

What's New in Land Conservation Law?

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In the rapidly evolving world of land conservation law, we recently have witnessed three legal cases, the resolution or continuation of which have provided guidance to those of us practicing in this field of law, as well as those drafting and holding conservation easements, and for everyone attempting to defend and enforce conservation easements. The cases of which I write are cases of first impression for which no prior legal precedent existed and address four important topics: termination, amendment, third-party enforcement, and violation by third parties.

All three of the cases address issues relating to third parties, considering either directly or indirectly who has standing to enforce conservation easements and exploring the topic of third party enforcement (or enforcement by other than the easement's holder), and one case shows how to reach a third party violator of a conservation easement. I will summarize these cases and then describe their importance to the land trust community.

The subject of much controversy from its inception, *Hicks v. Dowd*² involves the

* Founding partner, Conservation Law, P.C., a law firm devoted to ensuring the permanence of land conservation through strong holders, sound transactions, and easement enforcement and defense. The subject of this article, along with other topics relating to land conservation law, case-law and discussions, will be available in a forthcoming law textbook by the same author.

² *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007).

donation and subsequent termination of a conservation easement on the Meadowood Ranch in Johnson County, Wyoming, granted by the Dowd's predecessors in interest to the Scenic Preserve Trust (SPT), a both charitable 501(c)(3) and arguably quasi-governmental organization for which the Board of County Commissioners of Johnson County serves as the board of trustees. From its inception, questions in the case swirled around Hicks' standing to bring action against the Dowds, seeing as he was not the holder of the conservation easement, but a citizen of Johnson County outraged by the SPT's acquiescence to terminate the perpetual conservation easement for reasons related to the development of coal-bed methane on the ranch, a potential use that preceded the conservation easement in both time and right, and for which the Dowd's predecessor in interest obtained a mineral remoteness letter.

Initiated by Hicks in state district court against the County and the Dowds, and asserting a variety of bases for standing, the court originally recognized as a basis for Hicks' standing the charitable trust doctrine, by interpreting the SPT to be a charitable trust and Hicks to be a qualified beneficiary authorized to enforce that trust, but not before instructing the parties to notify the Wyoming Attorney General to afford him the opportunity to intervene in the action on behalf of the public. The Attorney General declined to intervene or participate in the action, citing the Court's recognition of Hicks' role on the public's behalf as adequate representation of the public. The Court subsequently dismissed the case for Hicks' failure to exhaust all of his administrative options with Johnson County prior to initiating the lawsuit.

Hicks appealed to the Wyoming Supreme Court, which in May 2007 held that Hicks did not have standing to challenge the easement's termination, under either Wyoming's statutory or common law relating to charitable trusts, and through which opinion the Court all but instructed

the Attorney General to bring the case on the public's behalf: "Given our holding that [Hicks] does not have standing, the Attorney General has the opportunity to reassess his position".³

The then-Attorney General accepted the Court's invitation (or rather followed its implicit instruction), and filed a complaint with the district court in July 2008 restating and re-alleging Hicks' claims, based this time on the Attorney General's authority to enforce a charitable trust as a qualified beneficiary, and asking for relief based on charitable trust doctrines including: that the SPT was a charitable trust holding assets, including the easement, for the benefit of the citizens of Johnson County, and that the County failed in its fiduciary duty to its citizens when acting as the Board of Trustees for SPT and transferring the trust's assets through the easement's termination, without replacing them. Other bases for the complaint included mandamus relief to allow the County to rescind the quitclaim deed by which it effected termination of the conservation easement without judicial oversight; and constitutional violations relating to use of public funds for private purposes when SPT terminated the conservation easement (argued to be worth over one million dollars), without receiving adequate consideration or funds in exchange, which loosely translates to an argument of private benefit given by SPT to the Dowds.

It remains to be seen whether the Wyoming Supreme Court will endorse the charitable trust principles invoked by its Attorney General, including that SPT is a charitable trust and the conservation easement on Meadowood Ranch is a trust asset, the disposition of which trust plus assets falls within the authority of the Wyoming Attorney General to oversee and enforce. In the meantime, the case continues to raise questions of standing based on charitable trust principles, both for

³ See *id.* at 921.

citizens and land trusts alike, and to challenge assumptions of the perpetual nature of conservation easements.

