PROTECTING CONSERVATION EASEMENTS
IN EMINENT DOMAIN PROCEEDINGS
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On Behalf of the NC Land Trust Council
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I. BACKGROUND

As one of the most rapidly developing states in the country, North Carolina is losing natural areas, historic sites and agricultural and forestry lands at a rate of over 100,000 acres per year. Yet, the State's waters, forests, open lands and historic properties are critical to North Carolina's economic future and quality of life. To address this dilemma, the State has adopted a policy to encourage, plan, coordinate and support land protection efforts to preserve and permanently protect within the State an additional one million acres by December 31, 2009.[1]

Concurrent with this rapid pace of development within North Carolina, the public is investing substantial resources in conservation easements. These easements, frequently used by land trusts and government agencies, restrict the development and use of land in order to preserve the land's natural, open, scenic, historic or ecological features. In this way they protect North Carolina's unique natural resources and diminishing, but critically important, natural "capital" of clean air and water, wildlife habitat, and working farmland and forests. Federal and State tax policies encourage grants of conservation easements[2] and implement Article XIV, Section 5 of the State's Constitution which declares that it is the policy of North Carolina to conserve and protect its lands and waters for the benefit of all of its citizens.[3] Without the

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[1] N.C. Gen. Stat. § 113A-241(a); See also, N.C. Gen. Stat. § 113A-230, *et seq.*

[2] 26 C.F.R. §1.170A-14, *et seq.*; N.C. Gen. Stat. §§ 105-130.34 and 105-151.12, *et seq.*

[3] Article XIV, Section 5 of the Constitution of the State of North Carolina: "It shall be the policy of the State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and service areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this state its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty."

protection conservative easements afford, North Carolina's surging population growth will overwhelm the State's natural areas, farmland and open space which constitute the green "infrastructure" protecting and improving our overall public health and quality of life.

As undeveloped acreage shrinks within the state and an expanded population requires increased public infrastructure, it is increasingly more certain that condemning authorities in their planning will encounter land subject to conservation easements. Currently, conservation easements in North Carolina are given no protection from the power of eminent domain. North Carolina's easement-enabling statute expressly provides that conservation easements are subject to the power of eminent domain.[4] Moreover the method for calculating just compensation for taking land encumbered by a conservation easement is not currently established in North Carolina's statutes. The purpose of this paper is to outline legislation which, if adopted by the North Carolina General Assembly, would balance the interests of condemning authorities with the strong public policy favoring the use of conservation easements as a land protection tool and the considerable public investment in these easements.[5] Stated more simply, the legislation proposed in this paper is designed to help ensure that the public policy in favor of protecting lands for their conservation, historic or agricultural purposes is not subverted through the condemnation process.[6]

[4] N.C. Gen. Stat. § 121-36(c).

[5] Limiting the threat posed by eminent domain to these conservation easement-protected, scarce and unique, natural resources will no only help improve our environment and quality of life, but also will buttress the foundation for the State's two largest industries – agriculture and tourism.

[6] For a scholarly, in-depth treatment of this subject, see "Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation," 41 U.C. Davis L. Rev. 1897 (June 2008), from which this paper borrows heavily.

II. POLICY DISCUSSION

Like traditional easements, conservation easements, whether characterized as negative restrictions on the development and use of land or as restrictive covenants, are a compensable form of property under the Fifth Amendment[7] to the United States Constitution. Similar protection is a part of North Carolina's Constitution.[8] They are valid, enforceable and valuable interests in the land they encumber, and are no different than traditional easements for eminent domain purposes. As such, persons whose land is subject to a conservation easement are entitled to just compensation for the taking of the easement-encumbered land.

North Carolina traditionally uses the "before and after" test in eminent domain proceedings. Under N.C. Gen. Stat. §136-112, the measure of damages in NCDOT easement acquisition proceedings is "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the entire tract immediately after the taking…" (emphasis added). Under this test property subject to a conservation easement should be valued in the "before" state assuming it were not subject to the easement and valued likewise for the "after" analysis.[9] To treat conservation easements as non-compensable or limited value property would allow condemnors to acquire conservation easement-burdened land for its "reduced" or "restricted" value. This would encourage condemnation of such land, because it would be less expensive to condemn than similar unencumbered land, a result contrary to the strong public policy favoring the use of such easements as a land-protection tool and the substantial public investment conservation easements. Such a result would chill the interest of

[7] ". . .; nor shall private property be taken for public use, without just compensation."

[8] Article I, Section 19, provides that "No person shall be . . . deprived of his . . . property but by the law of the land."

