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CONSERVATION CONVEYANCING: WHEN YOUR CLIENT IS POSTERITY

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SPEECH**CONSERVATION CONVEYANCING: WHEN YOUR
CLIENT IS POSTERITY**

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It is an honor to be invited by the Western New England University School of Law Environmental Law Coalition to speak to you about legal practice in the field of land conservation; I thank you very much for this opportunity.

There are two parts to my message today.

First, I'll tell you about practice in this field, describing the work I do, the decisions I make, the advice I render to clients, and, of course, acquaint you with the statutory and common law that is intrinsic to the work of practitioners in this field.

Second, I'll offer some predictions as to the future of land conservation practice, how the role of lawyers can reasonably be expected to change, and the special responsibility, that in my opinion, devolves upon all of us whose skills and services are employed for the ultimate benefit not just for the immediate client, but for generations of owners, abutters and whole communities, including wildlife and plant species, for all of posterity.

It's a rewarding field of practice, and among its benefits is that you get to think long, and use words like "posterity" and "perpetuity" at least once a week. How many practitioners get to do that?

I. CONSERVATION PRACTICE

"Conservation practice" is simply conveyancing with a twist. "Conveyancing" refers to all the things that lawyers do in order to make real estate deals happen. We draw purchase and sale contracts, deeds,

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partial releases of mortgages and the myriad of instruments associated with transferring an interest in land from one holder to another, and, of course, we deal with title problems that may arise. Besides lawyers and their staffs, the universe of conveyancers is inhabited by brokers, bankers, surveyors, and title examiners. The process ends with a “closing”—which is the perfect word to describe the acts of exchanging and recording documents, as it enables everyone to pick up their checks, close their files, and move on to the next thing.

I’ve never liked the term, “conveyancing,” as it is a semantic corruption of the verb “convey,” and represents another triumph of jargon. We don’t conveyance things, we *convey* things, and what we convey are interests in land, whether fee interests or mortgage interests or leasehold interests or conservation interests. The familiar documents—deeds, mortgages, etc.—are the vehicles with which those interests in land move from one party to another. Our job is to map out the paths that those interests in land—and the consideration therefor—are going to take, and see that the goals are reached.

That process is about much more than exchanging familiar forms. It’s about carefully shaping the respective rights, duties and obligations of the parties relating to particular real property, with the right balance of burdens, benefits, and incentives that fosters cooperation over time. It’s about anticipating everything that can go wrong, both short-term and long-term. It’s about being sure that every topic that needs to be covered is covered. It’s about spelling things out with such clarity that the parties’ expectations are perfectly in sync and they match the words on the page. Nothing sours a contractual relationship so much as a misunderstanding between the parties. When you represent a buyer, it is no accomplishment to close a real estate deal amicably and on schedule if your client cannot sell the property years later due to something you overlooked or dismissed as unimportant.

The “twist” in conservation conveyancing is that our efforts are aimed at preserving the locus in its natural condition, to varying degrees, in perpetuity. Sometimes, by gift or sale, the owner conveys a fee simple interest to a government entity or land trust (more about them later). More often, however, the owner will retain a possessory interest and the transaction consists of conveying something far less than a fee.

There are a number of colloquial expressions used to describe the legal process of preserving land in its natural condition. You’ve likely heard of the “sale of development rights.” I’ve heard it described as “erecting walls against sprawl.” A new term borrowed from agriculture is “exclosure”—meaning an area from which something is excluded, like

a garden. The fence isn't there to keep the plants in; it's to keep the creatures out, lest your tomatoes be devoured. Whatever the metaphor, the first aim of conservation is prevent development (a misnomer, in the view of ardent conservationists) of a particular parcel of land. In the case of farmland, conservation aims to keep it in active agriculture; in the case of forestland, conservation aims to foster good forestry practices—or *silviculture*, to use another big word—for best-practices timber production, habitat, and watershed protection. Some parcels are protected for their rare species or geologic features, or archeological significance.

