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Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection

*Gerald Korngold**

INTRODUCTION

Since the advent of European settlers, there have been competing visions for the use of American land. The traditional ethos has been full development of resources in order to meet the needs of a growing population and country. People differed, and even battled at times, as to the direction and type of this development. Two examples of this conflict are the cattle wars in the West and disputes over the spillovers of industrial activities into residential areas. Yet, throughout the first 200 years of the American Republic, development of land resources in some form was the dominant principle.

Over the past two generations, however, a new environmentalism ethic has emerged.¹ Currently this ethos is quite pervasive, and is reflected in legislation and governmental programs, sustainability strategies of companies, and various

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1. The land conservation movement in the United States has roots in the 19th and early 20th centuries. John Muir founded the Sierra Club in 1892, at the dawn of the second American century, and has grown to a membership of 1.4 million people. *See Who was John Muir?*, SIERRA CLUB, http://www.sierraclub.org/john_muir_exhibit/about/, archived at <http://perma.cc/LMS6-NX8W> (last visited Oct. 6, 2014). The first non-governmental land trust, the Trustees of Public Reservations, was established in 1891 dedicated to acquiring and holding “for the benefit of the public, beautiful and historic places in Massachusetts.” RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 13, 17 (2003). In 1955, The Nature Conservancy (TNC), founded in 1951 but with roots in an organization established in 1915, began acquiring land for conservation purposes. *See Our History*, THE NATURE CONSERVANCY, <http://www.nature.org/about-us/vision-mission/history/index.htm>, archived at <http://perma.cc/K3QR-YCSS> (last visited Oct. 6, 2014). The precise origins of the modern environmental movement cannot be pinpointed. The publication of Rachel Carson’s *The Silent Spring* (1962) brought the message to a broader segment of the public. The first Earth Day in 1970 represented the first manifestation of environmentalism as a large-scale public movement. For a history of environmentalism, *see generally* ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* (2nd ed. 2005).

religious and belief systems. Environmentalism generally values land in its natural state and seeks to preserve it from development.² Conservation easements, authorized by states over the past 35 years, are a major vehicle to effectuate this new conservation value. Conservation easements allow nonprofit organizations (NPOs) and governmental entities to preserve land by preventing its owner from altering its natural, environmental, and ecological features.

Simultaneous with the widespread rise of environmentalism and conservation easements, is an increased drive to find new energy sources. One strain of this search operates within the traditional model of full development of land resources and focuses upon extraction of carbon-based fuels (oil and natural gas). Proponents of new domestic exploration argue that domestic exploration is necessary to meet consumer demand and to enhance America's geopolitical position by decreasing reliance on foreign oil imports.³ Because of new advances over the past ten years, exploration companies can now economically extract gas and oil from shale formations in new areas of the United States using a process that combines new horizontal drilling techniques with traditional hydraulic fracturing.⁴ (For convenience, and consistent with conventional usage, this Article will use the terms "fracking" and "hydrofracking" to refer to this combination of horizontal drilling with hydraulic fracturing technology.) Fracking increases gas and oil development, but also raises concerns about its effect on the environment.

A second category of new energy initiatives seeks to develop renewable energy sources. These innovations are predicated on a view that runs counter to the traditional full development model of

2. See RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* (4th ed. 2001). There sometimes are competing environmental visions. See, e.g., Lisa W. Foderaro, *As Adirondack Reserve Grows, Asking How Wild It Should Stay*, N.Y. TIMES, Sept. 19, 2013, at A27 (describing differing views of environmentalist, recreationalists, government agencies, and others on how forest preserve should be used).

3. See Bryan Walsh, *America's Oil Boom Won't Make It Energy-Independent from Middle East Madness*, TIME (Sept. 5, 2013), <http://science.time.com/2013/09/05/americas-oil-boom-wont-make-it-energy-independent-from-mideast-madness/>, archived at <http://perma.cc/D92R-RCCT>; Patti Domm, *US Is on Fast Track to Energy Independence: Study*, CNBC (Feb. 11, 2013, 2:29 PM), <http://www.cnbc.com/id/100450133>, archived at <http://perma.cc/JGQ6-944R>.

4. See Tomas W. Merrill, *Four Questions About Fracking*, 63 CASE W. RES. L. REV. 971, 971–72 (2013); Timothy Fitzgerald, *Frackonomics: Some Economics of Hydraulic Fracturing*, 63 CASE W. RES. L. REV. 1337, 1338–40 (2013).

land use and include wind turbines, solar fields, and other solar devices. Renewable energy generation seeks to provide power without utilizing finite earth resources (such as carbon-based substances) or increasing the carbon footprint. Renewables also aim to minimize their effect on the surrounding ecosystem—although there are some minor spillovers as described below. Overall, the development of wind and solar energy represents a concern about the sustainability of the environment and a different outlook than traditional full exploitation of land resources. (For convenience this Article will refer to fracking, wind, and solar energy collectively “new energy” or “new energies,” and to wind and solar collectively as “renewables.”)

This Article examines the intersection of these two major trends—the growth of conservation easements and the development of new energies—and whether they can be compatible under current law.⁵ Recent conflicts include cases involving fracking on conservation easement land,⁶ differing views among conservation organizations about drilling on easement property,⁷ and community debate about siting wind turbines on easement land.⁸ With the increase in both conservation easements and new energy trends, these conflicts are likely to grow. Specifically, this Article explores whether new energy creation can take place on a property that is subject to a conservation easement in light of the parties’ express agreement and argues for specific interpretative devices that will best find the parties’ intention while respecting public policy considerations when that intention is not made clear in the writing. This Article also analyzes the effect of the Internal Revenue Code on conservation easement development and how federal deductibility has driven the structuring of

5. There are other occasions where visions over conservation easement land have conflicted. See Gregg MacDonald, *Salona Task Force Will Meet*, WASH. POST, June 9, 2001, at T16 (describing public process to determine appropriate uses of land under governmental conservation easements, specifically whether ballfields should be permitted or land retained in a more natural state). William H. Whyte, Jr., an early proponent of NPO conservation easements, raised concerns about “muted class and economic conflicts,” with easement donors being the “gentry” with an interest in the natural countryside not in open space with public access for parks and playgrounds. William H. Whyte, Jr., *Securing Open Space for Urban America*, 36 URB. LAND INST.: TECHNICAL BULL. 36–37, (1959).

6. See *infra* Part II.D.

7. See David Giller, Note, *Implied Preemption And Its Effect On Local Hydrofracking Bans in New York*, 21 J.L. & POL’Y 631, 637–38 (2013).

8. See Eileen M. Adams, *Residents to Decide on Town Ownership of Lots*, SUN J. Dec. 1, 2009 (reporting on town meeting to discuss rescinding town’s conservation easement so that six wind towers could be built).

transactions and state policy goals. This Article then examines whether, in order to permit new energy development, a conservation easement can subsequently be amended by the fee owner and easement holder, and who must participate in this process. This Article suggests that the rules concerning modification and termination need to be clarified. The current confusion frustrates environmentally-rational decisions and the vindication of other public policies. Finally, this Article explores non-consensual alterations to conservation easements—by judicial action or eminent domain proceedings—that would permit new energy activities on the land and concludes that they are of limited application.

This Article examines the issue of conservation easements and new energies by juxtaposing “environmentally friendly” renewables and “environmentally threatening” fracking in order to force a deeper inquiry into the question. If only renewables were considered as examples, some pro-environment advocates may be willing to relax enforcement of the conservation easement because “green” purposes are being served. Similarly, if this Article only examined scenarios involving non-renewable energies, some proponents of increased exploitation of carbon fuels could be biased towards non-enforcement of the easement. By providing these counter examples, however, the discussion can peel away rote reactions. Consequently, there can be a more neutral analysis that examines the intent of the parties to the easement, provides a sophisticated exploration of the relative property rights, suggests a realistic legal architecture to respond to evolving conditions, and vindicates the public’s interest.

I. OVERVIEW OF CONSERVATION EASEMENTS AND NEW ENERGIES

A conservation easement is a restriction on land that prevents current and successor owners from disturbing the property’s natural, ecological, open, or scenic features.⁹ A typical easement

9. Unif. Conservation Easement Act § 1(1), 12 U.L.A. 170 (1981). See generally RUSSELL L. BRENNEMAN, PRIVATE APPROACHES TO PRESERVATION OF OPEN LAND (1967); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984) [hereinafter Korngold, *Conservation Servitudes*]; Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039 [hereinafter Korngold, *Contentious Issues*]; Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOKLYN L. REV. 467 (2013) [hereinafter Korngold,

document contains a general promise not to interfere with these natural attributes, along with specific prohibitions such as bans on additional structures, removal of natural growth and timber, and installation of roads.¹⁰ Conservation easements do not usually provide for access by the public.¹¹

Conservation easements are authorized by statute in all American jurisdictions. These statutes are often enacted to address questions concerning the validity of conservation restrictions under the common law.¹² Although there are some jurisdictional differences, conservation easements usually share common features. Easements may be held only by governmental units or qualified NPOs; they are typically held “in gross”—the easement holder does not need to own nearby land directly benefitted by the easement; they usually are perpetual and are required to have unlimited duration in order to be deductible under the Internal Revenue Code; conservation easements are enforceable “in rem” as property interests; and they bind successor owners of the burdened land.¹³

A. Conservation Easement Data

There is a scarcity of data about the number, acreage, holders, and location of conservation easements held by both NPOs and governments. This has complicated policy assessment and

Governmental Conservation Easements]; Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 28 WIS. INT'L L.J. 585 (2011) [hereinafter Korngold, *Globalizing Easements*]; Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1525-27 (2007) [hereinafter Korngold, *Future Generations*]; James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209 (2000); Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119 (2010); Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005).

10. Korngold, *Governmental Conservation Easements*, *supra* note 9, at 469–70.

11. *Id.* at 470 n.6. A limited right of access for the purpose of inspection to determine compliance may be granted to the easement holder.

12. *Id.* at 470–71.

13. *Id.* at 471.

decisions on easement costs and benefits.¹⁴ Some data can be found in the Land Trust Alliance's censuses of land trusts (a voluntary survey) and in the Form 990s filed by NPOs under the Internal Revenue Code. Moreover, in 2011 a consortium of NPOs and federal agencies launched the National Conservation Easement Database to gather, on a voluntary basis, information about conservation easements.¹⁵ Table 1 sets out data derived from these sources. This is only an incomplete picture, as some of the reporting is voluntary and does not include all NPOs and governmental units that may be holding conservation easements.¹⁶

Easements Held by Government (2013)	Count	Acres
Federal	24,480	4,958,436
State	30,202	6,231,606
Local	13,803	1,071,668
Regional	65	3,993
Total	68,550	12,265,703
Easements Held by State and Local Land Trusts (2010)	Count	Acres
Total		8,833,368
Easements Held by The Nature Conservancy (2012)	Count	Acres
Total	2367	2,888,283
Grand Total		23,987,354

Table 1. Number and acreage of conservation easements held by governmental entities, (as of 2013), state and local land trusts (as of 2010), and The Nature Conservancy (as of 2012).¹⁷

14. *See id.* at 475–76.

15. *See What is the NCED?*, NAT'L CONSERVATION EASEMENT DATABASE, <http://nced.conservationregistry.org/>, archived at <http://perma.cc/5PJ9-D44Y> (last updated June 2014).

16. I have argued for increased legislative action to increase data collection. Korngold, *Contentious Issues*, *supra* note 9, at 1070.

17. *See What is the NCED?*, *supra* note 15 (for government easements); *2010 Land Trust Census*, LAND TRUST ALLIANCE 6 (Nov. 16, 2011), <http://www.landtrustalliance.org/land-trusts/land-trust-census/2010-final-report>, archived at <http://perma.cc/9SX9-MWT8> (for land trusts); *See The Native*

The data show that there has been tremendous and continued growth in the number of conservation easements over the years. The number of acres under conservation easement reported by members of the Land Trust Alliance grew from several thousand in 1985 to 8.8 million in 2010.¹⁸

B. The Policy Calculus of Conservation Easements

There are various policy reasons supporting the validity and enforcement of conservation easements. Conservation easements allow landowners to exchange their development rights with easement buyers in return for cash or tax advantages, thus benefitting both parties.¹⁹ Future purchasers of the burdened land, taking with notice of the easement, can adjust their bargaining based on the restriction and should be presumed to consent to the existing easement rights.²⁰

These consensual, market-based transactions can increase the efficient allocation of our limited land resources. Landowners can liquidate property rights they no longer wish to retain; NPOs or governments can conserve a piece of property by merely obtaining an easement instead of overinvesting resources in obtaining a fee interest that they do not actually need to achieve preservation.

Moreover, creation of conservation easements is consistent with the concept that people may freely dispose of their property by virtue of freedom of contract and property rights.²¹ Holders of land are entitled to seek personal satisfaction by exercising free choice with respect to the land. Thus, the decision to convey a conservation easement should be respected. The law should intervene in such consensual arrangements only in the most unusual situations.

Conservation easements acquired by NPOs represent private rather than governmental initiatives.²² By virtue of being private action, NPO ownership shifts the cost of acquisition, monitoring, stewardship, and enforcement from the government to private resources.

Conservancy, 2012 Form 990, Schedule D, available at <http://tinyurl.com/mtg44b4>, archived at <http://perma.cc/BM2Q-3J7V> (NCED and LTA data are self-reported and may cause an undercount total conservation easements and acreage).

18. LAND TRUST ALLIANCE, *supra* note 17, at 6.

19. See Korngold, *Contentious Issues*, *supra* note 9, at 1056.

20. Korngold, *Conservation Servitudes*, *supra* note 9, at 448–49.

21. See Korngold, *Contentious Issues*, *supra* note 9, at 1056.

22. *Id.* at 1055.

