



January 1999

Tree Preservation Methods: Zoning Regulation vs. Conservation Servitude

R. Scott Wilder
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/jnrel>



Part of the [Environmental Law Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Wilder, R. Scott (1999) "Tree Preservation Methods: Zoning Regulation vs. Conservation Servitude," *Journal of Natural Resources & Environmental Law*. Vol. 14 : Iss. 2 , Article 6.
Available at: <https://uknowledge.uky.edu/jnrel/vol14/iss2/6>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in *Journal of Natural Resources & Environmental Law* by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

TREE PRESERVATION METHODS: ZONING REGULATION VS. CONSERVATION SERVITUDE

R. Scott Wilder*

I. INTRODUCTION

A major contribution of the environmental movement is the change made in traditional land use and planning programs.¹ The policy behind tree preservation was established over one hundred years ago.² Cities, in the age of industrialization and economic growth, were faced with the problems of "urban sprawl."³ Reviews of typical tree preservation mechanisms show that many tree preservation ordinances (TPOs) emerged as a way to prevent the clear-cutting of trees at the whim of developers.⁴ Cities typically began by looking for ways to preserve mature landscaping and to protect existing vegetation during construction, which typically is cut away to prevent interference with the construction process.⁵ Realization that tree stands and forests are valuable resources continued to spur the evolution behind tree preservation policies.

Conservation servitudes are private agreements between parties allowing them, "at their own initiative, to acquire protection interests (known as a 'servitude') in the property of another."⁶ Conservation servitudes 'run with the land,' such that environmental protection on a particular piece of property is perpetual.⁷ Like zoning regulations, conservation servitudes require some type of oversight.⁸ However, implementation of these private agreements allow more flexibility and less interference than zoning regulations because the only restrictions

* B.A. 1994, Western Kentucky University; J.D. 1999, University of Kentucky College of Law.

¹ DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT* at 775 (4th ed. 1995); Robert H. Bathrick, *Symposium: 25th Anniversary of the New York State Department of Environmental Conservation: Past and Future Challenges and Directions*, 7 ALB. L. J. SCI. & TECH. 159 (1996).

² Bathrick, *supra* note 1, at 159.

³ *Id.* at 160.

⁴ *Review of Tree Preservation Ordinance* (visited November 23, 1998) <http://www.ci.sunnyvale.ca.us/www2/_downloads/1997-09/97-372.txt>.

⁵ *Id.*

⁶ John Walliser, *Conservation Servitudes*, 13:1 J. NAT. RESOURCES & ENV'T L. 47 (1998).

⁷ *Id.* at 48.

⁸ *Id.* at 51.

are those voluntarily agreed to by the parties.⁹ This note will analyze the most common mechanisms used to achieve tree preservation objectives. The analysis will focus on regulatory zoning and land use methods as compared to private arrangements between parties in the forms of conservation easements and servitudes.

II. PRESERVATION TECHNIQUES VIA ZONING REGULATIONS

Cities typically establish TPOs in the planning process.¹⁰ This usually begins with a tree inventory, which assesses the "identification and location of the types of vegetation (i.e., cover types) which occur in the community; identification of any unique ecosystems; location of particularly large and/or historic trees; [and] profiles of the existing trees including species and size distribution."¹¹ This first step includes noting areas that are in unique situations or that constitute environmentally or aesthetically sensitive areas.¹² The next step establishes and articulates the municipality's goals. "Each community must determine its own needs and goals, and design its ordinance to best achieve these objectives."¹³

A. Role of the Comprehensive Plan

One of the many issues cities recognized as important was the preservation of natural resources. This type of preservation is often listed in city comprehensive plans as one of the goals to be considered in deriving appropriate regulations and ordinances.¹⁴ The comprehensive plan is used to articulate objectives and goals, on which local governments rely, in order to prevent enactment of legislation in a capricious or inconsistent manner.¹⁵ Planning commissions in Kentucky are required to prepare a statement of goals and objectives "to act as a guide" for implementing measures directed at them.¹⁶ In

⁹ *Id.* at 50 n.15 (citing Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 106 (1997)).