How do we do this? Let's go back to the year 1969—the apotheosis of the cultural revolution and the dawn of modern environmental consciousness. That year, Governor Francis Sargent signed a law, now chapter 184, sections 31 through 33 of the Massachusetts General Laws,¹ creating new “interests in land,”² and authorizing a landowner to execute and record certain instruments “appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use”³ These would forbid inconsistent uses, such as billboards, excavations and waste dumps, and, in a broad catch-all, would exclude “other acts or uses detrimental to such retention of land or water areas.”⁴

The new interests that pass my desk most frequently are called Conservation Restrictions [hereinafter *CRs*] and Agricultural Preservation Restrictions [hereinafter *APRs*]. They run twenty to thirty pages and contain a lot of detail as to what the landowner may and may not do on the land. Like zoning laws, they say “yes,” “no,” or “maybe” to a long list of perspective uses, declaring them allowed or prohibited or allowed under certain circumstances and with an “ok” from the holder. They spell out the grantee's enforcement rights and the procedures to be followed in the case of reported violations like erecting a building on restricted land. Landowners who grant *CRs* and *APRs* retain full possession of their land, but subject to the prescribed restrictions.

In the case of *APRs*, the language of the documents is well fixed, like a bank mortgage, leaving little to negotiate. *CRs*, however, can flex to meet the landowner's needs and wishes with regard to reserved rights, so long as the owner—and *his heirs*, as they used to say—cannot thwart the permanent protection for the land's *conservation values*; those

1. M.G.L. c. 184, §§ 31–33 (2012).

2. *Id.* § 32.

3. *Id.* § 31.

4. *Id.*

elements of the land that make it worthy of conserving in the first place. When taxpayers' money is used to purchase a restriction, usually rights of public access are included. When there's no public money involved, the landowner usually retains the right to exclude the public, but we're starting to see public trail easements.

Scholars of property law can quibble whether CRs and APRs are "servitudes" or "negative easements," but I see them simply as the conferring of the right to enjoin the landowner from violating the restrictions to which his land is now subject. To describe this as the "sale of development rights" is not technically correct, because the grantee, whether the state or a land trust, does not acquire the right to develop the land; rather, the grantee gets the right to sue the landowner and obtain injunctive relief if the landowner starts clear-cutting trees or damming brooks, or inflicting other injuries on the land's conservation values.

Like all long-term legal instruments, CRs and APRs contain a provision for amendments. The provisions are typically very tight, as amendments are inconsistent with the basic concept of permanence—and besides, as every practitioner knows, amendments to legal instruments can often create serious problems. They open the door to error, ambiguity, and inconsistency with those parts of the document that are not being amended. Every lawyer has seen sloppy changes to previous documents, and knows that if you are looking to find the structural flaws in an instrument, look closely at its amendments. The amendments can be a minefield or treasure chest, depending on whom you represent.

The current "model CR" promulgated by the Division of Conservation Services in the Department of The Executive Office of Energy and Environmental Affairs, most unambiguously frowns on amendments:

Any amendments to this Conservation Restriction shall occur only in exceptional circumstances. The Grantees will consider amendments only to correct an error or oversight, to clarify an ambiguity, . . . [and in exceptional circumstances where in granting an amendment] there is a net gain in conservation value.⁵

APRs held by the state contain an important feature we don't see in CRs, which deserves a mention. During the infancy of APRs, some farms were put under restriction, but later acquired by new owners

5. *Model Conservation Restriction*, ENERGY AND ENVIRONMENTAL AFFAIRS, DIVISION OF CONSERVATION SERVICES, <http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/> (listed under publications).

having no commitment to agriculture, who transformed them into “estates,” by changing pastures into expansive lawns and barns into riding stables. This resulted in the loss of valuable agricultural resources. To put a stop to that practice, the Department of Agriculture inserted a mechanism into APRs called the “option to purchase at agricultural value,”⁶ whereby the state has the right to buy the farm or assign that right to a genuine farmer, of which they have a long list. The bottom line is that a farmer whose land is under APR *can’t* sell the farm except to another farmer.

