When Forever Proves Fleeting:
The Condemnation and Conversion of Conservation Land

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INTRODUCTION

The United States is currently in the midst of both an unprecedented land conservation boom and an even greater development boom. Never before has so much land been declared permanently off limits to development, and never before has so much land been developed. Citizens, foundations, and governments across the nation are committing substantial funds to protect land by acquiring conservation easements and fee simple holdings. But the phenomenal growth of the economy throughout the 1990s has sustained a vastly accelerated rate of sprawl. In short, the conservation movement is more active than ever before, yet daily it is losing ground to the latest subdivision.

A simple comparison shows the relative rates of conservation and development activity. The Nature Conservancy, one of the largest and most respected environmental organizations in the world, has protected over twelve million acres in the United States since its inception in 1951. On the other hand, a widely respected report from the Natural Resources Conservation Service, an arm of the U.S. Department of Agriculture, indicates that between 1992 and 1997, over eleven million acres of land were developed for the first time, shattering any previous rates. To put these figures in perspective, in five years alone almost as much land was developed as has been protected by the Nature Conservancy in its entire fifty-year history. So while land conservation is occurring on a greater scale than ever before, the astronomical spike in land development more than offsets the conservation gains. This comparison should not come as a surprise. To take a drive down any road on the suburban fringe is to witness mile after mile of construction activity. Indeed, the growing popularity of conservation programs is in many ways a response to the shocking pace of development.

These unprecedented dual trends of conservation and development suggest first .and foremost that conservationists cannot truly win what has been called the "open space race." At the same time, they can achieve many important conservation victories. This state of affairs demonstrates the heightened importance of those victories in ensuring that future generations still enjoy a modicum of open space and parklands. Even amidst the general proliferation of development, conservation acquisitions protect a large amount of our most highly cherished landscapes from development. To achieve this more limited goal, however, the protections must endure. And durability, in turn, requires a solid barrier that permanently shields conservation lands from development. This Article examines the strength of that barrier by asking whether conservation lands do, in fact, remain protected from development. In particular, the Article will focus on two possible weaknesses: condemnation and conversion.

Land with conservation easement or park status is not magically shielded from all future development threats. In fact, government-owned parkland that citizens have used and appreciated for years is not as protected as is commonly thought. After one recent case in which a state sold a state-owned wildlife management area to a private developer, one angry citizen wrote to his local newspaper: "There ought to be a law against such transfers." Local and state governments may be able to sell or condemn conservation land with surprising ease. In the absence of adequate statutory restrictions, conservation lands may be unduly vulnerable to condemnation and conversion.

This Article examines whether governmental actions to reverse previously enacted conservation protections should be prohibited or limited. As such, this Article discusses "conservation land," defined here as land officially designated for conservation purposes. Designation could be either an administrative or legislative function, in a governmental context, or through legal restrictions in the context of private land. Having said this, it is not always clear when a property is in fact officially designated specifically for a conservation purpose. Clearly, a wildlife sanctuary would seem to qualify. But what about a hunting preserve, or a multiple use forest area? Although there are many fine distinctions that could be argued, for simplicity's sake, this Article uses a functional definition of conservation land, borrowed directly from the Internal Revenue Code's definition of "conservation purpose" in the context of conservation easements. Conservation land is property that has been designated for outdoor recreation, preservation of wildlife and plant habitat, open space (including agricultural), or scenic purposes. Private conservation land is therefore land owned in fee simple or subject to a conservation easement owned by a not-for-profit organization whose mission involves one or more of these purposes. Public conservation land, in turn, includes government-owned parks, wildlife management areas, and wilderness areas, to name a few. Condemnation, or eminent domain, is the process by which government or a government-empowered private entity appropriates or "takes" property for public use without the owner's consent. Condemnation usually applies to private property, although occasionally a government seeks to condemn land owned by a political co-equal or subordinate. The condemnation of conservation land occurs where the taking is of a nature preserve owned in fee simple by a conservation organization, or of land owned by an individual but subject to a conservation easement. A textbook example occurred recently in California, where the City of Santa Rosa initiated a condemnation proceeding to route an underground wastewater pipeline and above-ground pumping stations across the California Audubon Society's Mayacamas Sanctuary. Some conservation properties, such as the Red Hills area in northern Florida and southern Georgia, were targeted by large oil companies that have been delegated federal condemnation power, only to be saved at the considerable expense of conservation

organizations such as the Tall Timbers Research Station. And even though eminent domain power is supposed to be reserved for public purposes, it is possible for a government to condemn conservation land and then transfer it to well-connected private developers for residential or commercial use. In fact, many commentators point to the growing scandal of using eminent domain power for such unabashedly private uses. Although these authors were writing about abuses in a more general context, such improprieties in the future could very well involve conservation land.

Conversion, in contradistinction to condemnation, occurs when government-owned conservation land is sold or used for non-conservation purposes. Conversion can be intragovernmental (e.g., when a town converts a park to a public landfill), intergovernmental (e.g., when a state conveys a park to a county or municipality for a new road), or public to private (e.g., when a government conveys parkland to a private owner). One example of public to private conversion occurred when the New Jersey Division of Fish and Wildlife sold a wildlife management area on Hamburg Mountain to a private developer in 1986. In a broader context, scores of conversions have occurred in Massachusetts, where the state legislature approved 150 out of 176 transfer requests of public conservation lands between 1989 and 1998. Although the definition of conversion varies slightly from governmental program to program, in most cases there is little doubt that the conservation purposes for which the land was originally acquired have been irrevocably eliminated.

Although the federal government is the largest owner of conservation lands, this Article focuses for the most part on state and local activity. Given the crazy-quilt patchwork of federal public land classifications, a thorough analysis of federal conversion and condemnation practices is beyond the scope of this analysis. Our national forests, national parks, wilderness areas, national monuments, wildlife refuges, and marine sanctuaries are all subject to varying degrees of conversion pressure, but these lands are best reserved for a separate analysis. The issues at stake in regard to federal lands usually involve natural resource use such as mining or drilling, while this Article focuses more on the everyday threats of commercial and residential development and public works projects. Therefore, this Article discusses only a few federal statutes that pertain to the conversion of state and local lands.

To be sure, conversion and condemnation are not inherently wrong processes that should be invariably opposed. Certain minor conversions, such as road widening for safety purposes, are not the least bit controversial. Even major condemnation attempts, such as those for new schools, can be very pressing projects that the conservation community, under certain conditions, has felt compelled to support. Indeed, the need for a conversion or condemnation may be amply justified in some cases. For this reason, blanket prohibitions on condemnation and conversion would be inappropriate. Rather, a more nuanced approach is needed. Conversion and condemnation issues are particularly troublesome because they bring into conflict the competing principles of land use flexibility and the perpetual conservation of land. Although it is unlikely that a government would purchase a property for conservation purposes in one year and turn around and sell it for development in the next, the pressure to convert and condemn land will inevitably grow over time. This Article calls for legislation to impose procedural hurdles to and substantive criteria for the condemnation and conversion of conservation lands in order to ensure that these lands are a choice of last resort for development and other non-conservation uses. While there is no bright line distinguishing an acceptable conversion or condemnation from an abusive one, meaningful restrictions can go a long way towards ensuring that conservation land is treated prudently.

The sky is not falling; this Article is not intended to be alarmist. Rather, it sounds a note of concern, based on evidence of past and current events in certain states and localities. Moreover, in those areas where such threats may yet be a few years away, the key is to address these issues before the damage is incurred. There are concrete and effective measures that state and local governments can enact to protect conservation lands from further encroachment. States with relatively recent acquisition programs might draw insight from the abuses that have occurred in other states with a longer track record. Hopefully, with proper restrictions in place, the most flagrant abuses can be prevented rather than lamented.