¹⁰ See *A Guide to Developing a Community Tree Preservation Ordinance* (visited March 9, 1999) <<http://willow.ncfes.umn.edu/mnstac/treepres.htm>>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See KY. REV. STAT. ANN. § 100.187(5) (Banks-Baldwin 1998).

¹⁵ See *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 2 (N.J. 1957).

¹⁶ KY. REV. STAT. ANN. § 100.193(1) (Banks-Baldwin 1998).

harmony with city goals, planning commissions are then permitted to adopt land use and zoning regulations that protect, among other things, natural resources.¹⁷ More specifically, the planning commissions are authorized to develop text regulating the activity on particular lands including the "removal of natural resources."¹⁸ It appears that Kentucky has, through specific comprehensive plan requirements, authorized implementation of ordinances directed at such things as tree preservation.

Efforts to deal with tree preservation have varied. Ordinances specifying particular percentages of a tree stand that must remain alive seem to be the most common method. Such ordinances, like most zoning ordinances, utilize the police powers of the municipality and, therefore, are scrutinized in much the same way. Other cities use conditional development permits as a way to ensure tree preservation. This method, used on a case by case basis, conditions development upon the preservation of a certain number or percentage of trees on the particular property. This Note will describe the various issues involved in the implementation and validity of TPOs as well as other less popular alternatives that may more readily survive constitutional and public policy attack.

B. Effect of the Enabling Statute

The authority to implement certain land preservation policies is usually premised upon the city's discretionary ability to require land or easement dedications for parks, schools, waterways, and coastlines within the subdivision process.¹⁹ The municipality's power must come from an enabling statute.²⁰ With a valid enabling statute, comprehensive plans, along with subdivision regulations and zoning ordinances, authorize planning commissions to consider environmental conditions such as tree preservation.²¹ "Temporary" tree preservation may be achieved in Kentucky within the subdivision regulations. Kentucky Revised Statutes permit the planning commission to "require a reservation, not to exceed two (2) years, for parks, open space, school,

¹⁷KY. REV. STAT. ANN. § 100.201(2) (Banks-Baldwin 1998).

¹⁸KY. REV. STAT. ANN. § 100.203(1)(a) (Banks-Baldwin 1998).

¹⁹Robert A. Johnson & Mary Madison, *Using the County General Plan to Guide Habitat Mitigation Under CEQA*, 34 SANTA CLARA L. REV. 81, 105 n.209 (1993).

²⁰MANDELKER ET AL., *supra* note 1, at 202-03.

²¹McDaniel Rosenfeld, *Update on Local Growth Management*, 629 A.L.I.-A.B.A. 473, 475 (1991).

and other public uses."²² Although preserved tree stands may qualify for treatment as an open space within the definitions of a particular zoning ordinance, planners are only allowed to condition approval for two years. Apparently, after two years, the landowner would then be allowed to remove the trees. Obviously, true tree preservation is not accomplished by this method and requires a more encompassing scheme.

C. Goals

Each local government must establish specific goals and objectives to fit its needs. The goals of tree preservation ordinances include "reducing tree loss during development; reducing damage to standing trees during construction; providing for replacement of trees lost during construction; providing for planting trees where none occurred previously; [and] providing for the maintenance of preserved trees after construction is completed."²³ Further, the scope of the ordinance may only cover public land or may include "private residential, commercial or industrial projects" while regulating "only tree preservation or . . . replacement and new planning."²⁴

1. Health and Safety

The Fifth Amendment to the United States Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."²⁵ State constitutions and the Fourteenth Amendment, which makes the Fifth Amendment applicable to the states, limit the exercise of police power by cities.²⁶ Courts generally consider an exercise of police power valid if done to protect public health, safety, morals, or general welfare.²⁷ In *Mugler v. Kansas*,²⁸ the Supreme Court held that the exercise of police power must have a "real or substantial relation" to the protection of "the public

²²KY. REV. STAT. § 100.281(5) (Banks-Baldwin 1998).

²³See *A Guide to Developing a Community Tree Preservation Ordinance*, *supra* note

10.