Governmental conservation easements have their own advantages. When conservation easements are purchased by the government, conservation is advanced through consent of the owner rather than by the coercive means of governmental regulation.²³

The legislative validation of conservation easements reflects a new American perspective towards land, which favors a balancing of development against preservation values.²⁴ Conservation easements can bring increased social and economic value. Conservation easements are praised for providing beautiful vistas, species protection, atmospheric remediation, carbon dioxide reduction, watershed preservation, and psychic gains.²⁵ Proponents assert economic gains also, including protection of ecological capital for future generations, preservation of farmland for food sources, and quality of life enhancement necessary to attract and retain skilled labor.²⁶ Conservation easements may also increase the values of nearby land.²⁷ Yet the conservation easement phenomenon is more than the sum of its various benefits, as it reflects a new American ethos favoring land preservation.²⁸

23. See Korngold, *Governmental Conservation Easements*, *supra* note 9, at 477–78.

24. See Korngold, *Contentious Issues*, *supra* note 9, at 1054–55.

25. See VIRGINIA MCCONNELL & MARGARET WALLS, *THE VALUE OF OPEN SPACE: EVIDENCE FROM STUDIES OF NONMARKET BENEFITS* 48 (2005); LILLY SHOUP & REID EWING, *THE ECONOMIC BENEFITS OF OPEN SPACE, RECREATION FACILITIES AND WALKABLE COMMUNITY DESIGN*, *ACTIVE LIVING RES.* 17 (2010), available at <http://atfiles.org/files/pdf/Economic-Benefits-Active.pdf>, archived at <http://perma.cc/BHK7-3G8A>.

26. See Rand Wentworth, *Economic Benefits of Open Space Protection*, LAND TRUST ALLIANCE (2003), <http://www.landtrustalliance.org/conservation/documents/economic-benefits.pdf>, archived at <http://perma.cc/V5X-4E8P>; John L. Crompton, *The Impact of Parks on Property Values: A Review of the Empirical Evidence*, 33 *J. LEISURE RESEARCH* 1 (2001); GREEN SPACE ALLIANCE, *THE ECONOMIC VALUE OF PROTECTED OPEN SPACE IN SOUTHEASTERN PENNSYLVANIA* (Jan. 2011), available at http://economyleague.org/files/Protected_Open_Space_SEPA_2-11.pdf, archived at <http://perma.cc/F7DS-V7XM>.

27. Jacqueline Geoghegan, *The Value of Open Spaces in Residential Land Use*, 19 *LAND USE POL'Y* 91 (2002).

28. See Cary Coglianese, *Social Movements, Law and Society: The Institutionalization of the Environmental Movement*, 150 *U. PA. L. REV.* 85, 91–94 (2001); D.T. Kuzmiak, *The American Environmental Movement*, 157 *GEOGRAPHICAL J.* 265, 265 (1991).

C. The New Energies

The costs and benefits of the new energies and the ensuing public policy choices present important questions, fraught with conflicting scientific, economic, moral, and political views.²⁹ These conflicting views continually change as new studies are released and debated.³⁰ A detailed examination of these competing arguments is beyond the scope of this Article. What needs to be understood for this Article is that each of the new energies pose environmental costs (but to significantly varying degrees) that could threaten the preservation goals of a conservation easement. Moreover, while there is legislative and judicial support for renewables, there are concerns advanced in case law about their intrusion on neighboring landowners.³¹ These factors add a twist to the resolution of conflicts between new energy development and conservation easements.

1. Fracking

Briefly, modern fracking techniques marry traditional hydraulic fracturing with horizontal drilling, which results in a technologically feasible method for the removal of previously

29. Some have focused on governmental regulation of fracking, *see, e.g.*, Hannah Wiseman, *Fracturing Regulation Applied*, 22 DUKE ENVTL. L. & POL'Y F. 361, 382–84 (2012), while others have maintained that common law remedies might suffice, *see* Merrill, *supra* note 4, at 989. For other discussion of fracking, *see* Adam Garmezy, Note, *Balancing Hydraulic Fracturing's Environmental And Economic Impacts: The Need For A Comprehensive Federal Baseline And the Provision Of Local Rights*, 23 DUKE ENVTL. L. & POL'Y F. 405, 406 (2013); James Kirkup, *Church of England In 'Fracking Land-Grab'*, THE TELEGRAPH (Aug. 15, 2013, 9:00 PM), <http://www.telegraph.co.uk/news/politics/10245697/Church-of-England-in-fracking-land-grab.html>, archived at <http://perma.cc/EG8H-TXLS> (reporting on conflict created by the Church's failure to rule out fracking under its lands); Fred Siegel, *Fracking, Poverty and the New Liberal Gentry*, WALL ST. J., Nov. 8, 2013, at A15; Michele Wines, *Colorado Cities' Rejection of Fracking Poses Political Test for Natural Gas Industry*, N.Y. TIMES, Nov. 8, 2013, at A14; Stephen Castle, *European Union Proposes Easing of Climate Rules*, N.Y. TIMES, Jan. 23, 2014, at A1 (EU decided against proposing laws regulating environmental damage from fracking).

30. *See, e.g.*, Michael Wines, *Gas Leaks in Fracking Disputed in Study*, N.Y. TIMES, Sept. 17, 2013, at A12 (reporting on peer-reviewed study sponsored by Environmental Defense Fund and nine petroleum companies that found fracking releases less methane than previously thought and that shale gas is cleaner than coal); Brian Resnick, *Can Fracking Cause Earthquakes?*, THE NAT'L J. (Sept. 5, 2013), <http://www.nationaljournal.com/energy/can-fracking-cause-earthquakes-20130905>, archived at <http://perma.cc/S298-CDGD> (reporting on study making that conclusion).

31 *Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 434 (Nev. 2013).

unreachable gas and oil from shale rock. Traditional hydraulic fracturing has been utilized for some 60 years and involves vertical drilling into shale formations and injecting large volumes of water mixed with sand or rocks and chemicals.³² The water mixture breaks up the shale and releases previously trapped oil and gas. Over recent years, technological innovations have made horizontal fracturing possible, where the drill is sent down vertically, turned on an angle, and fluids injected into the shale.³³ This advance has made fracking financially profitable in new regions of the country and has opened up areas such as in Pennsylvania and New York to this process.³⁴ The Marcellus Shale deposit, lying under parts of New York, Pennsylvania, West Virginia, Ohio, Kentucky, Maryland, and Tennessee, contains approximately 141 trillion cubic feet of “technically recoverable” natural gas according to the United States Department of Energy in 2012, with the total United States shale-based natural gas being 482 trillion cubic feet.³⁵

Except in the most unusual situations, removal of oil and gas by fracking on conservation easement land presents ecological risks to the property. These potential risks include: excessive water usage in the fracking process; contamination of groundwater, on the parce itself and in aquifers under other land; disruption of the surface and habitat due to installation of the drillpad, other equipment, and roads; noise; harmful gas emissions affecting air quality; and claims that reinjection of waste water causes earthquakes.³⁶ The degree of environmental damage will likely be

32. See Merrill, *supra* note 4, at 971–72; Fitzgerald, *supra* note 4, at 1338–40; State of N.Y. v. U.S. Army Corps of Engineers, 896 F. Supp. 2d 180, 185–86 (E.D.N.Y. 2012); Rachel Heron, Justin S. DuClos & Shaun A. Goho, *The Interpretation of Surface Easements in Severance Deeds As A Limit On Hydraulic Fracturing Practices*, 19 BUFF. ENV'T'L L.J. 73, 78–79 (2012); Garmezy, *supra* note 29, at 406–07.

33. See Merrill, *supra* note 4, at 971–72; Fitzgerald, *supra* note 4, at 1338–40.

34. See David Giller, Note, *Implied Preemption And Its Effect On Local Hydrofracking Bans in New York*, 21 J.L. & POL'Y 631, 637–38 (2013).

35. *AEO2012 Early Release Overview*, ENERGY INFO. ADMIN., [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2012\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf), archived at <http://perma.cc/4ZRQ-7A2B> (last visited Oct. 6, 2014). To provide a sense of scale, in 2012, the total U.S. consumption of natural gas was approximately 25 million cubic feet. *Natural Gas Consumption by End Use*, ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/ng_cons_sum_dcunus_a.htm, archived at <http://perma.cc/5KY4-DLGU> (last visited Oct. 6, 2014). See also Joshua M. Tallent, Comment, *I Drink Your Milkshake? Potential Property Rights Repercussions of natural Gas Exploration in New York State*, 61 BUFF. L. REV. 413, 414 (2013).

36. See *U.S. Army Corps of Engineers*, 896 F. Supp. 2d at 185–86 (describing water pollution); *Supplemental Generic Environmental Impact Statement On The Oil, Gas and Solution Mining Regulatory Program*, N.Y. ST.

greater when the drilling rig is placed on the conservation land itself, thus creating direct surface and related risks. When oil and gas are removed from under conservation land by horizontal drilling from a rig on a neighboring unrestricted parcel, there may be limited surface damage on the conserved land, but there is still a potential threat to ground water as well as risks due to noise, gas emissions, and other fallout. There have been reports of differences among conservation organizations as to whether they will permit gas drilling on property on which they hold easements, with some barring all drilling, others permitting horizontal drilling from other properties, and some apparently allowing drilling, as well as related structures and roads, on the conserved property itself.³⁷

2. Renewables

Various legislatures have enacted statutes and courts have decided cases based on a public policy favoring renewables.³⁸ These range from state zoning enabling acts that require facilitating wind and solar access when possible in local ordinances,³⁹ to California's Global Warming Solutions Act of 2006, which sets state goals to create renewable energy,⁴⁰ to general state policies to develop and utilize renewable energy,⁴¹ to tax incentives to install renewable energy devices.⁴² Use of renewable energy sources has increased.

DEP'T OF ENVTL. CONSERVATION (2011), <http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf>, archived at <http://perma.cc/UU9G-EW2F>; Giller, *supra* note 34, at 638; Thomas Hooker, Note, *Zoning Out Fracking: Zoning Authority Under New York State's Oil, Gas and Solution Mining Law*, 40 FORDHAM URB. L.J. 869, 870–71 (2012); Rachel Rawlins, *Planning for Fracking on the Barnett Shale: Urban Air Pollution, Improving Health Based Regulation, and the Role of Local Governments*, 31 VA. ENVTL. L.J. 226, 233–35 (2013); Resnick, *supra* note 30 (reporting on study making that conclusion); Henry Fountain, *Experts Eye Oil and Gas Industry as Quakes Shake Oklahoma*, N.Y. TIMES, Dec. 13, 2013, at A20; Henry Fountain, *Ohio Looks at Whether Fracking Led to 2 Quakes*, N.Y. TIMES, Mar. 12, 2014, at A20 (reporting on commencement of state department of natural resources investigation).

37. Paige Anderson, Note, *Reasonable Accommodation: Split Estates, Conservation Easements, and Drilling In The Marcellus Shale*, 31 VA. ENVTL. L.J. 136, 143–44 (2013).

38. See *infra* Part II.C. for a discussion of statutes protecting solar devices against homeowner association restrictions.

39. See, e.g., *Wood v. City of Madison*, 659 N.W.2d 31, 35 (Wis. 2003) (quoting WIS. STAT. § 236.01).

40. CAL. HEALTH & SAFETY CODE § 38500 (West Supp. 2014).

41. See CONN. GEN. STAT. § 16a-35k (2008).

42. See Jeffrey D. Moss, *Solar Panels, Tax Incentives, and Your House*, PROBATE & PROP. MAGAZINE 17 (Jan./Feb. 2010).

As of 2011, 13 % of the United States's electricity generation was from renewable sources, primarily solar.⁴³

Although these renewable goals and programs bring environmental benefits, they are sometimes challenged for creating negative environmental effects. For example, wind turbines are sometimes opposed by neighboring landowners, local governments, and others for interfering with habitats, dislocating wildlife, marring vistas, generating noise, killing of local and migrating birds, and creating "shadow flicker."⁴⁴ At least one court has found that a residential wind turbine created an enjoined nuisance because of aesthetic, noise, shadow flicker, and property value concerns.⁴⁵ There have also been challenges of the siting of solar fields based on environmental impacts.⁴⁶

These issues played out in an analogous land dispute reported in 2009.⁴⁷ Woody Companies sought to lease federal land in the Mojave Desert to build wind farms and major solar plants. Much to the dismay of environmentalists seeking to promote such alternative energy sources, Senator Diane Feinstein introduced legislation to bar wind farms and solar plants on one million acres of the Mojave because of concerns from local citizens that such projects would destroy scenery and natural land features. Robert F. Kennedy, Jr. was quoted in the *New York Times* saying that "this is arguably the best solar land in the world, and Senator Feinstein shouldn't be

43. *AEO2014 Early Release Overview*, ENERGY INFO. ADMIN. 5 (Apr. 2013), [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2014\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2014).pdf), archived at <http://perma.cc/U3T7-WM7S>.

44. See *Fairwindct, Inc. v. Conn. Siting Council*, 2012 WL 5201354 (Conn. Super. Ct. 2012); *GPH Cohasset LLC v. Trustees of Reservations*, 2013 WL 3022390 (Mass. Land Ct. 2012); *In re Green Mountain Power Corp.*, 60 A.3d 654 (Vt. 2012). See also Katharine Q. Seelye, *Koch Brother Wages 12-Year Fight Over Wind Farm*, N.Y. TIMES, Oct. 22, 2013, at A12; Peter Schworm & David Filipoy, *Flickering Shadows From Wind Turbines Draw Complaints*, BOSTON GLOBE, Apr. 5, 2013, <http://www.bostonglobe.com/metro/2013/04/04/turbine-flicker-effect-draws-complaints/UKgf7nOwMHm8CWAz47V5L/story.html>, archived at <http://perma.cc/YR3M-ZWNE>. (explaining shadow flicker); Dan Frosch, *A Struggle to Balance Wind Energy with Wildlife*, N.Y. TIMES, Dec. 16, 2013, at A18 (explaining bird kills); Diane Cardwell, *U.S. Offshore Wind Farm, Made in Europe*, N.Y. TIMES, Jan. 22, 2014, at B1 (explaining interference with view).

45. *Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 434 (Nev. 2013).

46. See generally *Save Panoche Valley v. San Benito County*, 158 Cal. Rptr. 3d 719 (Cal. Ct. App. 2013) (upholding the solar power development plan).

47. Todd Woody, *Desert Vistas vs. Solar Power*, N.Y. TIMES, December 21, 2009, at B1.

allowed to take this land off the table without a proper and scientific environmental review.”⁴⁸

3. *Achieving a Balance*

New energies present complex scientific, economic, and policy perspectives. There may be differences between environmentalists focusing on preservation of land and species as the paramount value and those emphasizing carbon reduction. Finally, the issues get thornier when environmental values are juxtaposed with energy security and economic development resulting from oil and gas exploitation that benefits financially distressed areas. These competing factors require a balancing of the goals of conservation easements and new energy development.

A. *Conservation Easement Tax Policy and New Energies*

Some conservation easements are purchased for consideration by governments or NPOs. In many situations, however, owners donate conservation easements to these entities. While these donors apparently are motivated by philanthropic intentions, the donation of a qualified conservation easement may also provide significant federal, state, and local tax benefits to the donor. These benefits represent a significant tax subsidy to the public for conservation easement creation.