Although the processes of condemnation and conversion are quite discrete both legally and politically, this Article links them because both represent attempts by governmental entities to are equally burdened. Otherwise, condemnation would become a loophole that undermines any restrictions on conversion, and vice versa. This is especially true today, given the previously noted abuse of eminent domain power for private purposes. A jurisdiction that is considering ways to erode a property's protected status will likely choose the easier route. The policies and laws governing condemnation and conversion therefore are necessarily interrelated. The Article begins in Part I by articulating the importance of conversion and condemnation issues in a world that is increasingly focused on permanent protection. Part II then examines how prevalent the respective condemnation and conversion threats are by documenting instances of each process and offering statistical data. These data show that both condemnation and conversion are increasing in various jurisdictions, especially in developed areas. Part III focuses on different condemnation restrictions that are already in place in diverse jurisdictions. Privately held conservation easements, an increasingly popular means of preserving land, offer surprisingly little protection from condemnation. Publicly held easements, due to the prior purpose doctrine, offer somewhat greater protection. In addition, Part III discusses other protection models such as agricultural preservation districts and State Natural Area Programs. Part IV turns to assorted federal, state, and local conversion restrictions. In particular, New Jersey is highlighted as a state with a comprehensive set of conversion restrictions. Part V delineates the key issues for local and state governments to consider in enacting effective conversion restrictions. Finally, the Article concludes with a brief call to arms in defense of the goal of permanent protection.

I WHY CONVERSION MATTERS

Irreversibility looms large in the background of every conversion and condemnation question. Once land is developed, it is nearly impossible, for economic and ecological reasons, for it ever to return to its natural state. For this reason, conversion and condemnation restrictions take on added importance in a world where development is, for all intents and purposes, a one-way process. In many areas, the day is not far off when the only remaining undeveloped land will be that which has been officially protected, and when every developable property has been developed. Those in the planning and conservation fields refer to this point as "full buildout." It is not unrealistic to think that within the next century, the entire eastern seaboard will reach such a state. In these full buildout areas, conversion and condemnation restrictions will be critical to ensuring that the amount of protected conservation land does not gradually erode.

In response to the inexorability of development, today's conservation mechanisms almost uniformly strive for permanent protection. Perpetual conservation easements, for example, are designed to run with the land and to bind all future landowners. Of the forty-seven states that have conservation easements statutes, all allow, or even require, the easement to be perpetual. More importantly, a donated conservation easement must be perpetual in order for the donor to receive federal income and estate tax benefits for her charitable contributions.

Most recent public land acquisition programs also focus on permanence. In 1992, Alabama citizens approved the establishment of the Forever Wild Land Trust. The new Georgia Greenspace Program explicitly aims for permanent protection. In addition, the acreage goals of certain conservation programs aim for permanent protection. In 1998, former New Jersey Governor Christine Todd Whitman announced a goal of permanently protecting one million out of the remaining two million acres of unprotected and undeveloped land in the state.

Likewise, the Chesapeake 2000 Agreement recently signed by five different states and the Environmental Protection Agency sets a goal of permanent protection for 20% of the total land area in the Chesapeake Bay watershed. These various goals of permanent protection compel us to consider just what sort of protection we are establishing when we acquire such lands and easements. Quantitative conservation targets, and the considerable investment of public dollars they require, may only make sense if the land that is protected stays protected. Otherwise, the protections are more akin to a land banking program that, while offering conservation benefits in the short term, eventually becomes a source of inexpensive land for sundry public projects.

It is precisely because conservation efforts increasingly aim towards permanent protection that the threats of conversion and condemnation merit special attention. For it means little to call a conservation easement "perpetual" if it can be readily extinguished through condemnation. And to call a property "forever wild" is deceptive if the state or local government can easily reverse this designation. The goal of permanent protection reflects a decision to remove certain properties from the vicissitudes of land use politics. Protected conservation land accordingly needs to enjoy heightened safeguards from government-directed changes in the protected status. As our population grows and undeveloped land becomes ever scarcer, governments will face increasing pressure to use their conservation properties for other purposes.

Conversion attempts are likely to be most common and most controversial at the local level. This is chiefly because land use decisions are generally local. In addition, the small total land area of municipalities increases the likelihood of full or nearly full buildout. The limited amount of land carries implications for both how conversion attempts arise and how they are ultimately resolved. For instance, at the heart of many conversion attempts is the fiscal incentive to use conservation lands for other purposes. Protected conservation land will almost always be a less, expensive condemnation option than an already developed site. The disparity is even more glaring if the government already owns the protected property, for it need not go through condemnation proceedings or acquire right-of-way access. Such fiscal pressures are especially prevalent in full build out areas, where every acre takes on huge significance. As described later in this Article, these pressures are proving irresistible in many Massachusetts locales.

Furthermore, the limited land base may preclude the possibility of supplying suitable replacement land, the most satisfactory resolution of a conversion dispute. Requiring the converter or condemnor to provide suitable replacement conservation lands significantly mitigates the harm from a condemnation or conversion. But because the total land area of a municipality may comprise only a few square miles (if that), the availability of replacement lands is less probable, especially in highly developed towns. Given these realities, the recent proliferation of municipal conservation acquisition programs seems destined to engender future conversion and condemnation conflicts at the local level unless adequate protections are established in advance.

II THE SCOPE OF THE PROBLEM

Before weighing solutions, it is necessary first to grasp the extent and nature of the threat. The availability of hard data on either conversion or condemnation is quite limited. As with many issues, this lack of quantitative information often obscures the true extent of the problem. Thus, one of the greatest contributions that land trusts and conservation agencies can make is to begin to accurately track and record instances of conversion and condemnation. Quantitative data will be crucial in marshalling the requisite political will to take these issues seriously.

A. Frequency and Variety of Condemnation of Privately Protected Conservation Land

Because governments and private condemnors have an incentive to look for the least expensive and least controversial means of constructing a project, conservation properties are singularly vulnerable to condemnation. Eminent domain is most expensive when people must be relocated. But because conservation properties usually host no (human) residents,

there is a tendency to view such lands as "vacant" and therefore politically easier to condemn. Furthermore, because condemning authorities do not have to pay for any improvements and relocation expenses, as with developed properties, conservation properties are often less expensive options.

It is difficult to quantify the frequency of condemnation proceedings on private conservation land, as there is no central repository for this information. Based on an informal survey of major land trusts, the author has confirmed forty-five condemnation attempts involving eighteen different private organizations throughout the United States since 1986. Of the forty-five attempts, forty resulted in a successful condemnation or a negotiated settlement. The most common purposes for which conservation land was encroached upon were transportation-related, with new or widened roads being the most prevalent. In cases where conservation easements were involved, the portion of the easement on the condemned land was extinguished or amended to allow action.

Although some condemnation attempts undoubtedly were missed by this informal survey, the above numbers suggest that eminent domain is not a daily threat to privately protected conservation lands. There are legitimate fears, however, that it will become a growing problem as more land trusts protect more property and as unprotected open space becomes ever harder to find, particularly in suburban jurisdictions where the only remaining undeveloped land may be protected. Although the survey results are not definitive, the data do indicate a rise in the number of condemnations in recent years. For those land trusts that have opposed an eminent domain threat, considerable organizational resources have been expended. So even where the condemnation attempt is ultimately defeated, opposition efforts may be a costly drain on the resources of conservation groups and citizens.