Regardless of the applicability of the charitable trust doctrine here or in other cases, it is crucial to recognize the consequences of terminating conservation easements without complying with legal and ethical requirements, which consequences have begun to play out in the court system, as well as in the court of public opinion. Lessons for holders to take away from Hicks v. Dowd include: do not assume you know the reasons for standing to enforce a conservation easement if your state is silent or does not articulate them through common or statutory law; do not assume a willing qualified holder and a willing landowner of land burdened by a conservation easement will not work together to find a way to terminate the conservation easement in a manner potentially beyond the reach and scope of the judicial system (this sort of mutual agreement to terminate with extremely limited judicial oversight, occurred prior to this case in Colorado's Walter v. Otero County Land Trust⁴); and do not assume that the charitable trust doctrine or principles do not apply in your state, to the conservation easements you hold, or to the persons qualified to enforce easements, in advance or in the absence of any legislative or judicial declaration regarding the same.

The second case worth examining also explores issues of standing, as well as amendment of conservation easements. In Bjork v. Draper,⁵ decided in April 2008, an Illinois Appellate Court agreed that certain neighbors have standing to enforce conservation easements, and that a land trust may amend a conservation easement without judicial oversight, but also found that the land trust was not permitted to amend the

⁴ Walter v. Otero County Land Trust, 05-CV-96, Order (Otero Cty. Dist. Ct., Jun. 21, 2005).

⁵ Bjork v. Draper, 886 N.E. 2d 563 (Ill. App. Ct. 2008).

conservation easement at issue because the amendment(s) conflicted with other portions of the conservation easement (namely, the permitted and prohibited use sections). In a twist of reasoning that challenges even the most flexible mind, the Court's holding basically instructs that no amendment be permitted, even with a court's approval, that contradicts *any provision* of a conservation easement, as opposed to contradicting its *purpose* or the easement grantor's *intent*, such that any amendment with an impact on the original language or provisions of an easement would be impermissible. This constrains the mind mainly because the need for an amendment is usually for just that reason—to alter existing language and substitute the same with new language, while protecting the integrity of the easement's purpose and respecting the original grantor's intent.

The facts of the case involve a conservation easement donated by the Drapers' predecessors in interest, to the Lake Forest Open Lands organization (LFOLA), for the purpose of protecting a historic home, arguably the oldest in Lake Forest, on the Lake Michigan Circle Tour, by ensuring the public's perpetual view of it. The Drapers proposed several changes to the home upon their purchase of it, which LFOLA agreed to, including a new addition and a new driveway. LFOLA and the Drapers agreed to amend the easement to remove certain restrictions on a portion of square footage of the property in exchange for additional protection of that same amount of property and removal of certain modernizations of the home, such as aluminum siding, and a required landscaping plan that would re-open the view of the property to the public where it had become obscured, in violation of the easement.

Neighbors to the property, specifically, neighbors living within 500 feet of the property protected by the conservation easement, possessed the requisite standing to enforce the conservation easement due to Illinois' enabling act providing standing for

neighbors living within 500 feet of easement-protected property to enforce the same. These neighbors, the Bjorks, claimed that the amendments were violations of the easement and asked the court for relief in the form of specific performance of the pre-amendment conservation easement to require removal of the addition and driveway, or for the easement's termination, due to the fact the amendments effectively extinguished the easement. The Bjorks claimed that Illinois' enabling act did not permit amendments, and that these illegal amendments represented LFOLA's failure to enforce the easement and in fact, destroyed the original bases for the easement and the easement itself, which termination required judicial oversight.

The Bjorks' assertions were correct about Illinois' enabling act, which is silent as to amendment, but the lower court's judgment, based on the application of deed and contract law, stated that although nothing in Illinois' enabling act expressly permitted amendment of conservation easements, the enabling act permitted termination under certain circumstances, which implied that amendment was permissible as a lesser right and without judicial oversight, and that nothing elsewhere in Illinois law prohibited such amendment. The lower court therefore found the amendments allowing the addition and new driveway to be permissible as not contradicting the easement's purpose by being invisible to the public from the road and walkway, but after inspecting the property personally, found the landscaping plan and adjustments made on the property in contradiction thereto, and determined that the plan and adjustments made without LFOLA's involvement did contravene the easement's purpose, by preventing and obstructing the public's view of the property, and disallowed that amendment.

