservation easements follow the same contours as
other CEs but are more likely to explicitly recognize sites listed on the historic register. Maine
for example has a separate statutory section for “Archeological Site Easements” (33 MRSA
§§1551-1555).

Even where archaeological CEs are permissible under state law, landowners may not be
able to claim charitable tax deductions for donations of them. IRS regulations clarify that tax
deductions are available for CEs that preserve a “historically important land area.” Yet, only one
case has considered what constitutes a “historically important land area.” In *Turner v.*
*Commissioner of Internal Revenue*, the Tax Court examined the legislative history of the tax
code in attempt to ascertain the meaning of the phrase. The Senate Report quoted by the tax court
explained:

The term “historically important land area” is intended to include independently
significant land areas (for example, a civil war battlefield) and historic sites and
related land areas, the physical or environmental features of which contribute to
the historic or cultural importance and continuing integrity of certified historic
structures such as Mount Vernon, or historic districts, such as Waterford,
Virginia, or Harper's Ferry, West Virginia [*Turner v. C.I.R* (citing S. Rept. 96–
1007 at 12)].

This complicated sentence is the only guidance regarding what qualifies as a historically
important land area. It is not clear that archaeological sites would fall under these categories if
not associated with an historic structure or in an historic district. The battlefield example
illustrates an extension to protecting something other than buildings, but there seems to be an
emphasis on early American history in this passage. Even if archaeological sites would meet these criteria, the law does not indicate how a site’s worth is measured or who gets to decide which sites are important enough to merit preservation.

Archaeological CEs differ from historic preservation CEs because they usually seek to protect resources in the ground, instead of a building currently in use. Moreover, archaeological CEs protect land for archeology goals. This may include site disruption. Instead of keeping people off the land or a particular area undisturbed, archaeological CEs contain terms explaining who will have the right to exploit archaeological resources and who will oversee any such explorations. For example, Archaeology Southwest, a holder of archeological CEs over pueblos in the southwest holds CEs not just to protect sites but also to facilitate what it views as the proper methods for conducting archaeological digs (methods that involve limited excavation) (Archaeology Southwest 2012). In other jurisdictions, covering areas of archaeological resources with either a parking lot or golf course may be deemed an acceptable or desirable as a way to protect resources (Florida Department of State).

2.3 Cultural Conservation Easements

Cultural CEs protect sites that have cultural but not necessarily archaeological importance. The site disturbance permitted by archaeological CEs may be directly at odds with the goals of cultural CEs. Yet, cultural CEs tend to differ from traditional environmental CEs by allowing access to and use of the sites (at least to specified groups of people).

Research on cultural conservation easements has focused on use in conjunction with tribes and tribal interests. Yet, the history of cultural conservation in the United States and elsewhere goes far beyond indigenous interests. For example, CEs can protect cultural sites such as civil war battlefields or locations of important historic events (Fairfax et al. 2005). In many
nations such protections are carried out by government entities, but where governments are uninterested or unable to protect these resources, cultural conservation easements may offer a venue for preservation.

In the United States, tribes and tribal organizations have turned to cultural CEs to protect culturally important sites. The InterTribal Sinkyone Wilderness Council identifies cultural CEs as “important for ensuring protection of and access to culturally important Native American sites that may not be in Tribal ownership” (Trees Foundation 2012). To date, cultural CEs have only been written about as mechanisms to protect Native American tribal sites (Middleton 2011).

Tribal interests represent a particularly challenging case for protection via property law tools because of concerns with issues like tribal sovereignty, varying concepts of property law, and a unique governmental relationship among states, tribes, and the federal government. Similar conundrums are present outside of the United States where indigenous property rules or environmental protection schemes fail to coincide with the more dominant legal regime (Owley 2012a). Drawing upon the power of familiar entities like land trusts and conservation easement statutes may offer an additional venue of cultural site protection.