One of the most publicized condemnation examples occurred recently in Santa Rosa, California. In 1994, the Sonoma County Agriculture and Open Space District purchased a "Forever Wild" conservation easement on a 3,100-acre ranch for $750,000. Three years later, the National Audubon Society (NAS) and its Madrone Chapter acquired a portion of the land (named the Mayacamas Sanctuary) in fee simple. Shortly thereafter, the City of Santa Rosa proposed to run a treated waste-water pipeline through the property, threatening condemnation. NAS and the Madrone Chapter filed suit against the City in 1998 to prevent the pipeline. The suit was settled in October 1998, providing for compensation, design improvements, a construction moratorium during the bird nesting season, a mitigation monitor (to oversee the design improvements and the moratorium), and the City's participation in a Task Force to figure out how to make protected properties less susceptible to future encroachment by public bodies. Notably, the County, despite its conservation easement interest, did not join the Audubon Society in actively opposing the condemnation, which reflects the reality that an easement will only be effective if its holder is willing to defend it.

The Red Hills Conservation Program's (RHCP) defeat of a proposed oil pipeline is probably the biggest success any land trust has enjoyed in the face of a condemnation threat. In 1990, Colonial Pipeline Corporation, with the backing of a conglomeration of oil companies, proposed an oil pipeline across parts of Florida and Georgia, through the heart of the Red Hills aquifer and across more than a dozen properties with conservation easements held by RHCP. Colonial had a track record of oil spills and other environmentally damaging accidents. Along with other organizations, RHCP mounted a strong opposition campaign, raising over $300,000 for legal expenses over two years. Eventually, after spending over $22 million in support of the project, Colonial abandoned its plans in the face of resistance by RHCP and a Florida county. Significantly, the pipeline was defeated on growth management principles, as Florida's eminent domain law, like those of most states, extended no protection to private conservation property. Stronger condemnation protections for RHCP's conservation lands might have prevented this attempted taking in the first place, sparing RHCP its enormous legal costs.

One final condemnation example shows how local jurisdictions face unique pressures to consider conservation lands for public purposes. In 1995, the City of San Juan Island, Washington, needed to build a new school. As a rapidly developing island of 35,000 acres, the City had limited location options from which to choose. In addition, real estate values on the island had soared, rendering the condemnation of developed property an expensive proposition. After some deliberation, the council turned to the San Juan Island Preservation Trust, a local land trust, and requested that it accede to the friendly condemnation of ten acres out of a twenty-acre conservation easement property. Seeking to retain the goodwill that it had established with the community and the local government, and realizing the limited grounds on which it could oppose a formal condemnation, the Trust agreed to the request. As will be demonstrated, this is not the only example of conservation lands being turned into schools.

B. Frequency and Nature of Conversion of Public Conservation Land

1 As with condemnations, the conversion of conservation land is not well-documented. Even where quantitative data on the number of conversion requests has been compiled, it understates the threat of conversion because many requests do not ever reach a formal stage where an official decision must be rendered. Similarly, the approval rate of formal requests is misleading because less meritorious requests are weeded out along the way. Ideally, the most telling statistic would compare the total number of requests, both informal and formal, to the ultimate number of approvals. Nevertheless, useful quantitative data do exist from scattered sources, most notably where conversion restrictions are in place. These data show that conversion is far more than an abstract or future threat.

Perhaps the most useful conversion statistics were compiled in a report by a committee of the Massachusetts legislature on the transfer of Article 97 conservation land. Article 97 land refers to a provision of the Massachusetts Constitution, passed in 1972, which outlines basic environmental rights, including land conservation rights. All public land acquired or held for conservation ends is designated Article 97 land and enjoys certain protections from conversion. In order for a

municipality's Article 97 land to be converted, both the municipal council and the state legislature must approve conversion bills by a two-thirds majority. Despite these protections, between 1989 and 1998, 176 conversion requests for municipal-owned Article 97 land were approved by municipal councils and reached the state legislature. Of these, 150 bills passed, allowing conversion of 30 parcels for private and residential purposes, 18 for water supply and sewage purposes, 16 for commercial and industrial purposes, 14 for school construction, 14 for public buildings, 13 for roads and highways, 13 for recreational and "other municipal" use, five for public housing, and two for cemeteries. Only 32 of the 150 transfer bills provided for replacement lands.

The school construction transfers are seen as especially harmful to open space goals because schools often require large tracts of 10 to 20 acres, which are often the main parklands in smaller, denser municipalities. Many of these school transfers are particularly troubling. The Town of Malden built a school on its last remaining park, designed by renowned landscape architect Frederick Law Olmstead. In some cases, procedural irregularities suggest that municipal legislators are trying to avoid scrutiny in their treatment of Article 97 lands. In January 2000, the Council of the City of Everett attached an Article 97 transfer rider onto a completely unrelated bill.

Huge economic incentives are the major driving force behind the high number of Massachusetts conversions, as the towns need not pay to convert their open space land. In addition, conservation and preservation groups have accused the state's School Building Assistance Bureau (SBAB) of encouraging municipalities to site new schools on open space land rather than renovating existing structures. The SBAB reimburses school districts for construction costs, but not for the cost of acquiring land. Although a conversion for school construction involves state funds, triggering the Massachusetts Environmental Policy Act (MEPA), the MEPA review process is so disconnected from the legislative approval process that it is ineffective in discouraging or mitigating such conversions. Because MEPA review often takes place after the state legislature has voted on the conversion bill, legislators are not even aware of the environmental impacts of the transfers. The conversion of Article 97 land is a complex issue that is still a source of conflict as of the date of this publication. In fact, the Massachusetts Audubon Society has declared the matter its number one priority on its policy agenda for the 2001 legislative session.

Furthermore, the evidence suggests that Massachusetts is not the only state where schools are being placed on conservation lands. The Town of Bow, New Hampshire, recently converted town-held forestland for a new high school. As in the San Juan Island example discussed above, towns also have used private conservation land for school purposes. This phenomenon reflects the difficulties that municipalities face in keeping conservation land undeveloped.
As will be discussed in Part IV, New Jersey has erected the most comprehensive conversion restrictions of any state through its Green Acres Program. Even so, the Green Acres Bureau of Legal Services and Stewardship currently receives approximately 40 to 50 informal conversion requests per year from state, county, and local government entities, an increase over past years. Because of the Program's conversion restrictions, most of these requests never lead to conversions. But the increasing volume of requests attests to the pressures to use conservation land for other purposes.

Broader data are available on conversion of state and local properties that were acquired with support from the federal Land and Water Conservation Fund (LWCF). Since 1968, the LWCF has distributed funds generated from offshore oil and gas drilling leases to purchase conservation and recreation lands. Over the past 35 years, the program has supported over 38,000 state and local projects at approximately 30,000 sites across the country. As of summer 2000, approximately 1000 requests to convert these sites have been approved by the National Park Service, which administers these requests under Section 6(f) of the Land and Water Conservation Fund Act.

It is no accident that conversion requests are more common in relatively developed states such as New Jersey and Massachusetts. In contrast, it seems that conversion is not a major problem in states without as much growth pressure. In Maine, for instance, the Land for Maine's Future Program has acquired roughly 68,000 acres since its inception in 1987. In this time, only two conversions have occurred, with minimal conservation degradation resulting from either. But if the number of conversion requests is in part a function of population density, as seems likely, then we can expect an increasing number of conversion requests in the coming years.

III A SURVEY OF CONDEMNATION RESTRICTIONS

A. Condemnation of Privately Held Conservation Easements

Land conservation is the fastest growing branch of the environmental field, and conservation easements are an increasingly popular tool to preserve land. The number of local and regional land trusts -- nonprofit organizations dedicated to land conservation -- stood at 1,213 as of 1998, up from 743 a decade earlier. Together, these groups have placed conservation easements on nearly 1.4 million acres. Moreover, the size of easements are growing larger; a 1999 Nature Conservancy easement in California covers 36,000 acres of ranchland. The question remains whether these properties are truly protected, for the conservation easement, despite being perpetual, provides surprisingly little protection from condemnation.