Upon appeal, the appellate court agreed with the lower court that amendment was permitted *per se*, and placed weight on the fact that the easement contained an

amendment provision for the same, but then rejected both amendments permitting the driveway and addition, as well as that relating to the landscaping plan. As previously mentioned, the court stated that amendments modifying *any provision* of an easement would not be tolerated. Regarding a request by the Bjorks for attorney fees for their enforcement of the easement, the court rejected this claim, interpreting the easement's clause providing for fees to apply only to the easement's holder and the landowner. The appellate court remanded the case for the lower court to decide whether removal of the driveway was necessary consistent with its ruling. Both parties appealed the appellate court's decision, with LFOA arguing the amendments were all permitted, and the Bjorks claiming that the amendments were prohibited as a matter of law, and that the original easement language should be honored and reinstated, to cause the removal of the addition and driveway. The Illinois Supreme Court declined to review the case on any grounds, preserving the appellate court's rulings.

Even with the arguably odd reasoning and conclusions of the appellate court, the case raises several important issues for the holders of conservation easements: first, standing for parties other than those to the conservation easement itself may be established as a matter of law legislatively, such as the right of neighbors within 500 feet of an easement-encumbered property to enforce that easement; second, the absence of language regarding easement amendment leaves that issue open to interpretation by the courts confronted with it and placement of such authority within the terms of the easement itself may carry weight where no other guidance exists; third, regular easement monitoring is essential with or without amendment to ensure consistency of use with original easement or amendment language; and last, our presumption that easement amendments that are consistent with the original purposes of the easement, or that do not contradict the same, consistent

with the donor's intent, and that either increase or have no detrimental impact upon a property's conservation values may not be valid in jurisdictions adopting this rigid view of amendments that impact any provision of the original document (even though that generally is their purpose).

The third case worthy of mention here involves enforcement of a conservation-easement protected property by the landowner (a conservation organization), against the violator of that easement, who happens to be an adjacent landowner, and raises issues relating to who is qualified to enforce conservation easements, how to reach third-party violators of conservation easements (or those other than the landowner or holder), and what defenses and damages might be available when litigating such a violation.

The history of the land giving rise to the *Cullen v. Western New York Land Conservancy* case⁶ is important to understanding the case's outcome. The Western New York Land Conservancy (WNYLC), an up-state New York land protection organization, purchased in 2000, a 130-acre parcel of land at a bargain sale price from a family using the land as a retreat, educational area, and nature preserve, in order to continue the land's use as a public education resource and nature preserve. At the same time WNYLC purchased the conservation property, the family sold to a private buyer owning a gentlemen's farm adjacent to the conserved property, the property's original estate building along with a 12-acre parcel completely encircled by the conservation property, and served by a driveway and utility right of way through the conserved property. WNYLC granted a conservation

⁶ *Cullen v. Western New York Land Conservancy, Inc.*, Docket No. 2006-5184, Docket No. 2007-496 (2008); *see also* case discussion at: www.lta.org/conservation_defense/western_ny_conservancy.html.

easement on the 130 acres to the New York State Department of Parks two years after its purchase of the 130 acres.

The first buyer of the estate sold to its current owner, a wealthy businessman, after a fire destroyed much of the main building. WNYLC attempted to contact the new owner to introduce themselves, to no avail. The new owner began trespassing on the conserved property almost immediately, while rebuilding the main building and redesigning the landscaping on the 12 acres. The first trespass was by substantially resurfacing, with over a foot of gravel, a farm lane running off the driveway through the conserved property to the 12 acres, in order to allow heavy equipment and construction vehicles to reach the main building without using the permitted driveway. Upon discovering the same, WNYLC attempted to resolve the issue in a non-adversarial manner by trying to contact and meet with the owner, rather than pursuing outright any claims of trespass or easement violation against the property, to which the owner did not respond.