[9] The principal parties in an action to condemn land subject to a conservation easement would be the owner of the land and the government or land trust holding the easement. By computing the damages to the entire property without regard to the presence of the conservation easement, the existence of the easement would neither increase the just compensation award payable by the condemning authority nor decrease it. It would simply cause the award to be apportioned between the owner of the encumbered land and the holder of the easement based on their respective interests.

prospective easement grantors and the general public in conservation easements for land protection.

The goal is to preserve conservation easements and ensure the long-term protection of easement-burdened lands for perpetual public benefit while not unreasonably limiting the power of eminent domain which is exercised also for the public benefit. This goal can be accomplished in four ways: (1) by requiring condemning authorities to meet certain conditions before condemning land subject to conservation easements; (2) by allowing the condemnee in such actions to recover its attorneys fees and reasonable costs, including surveyors, engineers and appraisers fees if the threshold test discussed in Section III of this paper is not met; (3) by awarding damages in actions to condemn conservation easement-encumbered lands without regard to the presence of the conservation easement, as discussed above; and (4) by adding a mitigation payment (*e.g.* 25%) to the just compensation awarded to the conservation easement holder (usually a land trust or governmental entity) to be used in a manner consistent with the conservation purposes of the conservation easement.[10] While this latter proposal would require the condemnor technically to pay more than the fair market value of the property actually taken, the excess paid to the easement holder is intended to compensate it for a portion of its cost in finding and purchasing a replacement conservation easement of approximately equal value, or otherwise in using the condemnation proceeds in a manner consistent with the conservation purposes of the conservation easement.

[10] This language is consistent with Treasury Regulations §1.170-A-14(g)(6) and N.C. Gen. Stat §146-30(a).

III. PROPOSED CONDITION PRECEDENT TO BE MET BY CONDEMNORS

In North Carolina, the standard legal tests for exercising the power of eminent domain are imminent public need and an enumerated public purpose as well as payment of just compensation. We propose that an additional constraint be added by statute in the limited circumstance where land subject to a conservation easement is taken by condemnation. This test would be a threshold finding by the Court that "unavoidable public necessity and absence of a prudent and feasible alternative" require the taking.[11] This threshold test could be set up so that a judge would rule on this issue before the condemnation action could proceed.[12] Note that this is not tantamount to a ban on condemnation of conservation easements, but instead adopts an enhanced public-need test which the condemnor would have to satisfy in the limited circumstance of taking land subject to a conservation easement. By adopting this enhanced public-need standard, the General Assembly would be placing a "check" (*i.e.* a Superior Court Judge's review) on the condemnor's exercise of the power of eminent domain. This "check" is consistent with balancing the strong public policy favoring preservation and protection of conservation easements with the need of condemnors to acquire property for public improvements. Moreover, adoption of this "legal test" would not be at public expense, since the

[11] The statute might be written as follows:

> "The provisions of any law to the contrary notwithstanding, no county, municipality, other political subdivisions, department or agency of this State, and no other entity having the power of eminent domain pursuant to North Carolina Statutes shall exercise the power of eminent domain on land subject to a conservation easement unless such entity, first demonstrates that the action is justified by unavoidable public necessity and that there is no prudent and feasible alternative.
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> This determination shall be made by a Judge of the Superior Court. A ruling by said judge that either the taking is not justified by unavoidable public necessity or that there is a prudent and feasible alternative shall entitle the easement holder to recover its reasonable attorneys fees and costs including, without limitation, reasonable surveying, engineering and appraisal costs."

[12] The NCDOT's "quick take" procedure (N.C. Gen. Stat. §136-104) under which title vests and the NCDOT has the immediate right to possession upon filing the Declaration of Taking, Complaint and posting a deposit of its estimate of just compensation would be preceded by this determination by a Superior Court Judge.

condemnation action would be allowed to proceed if the test were satisfied, and, arguably, should not have been proposed if the Court ruled otherwise.

There is precedent for adding a legal test of this nature to eminent domain proceedings involving conservation easements. Texas has a "no feasible and prudent alternative to the use or taking of the land" test.[13] Rhode Island's test is demonstration of "extreme need and the lack of any viable alternative . . .."[14] New Jersey law provides that the Governor must declare "that the action is necessary for the public health, safety and welfare, and that there is no immediately apparent feasible alternative."[15] Florida law provides that "the court must consider the public benefit provided by both the conservation easement and the (public work improvement) in determining which lands may be taken."[16] Finally, as to agricultural lands, Kentucky law provides that the State "shall not locate landfills, sewage treatment plants, or other public service facilities that are not compatible with or complimentary to agricultural production on restricted lands."[17]

IV. FAIR MARKET VALUE COMPUTATION

North Carolina's courts generally use the "before and after" method, discussed earlier in Section II, to value traditional easements for eminent domain purposes. Similarly, when land subject to a conservation easement is condemned, both the servient estate owner (the underlying fee simple owner) and the government entity or land trust holding the easement (the dominant estate owner) should be entitled to compensation based on the value of the property as if it were not subject to the easement (i.e. based on its unrestricted value). The compensation awarded

[13] TEX. NAT. RES. CODE ANN. § 183.057(a)(1).