Private land trusts currently have limited grounds on which to legally oppose condemnation. Federal and state governments, as sovereign entities, possess the inherent power of eminent domain, subject only to just compensation requirements and the public purpose doctrine. County governments, municipal governments, and special use districts are political subdivisions of the state, and are usually granted eminent domain powers through statute. Furthermore, utility companies have been empowered by various federal and state statutes to condemn property. Since land trusts are private

organizations, their conservation easement holdings are considered private property, even though many of them are partially funded by the public through charitable contribution tax deductions. And although there is some case law suggesting that private conservation land might be afforded added consideration in takings cases, as a matter of course, private property owners are generally unsuccessful in challenging eminent domain actions.

Legal opposition to the taking of a conservation easement is especially futile in states where the conservation easement enabling statutes include a provision that expressly allows land subject to a conservation easement to be condemned. Legal action is also unlikely to succeed in the remaining states, where the enabling legislation is silent on this issue. Currently, a land trust's best hope is to challenge a condemnation action through a public relations campaign or legal grounds distinct from eminent domain law. As seen with the Red Hills Conservation Program's opposition to the oil pipeline, a land trust may be able to stall or defeat a project by claiming that the condemnor did not fulfill its obligations under a state environmental policy act. It is neither realistic nor advisable that conservation properties enjoy blanket protection from condemnation. Instead, a more balanced approach, such as adding concrete procedural and substantive hurdles, will go a long way towards protecting these properties from ill-considered condemnations, while still allowing necessary ones to occur.

B. Condemnation of Publicly Held Conservation Easements

Public property generally enjoys greater protection from condemnation than does private property. Property owned by a government is considered devoted to a "prior public use" and may be condemned only by express statutory authorization or by necessary implication. Under the prior public use doctrine, a publicly owned conservation easement cannot be condemned by a "lower" government entity. A municipal government, for example, cannot condemn state land without specific authority from the state legislature. A state government can condemn municipal property but not federal property. The state government's property, in turn, can be condemned by the federal government but not by a county or municipal government.

This hierarchy prompts some interesting strategic decisions for the landowner or easement holder who is concerned about condemnation. The added protections of publicly held easements may make them more attractive as a conservation tool. For example, land trusts that are concerned about an imminent or latent condemnation threat to one of their holdings may convey the land or an interest therein to a government entity. Landowners and their attorneys often view a public conservation easement as a way to protect their property from condemnation. Some landowners in Virginia have been known to donate easements to the public Virginia Outdoors Foundation rather than to a private land trust, in order to shield the property from condemnation. Similarly, in Maryland, where the Maryland Environmental Trust acts as a public land trust, protection from condemnation has been a motivation for some conservation easement donors. Sometimes condemnation protection is a fortuitous byproduct of a deal's structure. When the State of New Hampshire purchased a particular conservation property in 1988, it also granted a conservation easement to the United States Forest Service. Although it appears that the state granted the easement for other reasons, this action also protected the land from state condemnation. There are also examples of landowners granting historic preservation easements to state Historic Preservation Programs solely to prevent condemnation.

In additional, there are ways in which private land trusts can capitalize on the relative immunity that public ownership provides. Land trusts might consider co-holding easements with state agencies in order to preclude a municipal or county government from condemning the interest. For example, the New Jersey Conservation Foundation, a private land trust, has conveyed easements to the New Jersey Natural Lands Trust, a public state entity. Although the purpose of the conveyances was not to prevent condemnation, this was an added advantage. A land trust might also look into the possibility of dedicating property under a State Natural Area Program (SNAP). Selected portions of larger parcels may be dedicated, giving extra protection to the most important areas. State historic preservation programs offer another way to protect certain historic and archeological sites from condemnation. In Texas, for instance, historic preservation easements are sometimes granted in conjunction with designation as a State Archeological Landmark.

Although publicly held easements do offer somewhat stronger protections from condemnation, it must be stressed that conveyance to a public entity is not a complete answer to the problem. Conveyance in the face of an immediate condemnation threat is not a preferred course of action. In general, the governmental acquisition programs are not created to protect property from imminent condemnation, but rather to protect it from an as-yet-unplanned taking. Protecting a property at the eleventh hour by conveying an interest to a state or federal agency could threaten the land trust's and the public agency's credibility. In addition, thwarted municipalities may pressure state legislators to weaken the state agency's condemnation protections or the land trust's authority. Although conveyance to a public entity might make sense on occasion, since many land trusts pride themselves on their independence from government, widespread conveyance is unrealistic. Statutory restrictions on the ability to condemn easements would be more realistic and effective.

At least one state has imposed special procedural and substantive hurdles to the condemnation of public conservation easements. New Hampshire has taken such an approach with its Land Conservation Investment Program (LCIP), which holds easements on behalf of the State. LCIP is the sole holder of conservation easements on 30,000 acres and backup holders on another 25,000 acres held by municipalities. The original LCIP enabling legislation required an act of the state legislature in order to condemn any easements acquired under the program. Because the New Hampshire Department of Transportation feared this restriction was too broad and would prevent even minor incursions, the statute was amended in 1999 to allow a compromise process by which the Department of Transportation may condemn minor slope and drainage

easements after providing notice to all interested parties and a declaration that there are no "reasonable and prudent alternatives." All in all, the restrictions have been so well-received that they are now being included in a new state acquisition program for conservation and historic
properties. This legislation serves as a rare example of conservation easements that have been afforded specific protection from condemnation actions.

C. State Natural Area Program Protections

Another model for protecting conservation lands arises under various State Natural Areas Programs (SNAPs). Under a typical SNAP, lands that host rare or significant wildlife habitat, plant communities, or geologic formations may be dedicated as "natural areas" or "nature preserves." Although the legal frameworks are very different, the dedication of land is similar to the granting of an easement. Both are intended to establish perpetual usage restrictions in order to preserve the land's conservation resources. The articles of dedication are akin to an easement agreement, specifying what uses are permitted and prohibited. To date, 28 states have some form of statutory SNAPs, while at least one state operates an administrative SNAP. In a few states, such as Indiana, the SNAP is the sole or the major conservation land acquisition program, while in most it is merely supplemental to larger acquisition programs and natural resource agencies.

SNAPs present important yet overlooked precedents for protecting conservation lands from both condemnation and conservation. In some states, properties dedicated to SNAPs cannot be condemned or otherwise converted without overcoming significant procedural and substantive hurdles. The level of protection varies from state to state, according to the enabling legislation and to administrative resolve. For some SNAPs, dedication of a property is mostly a symbolic act, without any extra protection extended to dedicated properties. Others place substantial limits on condemnation, sale, exchange, or change in designation of dedicated properties. In Minnesota, for example, the change of use or designation cannot be altered without a public hearing. Further, the Minnesota Department of Natural Resources (DNR) has to approve any conversion request, and has been very reluctant to do so. In the program's 26 years, it has dedicated 132 properties covering 179,000 acres. To date, the Minnesota DNR has not approved a single conversion request. The likelihood of DNR rejection often discourages requests from even reaching the stage of a public hearing.

One key variation among the different SNAPs is whether both public and private land may be dedicated. In Hawaii, for example, only public land can be dedicated. In contrast, both public and private land can be dedicated in most of the other SNAPs. In these states, private land trusts and individuals can dedicate their conservation lands (with the landowner's participation, for easement properties) to a SNAP, providing what amounts to an overlay protection from condemnation that is not ordinarily available to conservation easement lands.