1. *Federal*

Under Section 170(h) of the Internal Revenue Code (IRC), the donor of a conservation easement to an NPO, federal, state, or political subdivision may receive a federal income tax deduction.⁴⁹ Deductions are allowed only for a conservation easement “granted in perpetuity,”⁵⁰ which explains why donated easements in the various states are almost always of perpetual duration. It is estimated that between 2002 and 2007, these deductions resulted in \$3.6 billion of lost tax revenue.⁵¹ The donation of a conservation easement also serves to reduce the value of the property for federal

48. *Id.*

49. 26 U.S.C. § 170(c),(h) (2012).

50. 26 U.S.C. § 170(h)(2).

51. Roger Colinvaux, *The Conservation Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 9–10 (2012).

estate tax purposes, causing additional potential revenue losses for the federal government.⁵²

The indirect expenditure for conservation easements, notably through the income tax deduction, raises various policy questions. One issue outside the scope of this Article is whether the government should subsidize any donor activity, and if so, to what extent. A second level of inquiry, similarly outside the ambit of this Article, is whether the investment in preserved open space without public access is preferable to open space outlays that provide access, such as playgrounds in urban areas.⁵³

The question at hand is whether the provisions of the IRC and accompanying Regulations further the articulated congressional goal of protecting open space for the scenic enjoyment of the public and habitat preservation. Under the IRC, a donation will qualify for a deduction where its purpose is “preservation of open space” that is “(I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State or local governmental conservation policy, and will yield significant public benefit.”⁵⁴ The first clause raises multiple questions. What does “scenic enjoyment of the public” mean? Will there be a deduction for the donation of a 100-acre tract where only 2 acres are visible to the public from a roadway? Does the view have to be environmentally or aesthetically special to give “enjoyment”? Does a random half-acre parcel in a crowded urban area provide more or less scenic enjoyment than 100 acres in wilderness area?

The IRS Regulations attempt to provide guidance to determine “scenic enjoyment.”⁵⁵ They state:

Preservation of land may be for the scenic enjoyment of the general public if development of the property would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed from a park, nature preserve, road, waterbody, trail, or historic structure or land area, and such area or transportation way is open to, or utilized by, the public.⁵⁶

52. 26 C.F.R. §25.2703-1(a)(4) (2014). Additionally, the IRC permits postmortem donations of conservation easements by the estate, further lowering the property’s value for estate tax purposes. See 26 U.S.C. §§ 2031(c), 2055(f).

53. See Korngold, *Contentious Issues*, *supra* note 9, at 1060–61.

54. 26 U.S.C. § 170(h)(4)(A). See *RP Golf, LLC v. Comm’r, T.C.* Memo 2012-282 (T.C. 2012) (rejecting claim of a clearly delineated governmental open space policy on the facts).

55. 26 C.F.R. § 1.170A-14(h)(4)(d)(4)(ii).

56. *Id.*

The Regulations then provide eight factors, most of which lack clarity and are subject to debate.

Unclear scenic easement criteria present the opportunity for abuses of deductions and wasting of funds that Congress intended to support bona fide conservation easement efforts. The public interest might be better served if scenic easements were deductible only when there was a local, state, or federal governmental certification that the easement serves a public conservation purpose.⁵⁷ The IRC already permits the validation of a scenic easement with such governmental action; this could be required for all scenic easements.⁵⁸ This formulation might improve the process for conservation easement creation and help to ensure that public resources are well spent. There are costs, but arguably they are outweighed by the benefits: as donors will have to get government approvals, transaction costs and time delays will increase. Bureaucracy could grow. Some owners may be dissuaded from making contributions because of increased red tape. One data point may provide comfort, however: Massachusetts currently requires local and state governments to approve all conservation easements as a condition to creation, unrelated to federal tax deductibility issues.⁵⁹ Nevertheless, Massachusetts has an active conservation easement culture, with the second highest number of land trusts in the country.⁶⁰

2. *New Energies and Federal Deductions*

The IRC and Regulations may limit deductibility for conservation easements where energy development takes place on the preserved land. First, the IRC addresses some situations where subsurface oil, gas, or other minerals and the right to access such minerals are not included in the gift.⁶¹ When such mineral rights are retained, the donation of a conservation easement will not be

57. I have suggested in earlier work that the public interest might be better served if scenic easements were deductible only if there were a local, state, or federal governmental certification that the easement serves a public conservation purpose. Korngold, *Contentious Issues*, *supra* note 9, at 1068.

58. *Id.* My suggestion would align scenic easements with historical easements. The latter are deductible only if the land is listed in the National Register or included in a registered historic district and certified by the Secretary of the Interior as being of historic significance.

59. MASS. ANN. LAWS Ch. 184, §§ 31-32 (2014). Massachusetts is the only state requiring governmental approval of all conservation easements.

60. *2010 National Land Trust Census Report*, LAND TRUST ALLIANCE 17 (Nov. 16, 2011), <http://www.landtrustalliance.org/land-trusts/land-trust-census/data-tables>, archived at <http://perma.cc/J26K-Y973>.

61. 26 U.S.C. § 170(h)(6) (2012).

considered exclusively for conservation purposes and thus not deductible “if at any time there may be extraction or removal of minerals *by any surface mining method*.”⁶² Because of this provision, some lawyers counsel clients seeking conservation easement deductions to specifically prohibit surface mining in the easement document.⁶³ Thus, the federal deduction affects the structuring of conservation easement transactions and possibly state policy goals.

Although surface mining is barred, the Regulations contemplate other extraction activities on conservation easement land that will not interfere with deductibility. The Regulations state that a deduction will be permitted

in the case of certain methods of mining that may have limited, localized impact on the real property but that are not irremediably destructive of significant conservation interests. For example, a deduction will not be denied in a case where production facilities are concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state.⁶⁴

It is unclear, however, whether a fracking operation could fit within this illustration. The potential adverse environmental effects on the conserved parcel itself—the building and the installation of the drill pad and related infrastructure, building of roads, disturbance of habitat, use of substantial water resources, and possible pollution of water—may fail the “not irremediably destructive of significant conservation interests” test. Moreover, the possible negative ecological spillovers of fracking on adjacent land, such as possible exhaustion and pollution of aquifers, may also prevent the easement from achieving “conservation purposes,” which is the predicate for receiving a deduction.⁶⁵ Determining these issues would require a factual examination of the nature of any given operation, the particular parcel, and the effects on the

62. 26 U.S.C. § 170(h)(5)(B)(i). *Great N. Nekoosa Corp. v. United States*, 38 Fed. Cl. 645, 658 (Fed. Cl. 1997).

63. See William M. Silberstein, *Pitfalls Galore: Mineral Development and Conservation Easement Tax Law* 414, in AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION, CONSERVATION AND PRESERVATION EASEMENTS AND COMMUNITY STEWARDSHIP ENTITIES, PRINCIPLES, DRAFTING PRACTICES, AND PRACTICAL REALITIES (2008), SN055 ALI-ABA (Westlaw); *Glass v. Comm’r*, 471 F.3d 698, 703 (6th Cir. 2006) (referring to prohibition on mining activities in conservation easement).

64. 26 C.F.R. § 1.170A-14(g) (2008), Example 1.

65. 26 U.S.C. § 170(h)(1)(C).

land and surroundings. Slant drilling from another parcel, however, may present less environmental impacts but may still be too significant to allow deductibility.

3. State and Local Tax Subsidies

The creation of a conservation easement can also cause a reduction in state and local tax revenues. Many states provide income tax incentives for the donation of conservation easements through deductions⁶⁶ or income tax credits.⁶⁷ Additionally, the restrictions of a conservation easement reduce the assessed value of the property, thus decreasing property tax revenues for the state and local government.⁶⁸ The decline in tax revenues leaves municipalities with the prospect of lowering services or raising taxes on other taxpayers to close the gap.

While federal and state law offer tax incentives for the creation of conservation easements, the IRC may deny income tax deductions if fracking takes place under certain conditions. The risk of the loss of the deduction may lead a donor/fee owner to require a ban on all fracking activities in the easement document.

II. TERMS OF THE CONSERVATION EASEMENT

Under contract theory, the conservation easement agreement should control whether the fee owner or the fee owner's transferee

66. See Jeffrey O. Sundberg & Richard F. Dye, *Tax Property Value Effects of Conservation Easements*, (Lincoln Institute of Land Pol'y, Working Paper WP06JS1, 2006), available at http://www.lincolninst.edu/pubs/dl/1128_Sundberg_complete_web.pdf, archived at <http://perma.cc/LV32-LNNC> (noting that the deduction is usually not provided by a specific state tax legislation but by the state's general tracking of the federal tax code and its deductions).

67. See, e.g., N.Y. TAX LAW § 210(38) (Consol. 2014); N.C. GEN STAT. § 105-151.12 (2014). Colorado lost \$85.1 million in revenue through easement credits in 2005, up from \$2.3 million in 2001 (though the Colorado program has since been changed). K.C. Mason, *Lawmakers Want to Tighten Controls on Credit for Donated Land*, 44 STATE TAX NOTES 146 (2007).

68. See, e.g., *Jet Black, LLC v. Routt Cnty. Bd. of Cnty. Comm'rs*, 165 P.3d 744 (Colo. App. 2006); *Gibson v. Gleason*, 798 N.Y.S.2d 541 (N.Y. App. Div. 2005); *McKee v. Dep't of Rev. & Lincoln Cnty. Assessor*, 2004 WL 2340265 (Or. Tax Ct. 2004). See also Joan M. Youngman, *Taxing and Untaxing Land: Open Space and Conservation Easements*, 41 STATE TAX NOTES 747, 747-62 (2006) (questioning the hypothesis that increased values of surrounding land due to the open space offsets the revenue loss); Jeffrey O. Sundberg, *Tax Incentives for Open Space Preservation: Examining the Costs and Benefits of Preferential Assessment*, LINCOLN INST. OF LAND POLICY 14 (Oct. 2013), https://www.lincolninst.edu/pubs/dl/2324_1664_Tax_Incentives_for_Open_Space_1013LL.pdf, archived at <http://perma.cc/65E2-D48J>.

can engage in new energy development activities—solar, wind, fracking—on the land. In an ideal transactional world, this is a matter that the parties (or their lawyers) considered, negotiated, agreed upon, and reduced to clear, comprehensible language. In a good situation, the parties would have contemplated not just issues apparent in the present day but also would have carefully anticipated potential future scenarios that could arise.

Too often, however, parties fail to discuss essential issues and align expectations, reduce their understanding to a clear writing, or imagine what the future might look like. Furthermore, even the most prescient parties and counsel are unable to predict coming technological and related economic changes that would shift the parties' views of the deal, such as the combining of horizontal drilling with hydrofracking. In such situations, differences may ultimately arise when one party seeks to take a course of action that the other believes is (or is not) permitted under the terms of the writing. In such cases, courts will have to decide disputes as to the meaning and extent of the understanding.

Because both conservation easements and emerging energy practices are relatively new and continue to evolve, there are only a few cases involving conflicts between these interests.⁶⁹ This section will isolate these two variables in several ways. First, it will examine the rich body of law on interpretation of land restrictions in general and the ways that courts have and should approach disputes between the fee owner and the holder of a lesser

69. This examination assumes that the conservation easement has priority in the property over the fee owner and over any third party holding a right to extract oil and gas or erect solar devices and wind turbines. In this scenario, the fee owner would have created the conservation easement and then either retained all remaining rights or granted an extraction right to another, e.g. an oil or alternative energy company. Assuming that the third party took with notice of the conservation easement, the third party is bound by the conservation easement and subordinate to it. See GERALD KORNGOLD & PAUL GOLDSTEIN, *REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, FINANCE & DEVELOPMENT* 269–86 (5th. ed. 2009); ANTHONY ANELLA & JOHN B. WRIGHT, *SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST* 147 (2004) (stating in clause C. of model deed of conservation easement that mineral rights owned by landowner are governed by the easement). If, however, the extraction right of the third party was created prior to the conservation easement, the NPO or government holders' conservation rights are junior (again assuming notice). Provisions in the easement that conflict with the prior interest will, therefore, not be binding. See generally Paige Anderson, Note, *Reasonable Accommodation: Split Estates, Conservation Easements, And Drilling In The Marcellus Shale*, 31 VA. ENVTL. L.J. 136 (2013) (suggesting use of the accommodation doctrine to protect properties where mineral rights were severed prior to the placement of the conservation easement on the property).

interest (typically an easement or covenant). It will then analyze general conservation easement cases (i.e., not dealing with new energies) to see how courts have applied traditional construction tools to these relatively new interests. The section will then explore how cases have decided attempts by lot owners to develop oil, gas, solar, and wind resources in the face of homeowner association restrictions. Finally, this section will bring this analysis to bear in the two recent cases that actually address a conflict between fracking and an existing conservation easement and suggests how parties, drafters, and courts might deal with such matters in the future.

A. Constructional Norms for Private Land Use Agreements

The norms controlling the interpretation of private land use agreements—covenants and easements—provide insights into how conservation easements will be construed and applied by courts. Ultimately, these interpretational rules will be important in determining if a given conservation easement permits new energy development.

As will be discussed in this section, despite the use of the term “easement,” conservation easements are not traditional easements. Rather, they are like covenants, which are negative in nature and establish restrictions on property. Thus, the body of law interpreting covenants should be used to construe conservation easements.⁷⁰ The polestar in interpreting conservation easements under the “covenant” rubric should be the intent expressed in the instrument. The result is the same for those who insist that conservation easements should be interpreted like other “true easements” since, as will also be developed below, the intention of the parties determines the extent of an easement. Both easements and covenants are consensual land use arrangements and it is logical and desirable that the extent of these rights should be controlled by the parties’ intent.

1. Interpreting Covenants

Courts often hedge, however, about giving unfettered dominance to the parties’ intent when construing covenants. The traditional conflict between freedom of contract and concerns over restrictions of land reverberates in the statements, if not actions, of courts interpreting covenants.

70. Unif. Conservation Easement Act § 2 describes creation, transfer, and other aspects of conservation easements but is silent on interpretation doctrines.

a. Should Intent Control?

Some courts state that covenants should be enforced “like other contracts.”⁷¹ They announce that they will give effect to the parties’ clearly expressed intent⁷² since public policy “favors the fullest liberty of contract and widest latitude possible on the disposition of one’s property.”⁷³ Conversely, some courts continue to declare that covenants will be strictly construed because they limit the free use of property.⁷⁴ This anti-restrictions bias serves to curb the intent of parties in private land use arrangements.

