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Conservation Easements: Striking a Balance between Public and Private Wishes (/full- blog/2010/02/conservation-easements-striking- balance.html)

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(http://i976.photobucket.com/albums/ae249/jyoungs82/Kentucky%20Visit%20November%202009/IMG_8543.jpg)

By: Jessica Drake, Staff Member

In 2010, the Bluegrass Conservancy reached its goal of protecting 10,000 acres of farmlands in the Bluegrass Region. Andy Mead, *Saving the Bluegrass Farm by Farm*, Lexington Herald Leader, Jan. 9, 2010, *available at* http://www.kentucky.com/home_garden/story/1088648.html (last visited Jan. 20, 2010). The conservancy, like many in the United States, is a private, non-profit organization

that encourages the protection of farms like those in Kentucky through innovative, legal means such as conservation easements. Bluegrass Conservancy, <http://www.bluegrassconservancy.org/index.html> (last visited Jan. 20, 2010). These easements require the voluntary relinquishment of "sticks" of private landowners' "bundle of rights" that accompanies landownership. These "sticks" inevitably restrict the ability for land to be developed and require the preservation of the property in its current state and for its current uses. In Kentucky, specifically, many horse and agricultural farm owners find the prospect increasingly appealing in order to protect their land from being sold to build strip malls and subdivisions, with the added benefit of tax breaks. *Id.* While the documents establishing these easement protections are usually flexible and tailored to the land at issue, they are, by definition, perpetual in duration and not generally susceptible to alteration or termination. Kentucky Revised Statutes § 382.810-382.860 (2010).

As lawyers and critical thinkers, we must always question our policies and decisions. Are conservation easements the way to go?

Conservation Easements are not created without opportunity costs. These lands will be labored with dead hand control – limiting the ability of future generations to change/sell the land according to their own needs and desires. Is it possible for conservation easements written today to allow enough room for future developments and changed circumstances? Many are concerned with the possibility that the present uses may become obsolete or even detrimental to the collective generations of the future, but find refuge in the ability of the law to cope. Nancy A. McLaughlin, *Conservation Easements – A Troubled Adolescence*, 26 J. Land Resources & Envtl. L. 47 (2005); Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 Nat. Resources J. 601 (2004). *The Trouble with Time*, in fact, asserts that while these are valid concerns, the law has built in mechanisms to deal with unanticipated changed circumstances, and the benefits of perpetual conservation, such as lower transactional costs and hard barriers for future development, far outweigh the problems. *Id.* at 608-613. Kentucky courts also have this same ability to terminate or modify a conservation easement in certain situations. Kentucky Revised Statutes § 382.810-382.860 (2010). Still, is this enough of a safety valve?

On the other hand, some landowners feel that placing negative covenants upon their property is not enough. While it currently appears that these negative covenants will be enforceable in state courts by the private or public entities that "own" the "development stick," many feel that things could change. National Public Radio recently reported about one Michigan woman who desired to never to leave her "easement protected" land. David Baron, *Landowner Calls on Death to Save Her Farm* (NPR broadcast Dec. 30, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=121752798>. In order to carry out this wish, she intended to require, at her death, to be buried on her precious property according to the ideas of the "green burial movement". Green Burials, <http://www.greenburials.org/> (last visited January 23, 2010) (this movement is one that encourages people to be buried in either bio-degradable casket, shroud, or favorite blanket to ensure the most natural burial possible). She discussed her desire to assure the preservation of her land as well as giving back to it

even after her death. *Id.* In fact, she has invited others to join her in this mission – an invitation that several of her friends have accepted. *Id.* The idea of her burial will just make it that much harder for someone to build something like "a bookstore" on her property. *Id.*

Ultimately, the law rarely makes everyone happy, as lines must be drawn at some point. However, conservation easements have, over time, become not only an innovative way but also a reliable way to strike the balance between public interests and private landownership. The world only has so much land and if it continues to be developed each time huge sums of money are at stake, our environment will be increasingly harmed. Regions like the Bluegrass may look to the option of conservative easements to ensure the continuation of not only their environment but also historic industries like raising horses. While some, like Joan Graham, would argue that these easements are not enough – that the land must become something more sacred than legally prohibited – it must be recognized that the future is unpredictable. The law then must allow for unknown possibilities that could change the current outlook of such land. In any event, our future generations, while maybe having to change the legal restrictions upon the land, will at least have it to fight over.

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631 SOUTH LIMESTONE, LEXINGTON, KY

40508 (859) 257-4747 BLOG.KJEANRL@GMAIL.COM (MAILTO:BLOG.KJEANRL@GMAIL.COM)