In Indiana, private properties may be dedicated as nature preserves, and private land trusts have developed a close cooperation with the SNAP. Of the 172 properties dedicated to the SNAP, 53 are owned by private land trusts. Two private land trusts, the Nature Conservancy and ACRES, each have dedicated over 1000 acres, while four other land trusts bring the total land trust dedications to over 3000 acres. Often, the SNAP works on joint acquisition projects with these land trusts under the state's Heritage Trust Program. Furthermore, Indiana has not enacted any other statewide land acquisition program, so land trusts looking for state funds have tailored their acquisition criteria to meet the Nature Preserve Act's qualifying criteria. One result of this arrangement is that a greater proportion of land trust properties in Indiana are of high natural resource value, while recreation and scenic properties are less prevalent.

Thus, land trusts in certain states may want to examine the possibility of cooperating with SNAPs in order to add to the protection of significant conservation lands. In addition, SNAPs serve as a model that may be adapted to other programs and statutes. In states without SNAPs or with weak SNAPs, the conservation community may wish to advocate for programs that would provide their properties with heightened levels of protection from condemnation and conversion.

D. Agricultural Preservation District Restrictions

In addition to the above protections, agricultural preservation programs in certain states serve as a model that may be adapted to the broader category of conservation lands. As of 1998, 16 states had adopted agricultural preservation programs to stem the loss of farmland to sprawl and other threats. Through these programs, farmers voluntarily enroll their lands in an agricultural preservation district, thereby achieving various benefits such as protection from nuisance laws and favorable property tax treatment. Some states' programs include procedural protections from condemnation for enrolled lands. In particular, New Hampshire, Ohio, and Rhode Island have established agricultural preservation easement programs that provide some level of protection. New Hampshire requires that condemning authorities consider alternative land areas. In Rhode Island, the condemnor must file a report, endorsed by the governor after public hearings, that "demonstrate[s] extreme need and the lack of any viable alternative." In Ohio, properties enrolled in agricultural districts can only be condemned after passing similar hurdles. Whenever the proposed condemnation would take more than ten acres or ten percent of an individual's property, the condemning authority must notify the Ohio Department of Agriculture at least 30 days before beginning condemnation proceedings and must justify the taking and evaluate alternatives.

Despite these procedural hurdles, it is not clear that such measures have made much of a difference. The Ohio Department of Agriculture typically reviews the proposed condemnation action, holds a hearing, and issues a report that either recommends or objects to the action. But the report is entirely advisory and carries no mandatory response. The condemnor routinely receives the report and proceeds with the project in its unaltered form. One employee of the

Department of Agriculture referred to the process as simply "a moment for the conscience to shine," rather than an effective way of protecting agricultural land. As discussed later in this Article, effective condemnation and conversion restrictions require more than adding a few more sheets of paper to the process.

IV

A SURVEY OF CONVERSION RESTRICTIONS

The issue of conversion is taking on increasing importance with the astronomical growth in state and local conservation acquisition programs. Recent years have seen a burgeoning of open space referenda on state and local ballots, with overwhelming approval rates. In the last three years, 390 out of 459 (85%) referenda for the acquisition of open space were approved by voters across the country. In the October 2000 elections alone, over $7.4 billion was committed to conservation acquisitions. Most of these referenda establish or expand state or local acquisition programs. For example, in March 2000, California voters approved Proposition 12, a $2.1 billion measure to fund rural and urban open space acquisitions and improvements to already established parks. On a smaller scale, the City of Lake Oswego, Oregon approved an open space bond act for $13 million for use in refurbishing baseball fields, among other things. These are just two of the hundreds of examples of states and communities accepting higher taxes to preserve fast-disappearing open space. All of this public land acquisition increases the odds that state and local governments will face conversion disputes in the years to come. To prepare for such an eventuality, they might do well to explore some of the models used to date in different states.

Most states have surplus land statutes that govern the disposition of all real property held by the state. In addition, more specific disposition statutes may govern land held by state conservation agencies. In Virginia, for example, any land owned or controlled by the Department of Conservation and Recreation may be conveyed or leased only upon the approval of the governor and the General Assembly. This Part discusses state and local conversion restrictions on such conservation land.

A. The New Jersey Model

The state with the most longstanding and comprehensive conversion restrictions is New Jersey. Green Acres, a statewide acquisition program, has funded conservation purchases since 1961 through a series of bond acts. Most recently, in 1998, New Jersey voters approved a referendum that allocates nearly $2 billion over ten years to preserve roughly one million acres of farmland and open space. Because of Green Acres' relatively long history, the program has had the opportunity to learn from past mistakes and has come to realize the importance of conversion restrictions in its overall conservation plan. These restrictions, which have evolved over time and will probably continue to do so, nevertheless may serve as a model for other states to consider.

The heart of the current conversion restrictions stems from the Green Acres Land Acquisition and Recreation Opportunities Act of 1975, passed 14 years after the program was first established. In addition to this enabling statute, the New Jersey Administrative Code spells out a set of administrative regulations to which the conversion process must adhere. The conversion application process is an intentionally cumbersome one, meant to discourage applicants from the start. The process begins with an inquiry by a town, county, or state administrator to the Green Acres Bureau of Legal Services and Stewardship. The Green Acres staff fields these inquiries by explaining the conversion process and informally discouraging the parties from submitting a formal request. Next, there is an informational pre-application meeting between the applicant and Green Acres staff, in which the staff runs through a checklist of the 11 separate requirements that exist in the statute's accompanying regulations. An on-site inspection of the property proposed for conversion is included in this meeting. At this point, the Green Acres staff holds a closed, in-house meeting at which it either rejects the request outright, asks for additional information or amendment, or authorizes the applicant to submit a formal application.

A final conversion approval requires a public hearing and adherence to five specific criteria: First, the conversion must "fulfill [ ] a compelling public need or yield [ ] a significant public benefit. . . ." A compelling public need is a health or safety hazard, while a significant public benefit is the improvement of the delivery of essential services. The compelling public need requirement is waived where the applicant government offers replacement land that will "substantially improve the quantity and quality of parkland within the boundaries of the local unit where the parkland proposed for disposal or diversion is located." As a second requirement, there must be a determination that there are no feasible alternatives to the proposed conversion. The alternatives analysis must look at the environmental impacts of every alternative, including a no-build alternative, whereby the purpose for which the conversion is proposed is not fulfilled.

Third, the applicant government must compensate for the conversion with replacement land or, if none is available, with a deposit into an account dedicated solely for new conservation and recreation land purchases. The replacement property must be of equal or greater market value and of reasonably equivalent size, quality, location, and usefulness for conservation and recreation purposes. The monetary deposit must be equal to the appraised market value of the conversion property at the time of the application. The applicant must also commission appraisals of both the conversion property and replacement property, although these appraisals are waived if the replacement property is at least twice as large as the conversion property and of at least equal market value. In some cases, Green Acres requests scientific data from the relevant state agency on the conservation resources on the conversion or replacement properties. Fourth, the applicant government must replace any recreational facilities that are lost due to the conversion. Finally, the applicant government (or the land trust's governing board if the land is held by a land trust) must approve the conversion by

resolution. Upon receiving a formal application, Green Acres issues a recommendation to the Commission of the Department of Environmental Protection to approve or deny the application. The Commissioner's approval is then forwarded to the State House Commission, which is comprised of the Governor and other top cabinet officials, to approve or deny the request. In most cases, if a formal application is completed, Green Acres recommends approval. Likewise, if Green Acres recommends approval, the DEP Commissioner and the State House Commission usually approve the request.

The Green Acres Act includes a unique provision that extends the conversion review process to both Green Acres-funded and non-funded properties owned by the applicant government at the time of the Green Acres grant. Thus, when a municipality or county applies for Green Acres funding to acquire a property, all of its parkland becomes subject to the Green Acres conversion review process. Since most municipal- and town-owned parkland has not been funded by Green Acres, this provision significantly expands the scope of protection. Although some municipalities objected to this provision, a state court upheld the expanded jurisdiction in 1977. This expanded scope has ensured that a local government does not purchase parkland with the Green Acres money and then sell other government-owned parkland, in effect using the Green Acres money to fill its coffers without any net gain in parkland.