²⁴*Id.*

²⁵U.S. CONST. amend. V.

²⁶See U.S. CONST. amend. XIV.

²⁷See generally, MANDELKER ET AL., *supra* note 1, at 197.

²⁸123 U.S. 623 (1887).

health, the public morals, or the public safety."²⁹ Following this analysis, TPOs must be designed such that they have a substantial relation to a valid state interest. The goals of TPOs must therefore take into account issues concerning public health and/or safety.

As an overall goal, TPOs are generally viewed as methods to reduce the removal rate of forest cover.³⁰ Most cities have also adopted a policy of re-forestation as a way to expand tree cover.³¹ Such a policy is a way to remedy past removals of forests when no restrictions existed. More specifically, foresters and ecologists have helped bring about public awareness of the environmental benefits of such legislation in terms of ground water filtration, reduction in surface runoff, alleviation of flooding, and the provision of necessary habitats for wildlife.³² Further, aesthetic interests, as they impact property value, are considerations that benefit the public at large.

2. Aesthetics

"A majority of courts now recognize 'aesthetics alone' as a proper regulatory purpose in land use controls."³³ The initial position of the courts was that "(a)esthetic conditions are a matter of luxury and indulgence rather than necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."³⁴ Courts began treating aesthetics as a factor, when coupled with other concerns, that may be considered sufficient to justify regulations.³⁵ The present treatment of aesthetics is illustrated in *State v. Miller*,³⁶ where the court held that "the development and preservation of natural resources and clean salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride."³⁷ However, the court in

²⁹ *Id.* at 663.

³⁰ See Stacy Plotkin Silber, *Afforestation Under Maryland's Forest Conservation Act and Selected County Codes: Viability of This Land Use Regulation Pre- and Post- Dolan v. City of Tigard*, 4 U. BALT. J. ENVTL. L. 53, 54 (1994).

³¹ *Id.*

³² *Id.* at 60 n. 32.

³³ See MANDELKER ET AL., *supra* note 1, at 705.

³⁴ *Id.* (citing *City of Passaic v. Paterson Bill Posting, Adv. & Sign Painting Co.*, 62 A. 267 (N.J. 1905)).

³⁵ See *Id.*

³⁶ 416 A.2d 821 (N.J. 1980).

³⁷ *Id.* at 824.

*People v. Goodman*³⁸ held that "regulation in the name of aesthetics must bear substantially on the economic, social and cultural patterns of the community or district."³⁹ These cases suggest that although cities may fashion tree preservation regulations as ways to deal with aesthetic concerns, underlying economic and social justifications must exist.

3. Preservation

"There are longstanding traditions of preserving and maintaining a collective inheritance."⁴⁰ However, fashioning a preservation scheme may subject local governments to judicial scrutiny in terms of the relationship between such regulations and state goals. Establishment of TPOs to deal with environmental objectives such as preservation may be the best way for cities to develop constitutionally valid ordinances;⁴¹ environmental goals may be deemed by courts to be sufficiently related to the protection of public health and safety. As mentioned, ecological goals such as alleviating problems of erosion, loss of top soil, sedimentation on roadways, diminution in production of oxygen, cover for wildlife, and wind and noise insulation are common concerns.⁴² It seems that a persuasive argument exists that TPOs, if enacted to deal with the above-mentioned environmental problems, are valid exercises of police powers.

4. Forestation

Constructing tree preservation schemes to encourage re-planting of trees is a common element in recent measures. The premise behind a re-planting requirement is that creation of a resource (forest) is a condition precedent to issuing a permit to improve and/or subdivide property.⁴³ Provisions relating to re-planting allow developers reasonable use of their land without creating obscure lots or

³⁸290 N.E.2d 139 (N.Y. 1972).

³⁹*Id.* at 141.

⁴⁰Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93, 103 (1990).

⁴¹*See* *Keystone Bituminous Coal Assn. v. DeBenedicts*, 480 U.S. 470, 491-93 (1986). The Court uses a two-part test to determine whether coal mining regulations constitute a taking: (1) whether legitimate state interests are advanced; and (2) whether the land is still economically viable.