To whom are restrictions granted? There are two classes of eligible grantees, or, as we often call them, “holders” of the restriction: “governmental bod[ies]” and “charitable corporation[s] or trust[s] whose purposes include conservation of land”⁷—in other words, land trusts. In the vast majority of conservation transactions I’ve handled, my client was a land trust.

Land trusts are not trusts. They are not set up like trusts and we do not look to the Uniform Trust Code for any guidance as to how they should operate, although the statute does seem to leave the door open for that possibility.⁸ Rather, land trusts are non-profit corporations organized under chapter 180 of the Massachusetts General Laws.⁹ Like thousands of other non-profit organizations, they are run by people dedicated to worthy causes, sometimes but not always with a level of organizational sophistication matching their zeal. Massachusetts now has some 150 land trusts, including large and venerable statewide organizations like The Trustees of Reservations and Massachusetts Audubon, strong regional land trusts like the Franklin Land Trust in Franklin County and the Kestrel Land Trust in Amherst, and active local groups, usually operated by volunteers, that focus on a single town, like Pascommuck Conservation Trust in Easthampton.

Like many fields of law and commerce, much of conservation practice is driven by tax law, as a landowner’s conveyance of a conservation restriction for less than fair market value represents a gift to a charitable organization for which he may claim a deduction.¹⁰ Not infrequently, the deduction is a stronger motivation than saving the

6. 330 MASS. CODE REGS. 22.08 (2015).

7. M.G.L. c. 184, § 32 (2015).

8. UNIF. TRUST CODE (amended 2010) (the 2010 amended version of the Uniform Trust Code details the processes and policies of creating equitable trusts. It does not mention, however, the purposes and policies guiding the formation of land trusts).

9. M.G.L. c. 180 (2015) (this chapter of the M.G.L. lays out the policies guiding corporations for charitable and other purposes).

10. *See* 830 MASS. CODE REGS. 62.6.4 (2014).

environment. Hence it is of critical importance that the restriction conforms to the tax-based requirements. The first among many essentials, one might say, is that the restriction be absolutely permanent. After all, it would be a sham to give a tax break for donating a restriction that could be later weakened or nullified by the owner or a court.

There are tax benefits to restricting one's land beyond a charitable deduction. As for local property taxes, restricting land reduces its fair market, and thus assessed value, therefore lowering one's tax bills. And, if you're wealthy enough to be concerned with estate taxes, the value of your taxable estate is lowered, and thus your estate's tax liability. And, Massachusetts currently offers a significant tax credit for conservation donations.¹¹

Let's pause for a minute. I've told you about the chief legal mechanisms for conservation, CRs and APRs, that protect the land in its natural, scenic or open condition, and how they are intended to last forever, and how hard or impossible it is to amend them, and how the easement benefits the public generally, and not any abutter. Is there a problem here? Does everything I've told you sound slightly antithetical to the basic precept of English and American property law, namely the policy favoring the right of free alienation and unrestricted use of property, unhampered by the "dead hand from the grave"—a popular and compelling image referring to restraints imposed by those now long-dead?

Certainly there is a fetid odor. One first looks for a violation of the Rule Against Perpetuities, but that is not a problem here. In the cases of CRs and APRs, the interest in land that is conveyed to the holder vests immediately. The recipient of the restrictions needn't wait to know what rights it has obtained.

However, when conveyed to and held by a non-profit organization or government entity having no connection with the land, CRs and APRs do appear to run afoul of ancient common law rules about privity of estate, lack of benefit to any particular piece of property and easements in gross, which the law has long disfavored. Their vulnerability to these common law rules explains the dynamic between the state and the landowner: *on the condition* that the restriction is approved by state officials as in the public interest and otherwise conforms to other requirements of the enabling statute, the restriction is protected against unenforceability on those grounds.¹² It is protection from the operation

11. M.G.L. c. 62 (2015), 301 MASS. CODE REGS. 14.00 (2015).

12. M.G.L. c. 184, § 32 (2015).

of those rules that is the *sine qua non* of the statute, as the original legislation trumpeted in its title: “An Act protecting conservation and preservation restrictions held or approved by appropriate public authority”¹³

II. A LOOK AHEAD

Since 1969, thousands of acres of land have been protected through the work of state and local officials and land trusts and many volunteers.¹⁴ For that period we conservation practitioners have focused on helping our clients put land in conservation. In coming decades, I predict, the focus of conservation practice will be on keeping it there.