The anti-restrictions bias in interpretation of covenants has been directly rejected, however, by some courts that recognize the efficiency benefits of these arrangements. One opinion, for example, stated that “under the modern view, building restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and the old-time doctrine of strict construction no longer applies.”⁷⁵ Many courts try to balance these competing principles by stating that they will enforce a covenant as written if its intent is clear, but if it is ambiguous, they will strictly construe the instrument and resolve doubts in favor of free use of land.⁷⁶ As one court asserted:

In order to accommodate the principle favoring free and unrestricted use of property and the principle favoring individuals’ right to free contract in ordering their own affairs, we have generally said that documents such as the Community Declaration must be express in unambiguous language to be enforceable contracts.⁷⁷

71. *Benton v. Bush*, 644 S.W.2d 690, 691 (Tenn. Ct. App. 1982).

72. *See, e.g., Christian v. Flora*, 78 Cal. Rptr. 3d 892, 899 (Ct. App. 2008); *Weisel v. Beaver Springs Owners Ass’n, Inc.*, 272 P.3d 491, 500–501 (Idaho 2012); *Knudson v. Trainor*, 345 N.W.2d 4, 6 (Neb. 1984).

73. *Sinclair Refining Co. v. Watson*, 65 So. 2d 732, 733 (Fla. 1953), *cert. denied*, 346 U.S. 872 (1953).

74. *See, e.g., Orlando Lake Forest Joint Venture v. Lake Forest Master Cmty.*, 105 So. 3d 646, 648 (Fla. Dist. Ct. App. 2013); *Davista Holdings, LLC v. Capital Plaza, Inc.*, 741 S.E.2d 266, 269 (Ga. App. 2013); *Taddei v. Vill. Creek Prop. Owners Ass’n, Inc.*, 725 S.E.2d 451, 453 (N.C. Ct. App. 2012).

75. *Brandon v. Price*, 314 S.W.2d 521, 522 (Ky. 1958), *quoted in Triple Crown Subdivision Homeowners Ass’n, Inc. v. Oberst*, 279 S.W.3d 138, 140 (Ky. 2009). *Accord Aqua Fria Save the Open Space Ass’n v. Rowe*, 255 P.3d 390, 394–396 (N.M. Ct. App. 2011).

76. *See, e.g., Lamoreux v. Langlotz*, 757 P.2d 584, 587 (Ala. 1988); *Woodglen Estates Ass’n v. Dulaney*, 359 S.W.3d 508, 513 (Mo. Ct. App. 2012); *Estates at Desert Ridge Trails Homeowners Ass’n v. Vasquez*, 300 P.3d 736, 743 (N.M. Ct. App. 2013).

77. *Solowicz v. Forward Geneva Nat’l, LLC*, 780 N.W.2d 111, 124 (2010).

Arguably, courts should downplay concerns over restrictions on land when interpreting and enforcing conservation easements. The legislation expressly authorizing conservation easements in all states demonstrates a public policy favoring these interests. While in certain discrete scenarios, perpetual conservation easements may raise anti-restriction policy concerns that would be relevant to a court interpreting an easement instrument, the intent of the parties to such legislatively authorized interests should generally be paramount.

b. Finding the Intent

The parties' intent should be the essential inquiry in enforcement of conservation easements if the easements are interpreted under the covenant rubric. However, finding the parties' expectations in a given covenant is not always an easy proposition. There is a general lack of clarity in the manner of expression as well as varying views in the states as to the permissible use of extrinsic evidence in interpreting a document. These issues are manifest in construing all types of contracts.

In determining the parties' intent, a threshold consideration is whether the court should look solely at the covenant in question or whether it should consider extrinsic evidence. There are jurisdictional and philosophical differences at work in this question. Some courts take a broad approach, indicating that intent should be found from both the covenant and circumstances surrounding its execution.⁷⁸ Others, though, are more circumspect in looking beyond the language of the instrument itself. These courts declare that if the language of the covenant is clear and unambiguous, the court should not construe the covenant but should enforce the language according to its plain and ordinary meaning.⁷⁹ Only if the writing is ambiguous is it proper to admit extrinsic evidence.⁸⁰

The hard question is determining whether any given language is ambiguous. The courts have struggled mightily, and in vain, to

78. See, e.g., *Martin's Landing Found., Inc. v. Land Lake Assocs.*, 707 F.2d 1329, 1333–1334 (11th Cir. 1983); *CDR Devs., LLC v. College Hill Heights Homeowners, LLC*, 973 So. 2d 273, 280 (Miss. Ct. App. 2008); *Gosnay v. Big Sky Owners Ass'n*, 666 P.2d 1247, 1250 (1983).

79. See, e.g., *Good v. Bear Canyon Ranch Ass'n*, 160 P.3d 251, 253 (Colo. App. 2007); *600 N. Frederick Rd., LLC v. Burlington Coat Factory of Md., LLC*, 19 A.3d 837, 852 (Md. 2011); *Fayard v. Design Comm. of Homestead Subdivision*, 230 P.3d 299, 303 (Wyo. 2010).

80. See, e.g., *Divizio v. Kewin Enters.*, 666 P.2d 1085, 1090 (Ariz. Ct. App. 1983); *Dierberg v. Willis*, 700 S.W.2d 461, 468 (Mo. Ct. App. 1985); *Cupola Golf Course, Inc. v. Dooley*, 898 A.2d 134, 139 (Vt. 2006).

develop a workable general test and instead have offered circular, elastic, unpredictable and contradictory statements.⁸¹ The results are also difficult to harmonize. For example, one court found that a ban on “trucks . . . house trailers . . . and trailers of every description” was unambiguous and did not include motor homes,⁸² while another held that a prohibition against a “house trailer, trailer, coach” was ambiguous leading to a construction barring motor homes.⁸³

Once a covenant is found to be ambiguous, the courts will admit various types of extrinsic evidence such as the purpose of the covenant and the circumstances surrounding the execution of the instrument.⁸⁴ They may also employ constructional canons, such as *ejusdem generis*⁸⁵ and the “last antecedent rule.”⁸⁶

It is not easy, therefore, to find the parties’ intent in all covenant situations. The language chosen by the parties may create difficulties, and the courts’ interpretation devices and outcomes make for unpredictable and contradictory results.

2. *Construing Easements*

Easements have long been respected and valued property interests, allowing parties to create efficiency-maximizing private arrangements such as right of ways, canals, railways, utility access, and pipelines.⁸⁷ With easements, courts do not express any of the ambivalence that they state with covenants, nor do they manifest fears that easements will create undesirable restrictions on property. As a result, courts enforce express easements based on the intent of the parties,⁸⁸ unencumbered by anti-restriction concerns.

81. For one example, contrast *Rusanowski v. Gurule*, 840 P.2d 595, 597 (N.M. Ct. App. 1992) with *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 309 (Tex. App. 2001).

82. *Lake St. Louse Cmty. Ass’n v. Ledity*, 672 S.W.2d 381, 382 (Mo. Ct. App. 1984).

83. *Borowski v. Welch*, 324 N.W.2d 144, 145 (Mich. Ct. App. 1982).

84. See, e.g., *Strader v. Oaklery*, 410 So. 2d 954, 956 (Fla. App. 1982); *Birch Tree Partners, LLC v. Windsor Digital Studio, LLC*, 945 N.Y.S.2d 162 (App. Div. 2012); *Breeling v. Churchill*, 423 N.W.2d 469, 470 (Neb. 1988).

85. See, e.g., *Campbell v. Glacier Park Co.*, 381 F. Supp. 1243, 1249–50 (D. Idaho 1974).

86. See, e.g., *Illini Fed. Sav. & Loan Ass’n v. Elsah Hills Corp.*, 445 N.E.2d 1193, 1196 (Ill. App. 1983).

87. See Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1214 (1988).

88. See, e.g., *Parris Props., LLC v. Nichols*, 700 S.E.2d 848, 853 (Ga. Ct. App. 2010), *cert denied* (2011); *City of Las Vegas v. Cliff Shadow Prof’l Plaza*,

As with covenants, there are different easement interpretation methods employed by the courts, and the range of views is similar to those applied with covenants. Traditionally, most courts looked solely at the document and the written word to find the parties' intent.⁸⁹ These courts consider extrinsic evidence only if the language is ambiguous.⁹⁰ Once again, the difficulty is determining whether language is indeed ambiguous, and courts have differed when interpreting the same language.⁹¹ When a document is ambiguous, courts have commonly utilized certain types of extrinsic evidence, including the circumstances at the time of the instrument's execution, practices of the parties since the easement's creation, direct evidence of the parties' intent, previous judicial constructions of similar language, and a general rule of reason.⁹²

Some courts, and the Third Restatement of Property, promulgated in 2000, articulate a less rigid reliance on the words of the written instrument and allow for an enhanced role of extrinsic evidence in determining intent—apparently without drawing a formal line between ambiguous and non-ambiguous documents.⁹³ The Third Restatement declares that “intention is ascertained from the servitude’s language interpreted in light of all the circumstances,”⁹⁴ apparently allowing such extrinsic evidence

LLC, 293 P.3d 860, 865 (Nev. 2013); *Borek v. Cranberry Marsh, Inc. v. Jackson Cnty.*, 785 N.W.2d 615, 625 (Wis. 2010).

89. *See, e.g.*, *Cobb v. Allen*, 460 So. 2d 1261, 1264 (Ala. 1984); *Borton v. Forest Hill Country Club*, 926 S.W.2d 232, 234 (Mo. Ct. App. 1996); *810 Properties v. Jump*, 170 P.3d 1209, 1213 (Wash. Ct. App. 2007). *See* RESTATEMENT OF PROPERTY § 482 (1944).

90. *See, e.g.*, *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. Dist. Ct. App. 1984); *Kwolek v. Swickard*, 944 N.E.2d 564, 571-574 (Ind. Ct. App. 2011); *Tipperman v. Tsiatsos*, 964 P.2d 1015, 1019 (Or. 1998).

91. For example, *compare* *Deyling v. Flowers*, 460 N.E.2d 280, 284 (Ohio Ct. App. 1983) (holding that “ingress and egress” is unambiguous and allows access by pedestrian and auto traffic) *with* *Phillips Industries v. Firkins*, 827 P.2d 706, 711-713 (Idaho Ct. App. 1992) (holding that “ingress and egress by vehicles” was ambiguous requiring resort to extrinsic evidence resulting in barring of trucks and requiring 24 hour notice for use of vehicles).

92. *See* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 126 (2004) [hereinafter KORNGOLD, PRIVATE LAND USE ARRANGEMENTS].

93. *See, e.g.*, *Hoffman Fuel Co. v. Elliott*, 789 A.2d 1149, 1156 (Conn. App. Ct. 2002); *Kovanda v. Vavra*, 633 N.W.2d 576, 585 (Neb. Ct. App. 2001); *Sunnyside Valley Irrigation Dist. v. Dickie*, 43 P.3d 1277, 1281 (Wash. Ct. App. 2002). *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.1, cmt. d (2000).

94. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, *supra* note 93.

in all cases. This may represent a view that because language so often may have multiple, or at least nuanced meanings, it is rare to find truly non-ambiguous words. The danger of course is that the written, final expression of the parties' intention may be diluted by other factors.

3. *Successor Issues*

Private land use agreements, whether cast as easements or covenants, impact not only the original parties but also control the subsequent owners of the parcels burdened and benefited by these arrangements. A successor owner will be bound by prior interests, such as easements and covenants affecting the parcel, if the successor had notice of them prior to purchasing the property.⁹⁵ Ambiguities in the original easement or covenant will create uncertain legal effects for future holders of the land in question.

When courts determine the intent behind an easement or covenant, however, they typically fail to recognize that the true parties in interest may no longer be the original owners but rather successors. The courts usually attempt to decide what the easement or covenant meant to the original transacting parties, as if it were a simple bilateral contract interpretation case. This could yield bad results. For example, a side discussion or letter between the original parties could be powerful evidence in interpreting their intent in an action between them. But successor owners of the affected parcels may not even know of such a discussion or letter.⁹⁶ This letter or discussion might be good, even the best, evidence of what the original parties intended. But it would do violence to the contract expectations of the successors relying on the written and recorded documents if this wild card evidence of "original intent" were allowed. This could result in inefficient market decisions and unfairness. For successor cases, the "purest meaning" might have to give way to the "best expected meaning."

Thus, courts should protect subsequent buyers by refocusing the judicial inquiry.⁹⁷ The question should be: At the time of purchase, what could a reasonable successor have thought the

95. See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 92, §§ 5.02, 8.01; KORNGOLD & GOLDSTEIN, *supra* note 69, at 269–86.

96. See, e.g., *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. Dist. Ct. App. 1984) (unwritten expectation of original parties to easement as to extent of use held binding against subsequent purchaser of dominant lot); *Latham v. Garner*, 105 Idaho 854, 673 P.2d 1048 (1983) (remanded for trial court to consider circumstances surrounding execution of easement between defendants and plaintiff—successor owner to the servient land).

97. Korngold, *Future Generations*, *supra* note 9.

original parties intended? This would require the courts to adjust in two ways. First, the courts should, whenever possible, rely on the express language of the document in making decisions and should eschew the use of extrinsic evidence if they can. Second, when courts must admit extrinsic evidence because they cannot find the understanding from the document alone, they should only admit evidence to which the successors could reasonably have had access.

Unfortunately, most courts interpreting land use instruments miss the successor issue. They blithely state that deeds are to be construed like “ordinary” contracts⁹⁸ and rely on context at the time of drafting regardless of the presence of successors.⁹⁹ It is the rare and appreciated case where the court understands that it is engaged in a matter more subtle than first generation contract interpretation. One such court insightfully noted that “[p]rospective purchasers of property are . . . entitled to know what they will and what they will not be permitted to park on their lots [and] nothing in the language . . . is calculated to put the reader upon notice.”¹⁰⁰

Therefore, interpretation of private land use agreements—including conservation easements—should focus on the original parties’ intent. When dealing with successor owners though, courts should focus on the intention of the original parties in the mind of a reasonable successor at the time of the successor’s purchase. These rules should control a court’s analysis of a conservation easement on the question of whether new energy development was contemplated.