3 Challenges of Using Conservation Easements for Heritage Protection

CEs harness the power of citizens engaged in protecting special places. Through land trusts, private citizens can achieve greater heritage protection than currently occurs through public channels. There is little doubt that the CE tool protects lands that would otherwise be converted to less desirable uses from an ecological, cultural, or social viewpoint. However, CEs are not without problems. This author and others have documented concerns with CEs, focusing on those seeking to provide ecological benefits (Owley 2011; Owley 2013; Mahoney 2002; Jay 2012). This Viewpoint focuses on issues pertinent to cultural heritage CEs.
3.1 Privatization

Cultural heritage CEs are a mechanism for private parties to protect important sites. This raises the question of who is the appropriate entity for protecting cultural heritage. Some might argue that it is a government role; indeed, many of our protected sites are owned and managed by government agencies (Phelan 1993). Some may even argue there is a public duty to protect such sites (Renaud 2000). This ideal aligns with the modes of heritage protection present throughout Europe and South America. If protection of heritage is a governmental duty, there may be concern regarding land trusts performing this duty.

Land trusts may not focus on the right sites or make the rights rules for those sites (Merenlender et al. 2004). When land trusts and landowners negotiate which properties to protect and how to protect them, important sites may receive little acknowledgement or protection. The heritage protection site selection and rule choices are more likely to be driven by individual landowner desires and organization goals. For example, reliance on landowner donation of cultural heritage CEs leads to protection of sites that the landowners are already inclined to encumber, not necessarily the sites most in need of (or deserving of) protection.

Land trusts efforts may deter government action (Echeverria & Pidot 2009). Governments may see the job of heritage protection as covered and address other needs without investigating the nature or scope of the private heritage protection regimes. Land trusts, however, are likely expanding the number of sites being protected instead of replacing or usurping government protection regimes. Even so, privatizing protection of cultural sites reduces public involvement in deciding what to protect and may hamper public oversight and enforcement of land-use restrictions.

3.2 Static Perpetual Agreements
Most CEs are perpetual. Some states require perpetuity and most make perpetuity the default duration. To qualify as a tax-deductible donation, a CE must be perpetual. The perpetual aspect of CEs has been critiqued as hampering ecological goals, especially when combined with static rules (Mahoney 2002; Rissman 2010) and as limiting development of social goals (Korngold 2008; Richardson and Bernard 2011). Cultural heritage CEs also encounter perpetuity problems. Protecting fixed cultural sites in perpetuity may conflict with the idea that sites evolve and change.

Perpetuity concerns are salient largely because most CEs are static. That is, the rules regarding the land, buildings, and resources lock-in the status quo. This freezes heritage in time. In some ways, this converts active cultural spaces into a distributed museum. Fixing the sites in time and place hampers the evolution of the sites’ use and contributes to a loss in an understanding of the role a place plays in its surroundings. While CEs present a promising tool for protecting culturally important sites, the perpetual static nature of the tool means that we should be cautious about overusing it.

The static nature of land protection in this way can be directly at odds with some of the goals of the parties entering into the agreements. Tribes, for example, often challenge the notion that heritage protection governs unchanging patterns of lands and practices. This has also been articulated in legal agreements. A Memorandum of Understanding between the Kashaya\(^2\) and the California State Department of Transportation recognizes “that Traditional Kashaya Places change over time.” Members of the Maidu tribes believe that cultural sites move with the seasons and over the years and are not a single locked-in-time–and-place concept. Many Maidu also believe in managing their landscape instead of letting it stand idle. Maidu member Trina

\(^2\) Sometimes spelled Kashia or Kahsa-ya.
Cunningham explains that to the Maidu “land needs to be harvested, tended, walked on and sung to—it can’t just sit there idle and neglected” (Knadler 2009). While tribes may view involvement with the land as an essential element of a cultural CE, it is a rare cultural CE that enables such a relationship between landowner and holder. Even where cultural CEs allow land access, land management and changing the landscape would be a departure from former and current CE use. The idea that places (and not just practices) evolve has been slowly embraced by government agencies and is not yet embodied in the idea of cultural heritage CEs.