Soon thereafter, the new owner extended a new pond onto the conserved property by 120 feet (testimony at trial by the contractors working on the 12 acres would confirm that the owner not only knew he had crossed the property boundary, but had instructed the workers to cross the line, pull up boundary stakes and clear-cut an 80-year old successional hardwood swamp). WNYLC again immediately called and wrote to the neighbor to attempt to resolve this issue and to re-stake the property boundary, but again, received no response as the new owner continued to ignore WNYLC's repeated attempts to discuss, negotiate, and resolve the road, clear-cutting, and pond encroachment.

Contemporaneous with the pond construction, the new owner's employees removed trees, vegetation, and topsoil to cut a 20-foot wide road, complete with culverts

and topped with gravel, across the conserved property to allow access between the new owner's adjacent-farm staging area and the main building, in lieu of using a designated right of way and public road to his driveway and entrance to his adjacent property. WNYLC made more attempts at contact through calls and letters to the new owner, still with no response, and provided notice to the property manager working at the site that all of these issues were a problem. WNYLC then placed chains across the new road and demanded that the new owner cease all trespass against the conserved property. In response, the new owner cut another 20-foot wide road across the conserved property to reach the staging area.

After providing written notice to the new owner that WNYLC may need to take legal action to protect the conserved property, the new owner beat WNYLC to the punch and sued them first, alleging WNYLC's interference with the quiet enjoyment of his property and, improbably, invoking a claim of WNYLC's own violation of the conservation easement on the conserved land. WNYLC responded with counterclaims and its own claim in straight trespass against its land. As a result of defending itself against the new owner's legal attacks, WNYLC's liability insurance coverage was triggered to offer protection, and WNYLC's attorney convinced its insurance carrier to allow him to handle both the defense and enforcement actions against the new owner, which through this consolidated approach, reduced the overall legal fees for WNYLC.

WNYLC successfully argued for the court to dismiss the new owner's original claims that it violated the State-held conservation easement based on arguments of lack of standing, using New York's established statutory and common law on point. Despite WNYLC's pleas for it to intervene and defend its conservation easement, the State refused to participate in the case or even write a letter saying that that WNYLC was in compliance with the

conservation easement. Just before trial, the new owner dropped the remainder of his claims against WNYLC.

On February 29, 2008, in a unanimous decision, a jury awarded \$98,181 in compensatory damages and \$500,000 in punitive damages to WNYLC.

This is the first case of its kind involving conservation easement enforcement, in terms of the amount of damages and message sent to easement violators. WNYLC attributes its success to a combination of respect for the new owner (despite his bad acts), and strong efforts to communicate and stop the damage without retaliating, combined with the outrageous, intentional, and repeated bad acts of the new owner. Another critical component cited by WNYLC was that it retained independent engineers to visit the land and give a dispassionate assessment of the damage to the conserved land. WNYLC also cited the baseline documentation report as critical to proving their case by providing the photos and narrative to show the property's condition prior to the damage. WNYLC last felt that its ability to produce all of its communication with the new owner demonstrated its good faith attempts to resolve the matter amicably.

It is no surprise that the new owner has appealed the jury verdict. It may be quite some time before WNYLC receives any of the \$600,000 award, even with continued success on appeal, and appeal costs will continue to diminish the award unless WNYLC is able to add those costs to the award and actually collect the award.

The lessons easement holders and landowners can take away from this verdict and the history behind it include: be aware of permitted and prohibited uses of protected properties, nearby landowners, and potential trespassers; attempt to create and maintain relationships with landowners and neighbors of conserved lands; pursue all violations in a

timely manner with vigilance and respect for the process as well as the potential violator; keep good records of the property's conservation, including the conservation transaction and supporting documents, as well as all correspondence with the potential violator.

WNYLC is pleased with the result here, but with hindsight, wishes it had instituted its own legal action earlier in the timeline to protect the land from further destruction, and before being sued by the violator. Also, the ability to rely on insurance coverage in defense of itself here was instrumental in WNYLC's enforcement and defense of its conserved property, and underscores the importance of pursuing further the potential for insurance as a model for easement defense and enforcement, as identified by this author in her research and writing⁷, and as currently is being explored by the Alliance for its members today.

⁷ Jessica E. Jay, "Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions" 6 *Envtl. Law.* 441 (2000), (available by request and at: www.conservationlaw.org).