Despite the strength of the Green Acres conversion restrictions, gaps did exist and were exploited. State lands acquired without Green Acres funding, for instance, were not covered by the restrictions. In 1986, the state legislature approved the sale of over 1,200 acres of state wildlife management area land on Hamburg Mountain to a developer. Since the land was state property, it was not subject to the Green Acres conversion process just described. Years of wrangling have left the ultimate fate of the land unresolved, and the developer recently submitted new development plans for a large golf resort complex.

As a result of the Hamburg Mountain fiasco, a bill was passed to apply the Green Acres conversion review process to all state conservation lands. Any state-owned land acquired with Green Acres funds or administered by the Department of Environmental Protection may not be conveyed without: (1) preparing a report that identifies the environmental, recreational, and ecological impacts of the conveyance; (2) submitting the report to several legislative committees; (3) making the report public at least thirty days in advance of; (4) holding a public hearing on the proposed conveyance. This process would have prevented the Hamburg Mountain transfer.

Finally, a separate process governs the sale of county-owned non-conservation land that the county desires to sell. Since the land is not designated parkland, it does not fall under the Green Acres restrictions. But the land may still be valuable for open space purposes. A separate statute establishes a notice provision, requiring the county to hold two public hearings before it may convey these surplus lands. In addition, every municipality within the county must be notified and provided with an opportunity to purchase the property for its own open space needs.

Recently compiled data suggest that the strong conversion restrictions have been successful in limiting the number of conversions. As noted earlier, the Green Acres Bureau of Legal Services and Stewardship receives between 40 and 50 informal conversion requests per year. But due to the strong restrictions, most of these requests never make it to a formal level, where an official decision must be made. For instance, in the 18 months from the beginning of 1999 through June 2000, only 22 requests made it to an in-house meeting stage. Of these, one was deemed not to be a conversion, two were withdrawn, one was denied, and the remaining 18 are pending. Although the Green Acres office has only tracked these requests since this time, the initial data suggest that the restrictions are serving to limit the ultimate number of conversions.

New Jersey's conversion restrictions work because they are comprehensive, extensive, and thorough. At the same time, there is always pressure on municipal officials and the Green Acres Program to support conversions by acquiescing in a premature determination that there are no feasible alternatives to the proposed conversion. Most recently, some municipalities have sought to exempt the construction of schools on protected lands. Without its strong restrictions, New Jersey would be in the same position as Massachusetts in opening up conservation lands for school purposes.

B. The Florida Model

Florida has carried out one of the nation's most ambitious statewide acquisition programs over the last decade. In 1990, the legislature committed $3 billion over ten years to conservation land acquisition. In 2000, the legislature passed a successor program, Florida Forever, which commits billions more. To date, the program has protected over one million acres of land.
A push for stronger and clearer conversion restrictions arose out of a controversy regarding part of a property acquired for conservation purposes but later proposed for sale and commercial development. In 1992, the state used Preservation 2000 funds to acquire an 18,000-acre parcel in Walton County. According to some accounts, the state acquired the entire parcel but reached an informal understanding with the County that a portion containing marginal conservation resources would be turned over for the proposed development. When the state tried to convey 420 acres to the County, a coalition of environmental groups, led by the Florida Wildlife Federation, filed a lawsuit opposing the disposition. Because there were no clear regulations on the conversion of conservation land, the lawsuit focused on local planning and zoning statutes.

Partly as a result of this controversy, the State has tightened its conversion restrictions in recent years. Voters overwhelmingly ratified a Conservation Amendment to the state constitution in November 1998. One of the provisions of the amendment sets up restrictions on the disposition of any conservation lands, stating:

"The fee interest in real property held by an entity of the state and designated for natural resources conservation purposes as provided by general law shall be managed for the benefit of the citizens of this state and may be disposed of only if the members of the governing board of the entity holding title determine the property is no longer needed for conservation purposes and only upon a vote of two-thirds of the governing board."

The Florida Forever legislation designates all land purchased under that legislation and all of the state's previous land acquisition programs as having been purchased for conservation purposes, thus bringing over two million acres of land within the scope of the amendment.
The supermajority approval requires five of the seven members of the governor's cabinet to vote in favor of the disposition. This in itself is not a unique procedural mechanism, for supermajority votes are common in conversion restriction provisions. What is exceptional about the Florida amendment and implementing statute is the imposition of a conservation-based standard to guide the cabinet's decision. Although the "no longer needed for conservation purposes" standard is vague and open to abuse, the Board's staff is in the process of designing specific criteria by which to implement this standard. These criteria include the requirement that scientific data support the "no longer needed" determination.

C. Local Conversion Restrictions

As a whole, municipalities are surprisingly unprepared to handle conversion issues in any systematic way. Most municipalities own extensive parkland but have no restrictions against conversion. Only a few municipalities have adopted ordinances or provisions in their home rule charters that ensure against conversion. The citizens of Colorado Springs, Colorado, passed an initiative ordinance in 1997 which establishes an open space acquisition program. One of the ordinance's provisions requires a majority vote in a city-wide referendum or initiative if the city seeks to sell, trade or otherwise convey any land acquired under the program. In the event that such a conveyance is approved in this manner, the money received in return for the conveyance must be devoted to new open space acquisition. The simplest and broadest approach would be to amend the municipality's charter to require that all park land owned by the municipality (not only land acquired through a particular program) are to remain so unless the voters through a referendum or initiative decide to convey the property or to allow some other public but non-conservation use. There is some anecdotal evidence that citizens and municipalities are beginning to consider such measures, but unfortunately these forward-thinking provisions are all too rare on the local level.

D. Federal Conversion Restrictions

The federal government has protected land for conservation purposes in a variety of ways over the course of its long history. Among the most familiar conservation designations are National Parks, National Wildlife Refuges, National Wildernesses, and National Monuments. Furthermore, conservation lands have been acquired through a multitude of different federal programs. Although an exhaustive review of each of these designations and acquisition programs is beyond the scope of this analysis, certain statutes and policies are especially noteworthy examples of conversion restrictions.

The most explicit conversion restrictions of any government land acquisition program are found in the Land and Water Conservation Fund (LWCF) program. This program, enacted by Congress in 1961, has funded over 38,000 projects (either acquisitions or improvements) involving approximately 30,000 different properties. Property acquired or improved by funds from the LWCF may not be disposed of without the approval of the National Park Service (NPS) and the substitution of replacement properties of equivalent conservation and/or recreation value. The program's enabling legislation states:

"No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location."

As discussed above, despite this statutory restriction there have been roughly 1,000 conversions since the program was enacted in 1961. What little hard data there is suggest that cities or states seeking to convert such properties have been quite successful and that the Secretary of the Interior approves most conversion requests supported by the state agency overseeing the LWCF program. It is not clear that the National Park Service
has adequately monitored the conversion process. In at least one instance, a municipality (Lebanon, New Hampshire) converted land that it did not even realize was under LWCF restrictions. Perhaps because of the regularity of these conversions, the proposed Conservation and Reinvestment Act of 2000, which passed the House of Representatives but did not reach a vote in the Senate, included a strengthening of the conversion restrictions. This statute would have added a "feasible and prudent alternatives" analysis to Section 6(f), thus expanding the National Park Service's authority to reject conversion requests.