B. Judicial Interpretation of Conservation Easements in General

The interpretation of conservation easements, whether viewed as “covenants” or as “true” easements, should center on the intent of the original parties. While denoted as “easements,” conservation easements do not truly resemble typical easements.¹⁰¹ Easements usually grant affirmative rights in the property of another, such as a right of way over another’s land. Instead, conservation easements create negative restrictions on property, limiting the owner of the burdened property from doing certain acts on the land. Thus,

98. See, e.g., *Christian v. Flora*, 78 Cal. Rptr. 3d 892 (Cal. App. 3d Dist. 2008); *Capital Assets Fin. Servs. v. Lindsay*, 956 P.2d 1090, 1093 (Utah Ct. App. 1998); *Wagner v. Woodward*, 270 P.3d 21, 25 (Mo. 2012).

99. See, e.g., *N. Utils., Inc. v. City of S. Portland*, 536 A.2d 1116, 1117 (Me. 1988).

100. *Lake St. Louis Cmty. Ass’n v. Leidy*, 672 S.W.2d 381, 382 (Mo. Ct. App. 1984).

101. See Korngold, *Contentious Issues*, *supra* note 9, at 1052–54.

despite the term “easement,” conservation easements resemble covenants. As described above, the law has historically valued and enforced easements as utility-maximizing arrangements between property owners.¹⁰² In contrast, courts have viewed covenants with suspicion as hindering an owner’s freedom to deal with her property. Thus, to the extent that courts follow the easement paradigm based on the name “conservation easement” and statutory provisions placing the creation of these interests within the law of easements,¹⁰³ it is more likely that courts will uphold the conservation easement’s broad environmental purpose. On the other hand, if a court sees a conservation easement as a covenant, it may be more likely to construe it narrowly to encourage free use of land.

Moreover, because conservation easements are typically perpetual, successor owners will likely be involved in interpretation and enforcement actions. The holder of the easement could change, when the NPO or governmental entity that initially acquires the conservation easement assigns it to another authorized holder, perhaps in a situation where the acquiring entity acted as facilitator or funder of the transaction.¹⁰⁴ Similarly, when the initial donor/seller of the easement transfers the remaining fee interest, the transferee will take subject to the conservation easement. When courts interpret conservation easements in such situations, they should take into account the reasonable expectations and understandings of successors as to the original intent.

The limited case law interpreting conservation easements adheres to traditional interpretative norms for land agreements.¹⁰⁵

102. *See supra* Part II.A.1.a. and II.A.2.

103. UNIF. CONSERVATION EASEMENT ACT § 2(a) (1982) (providing that creation is in the manner of other easements).

104. *Id.* (contemplating assignment of conservation easements). In some cases, though, an organization with unlimited life might continue to hold the conservation easement and the owner of the burdened property might similarly be an entity with a perpetual life, such as a corporation.

105. *See, e.g.,* Bjork v. Draper, 886 N.E.2d 563, 571–72 (Ill. App. Ct. 2008) (“The same rules that apply to deeds and other written instruments apply to grants of easements: in the construction of instruments creating easements, courts ascertain and give effect to the intentions of the parties.”); Stitzel v. State, 6 A.3d 935, 940 (Md. Ct. Spec. App. 2010) (relying on plain meaning of agricultural easement to find that land could not be subdivided). *See* Wooster v. Dept. of Fish & Game, 151 Cal. Rptr. 3d 340, 345–46 (Cal. Ct. App. 3d Dist. 2012) (interpreting a condition subsequent in a conservation easement). *See also* Laura Ingles, *Conservation Group Says Trump Golf Course Violates Easement Policy*, C-VILLE [Charlottesville], May 14, 2013 (describing claim that golf course is permitted under language allowing commercial activity that is “temporary or seasonal outdoor activities that do not permanently alter the

In *Nature Conservancy v. Sims*,¹⁰⁶ the United States Court of Appeals for the Sixth Circuit upheld the enforcement of a conservation easement by the Conservancy against the original grantors. The easement expressly permitted the grantors to “enhance their agricultural usage” of the property and to “dig wells” and “create ponds,” but barred the removal of topsoil or other materials and any change in the topography. The court upheld the trial court’s holding that the grantors’ filling of a sinkhole behind their residence by placing over 6,000 cubic yards of fill material into the depression violated the easement.¹⁰⁷ The appeals court upheld the trial court’s reliance on the plain meaning of the document:

Where the language of a contract is not ambiguous Kentucky law limits a court’s analysis to the “four corners of the document.” . . . In determining a contract’s plain meaning, the court is “obligated to read the parts of the contact as a whole,” and when possible should embrace an interpretation that “promote[s] harmony between the provisions.”¹⁰⁸

This decision is consistent with traditional interpretation methods. Moreover, as the original parties were involved in the enforcement action, there were no “second generation” interpretation issues.

Similarly, in *Windham Land Trust v. Jeffords*, the court employed conventional interpretation methods in enforcing a conservation easement.¹⁰⁹ The original property owner conveyed a conservation easement on 85 acres of a 100-acre tract to the Windham Land Trust.¹¹⁰ Four years later, after an intermediate conveyance, the defendants acquired the fee interest to the burdened land.¹¹¹ The easement limited the use of the restricted area to “residential recreational purposes.”¹¹² The owners sought to use the existing logging roads on the property for wagon and sleigh rides, hiking, snowshoeing, and Nordic skiing, and the pond for

physical appearance of the Property, and that do not diminish the conservation values herein protected.”).

106. 680 F.3d 672 (6th Cir. 2012).

107. *Id.* at 676.

108. *Id.*

109. 967 A.2d 690, 695–96 (Me. 2009).

110. *Id.* at 693.

111. *Id.* at 695.

112. *Id.* at 693.

fishing and ice skating—all for paying guests only.¹¹³ The appellate court upheld the trial court’s finding that this was a commercial use violating the conservation easement.¹¹⁴ The appellate court relied on plain meaning principles:

The terms “residential recreational purposes” and “non-residential use” are not defined in the deed. The [defendants] urge us to apply a meaning of “residential” as that word is, they argue, typically used in land use law. We decline to do so. “In evaluating the language of a deed, courts should give effect to the common or everyday meaning of the words in the instrument.” . . . We apply the common everyday understanding of the word “residential,” which is “of or relating to residence or residences.” Webster’s New Collegiate Dictionary 977 (1979).¹¹⁵

Like *Nature Conservancy v. Sims*, *Windham* relied on classic plain meaning principles. Moreover, although successor owners of the servient property were involved in *Windham*, because the gap between the creation of the easement and enforcement was so short, it is extremely likely that the plain meaning of the original parties would have been the same to the defendants when they purchased the burdened property.

Therefore, in the limited case law, courts interpreting conservation easements appear to apply traditional rules of easement and covenant law to find the parties’ intent. Despite the small number of cases, one would expect that these concepts would pertain to construing conservation easements in the context of new energy development.

C. Homeowner Association Covenants and Energy Exploitation

An examination of the body of cases involving disputes within covenant communities over an individual owner’s oil, gas, or solar development activities provides another reference point on how courts may resolve conflicts over conservation easements and new energy development. Beginning in the late 19th century, developers responded to demand from people seeking homes in areas free from the noise and pollution of an increasingly industrialized America.¹¹⁶ These

113. *Id.* at 694.

114. *Id.* at 701.

115. *Windham Land Trust*, 967 A.2d at 698.

116. See GERALD KORNGOLD, PROPERTY STORIES, 241–42, 257–259 (Gerald Korngold & Andrew P. Morriss, eds., 2d ed.) (2009); Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE. W. RES.

developers created large-scale subdivisions by dividing raw land into building lots. They employed traditional rules of covenants running with the land to limit use of the properties to residential purposes, restrict the types of permitted structures, delineate setback and side lines, prohibit certain “nuisance” activities, and set other guidelines to create a quality residential experience for the lot owners.¹¹⁷ Over time, developers used covenants to create subdivisions with common areas, such as roadways, utilities, and recreational areas, supported by homeowner dues and administered by “private governments” comprised of homeowners elected by their peers.¹¹⁸

These subdivision communities, formed and protected by covenants, serve important policy goals inherent in the concept of freedom of contract. They allow people to arrive at efficiency maximizing arrangements in the marketplace (why does everyone need a swimming pool, when a community pool is cheaper and gives enough opportunity to swim?) and permit people the freedom to choose the living arrangement that they believe will maximize their happiness. Many courts have recognized the value of private subdivision arrangements, a shift from their historical suspicion of covenants as interfering with free use of land.¹¹⁹ This new attitude is reflected in both express statements of the courts¹²⁰ and in various decisions upholding these arrangements.¹²¹

L. REV. 617, 618-621 (2001) [hereinafter Korngold, *Private Land Use Controls*].

117. For examples of early subdivision communities, see *Downs v. Kroeger*, 254 P. 1101, 1102-03 (Cal. 1927); *Sanborn v. McLean*, 206 N.W. 496, 498 (Mich. 1925); *Neponsit Prop. Owners Ass’n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 795 (1938). See also Korngold, *Private Land Use Controls*, *supra* note 116, at 621-23, (describing of one such community’s development, Shaker Heights, Ohio).

118. See Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 WIS. L. REV. 513, 513 (1990).

119. See *Windham Land Trust v. Jeffords*, 967 A.2d 690 (Me. 2009); *Downs*, 254 P. 1101; *Sanborn*, 206 N.W. 496; *Neponsit Prop. Owners*, 15 N.E.2d 793.

120. See, e.g., *Beverly Island Ass’n v. Zinger*, 317 N.W.2d 611, 612 (Mich. 1982) (“Building and use restrictions in residential deeds are favored by public policy.”); *Town Country Estates Ass’n v. Slater*, 740 P.2d 668, 671 (Mich. 1987) (“Free use of the property must be balanced against the rights of the other purchasers in the subdivision.”); *Dixon v. Van Sweringen Co.*, 166 N.E. 887, 892 (Ohio 1929) (“We see no reason for denying the right of these parties to contract between themselves . . . to create a highly exclusive and valuable residential district.”). See *Cottrell v. Miskove*, 605 So. 2d 572 (Fla. Dist. Ct. App. 2d Dist. 1992). See also *Lake Saint Louis Cmty. Assoc. v. Kamper*, 503 S.W.2d 447 (Mo. Ct. App. 1973).

121. See cases cited *supra* note 105.

There are several cases where courts have determined whether a given subdivision covenant bars oil and gas drilling, solar panels, or wind turbines.¹²² These decisions are instructive for deciding conflicts between new energies and conservation easements. First, like conservation easements, subdivision covenants require the preservation of a certain ambience on the land, which new energy development might destroy. Second, both subdivision covenants and conservation easements are supported by public policy considerations articulated by legislatures and courts. Thus, one might expect generally favorable judicial treatment of subdivision covenants when challenged by external threats, such as intrusive new energy development.

1. Oil and Gas Drilling

A number of reported cases involve subdivision covenants that expressly bar oil and gas drilling and related exploration operations.¹²³ *Hirsch v. Hancock*, decided by the California Court of Appeal in 1959, demonstrates, however, that courts may have to construe such express prohibitions.¹²⁴ In *Hirsch*, subdivision covenants created in 1919 required residential use of the properties and provided that no lot could be used for drilling or producing oil, gas, or other minerals. Approximately half of the lot owners brought an action and received a judgment from the lower court to the effect that it would be unjust to prevent the removal of subsurface oil, gas, and other minerals from their properties by use of slant drilling from surface locations other than these owners' parcels.¹²⁵ This judgment was upheld by the appellate court, which distinguished between surface removal of oil and gas, which was prohibited, and subsurface removal via slant drilling from other, unrestricted properties.¹²⁶

The slant drilling distinction did not appear in the words of the restriction. The appellate court reached its result by focusing on the

122. See cases discussed *infra* in Part II.C.1., 2., & 3.

123. See, e.g., *R & R Realty Co. v. Weinstein*, 422 P.2d 148, 161 (Ariz. Ct. App. 1966) (prohibiting drilling, derricks or similar structures); *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 484–85 (Tex. 2011) (barring drilling); *Imperial Interplaza II, Inc. v. Corr. Corp. of America*, 717 S.W.2d 422, 424 (Tex. App. Houston 14th Dist. 1986) (barring oil drilling, refinement, operations, tanks). See also *Thompson v. Paasche*, 950 F.2d 306, 309 (6th Cir. 1991) (covenant barring structures did not apply because mineral estate was excepted).

124. See *Hirsch v. Hancock*, 343 P.2d 959 (Cal. 1959).

125. *Id.* at 755.

126. *Id.* at 760–61.

intent of the subdivider and original purchasers.¹²⁷ It reasoned that slant drilling was unknown in 1919 when the restrictions were imposed.¹²⁸ “[T]he parties did not have in mind the possibility of that sort of oil development” and therefore could not have intended to bar it.¹²⁹ The decision, however, fails to adequately determine the parties’ intent. The fact that they did not specify slant drilling cannot necessarily be seen as a conscious decision to permit it, because, as the court states, the practice was not known when the covenant was made. The court should have attempted to “fill the gap” in the agreement by determining what the parties would have intended on this issue had they confronted it. Moreover, because successors were involved in the action, as previously suggested, the court should have focused on what they could have reasonably thought the parties intended on slant drilling in light of the language and circumstances.

While the covenant in *Hirsch* expressly prohibited oil and gas exploration, the court found it did not apply to the particular removal method before it.¹³⁰ In other cases, however, the covenant contained no express discussion at all of oil and gas activities. In these cases, the courts had to decide whether drilling activity or equipment violated the terms of restrictions that limited the subdivision to *residential* activities. Some decisions have found that drilling and related activities violate covenants that specifically limit the *use* of lots to residential purposes.¹³¹ As the court in *Reed v. Williamson* reasoned:

It may not be concluded that the drilling of a well or wells for oil and gas is a use of the lots for residential purposes or that a limitation on the use of the real estate like that contained in the restriction in this case does not exclude every use of the premises not pertaining to residence purposes.¹³²

One might fairly classify *Reed* as a plain meaning decision, as the court looked at the words of the restriction and ascribed to them a meaning in light of ordinary usages of the words. For the

127. *Id.*

128. *Id.*

129. *Hirsch*, 343 P.2d at 760.

130. *Id.* at 760–61.

131. *See, e.g.*, *Reed v. Williamson*, 82 N.W.2d 18, 25–27 (Neb. 1957) (showing oil and gas drilling not consistent with use for residential area); *Devendorf v. Akbar Petroleum Corp.*, 577 N.E.2d 707, 709–10 (Ohio Ct. App., Summit County 1989) (providing that the mere formation of drilling units on a lot without drilling violated restriction).