Creating islands (piecemeal and ad hoc ones) of protected sites within a landscape may hamper development and use of an area not just for economic development but for cultural development. Reverence of past cultural events and properties may hamper growth as users of CEs restrict use of properties in perpetuity without enabling communities to revisit or modify the restrictions.

3.3 Effectiveness and Valuation

Even if parties determine that CEs as a concept will meet land protection needs, there is a question about which lands should be protected with CEs. Evidence suggests that land protected with CEs may be in the least danger of being converted to conflicting land uses (Owley & Tulowiecki 2012). This phenomenon is likely present with many types of CEs but may be even more prevalent with historic façade CEs. Historic façade CEs have come under increased scrutiny from the IRS (Colinvaux 2013). There is little evidence to suggest that owners of historic buildings would have changed the buildings’ façade in the absence of tax breaks. Often such features were the attraction of the purchase. In fact, some landowners have described the tax deductions as getting money for something they would have done anyway. CEs may not change the level of threat to the landmarks. Thus, many historic preservation CEs seek to solve a
non-existent problem. Citizens lose the benefit of tax payments that could support social services and those mostly likely to benefit from the tax deductions are wealthy landowners.

Where a cultural heritage CE seeks to secure access, use, or investigation of a site, this concern differs. At times a CE may be the easiest tool to secure something more reliable than a license and donations of such CEs may provide needed assurances even if the same benefits may have been available without crediting large donations.

3.4 Social Justice

The nature of the CE mechanism raises concerns about social justice. Social justice is the view that everyone deserves equal economic, political, and social rights (Miller 2009). An environmental justice view elaborates this view to include a belief that everyone should have equal access to environmental amenities (Sister et al. 2010). The financial incentives associated with conservation easements lead to a greater chance that the protected areas will be far from population centers (Owley 2012b). The suburban and rural concentration of open space and environmental CEs means that large portions of society do not get the direct benefits of the preservation programs. The rural focus often applies to cultural and archaeological conservation easements as well. To the extent that these easements have specific purposes or goals that are not widely experienced social amenities, this may be unoffensive. Where such CEs expand the use and application of open space CEs, further funding and supporting rural CEs may detract from efforts to protect and provide access to urban landscapes.

Historic preservation CEs present a unique situation. Historic preservation CEs are likely to be located in urban settings or population centers, as opposed to archaeology, cultural, or ecological CEs. This may equate with a greater number of people enjoying the properties and a greater diversity of people viewing the protected sites. More people may be able to access the
social benefit or amenity that is preservation of cultural heritage. However, most landowners using historic preservation CEs are relatively wealthy. Indeed, they tend to have enough income to make the tax breaks worthwhile. Thus while the community benefits may be more widely felt, the tax benefits more commonly reside with wealthier landowners for any of the CE types.

3.5 Commodification of Heritage

The final critique of cultural heritage CEs contained herein questions whether it is ever appropriate to pay landowners not to destroy cultural sites. Essentially, we should consider whether there are some things that money shouldn’t buy (Sandel 2012, Dorfman and Harel 2013). Perhaps protecting important lands, buildings, and sites are things that should not be commoditized. This may be particularly persuasive in the context of sacred sites. For example, it may seem inappropriate to put a dollar value on the ability of tribes to exercise their religion or carry out cultural ceremonies. We must also ask whether we should have to pay landowners not to destroy ruins or civil war cemeteries. When we pay people to protect our cultural heritage, do we degrade cultural heritage or civic responsibility?

4 Conclusion: Implications for the Future

CEs tend to be perpetual agreements. They lock-in today’s land uses and preferences, usually preserving land in a static fashion (Richardson 2010). Securing resources in perpetuity ties the hands of future landowners and communities who may seek to alter the landscape, treat resources differently, or simply change their priorities for protecting cultural heritage sites. The permanent nature of encumbrances that remain as ownership changes (and are difficult to dissolve) hampers future community members (Thompson 2004). This concern related to all CEs takes on a unique character in the context of cultural heritage CEs. If the goal of the restrictions is static in situ protection of cultural heritage, CEs may be an appropriate tool. Perpetually
maintaining the status quo in this way is akin to the preservation work done in museum settings. Even where cultural heritage CEs facilitate stewardship and use of a site, compliance with state laws and tax codes may limit the ways the CEs can change over time. For example, California is one of the states requiring CEs to be perpetual. It is not clear when perpetual CEs can be changed or modified (Owley 2011; McLaughlin 2007). Illinois only allows amendment where it enhances conservation value or is directly in line with existing CE purposes. The IRS provides a further constraint, limiting levels of holder discretion for deductible conservation easements (Jay 2012).