⁴²*Seaboard Contracting & Material, Inc. v. Town of Smithtown*, 147 A.D.2d 4, 7 (N.Y. App. Div. 1989).

⁴³*See* *Silber*, *supra* note 30, at 54.

development patterns while preserving, or even increasing, a certain percentage of a tree stand.⁴⁴ Forestation seems to be a necessary compliment to the preservation provisions in TPOs to avoid constitutional litigation while implementing the city's tree coverage goals. Courts have held that forestation serves a legitimate state interest and is therefore constitutionally valid.⁴⁵

D. Other Implementation Methods

1. Statute

California, a leader in environmental protection measures, developed the California Environmental Quality Act (CEQA) in 1970.⁴⁶ This was designed to force local and state agencies to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state [of California]."⁴⁷ The agency is required to prepare an Environmental Impact Report (EIR) to determine the effects of the proposed development.⁴⁸ The EIR must then identify "all feasible mitigation measures that will reduce the significant effects of the project to insignificance."⁴⁹ This approach is drastically different from the zoning process as authorized by most comprehensive plans.⁵⁰ Whereas cities normally may permissively adopt TPOs in accordance with a comprehensive plan, California *requires*, as a matter of state law, that local agencies consider environmental impacts. Further, CEQA requires that the agency propose mitigation measures for the developer.⁵¹ An interesting provision in CEQA concerns the availability of "off-site mitigation."⁵² If no on-site mitigation is possible, the developer may mitigate the impact at another location. Application of this policy to tree preservation schemes would allow developers to re-plant trees on other property as a way to compensate the community for the elimination of tree stands on the site of the

⁴⁴*Id.* at 55.

⁴⁵*Id.* at 69 n.85.

⁴⁶Johnston & Madison, *supra*, note 19, at 121 n.88 (citing Cal. Pub. Res. Code § 21000-21177 (West 1986 & Supp. 1993)).

⁴⁷*Id.* (citing Cal. Pub. Res. Code § 21001(a) (West 1986 & Supp. 1993)).

⁴⁸*Id.* at 93.

⁴⁹*Id.* at 95.

⁵⁰See *Review of Tree Preservation Ordinance*, *supra* note 4.

⁵¹Johnston & Madison, *supra* note 19, at 94.

⁵²*Id.* at 97.

proposed development. This philosophy assumes that tree preservation goals relate to attaining a certain level of tree canopy for the entire city rather than on a site by site basis.

2. Development Procedural Requirements

In developing environmental policies such as tree preservation, it is important for municipalities and local governments to obtain information through environmental assessment mechanisms. Impact assessment is crucial in determining the legitimacy of environmental regulations and how they quantifiably relate to their goals.⁵³ Public information and public participation are also important elements in implementing an effective tree preservation scheme.⁵⁴ Public involvement will help ensure acceptance rather than skepticism from the citizens affected by the regulation.

A typical tree preservation scheme may require that developers provide a tree delineation plan, in which any impact upon any forest or tree stand must be documented.⁵⁵ A tree conservation plan must then be formulated, which is incorporated into the preliminary or site plan in terms of determining the location of lots, roads, utility easements, buildings, etc.⁵⁶ Such a consideration may result in fewer lots and/or non-traditional location of infrastructure and buildings.

Other cities, as a way to complement such forest impact considerations, require tree removal permits as a condition precedent to development.⁵⁷ The permit delineates the trees that may be cut down and those that must be preserved or replaced.⁵⁸ Special measures may be taken for trees with life expectancies of fifteen or more years and those that are in good condition with no pathological problems.⁵⁹ These permits are obtained by submitting a survey, or inventory, along with a site plan showing trees that are to be saved and those to be cut down. Further, a detailed plan showing how saved trees are to be protected over the next two years is required.⁶⁰ Some ordinances have more

⁵³ See Sax, *supra* note 40, at 98.

⁵⁴ *Id.*

⁵⁵ Silber, *supra* note 30, at 58.