It’s not hard to imagine the kinds of threats that could undermine our accomplishments in land conservation and seriously weaken those walls against sprawl that people like my client land trusts have labored so heartily to build. Climate change will cause the oceans to rise, forcing populations inland. A terrorist act could force the evacuation of a large city, perhaps necessitating the construction of vast temporary housing on public lands. While lands protected by restrictions purchased with public money enjoy constitutional protection,¹⁵ a tide of public opinion could push the legislature to weaken the protections accorded by the enabling act. Legislatures, we all know, are notoriously responsive to tides of public opinion.

Practitioners can’t control climate change or terrorist acts, but there is another threat to conservation that we are well-qualified and well-positioned to guard against. That risk is that someone, years or decades from now, will closely examine the text of the document and find some flaw, ambiguity, or inconsistency that can be exploited by a landowner less conservation-minded than his predecessor in title who granted the restriction, and whose “dead hand” he thinks unreasonably restrains his fair use of his land. Certainly, keeping instruments free of such deficiencies is the duty of all conveyancers, but that duty takes on a special significance when restrictions are expected to last in perpetuity.

13. 1969 MASS. ACTS 537, *available at* <http://archives.lib.state.ma.us/actsResolves/>

14. In 1987, Mass Audubon “warned that the pace of land loss would result in 2 million acres of then-open space in Massachusetts becoming homes, apartments, offices, malls, streets, and parking lots by 2030, while only 804,000 acres would be protected.” Today, Massachusetts has 1.26 million acres protected. From 2005 to 2013, 41 acres were protected per day. Only 13 acres per day were lost. Editorial, *Mass Audubon Tells Upbeat Story*, BOS. GLOBE (Aug. 17, 2014), *available at* <http://www.bostonglobe.com/opinion/editorials/2014/08/17/losing-ground-more-mass-audubon-report-tells-upbeat-story/yC9EkovAbjQ7DAoIvZdqIO/story.html>.

15. MASS. CONST. art. 97.

Exercising that duty requires more than good draftsmanship, exactness, getting all the numbers right, and recording the papers in the right order. Sometimes, I recently learned, it means conflict.

Unlike trial attorneys or entertainment lawyers, conveyancers are not known for combat, but no lawyer can shrink from conflict when circumstances demand. Let me close by telling you a “war story” about a recent transaction I handled, which I think may give a strong hint as to the future of conservation and how the role of practitioners can be expected to change.

My client, a wealthy and sophisticated landowner, had contracted to purchase a large parcel of forestland subject to a CR that a previous owner had granted to a state environmental agency. As is typical, it contained a provision requiring the landowner, in the event of a sale of the underlying fee interest, to give notice to the agency. That makes sense: the agency has an interest in knowing who the fee owner is and has the right to block the sale if the transfer would be contrary to the conservation purposes of the restriction. The only wrinkle—perhaps anomaly is a better word—was that the locus was one of four discrete parcels listed in the CR’s “Exhibit A,” the page containing the legal descriptions of the subject properties.

When seller’s counsel told me that the agency wanted to amend the CR, I groaned. My client didn’t hire me to negotiate an amendment to a CR. I saw no reason for one, as the instrument contained a simple mechanism that, I felt, would deal neatly with the anomaly. Amending the document would not only require tens of hours of legal time, but would also cause unnecessary complication and delay. My disappointment turned to disbelief a few days later when I received from the agency’s “stewardship coordinator” a proposed amendment. It was a rambling, amateurishly-drafted document full of inconsistencies, ambiguities, colloquialisms, and dubious legal conclusions, plus a number of new substantive provisions more restrictive to the landowner and more favorable to the agency.