V PROPOSAL FOR A MODEL ANTI-CONVERSION AND ANTI- CONDEMNATION STATUTE

There is no single best mechanism to prevent conservation lands from being condemned or converted to other uses. The ideal approach is to establish a comprehensive set of procedural and substantive restrictions that reflect the complexities of conversion and condemnation issues. The most important measure of any given restriction is its efficacy in preventing

rash and unnecessary conversions and condemnations. By raising the cost and time it takes to convert or condemn conservation property, restrictions force condemning authorities to consider other alternatives. This Part highlights some of the individual mechanisms adopted in various jurisdictions and flags the relevant issues to be considered in establishing a new set of conversion and condemnation restrictions.

A. Replacement Requirements

A replacement requirement is by far the most critical element of effective condemnation and conversion restrictions. Without a replacement requirement, the total amount of conservation land will inevitably shrink. Because most conversion requests involve a relatively small amount of land area, the property owner may not understand the importance of replacement. But an acre here and there adds up, causing the gradual but damaging loss of protected land. Thus, the mandatory replacement of converted or condemned property is the linchpin of a "no net loss" policy. Many jurisdictions have successfully implemented a replacement requirement in their conversion restrictions.

Of course, true replacement is not always possible for sensitive conservation properties. Ball fields, swimming pools, tennis courts, and other recreational facilities are easier to replace than a bird sanctuary or a wetlands. Where replacement of land is not feasible, the owner should be required to deposit money into an account specifically dedicated to conservation acquisition, preferably in the vicinity of the jurisdiction in which the conversion occurs.

A model replacement provision would require the replacement property to have conservation or recreation value and economic value greater than or equal to the converted property. As in New Jersey, appraisals should be required in determining economic equivalency. Although the conversion process is inherently political, the decision to convert a property should also be based on sound science. Where possible, scientific data should be required to determine whether replacement properties are of equal conservation value. Florida has the most explicit requirements for conservation-based decisions, stating that a conservation property cannot be converted until the reviewing bodies make an empirical determination that the property is "no longer needed for conservation purposes." New Jersey's Green Acres review process also receives assistance from state biologists in determining the conservation values of the replacement and conversion properties.

B. Elimination of Fiscal Incentives to Conversion

Related to the replacement issue is the need to eliminate fiscal incentives to convert or condemn conservation land. As discussed, there are often strong economic incentives to use public conservation lands instead of private land for transportation and other development projects. This fiscal incentive is most apparent in Massachusetts, where municipalities do not have to pay anything to convert conservation lands they already own. In Florida, by contrast, the state must sell surplus lands at the greater of fair market value or the price the state originally paid for the property, but there is an exception where the buyer is a county or municipal government. This exception might prove to be a significant loophole, as environmentalists fear that developers will pressure local governments to act as a conduit to purchase conservation lands from the state and then convey them to the developers. The state that has most successfully eliminated any fiscal incentives is New Jersey, where virtually all public conservation lands are protected by various statutes.

States must sometimes go to great lengths to close all of these economic loopholes. Maryland's Program Open Space (POS) has had to tighten its conversion restrictions in recent years by implementing a unique valuation provision to remove monetary incentives for conversions. Dating back to 1968, POS modeled its conversion provisions after the Land and Water Conservation Fund Act, requiring replacement of any converted lands with lands of at least equal recreational use value. But since many of the lands initially purchased with POS funds became zoned as open space, their fair market values were artificially lower. Developers could thus reap windfalls by providing replacement lands equal to the POS property's open space value and then rezoning the converted property for commercial or residential uses. In 1992, for instance, a Baltimore County developer applied to convert a POS-funded soccer field to expand a supermarket. To meet the replacement requirements, he offered property that was equal to the POS property's open space zoning value, and its comparable recreational use. Even though the POS property would be immediately rezoned after conversion, the developer would not have had to pay for the difference between the open space value and the rezoned commercial value. Protests from local "soccer moms" and the disparity between the appraisals for the two parcels caused POS to turn down the request for conversion. To further address this potential loophole, in 1995 the state legislature changed the law so that whenever a zoning change is required for a conversion, the converted land shall be valued at the use requested, not the prior open space or recreation value. Since the replacement property must be of equal value, this provision eliminates the economic incentive to convert land. As intended, the amendment has significantly reduced the number of conversion requests from the counties.

C. Meaningful Alternatives Analysis

One of the most common condemnation and conversion restrictions is a substantive alternatives analysis requirement. This burden has been established because of a perception that governments (and government-empowered condemnors) often select conservation lands for private properties without carefully considering viable alternatives. Many state and local conversion restrictions, including SNAPs, state that a request will only be approved if there are no prudent and feasible alternatives.

The prudent and feasible alternatives standard comes directly from Section 4(f) of the Department of Transportation Act. Section 4(f) imposes substantive and procedural restrictions on the use of certain parkland and historic sites for federally funded transportation projects. The Act, passed in 1966, allows the Department of Transportation (DOT) to approve such a project "only if (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . resulting from the use." The Act applies to publicly owned land from a public park, recreation area, wildlife and waterfowl refuges, and publicly and privately owned historic sites. Section 4(f)'s protections are very broad insofar as they may apply to all publicly owned parkland, from Yellowstone National Park down to a town-owned playground. In addition, even privately owned historic sites are protected, as long as they are listed on or are eligible for the National Register of Historic Places.
Section 4(f) may also extend additional protection to publicly held conservation easements. Although Section 4(f) protections apply for the most part to publicly owned park lands, the Department of Transportation Act's own 4(f) guideline manual concedes that private lands subject to publicly held easements are considered to be publicly owned for the purposes of the statute. This interpretation means that the thousands of conservation easements owned by federal, state, county, and municipal governments fall under Section 4(f) protection. Since there is little statistical information on 4(f) reviews, it is not possible to determine how often DOT projects have encroached on public conservation easements. But it is probable that to date these lands have not been protected to the full extent of Section 4(f). Officials who are charged with monitoring public easements should be aware of this overlooked provision.

Despite the strong language of the statute, the effectiveness of 4(f) in protecting parkland has been relatively modest and disappointing from the perspective of many environmentalists and preservationists. Because the protections are only triggered by a federally funded transportation project, solely state-funded transportation projects need not meet these requirements. This limitation has become a full-fledged loophole because states have become adept at avoiding 4(f) by shifting federal funds away from those projects that do use park or historic resources. In addition, projects funded by federal departments outside of the Department of Transportation are not covered by 4(f). Thus, a Department of Defense project that clearly impacts on public parkland would not trigger 4(f)'s procedural and substantive requirements.

Finally, although 4(f) contains strong language, it is administered largely by the Department of Transportation and the federal courts. Since the DOT's mission is primarily to support transportation projects, its institutional capacity and willingness to vigorously pursue environmental policies is inherently limited. And although the 4(f) process requires cooperation with other federal agencies with conservation missions, such as the Fish and Wildlife Service and the National Park Service, the DOT has the final word in deciding whether a proposed action meets 4(f) requirements. Even where these other agencies have expressed strong opposition, the DOT routinely approves its projects. On the judicial level, although Section 4(f) itself was originally a powerful tool for opponents of harmful highway projects and was even embraced by the Supreme Court in its forceful Overton Park opinion, more recent federal court decisions have proven mostly sympathetic to the DOT. Perhaps the broader lesson is that even the soundest conversion and condemnation restrictions will not amount to much without meaningful administrative and judicial enforcement.

Despite these Section 4(f) shortcomings, the "prudent and feasible alternatives" requirement nevertheless has the potential to be an effective means of protecting conservation land on the state and local level. As seen in the context of agricultural land preservation, an alternative analysis must be more than a mere formality. The general thrust of an alternatives analysis is to require a "second look" before authorities may proceed with eminent domain or conversion actions on conservation land. One commentator has recommended legislation that would establish substantive restrictions before a condemnor could take protected agricultural land. The second look review by a state agricultural preservation program would cover the suitability and costs of alternatives.