132. *Reed*, 82 N.W.2d at 113 (1957).

court, enforcement was a simple matter of holding a person to one's contractual obligations:

The instrument expressing the restrictions contains reciprocal and mutual covenants. Appellant thereby bound himself not to violate the covenants and if he did, anyone interested in the real estate was authorized to enforce them or sue for damages at his election.¹³³

Courts have also held that covenants restricting the type of *structures* that can be built in a subdivision, rather than the use of the lots, may prevent the erection of wells and other drilling equipment. Thus, restrictions stating that "all lots in this plat are restricted to residences only," with an exception for a few lots "on which retail business buildings or apartment houses may be erected," prevented drilling for oil and gas.¹³⁴ The court explained its interpretative theory:

Under the rule of strict construction . . . this clause does not prevent drilling wells for oil and gas. But this seems to us to strain the plain import of the language used. The clause is not ambiguous. The clear intention of the parties gathered from the clause in its entirety is that Lincoln Terrace addition must be used exclusively for residences and no other purpose, except that in block 20 these restrictions are relaxed to permit retail business buildings or apartment houses. Aside from these specified uses, all other uses are prevented in block 20 as well as the other blocks in the addition.¹³⁵

The decisions construing subdivision covenants, therefore, focus on the plain meaning of the word "residential" and prohibit oil and gas drilling. Depending on the terms of a given conservation easement, a court using such a plain meaning approach may reject similar activities on conservation easement property. The slant drilling situation, however, presents a different issue as no non-residential "structure" is being installed on the conservation land and the non-residential "use" or "activity" is only beneath the surface. A court might find, perhaps, that slant

133. *Id.* at 112.

134. *See, e.g.,* Sw. Petroleum Co. v. Logan, 71 P.2d 759, 760 (Neb. 1937); Smith Oil Co. v. Logan, 71 P.2d 766, 767 (Ok. 1937). These are companion cases that call into doubt a contrary result in the earlier *Cooke v. Kinkead*, 64 P.2d 682 (Ok. 1937) (a 5-4 decision finding drilling compatible with a residential only restriction). *Cooke's* position appears to be an outlier, within Oklahoma and nationally.

135. *Smith Oil Co.*, 71 P.2d at 767-68.

drilling from an unrestricted land under conservation easement property is permitted under such a reading.

2. Solar

Individual homeowners have faced litigation from neighbors and homeowners associations claiming that the homeowner's installation of solar panels or related technology violates a subdivision covenant. The devices arguably violate aesthetic or architectural standards that subdivisions impose generally to protect aesthetic and property values of the community. The results in these cases are often guided by express statutory policies favoring non-renewables.¹³⁶

In one case, homeowners installed six, 14-foot high, 8-foot wide solar panels in their side yard.¹³⁷ Neighbors brought suit alleging that the panels violated restrictive covenants governing the subdivision.¹³⁸ The appellate court reversed the trial court's dismissal of the complaint.¹³⁹ The appellate court reasoned, in light of the high aesthetic values of the community, that the complaint stated a cause of action for breach of covenant that provided that no "nuisances [shall] be maintained . . . which may in any manner [be] dangerous or noxious or offensive to the neighborhood inhabitants."¹⁴⁰ The opinion focused on the meaning of the agreement of the parties—standard interpretation of intention—and did not mention countervailing policy considerations favoring renewable energy.¹⁴¹

A number of states have trumped private agreements by enacting legislation limiting the enforcement of aesthetic covenants against solar energy devices.¹⁴² These statutes reflect

136. See generally COLO. REV. STAT. § 38-30-168 (2002) (limiting effect of aesthetic restrictions on solar devices); Palos Verdes Homes Ass'n v. Rodman, 227 Cal. Rptr. 81 (Cal. App. 2d Dist. 1986) (requiring proposed solar units to be submitted to the association's "art jury" and to comply with solar unit guidelines). See also Evan J. Rosenthal, *Letting the Sunshine In: Protecting Residential Access to Solar Energy in Common Interest Developments*, 40 FLA. ST. L. REV. 995 (2013).

137. Faler v. Haines, 962 N.Y.S.2d 500, 502 (N.Y. App. Div. 3d Dep't. 2013).

138. *Id.* at 501.

139. *Id.* at 502.

140. *Id.*

141. See *id.*

142. See, e.g., ARIZ. REV. STAT. § 33-439 (2003); CAL. CIV. CODE § 714 (2013); COLO. REV. STAT. § 38-30-168 (2002). See generally Governor's Ranch Homeowner's Ass'n v. Gunther, 705 P.2d 1011 (Colo. Ct. App. 1985) (finding

“the policy of the state to promote and encourage the use of solar energy systems and to remove the obstacles thereto,”¹⁴³ and require aesthetic considerations to take a secondary position behind energy goals. The California Solar Rights Act, for example, bars homeowner associations from imposing covenants that effectively prohibit installation of a solar energy system.¹⁴⁴ The statute, however, allows “reasonable” restrictions on a solar energy system “that do not significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.”¹⁴⁵ Decisions concerning the reasonableness of the association’s decision are findings of fact, requiring deference from the appellate courts.¹⁴⁶ These cases focus on statutory interpretation primarily rather than on the understanding of the covenant. In these states, public policy via statute is the controlling consideration, rather than private agreement.

3. *Wind Turbines*

One reported case, which held that the erection of a wind turbine did not create a private nuisance, briefly considered whether the turbine violated a subdivision covenant that required approval from an architectural board before construction.¹⁴⁷ The court held that there was no violation because the developer and other residents had abandoned the covenants, a type of waiver theory.¹⁴⁸ The court, therefore, did not explicate the meaning of the covenant but rather applied a rule of law abrogating it.

4. *Lessons for Conservation Easements and New Energies*

While there are a limited number of cases dealing with the conflict of subdivision covenants and new energy development,

that evaporative device combined with solar panels constituted protected solar device under the statute).

143. *Tesoro Del Valle Master Homeowners Ass’n v. Griffin*, 133 Cal. Rptr. 3d 167, 175 (Cal. App. 2d Dist. 2011). *See* *Garden Lakes Cmty. Ass’n v. Madigan*, 62 P.3d 983 (Ariz. Ct. App. 2003).

144. CAL. CIV. CODE § 714(a) (2007). *See* *Tesoro*, 133 Cal. Rptr.3d at 173.

145. CAL. CIV. CODE § 714(b). *See* COLO. REV. STAT. § 38-30-168 (limiting effect of aesthetic restrictions to “reasonable restrictions...which do not significantly increase the price of the device”).

146. *See, e.g., Garden Lakes*, 62 P.3d at 986; *Palos Verdes Homes Ass’n v. Rodman*, 227 Cal. Rptr. 81, 83 (Cal. App. 2d Dist. 1986).

147. *Rassier v. Houim*, 488 N.W.2d 635, 639 (N.D. 1992).

148. On abandonment in general, *see* KORNGOLD, *PRIVATE LAND USE ARRANGEMENTS*, *supra* note 92, at § 11.05.

some tentative lessons may be drawn for treatment of conservation easements by way of analogy. First, when interpreting the subdivision covenants, the courts focus primarily on the language of the instrument. The courts exhibit a tendency to find the intent of the parties from the “plain meaning” of the language. Moreover, to the extent that judges consider policy to support their interpretations, they appear to focus exclusively on the mutuality of the restriction and expectation of all of the homeowners that the subdivision plan would be respected. The countervailing policies, such as the benefits of solar energy or the public demand for fossil fuels, were not considered unless there was an express statute requiring the covenant to give way to solar devices. But again, the sample is small.

Thus, it is possible that when courts entertain claims that a conservation easement permits new energy development, they will limit their inquiry to the specific language used by the parties and, perhaps, the clearly articulated legislative policy favoring conservation easements as exemplified in authorizing statutes. The courts could follow the limited case law from homeowners associations, and not delve too greatly into countervailing public policies that favor new energy development (carbon-based, renewable, or both). Proponents of the consideration of other policies will have to convince the court to take a broader view than exemplified in the subdivision interpretation cases.

D. Cases Involving Fracking on Land under Conservation Easements

Courts confronting the question of whether a conservation easement permits new energy development will have to determine the intent of the parties under the instrument. Some easement language may address the issue directly: an express prohibition on “removing any fossil fuel” from the property would apparently ban fracking. Other clauses may not be so clear: Would a ban on accessory structures necessarily include wind turbines? The variety of conservation easements employed by parties to such transactions will require close consideration by courts where the intention is unclear.¹⁴⁹

149. Language that might be relevant to the permissibility of new energy development can be found in the following sample conservation easements: Sample 1. JULIE ANN GUSTANSKI, *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE*, 516–22 (Julie Ann Gustanski & Roderick H. Squires, eds., 2000). (Grant of Conservation Easement and Declaration of Restrictive Covenants, set out as Appendix B). Sample 1 provides for a grant of a conservation easement in gross “for the purpose of

Two recent cases have addressed the specific question of the permissibility of fracking on land restricted by conservation easements. They illustrate the difficulties inherent in easement language that does not clearly address the issue.

1. Stockport Mountain

Stockport Mountain Corporation LLC v. Norcross Wildlife Foundation, Inc. was the subject of three unpublished opinions by the United States District Court for the Middle District of Pennsylvania—one released in March 2012, a second in August

preserving the natural state of the Property for . . . conserving and protecting the Property and surrounding lands from soil erosion, water pollution, natural disruptions and other occurrences which might interfere with the beauty and unique character of the Property.” Further, the Grantor “covenants and agrees with Grantee that the Property shall remain in its present nature and scenic state.” Specific clauses bar “commercial and/or industrial activities including . . . the construction . . . of pipe lines; construction that will “destroy or impair the scenic enjoyment of the view by the public;” and the “removal of rock, minerals, gravel, sand, topsoil or other similar materials.” The grantor is permitted to build “accessory buildings such as garages and storage sheds” in the vicinity of the permitted single family residence.

Sample 2. John G. Cameron, Jr., *What You Should Know About Conservation Easements (With Form)*, 26 PRAC. REAL ESTATE. LAWYER 9 (July 2010). This form contains the grant of a conservation easement. It additionally states that “the Property possesses natural, scenic, open space, scientific, biological and ecological values of prominent importance to the Donor, the Conservancy and the public,” known as “Conservation Values.” It offers an apparently broad protection of the existing environmental conditions by stating that “any activity on or use of the Property inconsistent with the purposes of this Conservation Easement or detrimental to the Conservation Values is expressly prohibited.” The form also bars certain activities, including, “commercial or industrial activity,” “the placement or construction of any man-made modification, such as buildings, structures, fences, roads and parking lots,” and “any mining or alteration of the surface of the land.”

Sample 3. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK*, (The Land Trust Alliance and the Trust for Public Land CD-ROM, 2nd ed. July 2005). Sample 3 contains a similar broad definition of Conservation Values and states that the purpose of the conservation easement is to preserve and protect these values. It provides that “any activity on or use of the Protected Property that is inconsistent with the purposes of this easement is prohibited.” The form includes specific bans on “industrial or commercial use” and on “mining, drilling, exploring for or removing of any materials or fossil fuels;” this latter clause, appears to clearly bar oil and gas extraction through any means, a matter about which the other forms were not as definitive. Sample 3 also provides that “no temporary or permanent buildings, structures, roads or other improvements of any kind may be placed or constructed” on the property.

2013, and a brief opinion in 2014.¹⁵⁰ In *Stockport I*, the plaintiff, Stockport—owner of land subject to a conservation easement held by the defendant Norcross Wildlife Foundation (Norcross)—brought an action seeking a declaratory judgment that it was permitted to drill and extract natural gas through fracking on the property.¹⁵¹ The land had originally been acquired in fee by a subsidiary of Norcross, which conveyed the easement to Norcross and then conveyed the fee to Stockport.¹⁵²

Norcross sought a motion to dismiss the complaint and Stockport filed a cross-motion for summary judgment.¹⁵³ The opinions in this case illustrate the key role of the judiciary in the interpretation of the intention of the parties. The court applied construction devices utilized in covenant and easement law, as well as specific subject matter related policies.¹⁵⁴

In *Stockport I*, the court dismissed Stockport's motion for summary judgment and then addressed Norcross's motion to dismiss, applying the standard of whether the complaint alleged sufficient facts to sustain the cause of action.¹⁵⁵ Norcross claimed that the proposed extraction of natural gas by hydrofracture drilling violated the express language of the conservation easement.¹⁵⁶ Although fracking was not listed as a prohibited activity in the easement document, Norcross claimed that it was prohibited because of Pennsylvania's "preference for liberally construing conservation easements."¹⁵⁷ The court cited the state's enabling act language that provides that "any general rule of construction to the contrary notwithstanding, conservation or preservation easements shall be liberally construed in favor of the grants contained therein to affect the purpose of those easements and the policy and the purpose of this act."¹⁵⁸

The court explained that it would follow Pennsylvania's rule of construction.¹⁵⁹ First, the court would look at the language of the contract to determine intent, and if the language was unambiguous,

150. *Stockport Mt. Corp. LLC v. Norcross Wildlife Found., Inc.*, 2012 WL 719345 (U.S. Dist. Ct. M.D. Pa. 2012) (*Stockport I*), 2013 WL 4538822 (U.S. Dist. Ct. M.D. Pa. 2013) (*Stockport II*). A subsequent opinion, 2014 WL 116311 (U.S. Dist. Ct. M.D. Pa. 2014) upheld an award of attorney's fees to Norcross.

151. *Stockport I*, 2012 WL 719345 at *2.

152. *Id.*

153. *Id.*

154. *Id.* at *7.

155. *Id.* at *5–6.

156. *Stockport I*, 2012 WL 719345 at *5–6.

157. *Id.* at *6.

158. *Id.* See also 32 PA. CONS. STAT. ANN. § 5055(c)(2) (West 2001).