I resisted strongly. There being no threat to the purposes of the original CR and in the absence of any consideration, as the agency had no unilateral right to exact further restrictions. It seemed a simple case of extortion: as a condition of granting its “OK” for the sale, the agency was demanding that my client assent to a more restrictive CR. *Stewardship by thuggery*, I thought. Making matters worse, I found it personally insulting that the agency would even think that I might allow my client to be bound by a shoddily-drafted document.

I persistently sought from both seller’s counsel and the agency a

simple explanation as to why an amendment was legally required and why the existing simple mechanism could not be used. I even provided the needed documents, but they were ignored. After months of increasingly-contentious emails, my frustration at being unable to get straight answers (even from the agency's lawyers) finally drove me to appeal to the agency's governing board in a public session—a drastic move I had never before made.

Seller's counsel, an experienced conservation practitioner, surprised me by embracing the agency's position—but of course the first duty of every seller's lawyer is to get to the closing table as soon as possible and exchange a deed for a check, so it's understandable that she didn't want to risk any delay in the agency's approval. Besides, her client would own the land for only a minute after the amended restriction was recorded, so he was unaffected by it.

The deal finally closed. The agency backed down on all the new restrictions, but rejected—without explanation—my suggestion of the simple mechanism to deal with the anomaly. This made me spend hours poring over the document to ensure that the agency was not trying to slip something else in.

My client was satisfied, but my puzzlement and astonishment over the agency's handling of the transaction did not fade. Why did they spend multitudinous hours of state employee time on such a simple thing?

Why did they risk weakening the CR by amending it when no amendment was necessary? Why did they knowingly establish such a bad precedent?

When the dust was well settled, I took the extraordinary step of filing a Freedom of Information Request with the agency. After sifting through some 800-pages of mostly internal emails between agency staff, lawyers, and seller's counsel, my impression of *institutional thuggery* was validated. From the very beginning, I learned, the agency "strategized" how to use the approval requirement to pressure my client into accept changes to the CR he did not bargain for, notwithstanding that the only basis for withholding approval was inconsistency with the conservation purposes. I also learned that they convened an entire committee, including seller's lawyer, to prepare a "position paper" to explain why an amendment to the underlying document was necessary. According to an email from the stewardship coordinator, the committee acknowledged that my "alternative approach" was "legally valid." And, he reported, the group acknowledged as well that "if Evans was [sic] representing [the seller] we would be taking this approach." In other

words, the agency's insistence on amending the document was based on no legal necessity or had any rational basis: I had only angered them by asking why.

Curiously, they never showed me their "position paper," perhaps because it was simply doubletalk and obfuscation. Another curiosity from the emails was that the stewardship coordinator himself eventually came around to accepting my simple approach, after earlier accusing me of "ranting and raving," and "whining," and scolding me to "tone down the rhetoric."

The point of this story is not only about the duty of conveyancers, like all practitioners, to ask important questions even at the risk of earning the animus of an entire agency. Rather, it is to illustrate how the greatest threats to conservation may not be external, but internal, arising from carelessness, indifference, or simple bureaucratic dysfunction—or, as appears in this case, from the personal animus of an entire agency charged with conservation. Certainly I make no apologies for my "rhetoric;" my only regret is that I was not more effective in heading off this colossal waste of time and resources—and risk to conservation—at the outset.

In future decades, as the demand for housing puts an ever-tightening squeeze on land available to build it, it is plausible that you will get a call from a developer asking you look at a conservation restriction and see if it can be "broken." (I'm very glad to have not yet gotten that call.) And the first thing you will do is scrutinize the instrument very, very closely, for any flaw that can be exploited.

The duty of today's conservation practitioners is to leave no flaws for you to exploit tomorrow. We do so by seeing to it that the legal instruments we draft, exchange, and record—the vehicles with which interests in land are transferred and remain in the holder—are properly designed, engineered, and built to last forever.

If we do that job right, we will have helped preserve the blessings of nature, not only for our children and grandchildren, but for all of posterity. Their gratitude will be well-earned. I welcome you to practice in this field.

Thank you very much.