⁵⁶ *Id.*

⁵⁷ Connie Mulqueen, *No More Clear Cutting in Duluth*, JOHNS CREEK HERALD, July 30, 1998 at 1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

stringent requirements in terms of those trees that may be removed.⁶¹ For example, the City of Sunnyvale, California requires tree removal permits for the cutting of trees with a trunk diameter of twelve or more inches and measure four feet above the ground.⁶² Removal permits are then issued based upon three factors: 1) whether the trees are diseased or damaged; 2) whether the tree creates a potential hazard to people, structures, or other trees; and 3) even if the tree is in sound condition, whether it restricts the owner's ability to enjoy the reasonable use or economic potential of his/her property or unreasonably restricts adjoining property owner's use or economic potential.⁶³

San Antonio established a permit system wherein the total impact of removal is ascertained in relation to the property as a whole.⁶⁴ The city's tree preservation scheme requires preservation of a certain percentage of trees with a particular diameter measure. For example, the ordinance requires preservation of twenty-five percent of all trees with at least an eight inch diameter in commercial, multi-family, and other developments.⁶⁵ Issues may arise as to the criteria used by the legislature or governing body in setting percentages according to the particular land use or zone designation. Again, challenges to this authority are often analyzed in terms of whether the ordinance is a valid exercise of police power and whether the standards are related to legitimate state interests such as public health, safety, and general welfare.⁶⁶

3. Overlay Zoning

Another method that may be utilized is overlay zoning, a process where the planning commission adopts a second mapped zone in addition to the original zone for the property.⁶⁷ "Land in the area covered by both zones may be developed only in accordance with the regulations applicable in both zones."⁶⁸ A common application of this technique is in the protection of "special environmental features that

⁶¹ See *Review of Tree Preservation Ordinances*, *supra* note 4.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Tree Preservation Ordinance, City of San Antonio Department of Building Inspections* (visited November 23, 1998) <<http://www.ci.sat.tx.us.bldginsp.treepres4b.htm>>.

⁶⁵ *Id.*

⁶⁶ MANDELKER ET AL., *supra* note 1, at 83.

⁶⁷ *Id.* at 521.

⁶⁸ *Id.*

restrain development."⁶⁹ Flexibility is possible in this process because a special permit process or plan review may be required.⁷⁰ This provides another way for planning commissions to evaluate the appropriate tree preservation measures on a case by case basis.

4. Impact Fees

Another method that may indirectly promulgate tree preservation is assessing developers impact fees as conditions precedent for permitting development. The theory behind this is to have developers pay reasonable costs of improvements necessitated by the development.⁷¹ There must be a "rational nexus" between the costs to the developer and the benefits conferred upon the development.⁷² Planning commissions may require fees from developers that will be used to re-plant destroyed tree stands in other locations on the property or on other property. The cost of re-planting the number or percentage of trees would likely be deemed rationally, if not directly, related to the benefits of the re-planting to the community.⁷³

E. Constitutionality

"There is no legal tradition in our system that recognizes rights to nature preservation, so we cannot turn to precedent for guidance."⁷⁴ Unlike human rights, such as freedom of speech, press, religion, and association, "[t]here is no evident environmental principle analogous to the 'hands off' principle that underlies basic human rights."⁷⁵ In implementing an effective environmental policy, "recognition of a basic right to a healthy environment would be a novel step."⁷⁶

⁶⁹ *Id.* (citing M. Meshenberg, *The Administration of Flexible Zoning Techniques* 33-35 (American Soc'y of Planning Officials, *Planning Advisory Services Rep. No. 318*, 1975)).

⁷⁰ *Id.*

⁷¹ *See F&W Assoc. v. County of Somerset*, 648 A.2d 482 (N.J. Super. Ct. App. Div.1994).

⁷² *Id.* at 486.

⁷³ *See Id.*

⁷⁴ *See Sax, supra* note 40, at 101.

⁷⁵ *Id.* at 94.

⁷⁶ *Id.* at 96.