159. *Stockport I*, 2012 WL 719345 at *7.

the court would enforce the express language.¹⁶⁰ The court then noted that easement grants are to be construed like contracts, apparently following the “easement” label in conservation easements rather than their true nature as covenants.¹⁶¹ Norcross claimed that the easement was unambiguous and that drilling violated three express prohibitions of the easement: the drilling constituted prohibited “industrial or commercial uses;” resulted in the “depositing ... of chemical substances” on the property; and required installation of “new roads.”¹⁶² Additionally, fracking violated the express purpose of the easement to preserve conservation values, protect plant life and habitats, and prevent soil erosion and water pollution.¹⁶³ Finally, the fracking operation otherwise interfered with the property’s beauty and unique character in its then current state.¹⁶⁴

The court, however, rejected Norcross’s claim that the right to pursue fracking was clearly and unambiguously prohibited by easement and denied the motion to dismiss.¹⁶⁵ Rather, the court found that the “crucial provisions” of the easement were ambiguous.¹⁶⁶ The court noted that “[a]lthough this statement outlines the parties’ aspirations, the court cannot determine at this stage in the litigation that this provision prohibits natural gas drilling because it is too vague.”¹⁶⁷ The court also found that despite the stated ban on industrial and commercial uses, other provisions in the easement approved certain of such uses.¹⁶⁸ Thus, discovery was required to determine the intended definitions of “commercial” and “industrial.”¹⁶⁹ Moreover, Stockport’s allegation that the prohibition of chemical release only applied to surface chemicals and that it planned only a subsurface release rendered the easement clause ambiguous.¹⁷⁰ Finally, Stockport alleged that construction of new roads was largely unnecessary.¹⁷¹ Thus, the court found that Stockport had “adequately pled facts creating ambiguity,” and a motion to dismiss was not appropriate.¹⁷²

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Stockport I*, 2012 WL 719345 at *7.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See Stockport I*, 2012 WL 719345.

170. *Id.* at *8.

171. *Id.*

172. *Id.*

In *Stockport II*, however, the same judge considered a motion for summary judgment by Norcross after the parties engaged in discovery and fully briefed and argued the issue.¹⁷³ The court, in this second opinion, granted the motion for summary judgment finding that no genuine issue of material fact existed with respect to the permissibility of surface drilling under the conservation easement. Interestingly, the court deviated from its prior opinion on the motion to dismiss where it found ambiguity.

The court in *Stockport II* explained that the burden to show ambiguity rests on the party making that claim.¹⁷⁴ To determine if a contract is ambiguous, the court said it would consider the language of the instrument, alternative meanings suggested by counsel, and objective evidence such as the bargaining history and the parties' conduct that reveals their understanding of the words.¹⁷⁵ But, the court declared that it ultimately came down to the language that the parties used in the agreement: "Extrinsic evidence notwithstanding, the parties remain bound by the appropriate objective definition of the words they use to express their intent."¹⁷⁶ The court went on, "The words constituting the conservation easement are susceptible to only one reasonable interpretation with respect to the instant issue; surface natural gas drilling is prohibited. To reach this conclusion, the court did not need to look beyond section 4(c) of the easement, which prohibits 'industrial or commercial uses of any kind.'"¹⁷⁷ The court then looked to dictionary definitions of "commercial" and "industrial" to find that Stockport's planned lease to a natural gas driller in return for rent and royalties was "commerce" and the use of machinery to drill and remove natural gas was "industrial" in nature.¹⁷⁸ Moreover, the court indicated that the ambiguities that it had noted in *Stockport I*—such as the easement expressly permitting timbering and quarrying—no longer compelled a finding of ambiguity.¹⁷⁹ Finally, the court noted that the absence of an express prohibition on drilling does not create an ambiguity.¹⁸⁰

173. *Stockport II*, 2013 WL 4538822 at *7. Judge James M. Munley, United States District Judge, presided in both *Stockport I* and *Stockport II*. See *id.* at *1; 2012 WL 719345 at *1.

174. *Stockport II*, 2013 WL 4538822 at *9.

175. *Id.* at *10.

176. *Stockport II*, at *10 (quoting *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 76 (3d Cir. 2011); *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 103 (3d Cir. 1980)).

177. *Id.* at *10.

178. *Id.* at *11.

179. *Id.* at *11–12.

180. *Id.*

The court explained that extrinsic evidence supported its reading that the language of the conservation easement unambiguously barred drilling for natural gas.¹⁸¹ Stockport argued that the parties did not contemplate the feasibility of shale gas production by fracking when they signed the conservation easement, and thus did not intend to bar it.¹⁸² The court, however, turned this proposition on its head, noting that “[t]he external evidence Stockport points to, however, does not reasonably establish that the parties to the conservation easement intended to *permit* surface gas activities.”¹⁸³ The court instead chose to rely on what it considered to be the unambiguous language of the agreement. Given that the parties had apparently not considered the fracking issue because technology did not permit it at the time, the court should have gone beyond the words and looked at other evidence to discern what the parties would have intended on the issue.

There are several important takeaways from the two *Stockport* opinions. They illustrate the difficulty in determining whether any given language is “ambiguous” or “unambiguous”—the same court appears to have changed its view on this issue from the first to the second opinion. Language that can be fairly read to prohibit fracking—commercial and industrial use bans—may not be clear enough to survive a motion to dismiss. Thus, there are limits to the “plain meaning” even when the meaning is arguably clear. As a result, a trial will be required to consider extrinsic evidence to find the parties’ intent. This will be costly for both sides—for an NPO or entrepreneurial company with constrained capital—and time consuming—extending the period of uncertainty for the nonprofit and postponing a return on investment for the company. *Stockport Mountain* demonstrates that it is essential not only to make the intent clear, but also to make it sufficient to be adjudicated without an evidentiary showing. The parties could attempt to settle after denial of a motion to dismiss, but this would require flexibility and, as discussed below, the NPO may be hampered in attempts to modify the easement through settlement. For parties concerned about oil and gas drilling, the best protection would be through an express clause in the original easement agreement.

2. *Ray v. Western Pennsylvania Conservancy*

In *Ray v. Western Pennsylvania Conservancy*, the plaintiffs’ predecessor in title granted a conservation easement, which was

181. *Id.* at *13.

182. *Stockport II*, at *13.

183. *Id.* at *14 (emphasis added).

recorded, to the defendant-conservancy.¹⁸⁴ Some two weeks later the predecessor conveyed the land in fee to plaintiffs.¹⁸⁵ Plaintiffs brought a declaratory judgment action seeking an interpretation of the conservation easement as they sought to permit removal of oil and gas from their property by horizontal drilling from an adjacent, unrestricted lot.¹⁸⁶ The court denied the plaintiffs' motion for a judgment on the pleadings.¹⁸⁷

The trial court agreed with the *Stockport* opinions on the interpretative ground rules in Pennsylvania, stating that “[w]hen the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement.”¹⁸⁸ Importantly, the easement in *Ray* contained an express provision stating that “[n]o drilling or other removal of . . . gas . . . or similar . . . materials from the real estate shall occur.”¹⁸⁹ Plaintiffs argued, though, that the easement was meant only to protect surface features of the land, and thus subsurface horizontal drilling from a neighboring tract should be permitted.¹⁹⁰

Ray, like *Stockport II*, relied on a reading of the easement instrument alone to prohibit the proposed drilling. Following the opinion of *Stockport I*, the court could have found the *Ray* language ambiguous for failing to clarify the distinction between surface and subsurface drilling and denied a decision on the pleadings; or the court may have required factual determination of the effects of the different processes on the protected land, specific understandings of the parties, and other information. Instead, the *Ray* court relied only on its “comprehensive reading” of the easement, which led

to the conclusion that the parties intended a broader conservation effect than simply protecting the surface features of the land. In the agreement, reference is made to protecting nature environmental systems, protecting conservation values, conserving the quality of water resources, maintaining and protecting forested areas in order to protect water resources, conserving biological diversity, fostering the growth of healthy and unfragmented forest,

184. 2011 Pa. Dist. & Cnty. Dec. LEXIS 367 (Pa. County Ct. 2011), *aff'd*, 68 A.3d 368 (Pa. Super. 2013).

185. *Id.*

186. *Id.* at *3–4. The facts in the opinion are unclear whether this was “traditional” slant drilling or horizontal drilling used in fracking.

187. *Id.* at *6.

188. *Id.* at *4.

189. *Id.* at *5.

190. 2011 Pa. Dist. & Cnty. Dec. LEXIS 367, at *5.

conserving native species, maintaining a continuous canopy of trees, shrubs, wild flowers and grasses, maintaining, breeding, sites and migration corridors for birds and wildlife, and protecting biological integrity, natural resources and ecosystems.¹⁹¹

E. Going Forward

In both *Ray* and *Stockport II*, the courts favored interpreting conservation easement documents based on their language alone and did not look to extrinsic evidence. By doing so, the courts were able to dispose of claims on the pleadings and determine the rights under the conservation easement, avoiding expensive and long trials that would be necessary to weigh additional extrinsic facts. The courts did not explicitly rely on public policies favoring conservation easements or new energy development in their decisions, but rather focused on the contractual undertakings of the parties.

These cases remind drafters of a crucial lesson—to avoid uncertainty and costly litigation, it is imperative to make the document fully reflect the intent of the parties in light of current circumstances and possible events that the future might bring. More is better in drafting these documents. General, catch-all language expressing the spirit and purpose of the easement may provide direction for the parties and a decisionmaker in a future dispute.

Despite best efforts to provide a solution by drafting, questions will almost inevitably arise in the future given the perpetual nature of conservation easements and inexorable change. Although *Ray* and *Stockport II* eschewed extrinsic evidence, not all courts may be so inclined.¹⁹² A court may employ a more liberal attitude towards extrinsic evidence. Moreover, broadening the inquiry beyond the words of the document allows the court an opportunity to consider, explicitly or implicitly, underlying policy considerations, such as where the balance should be found between conservation and new energy priorities under current circumstances.¹⁹³

191. *Id.* at *5–6.

192. See *Orlando Lake Forest Joint Venture v. Lake Forest Master Cmty.*, 105 So. 3d 646, 648 (Fla. Dist. Ct. App. 2013); *Davista Holdings, LLC v. Capital Plaza, Inc.*, 741 S.E.2d 266, 269 (Ga. App. 2013); *Taddei v. Vill. Creek Prop. Owners Ass'n, Inc.*, 725 S.E.2d 451, 453 (N.C. Ct. App. 2012); *Cobb v. Allen*, 460 So. 2d 1261, 1264 (Ala. 1984); *Borton v. Forest Hill Country Club*, 926 S.W.2d 232, 234 (Mo. Ct. App. 1996); *810 Properties v. Jump*, 170 P.3d 1209, 1213 (Wash. Ct. App. 2007).

193. See *infra* Part IV.C. (discussing covenants and public policy).

III. CONSENSUAL MODIFICATION OF CONSERVATION EASEMENTS
TO PERMIT NEW ENERGIES

When an agreement does not allow a party to take a certain action or the party is unwilling to take the risk of acting where it is unclear if such behavior is permitted, the parties too often bargain to amend the original understanding to specifically authorize the activity. Theoretically, therefore, the fee owner and easement owner (an NPO or government) should be able to agree to modify a conservation easement to permit development of some or all of the new energies. As this section will show, however, there are legal hurdles to achieving a valid amendment between the fee owner and conservation easement holder.

A. Modification by Nonprofit Holder

If an NPO holder of a conservation easement seeks to amend a conservation easement to permit fracking, wind turbines, or solar devices on the burdened property, there are questions as to whether the NPO has the power to do so without judicial approval. Moreover, such a decision will likely create problems with respect to the easement donor's tax deduction.

1. Power to Amend

There is currently significant debate on the question of whether an NPO can simply agree, without more, to amend a conservation easement. Some argue that all gifts of conservation easements create charitable trusts.¹⁹⁴ This would mean that, under charitable trust law, changes can only be made if the original purpose of the easement becomes impossible or impracticable.¹⁹⁵ An arguably rational choice by the NPO to permit new energy development in exchange for a payment to be used to further the NPO's other conservation works (or a swap of land with even higher conservation values) would not meet the impossibility or impracticability tests. Thus, the amendment would not be permitted in the charitable trust context.

Moreover, a proposed change of a charitable trust must be approved by a court in a *cy pres* proceeding.¹⁹⁶ The state attorney

194. See, e.g., Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009).

195. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

196. *Id.* § 399 cmts. d, e.

general has authority to contest the amendment on the grounds that it does not serve the public interest.¹⁹⁷ The attorney general's involvement and the requirement for court approval, at a minimum, would add transaction costs, divert limited NPO funds from conservation activities to attorney costs, delay the amendment process, and may prevent the change altogether.

Proponents of the charitable trust classification for conservation easement gifts maintain that this would better protect the public interest in conservation lands, ensure that the charitable deduction is not subverted by allowing a modification benefitting the donor, and best respect the perpetual nature of conservation easements.¹⁹⁸ Others, however, reject the view that a gift of a conservation easement automatically creates a charitable trust.¹⁹⁹ They maintain that there is a lack of requisite intent to create a trust; trust law unnecessarily constrains easement holders from achieving conservation goals through modifications and alterations; and the general provisions of the IRC sufficiently ensure that any modifications will serve the public interest because the nonprofit would otherwise lose its tax-exempt status.²⁰⁰

The disputing sides have marshaled various arguments to support their positions, yet there is no clear winner.²⁰¹ For the purposes of this Article, however, the takeaway is that consensual modifications by the fee owner and holder of a conservation easement to permit new energy development may not be enforceable. Moreover, given this uncertainty, volunteer trustees of NPOs may hesitate to vote for easement alterations out of a fear of

197. *Id.* § 391 cmt. a.

198. See McLaughlin & Weeks, *supra* note 194, at 5, 27-28, 55-56, 70-71, 80-82.

199. See C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397, 398 (2009); C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25, 83 (2008) [hereinafter Lindstrom, *End of Perpetuity*]. For an excellent analysis of this issue, see generally Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012).

200. See Lindstrom, *End of Perpetuity*, *supra* note 199, at 45-56, 83.

201. See Korngold, *Governmental Conservation Easements*, *supra* note 9, at 508-13. I personally find the charitable trust argument unconvincing unless there is a clearly expressed, intent to create a trust; otherwise, the gift of the easement should be treated like any other unrestricted gift to a charitable organization. *Id.* at 511-12; *Id.* n.193. At the same time, I urge the different sides to move the discussion from one of classification as a trust or not to a policy-based examination of what should be required for alteration of a conservation easement, which parties should be involved, and whether judicial approval is necessary. *Id.* at 511-12.

personal liability, thus creating a further drag on flexibility in easements.²⁰²

2. Federal Tax Issues

The IRC and its accompanying Regulations require that a donor create a conservation easement in perpetuity in order to qualify for an income tax deduction.²⁰³ The one exception remotely relevant to this Article's consideration provides that if a court determines that the accomplishment of a conservation easement's purpose becomes impossible or impracticable, the easement may be released. In such case, the easement holder must be paid a portion of the consideration, which it must reinvest consistent with the original easement purposes.²⁰⁴ The regulation does not provide relief for the hypothetical scenario where a conservation organization seeks to amend an easement to allow new energy development simply to allow it to obtain funds to further its mission or to swap for land with higher conservation values. In this hypothetical scenario, the original deduction would be at risk.