[14] R.I. GEN. LAWS § 42-82-6.

[15] N.J. STAT. ANN. § 4:1C-25.

[16] FLA. STAT. § 704.06(11).

[17] KY. REV. STAT. ANN. § 262.910(2)(d).

should be apportioned between the two owners based upon the value of their respective interests. To arrive at a just compensation award using the restricted value of the property caused by imposition of a conservation easement would be a result benefiting the condemnor by allowing it to take property for less than its fair market value.[18] This would turn conservation-burdened land into an attractive, cheap target for condemning authorities. To prevent such a result, the statutes of North Carolina should provide that the appropriate standard for determining just compensation in takings of conservation easement-encumbered land is the difference between the fair market value of the entire tract before the taking and after the taking.[19]

V. JUST COMPENSATION MITIGATION PAYMENT

Conservation easements are assets usually held by a government entity or land trust for the benefit of the public. If land subject to a conservation easement is condemned, then the just compensation paid should be used to accomplish similar conservation or preservation purposes in another manner and location. If the just compensation paid is simply the unrestricted value of the property taken (*i.e.* the land is valued assuming it were not subject to the conservation easement), then the mitigation costs incurred by the property owner in restoring the status quo are borne by the easement holder and thereby reduce just compensation. A policy or laws which place these transactional costs (*e.g.* locating and arranging for a substitute conservation easement or otherwise using the proceeds in a manner consistent with the conservation purposes of the

[18] In City of Charlotte v. The Charlotte Park and Recreation Commission, et al., 278 N.C. 26 (1971), our Court held that the condemnee was entitled to recover the difference between the fair market value before and after the taking, without restrictions as to its use as park land. While this case does not involve taking a conservation easement, the opinion states that the Court is adopting ". . . the better view, which is supported by the weight of authority. . ." Id. at 34.

[19] The statute might be written as follows:

> "In all actions for the condemnation of lands under the statutes of this State, if the subject property is encumbered by a conservation easement, that conservation easement shall be treated as a separately compensable property interest. In each case, in determining the difference between the fair market value of the entire tract before the taking and after the taking, the existence of the conservation easement shall be disregarded, and the conservation easement holder shall be compensated according to applicable law, or according to the terms of the conservation easement."

conservation easement) on the easement holder in fact deprives the holder of a portion of just compensation to which the law entitles it. We propose adding to the amount of just compensation paid by the condemning authority to the easement holder a 25% mitigation payment in the limited circumstances of condemnation of conservation easements.[20] Such a provision would discourage the condemnation of such lands, but would help fund the purchase, protection and preservation of replacement lands (for the benefit of the public) if condemnation were necessary under the circumstances. Said differently, such a mitigation payment would help ensure that condemnation of conservation easements would occur only when the condemnor has concluded that no other practical alternative exists and that the project's importance justifies the additional expense.

VI. CONCLUSION

As a matter of public policy in North Carolina, lands subject to conservation easements should be taken through the power of eminent domain only when absolutely necessary. Imposing a high legal standard for such condemnations, requiring reimbursement of attorneys fees and costs to defend against meritless attempts to acquire such lands, disregarding the presence of the easement for valuation purposes, and invoking a condemnation mitigation payment would help ensure that a condemnor has every financial incentive to engage in systematic, in-depth planning when land subject to a conservation easement is the target of the condemnation proceeding (*e.g.* such considerations include adverse and environmental effects

[20] The statute might be written as follows:

> "To the amount of just compensation for the taking of lands subject to a conservation easement shall be added 25% of the amount for which the acquisition was made or the action resolved (whether by voluntary agreement or by judgment of the Superior Court for such taking to defray the mitigation costs incurred by the easement holder in locating and acquiring a substantially similar conservation easement or otherwise using the proceeds in a manner consistent with the conservation purposes of the conservation easement."

that cannot be avoided; alternatives to the proposed action; irreversible environmental changes involved, etc.). The substantial benefits which conservation easements provide the public in perpetuity should not be taken through the power of eminent domain without first conducting such an exhaustive analysis and balancing of interests.

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