1. Takings

a. Ordinances

Facial challenges to TPOs will rarely succeed, given that it applies equally to all landowners within a particular jurisdiction.⁷⁷ The most common challenges to zoning ordinances purporting to limit land use are takings claims based upon the Fifth Amendment of the United States Constitution. As mentioned before, the language of the amendment, applicable to states via the Fourteenth Amendment, prohibits government action that interferes with property rights absent just compensation to the landowner.⁷⁸ Requirements for preservation or re-planting may be deemed a regulatory taking if "the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of land."⁷⁹ In applying the usual balancing test, courts are likely to uphold land use regulations that merely restrict rather than suspend the rights of land owners.⁸⁰

As mentioned above, legitimate state interests concern the public health, safety, or general welfare.⁸¹ Legitimate state interests are often liberally construed;⁸² therefore, legitimate environmental concerns should be enough to validate most TPOs. However, governments, in establishing TPO goals and standards, must take care. It is not enough that the standards might achieve environmental goals; the TPO requirements also must have an "essential nexus" with the goals sought to be achieved.⁸³ This seems to indicate that governmental answers to challenges of the ordinance would have to include mathematical or objective data. Such evidence would need to demonstrate the accomplishment of environmental objectives via the prescribed standards and methods of the ordinance.

⁷⁷ See *Seaboard Contracting & Material, Inc. v. Town of Smithtown*, 147 A.D.2d 4 (N.Y. App. Div. 1989).

⁷⁸ See Silber, *supra* note 30, at 61.

⁷⁹ *Id.* at 62.

⁸⁰ See *Boundary Drive Assoc. v. Shresbury Township*, 491 A.2d 86 (Pa. 1985). An agricultural land preservation ordinance which limits the number of dwellings per lot based on soil type did not cause the landowner to lose the right to develop land; their right was merely restricted. The public interest in preserving agricultural land outweighed the interest of the landowner in placing a larger number of dwellings per lot. *Id.*

⁸¹ See Silber, *supra* note 30, at 62.

⁸² See, e.g., *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

⁸³ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

In *Lucas v. South Carolina Coastal Council*,⁸⁴ the court established per se takings rules wherein any physical invasion of property or denial of economically viable use is deemed to be a taking.⁸⁵ In tree preservation situations, there is no physical invasion upon the land. Further, a preservation requirement is unlikely to be deemed a deprivation of all economically viable use. Economic effects can be mitigated by re-planting with less expensive seedlings, utilizing state assistance programs, and working with the urban forester early in the development process.⁸⁶ Also, it would be difficult to argue economic loss when tree presence generally enhances property value.⁸⁷

b. Permit Conditions

Tree preservation schemes implemented in the form of conditioning development upon the maintenance of tree stands are analyzed as in *Dolan v. City Tigard*.⁸⁸ A two part test was developed requiring that: (1) there be an "essential nexus" between a permit condition and a legitimate state interest; and (2) that there be a sufficient relationship between the permit conditions and the impact of the development such that there is a rough proportionality between the condition and the effects of developments. As applied to TPOs, the analysis would first focus on whether environmental goals such as tree preservation are sufficiently linked to the actual preservation and/or reforestation requirements of the ordinance. Next, the relationship between the percentage of required tree stands under the ordinance and the impact of the proposed development would be analyzed. The Court acknowledged that it "quite simply, has been unable to develop any set formula 'for determining when justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."⁸⁹ Therefore, on a case by case basis, a city would need to show that a preserved tree stand is somehow related to alleviating the negative effects of the development. Objectives such as those mentioned above, including ground water filtration, reduction in surface

⁸⁴ 112 S.Ct. 2886 (1992).

⁸⁵ *Id.*

⁸⁶ See Silber, *supra* note 30, at 72..

⁸⁷ *Id.*

⁸⁸ 114 S.Ct. 2309 (1994).