B. Modification by Governmental Holder

A governmental holder might seek to modify a conservation easement that it holds. It may, for example, consider altering an easement to permit installation of wind turbines in order to achieve clean energy goals.²⁰⁵ In such a situation, the government easement owner would face the challenges based on charitable trust doctrine and federal tax issues discussed above. Moreover, governments must confront additional arguments against alteration of easement terms.

1. Standing

The ability of governmental conservation easement holders to agree to modifications is complicated by rules in jurisdictions who grant standing to citizens to independently enforce the easements.²⁰⁶

202. See Korngold, *Contentious Issues*, *supra* note 9, at 1072–73.

203. 26 U.S.C. § 170(h)(2)(C) (2013); 26 C.F.R. § 1.170A-14(g)(1) (2009).

204. 26 C.F.R. § 1.170A-14(g)(6).

205. See Eileen M. Adams, *Residents to Decide on Town Ownership of Lots*, RIVER VALLEY SUN J. (Dec. 1, 2009), <http://tinyurl.com/k8ftzxx>, archived at <http://perma.cc/ZD23-J87K> (reporting on town meeting to discuss rescinding town's conservation easement so that six wind towers could be built).

206. Compare *McEvoy v. Palumbo*, 2011 Conn. Super. Ct. LEXIS 2939 (Conn. Super. Ct. Nov. 15, 2011) (denying neighbor standing to enforce portion

These rules have the advantages of empowering “private attorneys general” to ensure that conservation goals are advanced. They create the risk, however, of lessening flexibility in land use and weakening the democratic process by permitting individual citizens to counter the decisions of elected and accountable public representatives. Moreover, some citizens find conservation easements attractive because they improve the value of their individual, neighboring properties rather than as a means to provide a general public good. These owners thus might engage in rent-seeking behavior with respect to easement decisions.

Government easement holders should be required to follow procedural requirements, but it seems sensible that they should not have to experience delay and spend taxpayer funds to defend a substantive decision against dissenting owners. These owners should rely on the democratic and elective process for vindication. Still, the threat of litigation may dissuade a governmental body from entering into a modification to permit new energy development on land over which it holds a conservation easement.

2. *Specific Statutory Provisions*

Three types of state legislation may limit governments from modifying or terminating conservation easements.²⁰⁷ First, some legislation authorizing general conservation easements provides limits on termination, such as requiring the approval of a public body.²⁰⁸ Other statutes establishing specific types of conservation easement programs set out precise requirements for release, termination, and modification of such easements.²⁰⁹ Finally, general laws controlling the sale of governmental assets can be viewed as applying to reconveyance of an easement right in whole

of conservation easement barring mowing of land), *and* *Zagrans v. Elk*, No. 08CA009472, 2009 Ohio Ct. App. WL 1743203 (Ohio Ct. App. June 22, 2009) (denying neighbor standing to challenge modification of conservation easement between park district and owner), *with* *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2d Dist. 2008), *aff'd*, 936 N.E.2d 763 (Ill. App. Ct. 2d Dist. 2010) (standing granted to neighbor pursuant to state’s conservation easement statute).

207. See Korngold, *Governmental Conservation Easements*, *supra* note 9, at 514–18.

208. See, e.g., MASS. GEN. L. ANN. ch. 184, §§ 31-34 (2014); N.J. STAT. ANN. § 13:8B-5 (2014); N.Y. ENVTL. CONSERVATION L. §49-0307 (2011) (requiring judicial proceeding for termination).

209. See Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 REAL PROP. TR. & EST. J. 1, 90–92 (2011) (listing statutes).

(termination) or in part (modification). Such transfers may require various procedural and substantive regulations.²¹⁰ These statutory requirements, therefore, may make it more difficult for a governmental entity to modify a conservation easement to permit new energy development.

IV. JUDICIAL MODIFICATION OR TERMINATION OF CONSERVATION EASEMENTS

There are various doctrines, drawn from the law of covenants, which a fee owner could rely upon to request the court to modify or terminate a conservation easement in order to permit the development of new energies. These include the doctrines of changed conditions, relative hardship, and prohibition of covenants violating public policy. These doctrines, however, may not be helpful to the fee owner except perhaps under the most unusual circumstances.

A. Changed Conditions

By applying the doctrine of changed conditions, a court will no longer enforce a covenant if conditions have changed since its creation so that enforcement can no longer accomplish the original benefits or purpose of the covenant.²¹¹ The changed conditions theory could theoretically be applied in the conservation easements setting.²¹² For example, pollution and development to surrounding properties might make the accomplishment of an easement to protect habitat no longer possible. Similarly, climate change may degrade all conservation values from the subject properties. Proponents may resist application of the changed conditions theory in such cases, though, arguing that any open space is valuable and even more necessary when surrounding lands have become more developed.

The changed conditions theory provides an answer to deal with obsolete covenants that no longer serve a significant purpose. It may prove useful to an owner seeking to develop new energies where the conservation easement no longer is effective. However, the changed conditions theory does not provide a mechanism for

210. See IND. CODE ANN. § 36-1-11-4 (2013) (procedure); N.Y. CONST. art. VIII, § 1 (requirement of “adequate consideration”).

211. See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 92, 453–55.

212. See Korngold, *Contentious Issues*, *supra* note 9, at 1077–78.

courts to balance a public interest in new energy exploration against a still viable conservation property right.

B. Relative Hardship

Though there are various formulations of the doctrine of relative hardship, a common articulation is that a court will not specifically enforce a covenant and will allow only damages if the harm from the injunction would be disproportionate to its benefits.²¹³ In applying the test, the courts typically focus on the positions of the two parties and do not factor in the public's interest in whether an injunction should be granted.²¹⁴ As currently conceived, the relative hardship rule differs, for example, from the standard in nuisance cases where courts expressly consider the public interest in determining whether to grant an injunction or limit the injured party to money damages.²¹⁵

Thus, under a traditional relative hardship doctrine, it would be unlikely that a court would factor in any public interest in new energy development in determining whether to grant an injunction. Under a standard relative hardship doctrine where the court evaluates only the competing positions of the parties, it would be hard for the fee owner to show that monetary damages would be sufficient to protect the property right of the conservation easement holder. The easement holder values its property interest for its unique ecological values, rather than as an economic asset or a commodity. Under such circumstances, it would seem appropriate that a court would grant the traditional injunction remedy to protect property rights rather than the market-based damages remedy.

The Restatement (Third) of Property: Servitudes, however, suggests that the interest of the public should be expressly considered by the courts in determining the remedy for breach of a servitude.²¹⁶ Under such an approach, a court might find that an injunction should not be issued, barring a relatively small intrusion (in terms of acreage, environmental fallout, etc.) on a conservation easement from a new energy development, but require the violator to pay compensation.

213. See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 92, at 462–70.

214. See Korngold, *Contentious Issues*, *supra* note 9, at 1078–79.

215. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970); RESTATEMENT (SECOND) OF TORTS § 942 (1979).

216. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3(1) cmt. e (2000) (suggesting that courts should consider costs and benefits to the parties and the public when determining remedies).

C. Covenants Violating Public Policy

Courts often state that covenants violating public policy will not be enforced, though there are few cases where courts actually void covenants on this theory.²¹⁷ One noteworthy line of cases involved courts invalidating subdivision covenants barring group homes, holding that these restrictions breached a clear statutory and regulatory policy favoring such institutions.²¹⁸ Not only do conservation easements not violate public policy, but rather, they are favored by public policy, as evidenced by their statutory authorization and public subsidy.²¹⁹ Thus, in all but the unusual case, courts should enforce these property rights.

In a rare instance, however, a court might find that a competing public policy might necessitate the modification of a conservation easement. It remains unclear whether the public interest in development of carbon-based or renewable energies is one of those situations. It would be a hard case to make: because there are only a limited number of decisions where courts have invoked public policy to actually void covenants (and those covenants are not even supported by strong public policy), it appears that courts would not be disposed to striking conservation easements, which by contrast are favored by statute and other public policies.

V. TERMINATION OF CONSERVATION EASEMENTS BY EMINENT DOMAIN

Like other easements²²⁰ and covenants,²²¹ conservation easements should be subject to eminent domain takings.²²² Some conservation easement statutes specifically provide that these interests are subject to being taken by eminent domain.²²³ As with other easements in gross, there would be a special measure of

217. See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 92, at 397–98.

218. See Korngold, *Contentious Issues*, *supra* note 9, at 1080.

219. See *supra* Part I.A, E.

220. See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 92, at 268–71.

221. See *id.* at 473–76.

222. See *Harford Nat'l Bank & Trust Co. v. Redevelopment Agency of City of Bristol*, 321 A.2d 469, 471 (Conn. 1975) (requiring compensation for eminent action invalidating an in gross building restriction, resembling a conservation easement); Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897 (2008).

223. See N.Y. ENVTL. CONSERVATION. L. § 49-0307(3)(b) (2011); N.C. GEN. STAT. ANN. § 121-36(c) (2014); VA. CODE ANN. § 10.1-1010(F) (2014).

damages for the easement holder: the difference in the value of the burdened land with, and without the covenant.²²⁴ Thus, a partial taking of an easement could theoretically be made, allowing new energy development to take place on a small portion of a large property encumbered by a conservation restriction, with payment to the conservation easement holder.

The decision of the Supreme Court of the United States in *Kelo v. City of New London*,²²⁵ upholding the use of eminent domain for economic development under the Fifth Amendment of the United States Constitution, generated a backlash among the public, scholars, and state lawmakers.²²⁶ Various voices within the anti-*Kelo* camp have maintained that the Fifth Amendment's "public use" requirement does not permit economic development takings or takings that result in the transfer from one private owner to another.²²⁷ Professor Ilya Somin has examined state legislative responses to *Kelo* and their attempts to limit economic development takings and "private to private" takings.²²⁸

The question is whether, in light of state reforms post-*Kelo*, governmental takings of conservation easements will be upheld.²²⁹ Until now, courts have held that condemnation of land for oil and gas pipes met the public use test, provided that the public has equal access to purchase the oil and gas.²³⁰ Arguably, this would be the case with an exploration company developing gas supply for sale through fracking. Similarly, courts held that the taking of land to build and maintain facilities to generate electricity for sale to the public is for a public use.²³¹ The taking of a conservation easement

224. See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 92, at 475.

225. *Kelo v. City of New London*, 545 U.S. 469 (2005).

226. See Korngold, *Contentious Issues*, *supra* note 9, at 1082–83.

227. *Id.*

228. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2114–38 (2009) (finding many of these efforts ineffective due to broad blight exceptions, poorly worded legislation, and other factors).

229. See Ilya Somin & Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 641–43 (2006) (arguing that economic development can cause environment damage and land owned by nonprofit environmental groups is not in the tax base and thus particularly vulnerable to local government seeking to increase revenue producing property).

230. See generally *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 114 N.W.2d 622 (Iowa 1962); *Ohio Oil Co. v. Fowler*, 100 So. 2d 128 (Miss. 1958); *McEwen v. MCR, LLC*, 291 P.3d 1253 (Mont. 2012).

231. See, e.g., *U.S. ex rel. Use of Tenn. Valley Auth. v. An Easement and Right-of-Way Over 1.8 Acres of Land, More or Less, in Maury County, Tenn.*, 682 F.Supp. 353 (M.D. Tenn. 1988); *Atkinson v. Carolina Power & Light Co.*,

would ultimately involve the transfer of a property right from one private party (the NPO holder) to another (the fee owner would get the right back, and then lease it to the energy developer). This could raise concerns for those objecting to “private to private” transfers. The fact that the transferee is operating in essence as a public utility, however, may blunt this argument. Thus, even in an anti-*Kelo* environment and legal regime, the taking of a conservation easement for new energy development might be upheld.

CONCLUSION

Over recent years, the rapid growth in the use of conservation easements and the search for new energies—carbon-based and renewables—have been important developments affecting American land ownership and policy. Recently, questions have emerged as to whether and how conservation easements and new energy development are compatible. The particular issues are whether fracking, wind turbines, and solar devices can be sited or operate on land subject to a conservation easement.

This Article shows several key factors influence the answer to these questions. The agreement of the parties on the issue will control, but interpreting an ambiguous agreement poses challenges to the courts and risks to the parties: the IRC provisions concerning deductibility of conservation easements may have a profound effect on whether a shift may be made to energy development and the type of permissible activities; consensual modification of the landowner and the easement holder to permit energy development may be complicated by the law of charitable trusts; certain nonconsensual modification doctrines to permit energy development might be applied by the courts; and a governmental taking of the conservation easement remains a possibility although not as straightforward under state law reforms post-*Kelo*.

One important lesson is that parties are best served if the original conservation easement document addresses the issue of energy development. Hindsight, however, is 20-20. The parties, the courts, and society are left to address those disputes where the original parties have not determined the issue consensually.

To better enable current and future generations to resolve questions that the parties have left open, this Article suggests several initiatives that may prove helpful. First, judicial

121 S.E.2d 743 (S.C. 1961); *Dyer v. Texas Elec. Service Co.*, 680 S.W.2d 883 (Tex. App. 1984).

interpretation methods for conservation easements should be clarified so courts should not presume that the failure to mention a technology ultimately developed in the future means that the parties intended that it be prohibited. Rather, the courts in such situations should determine from the whole document and extrinsic evidence what the parties would have intended on the issue. At the same time, though, courts should remember that successor parties might have a more limited understanding of the original intent. Consequently, they should only hold successors to what the successors reasonably could have thought the original parties intended.

Second, doctrines concerning the amendment and modification of conservation easements need to be clarified by courts and legislatures. The current law is unclear as to the extent that easement holders can make environmentally rational decisions to modify existing agreements. This potentially frustrates both conservation goals and other legitimate public policies such as new energy development. Settling this issue will involve a careful, thoughtful balancing of conservation values, property rights, flexibility concerns, the proper role of federal tax law as a driver of state conservation law, and other policy concerns. Those with conflicting viewpoints need to engage in open, productive dialogue to reach a resolution.

Finally, conservation easements are perpetual land interests. As time passes, it is inevitable that changes in technology, the environment, societal needs, and the economy will create questions as to whether a given new energy development is permitted on conservation easement land. It is important for all the players—the fee owner, the easement owner, counsel, the community and broader stakeholders, and decision makers—to recognize that the dispute invokes large and nuanced public policies and to craft solutions accordingly.