States and municipalities that seek to establish effective alternatives requirements should look to strict standards established by the Supreme Court in construing Section 4(f). Significantly, as the Court noted in Overton Park, the alternatives must be evaluated on more than a simple cost comparison. The Court noted that there were truly unusual factors demonstrating that the rejected alternatives would "present unique problems" or require costs or community disruption of "extraordinary magnitudes." These standards make sense, for if a proposed action need only show that it is less costly than any of the alternatives, then conservation lands will almost always lose out. Like Section 4(f), an alternatives requirement should do more than simply require a condemnor or converter to conduct an alternatives analysis; in addition, it should prohibit completion of the project unless that analysis meets these heightened objective standards. Only then will the alternatives analysis offer more than "a moment for the conscience to shine."

D. Supermajority Legislative Approval

A supermajority vote (usually two-thirds or greater) is potentially an effective procedural mechanism for ensuring that only non-controversial conversions are approved. Many SNAPs and land acquisition programs require a supermajority as part of the conversion process.

But a supermajority requirement by itself will not always be effective in preventing a large number of conversions. In Massachusetts, any conversion of municipally-owned conservation land first must be approved by a two-thirds majority of the city council (simple majority vote if the conversion is for low-income housing). Upon municipal approval, Article 97 of the Massachusetts Constitution requires a two-thirds vote of both branches of the state legislature to approve the town's conversion. As noted above, 150 out of 176 properties that came up for a vote before the state legislature were approved. State legislators, as a matter of course, have been reluctant to reject a bill that comes up from the local government level

and has already achieved a certain momentum.

E. Notice and Public Hearing

The public is often a key voice in preventing a conversion. But the public can only act when the conversion process is open to public scrutiny. Many of the most destructive conversions occur with limited public input. Conversely, where the process is open, vehement public support can add to the legitimacy of a conversion. Notice and hearing provisions feature prominently in many of the SNAP conversion restrictions and in various condemnation restrictions.

F. Broad Coverage of Conversion Restrictions

A land acquisition program should supplement and not substitute land that is already protected. Thus, a town or county government should not accept acquisition funds from the state with the left hand while it sells pre-existing conservation lands with the right. To prevent this maneuvering, an acquisition program can apply its conversion restrictions to both funded and non-funded properties.

The Land and Water Conservation Fund (LWCF) requires fund applicants to submit a "6(f)(3) project boundary map" with each application. This map defines the project area that will be covered by anti-conversion protections. Usually, the project area includes not only the facility or tract being improved or purchased, but the entire park or site in which the project lies. Thus, a LWCF grant to improve a small park facility can provide anti-conversion protection to the entire park. Likewise, New Jersey's Green Acres Program also extends its conversion restrictions to all of the municipality's conservation lands.

G. Declaration of Highest and Best Use

Declaring conservation to be the "highest and best" use of a property provides a limited measure of protection by making condemnation by a co-equal unit of government more difficult. The landowner or land trust cannot make such a declaration with any authority, but when a public agency does so, it protects the property through the prior public use doctrine. Under this doctrine, where there is legislative intent as to what constitutes a property's highest and best use, the property will often be shielded from condemnation by a co-equal unit of government. Maryland's incipient Rural Legacy Program includes a clause in its standard conservation easement that declares conservation to be the highest public use of the property under easement. Since all Rural Legacy easements are approved by the Maryland Board of Public Works, a state body, the provision is meant to ensure that the state legislature must vote to approve any condemnation by the state, a county, or a municipality. In addition, several SNAPs include similar language in their enabling statutes. This declaration is often accompanied by a provision that permits a taking only for an "imperative and unavoidable public necessity."

H. Use of Conservation Easement as a Backup Protection on Public Conservation Land

It is entirely possible for a state or municipality to grant a conservation easement on land it owns in fee simple. Colorado has taken this novel approach in ensuring the perpetuity of conservation land acquired by municipalities through the Greater Outdoors Colorado (GOCO) Trust Fund. GOCO, established in 1992 and funded by a state lottery, awards grants to both private land trusts and local governments for land acquisitions. Early on, the GOCO Board adopted a policy requiring a municipality to grant a conservation easement to a third party.

In New Hampshire, some towns have drawn a lesson from the recent condemnation of municipally owned conservation land for a highway extension. Most recently, the towns of Walpole and Lebanon voluntarily granted conservation easements on town-held conservation land to local land trusts to help ensure that the temptation to convert such property does not arise again. This approach has the advantage of eliminating some of the administrative burdens of a broader anti-conversion legislation. One drawback may be that conservation easements would still be vulnerable to condemnation attempts. Indeed, if it felt compelled, a government could condemn the very conservation easement that restricts its own fee simple holding.

I. Expedited Processing

Conversion restrictions are purposefully designed to discourage and prevent conversions. Approval processes that require public input, strong replacement standards and the like will no doubt cut down on rash conversions and ensure that those that go through are well thought out. At the same time, these processes have the potential to make non-controversial conversions needlessly difficult. A balanced conversion/condemnation process therefore should allow for expedited handling where the harm to the environment is negligible or where there is a net conservation gain. Interestingly, it is not uncommon for replacement property to be of greater conservation value, adding to the quality and/or quantity of protected land. This result can be encouraged by allowing an expedited process if the replacement property is of significantly greater conservation value.

In Maryland, the director of the Program Open Space can issue a discretionary approval where the proposed conversion affects less than 1 % of the property's total area. Similarly, New Jersey's Ogden process for the conversion of state lands applies only to properties above one acre. The legislation governing the condemnation of New Hampshire's Land Conservation Investment Program acquisitions allows the Department of Transportation to avoid legislative approval if the taking is for "minor" projects.

Another instance where expedited review might be prudent is where the acquiring conservation agency purchases rich conservation properties that also include areas of little or no conservation value. These marginal conservation lands may be of high economic value, so for maximum efficiency, the program should be able to resell the undesired portion and reinvest the proceeds in better quality conservation lands. For example, the New Jersey Fish and Wildlife Division acquired a prime wildlife habitat with a valuable home on one part of the tract. Even after it determined that it had no interest in owning the home, the Division had much difficulty selling it because of the strict Green Acres conversion restrictions. But this option works well only if it is clear from the outset which portion the acquiring agency intends to resell. To address this situation, the Florida Forever Act requires the purchasing agency to designate from the outset any portion of an acquired property that is not for conservation purposes. A similar provision exists under Maryland's Program Open Space. Such a procedure could be useful for other states to adopt.

J. Administrative Commitment

Regardless of the exact standards or procedures chosen to restrict governments' authority to condemn or convert conservation lands, administrative resolve is a key intangible factor in the success of those restrictions. The strongest restrictions will not endure an indifferent or hostile administrative atmosphere, while textually weak standards can go a long way if the administering agency possesses sufficient resolve. Agency staff can play an important role by discouraging conversions at the very beginning of an inquiry. At a minimum, any agency that administers conservation lands should designate at least one person who is responsible for monitoring those lands and making sure that any conversion and condemnation restrictions are honored. The fact that conversion statistics are incomplete is in part because most conversion attempts will be rebuffed before they reach a formal level, if the administering agency is doing a good job. Conversely, the requests that do advance to the final stages are those most worthy of approval.

CONCLUSION

Let there be no quibbling about the matter: Permanent protection is indeed a radical goal. It is quite ambitious to declare a property protected in perpetuity. Yet the fundamental inexorability of population increase and land development calls for such a radical solution. At its heart, the land conservation movement has always been about what this country should look like today and a hundred years from today. As sprawl encroaches ever further, states, cities, communities, and individuals are making decisions to declare selected properties off-limits to development and other intensive uses. In a sense, we are making a promise, to ourselves, to future generations, and to the Earth, to keep our hands off of these lands. Forever. While this may be an ideal, it is one worthy of our aspirations.