⁸⁹ Dan K. Ford, *Takings - Permits Conditioned on Property Dedication. Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 465, 471 (1995).

runoff, prevention of flooding, and provision of wildlife habitats must be shown by the city to somehow be furthered by tree preservation in order to survive judicial scrutiny under the "rough proportionality" test.⁹⁰

2. Due Process

According to *Nollan v. California Coastal Commission*,⁹¹ ordinances must promote a legitimate state interest and be "rationally related" to the governmental purpose in order to survive the due process requirement of the Fifth and Fourteenth Amendments.⁹² As in the takings analysis, it seems that virtually any environmental objective such as prevention of soil erosion, carbon dioxide consumption, runoff prevention, or even aesthetic improvements would be rationally related to a preservation scheme where developers are required to preserve or re-plant tree stands.⁹³

III. CONSERVATION EASEMENTS AND SERVITUDE: THE NON-REGULATORY METHOD

An increasingly popular method to achieve conservation preservation is the servitude or easement. Conservation servitudes are "privately created and managed land preservation technique(s)."⁹⁴ Although tree preservation is typically not the sole objective for such agreements, this may be a viable option for local governments to utilize. These options present local governments with an alternative to regulatory mechanisms for environmental protection.⁹⁵ As noted in *Western Land Co. v. Truskolasi*,⁹⁶ "a zoning ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to invalidate restrictive covenants merely because of a zoning change."⁹⁷ This suggests that private land agreements place requirements on land that will control any less restrictive provisions in the zoning ordinance.

Because conservation servitudes are privately created, they can

⁹⁰ *Id.* at 467.

⁹¹ 483 U.S. 825 (1987).

⁹² *Id.*

⁹³ See Silber, *supra* note 30, at 53.

⁹⁴ Walliser, *supra* note 6, at 47.

⁹⁵ See *id.*

⁹⁶ 495 P.2d 624 (Nev. 1972).

⁹⁷ *Id.* at 627.

be drafted with both flexibility and precision.⁹⁸ This allows "efficient land use by permitting the sharing of land resources among different users who acquire only the use rights needed, rather than a full fee interest."⁹⁹ Typically, governments establish a land trust, which "acquires (and consequently pays for) only what it seeks to protect."¹⁰⁰ Since the restriction upon the landowner is narrow in scope in that it only affects a small number of property rights, there would be only a minor effect upon the economic use of the land.¹⁰¹

A. Land Trust

An example of a land trust is the Bluegrass Conservancy,¹⁰² which was established in 1995 in Kentucky to preserve the rural resources by promoting the conservation of state farmland. The landowner realizes substantial income and estate tax benefits if the conservation easement is "donated in perpetuity to a 'qualified organization' such as the Bluegrass Conservancy which accepts the responsibility to monitor the eased property in the future."¹⁰³ The process involves inspection of the property upon request of the landowner and a vote by the board of directors of the land trust as to whether the easement will or will not be pursued.¹⁰⁴ The next step is an "inventory" of the property. "By defining the property's important resources, the inventory helps the easement drafter determine what restrictions need to be included in the document."¹⁰⁵ The Internal Revenue Service requires a baseline figure as well as a "true representation" of the property at the time of the gift.¹⁰⁶ Further, the legal title is adjusted to reflect the legal owner(s) of the property, the property description, the baseline inventory, and any liens or

⁹⁸ Walliser, *supra* note 6, at 49.

⁹⁹ *Id.* at 48 (citing Edward E. Chase, *Servitudes*, 1 AMERICAN LAW OF REAL PROPERTY § 6.01[1]);

¹⁰⁰ *Id.* at 49-50 (citing Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 108 (1997)).

¹⁰¹ See generally Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENV. L.J. 2, 7 (1989).

¹⁰² The Bluegrass Conservancy is a non-profit land trust created in 1995 that establishes conservation easements with private landowners on an individual basis. The easements typically limit future use of the land agricultural uses and open space.

¹⁰³ Bluegrass Conservancy, *A Guide to Donating a Conservation Easement*.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing I.R.C. § 1015(a) (1998)).

encumbrances on the property.¹⁰⁷ If any mortgages or liens exist against the property, subordination documents are provided to the land trust indicating that the mortgage interest is subordinate to the easement.¹⁰⁸ This step is required for the donor to deduct the gift.¹⁰⁹ Finally, the easement agreement is signed and recorded.