Historic preservation CEs generally seek to preserve façades and interior designs to protect examples of architectural work or period pieces. Thus, protecting them in perpetuity with only minimal allowance for changes may be an appropriate approach. The main concern related to historic preservation CEs is assessing the correct value of the restriction and determining whether allowing tax deductions for the restrictions actually results in greater protection and protection of the most desirable properties. In economically depressed areas with architectural resources, these tax breaks may help attract developers. In many situations, however, the tax breaks do not change landowner behavior or result in added heritage protection.

Archaeology CEs are still few in number. Whether CEs are an appropriate tool to protect archaeological resources will vary with the site. Where the land is still actively used for cultural practices, creating static perpetual restrictions may be at odds with the changing nature and use of the land. Where the restrictions govern site disturbance, one must examine whether such disturbance conflicts with other cultural or ecological goals. If active use of the land is intended, CEs may not make as much sense. In such cases, it may be advisable to hold the land in fee simple. Finally, while the same concerns regarding tax breaks above apply here, there is an additional question of whether CEs that facilitate archaeological exploration merit tax
deductions. The legislative history of the tax deductions and accompanying regulations do not discuss archaeology to any great extent and it may be that legislators did not contemplate this use of the tool.

Cultural CEs differ from the previous two categories because they tend to acknowledge that the location and use of sacred sites can change. Cultural CEs often allow direct access and use of the land by CE holders or third-party beneficiaries. In this way, cultural conservation easements resemble traditional affirmative easements and those may be a more appropriate tool where permissible by state or tribal law. Moreover, because stewarding CEs with access and use rights can be more complicated than overseeing ecological CEs, it may be that fee simple ownership is the most appropriate land protection technique and should be favored where possible. The strength of the cultural CE is that it enables land protection and use by tribes and other groups even in the absence of regulatory power, eminent domain power, or the ability to purchase land. Yet, the inherent static nature of the tool can be hard to reconcile with evolving cultural sites and uses.

While the use of CEs to protect cultural heritage is likely to continue growing, it may be that much of this growth will be hidden from view. Instead of explicitly categorizing CEs as protecting cultural heritage, it may be easier from a legal standpoint to protect these same sites as open space. In many areas, culturally important properties may also provide ecosystem services like wildlife habitat and watershed protection. Land trusts seeking to protect archaeological sites may use the label scenic or open space CEs instead of calling them archaeological CEs to avoid any uncertainty as to whether the structure will be enforceable under state CE statutes or the federal tax code (Florida Department of State). Additionally, identifying properties as cultural protection sites, by for example publicly labeling the protection an archaeology easement, may
publicize cultural resources in a greater extent that parties desire, potentially drawing looters,
(Middleton 2011) It may be easier for courts and CE holders to grapple with environmental
metrics (Middleton 2011; Wood & O’Brien 2008). Assessing ecosystem health or preventing
development may be simpler than determining whether something is culturally important and
merits protection.

Determining when to use CEs to protect cultural heritage (as opposed to other property
law tools) may be a challenging task, but it is relatively straightforward. The more complicated
task is assessing who gets to decide what happens to cultural sites. Is cultural heritage protection
an appropriate role for land trusts or should it be done by government agencies and incorporate
public processes? What does it mean for a private organization to hold a cultural heritage CE?
Do they become owners or stewards of the past? Cultural heritage CEs present some difficult
decisions and challenges logistically but we must go beyond considering the nuances of the tool
to explore the larger decisions of who gets to protect what and how.

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