B. Advantages and Disadvantages

The benefits of this system are tax advantages to the landowner as well as the local government.¹¹⁰ Furthermore, the voluntary nature of the agreements eliminates the need for governmental expenses incurred by direct regulation methods.¹¹¹ However, the servitude does require some managerial oversight and periodic inspections on the part of the land trust.¹¹² Regarding the tax benefits, two problems which arise include the following: determination of the fair market value of the servitude and the complex appraisal method.¹¹³

C. Conclusion

The three categories of servitudes are easements, restrictive covenants, and equitable servitudes.¹¹⁴ It may be difficult for local governments to ascertain which method would best achieve its tree preservation objectives. In terms of enforceability, several termination doctrines exist that apply differently depending upon the type of servitude created.¹¹⁵

1. Changed conditions doctrine

The "changed conditions" doctrine may be the most relevant because it is inapplicable to easements, though it does apply to

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See* I.R.C. §70(h), 2013(c)(1998).

¹¹⁰ *See* Walliser, *supra* note 6, at 50-51.

¹¹¹ *Id.*

¹¹² *Id.* at 51-52.

¹¹³ *See id.* at 52.

¹¹⁴ JESSE DUKEMINIER AND JAMES E. KRIER, PROPERTY 787 (3rd ed.1993).

¹¹⁵ *See* Walliser, *supra* note 6, at 72.

covenants and equitable servitudes.¹¹⁶ The rationale behind this termination doctrine is that the restrictions may become inapplicable because the "surrounding land uses have changed so radically as to destroy the benefits flowing from the restrictions."¹¹⁷ Therefore, the burdened landowner, under such regime, may seek to escape a tree preservation arrangement by showing, as required by the original Restatement of Property, that conditions have changed such that it is impossible to realize the benefits that were intended by such agreement.¹¹⁸ For example, aesthetic purposes, which may be sufficient justification for passing a TPO,¹¹⁹ may invalidate a tree preservation agreement if property is developed or infrastructure is re-routed such that the beauty or tranquility of a preserved tree stand is no longer enjoyed or visible. The changed conditions doctrine enforces a policy of fairness in light of the perpetuity of such servitudes.¹²⁰

2. Relative hardship doctrine

This doctrine establishes a balancing test to determine whether the burden on the landowner outweighs the public benefit of the conservation servitude.¹²¹ This doctrine has been criticized because of the arbitrariness of the test used.¹²² The magnitude of the burden on a landowner required to preserve a tree stand may depend on the intentions of the landowner. That is, a commercial developer may be significantly burdened by a tree stand in the middle of a parcel of land, while a farmer would be burdened only minutely. Further, the public interest may also be difficult to ascertain.

A general concern for tree preservation may not be weighed as heavily as the interest in a specific plot with a significant tree stand of very old growth. The relative hardship doctrine may therefore be too difficult of a method for the landowner to use in escaping the restrictions of a conservation servitude.¹²³

¹¹⁶*Id.* at 73.

¹¹⁷*Id.* at 109 (citing Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENV. L.J. 2, 7 (1989)).

¹¹⁸*Id.* at 110 (citing RESTATEMENT OF PROPERTY § 564 (1944)).

¹¹⁹*State v. Miller*, 416 A.2d 821, 828 (N.J. 1980).

¹²⁰*See Walliser, supra* note 6, at 112.

¹²¹*Id.* at 108.

¹²²*See id.* at 109.

¹²³*Id.*

IV. CONCLUSION

The implementation of tree preservation methods has come to the forefront of concerns that municipalities must now face. The prevention of urban sprawl and resulting ecological problems, as well as aesthetic concerns, are addressed by establishing a tree preservation policy.¹²⁴ The methods, as discussed above, vary a great deal as to what objectives should be established, the proper body to implement the strategy, the form of regulation and supervision, whether or not to have voluntary agreement, and the establishing of incentives. It is very important for local governments to assess their goals and determine precisely what is to be preserved and the rationale for this preservation. Cooperation with and education of the community are important elements in implementing a workable preservation plan. Local governments have a variety of measures to choose from and should fashion their programs such that the goals, policies, and individual characteristics of the community are taken into account and compliment the type of program chosen.

¹²⁴*Id.* at 50.

