Not a Public Trust

The Land Trust-Held Conservation Easement in Pennsylvania

No legal precedent exists in Pennsylvania for finding that a conservation easement acquired by a private land trust is a public trust.

Introduction

Land trusts work to conserve natural resources; in doing so they provide a public benefit. They act in the public's interest; they create lasting conservation legacies. Because of this, people come to trust these conservation organizations as community leaders and responsible stewards of the land. Land trust staff and volunteers naturally want to maintain and deepen that trust.

Advocates for increased government oversight of conservation easements sometimes assert that conservation easements acquired by land trusts are "trusts." Sometimes they mean charitable trusts; sometimes—public trusts. Sometimes it's not clear what is meant. Regardless, a person not educated in the distinctions between lay usage and legal constructs around the word *trust* may perceive the assertion that "a land trust-held easement is a public trust" to be an innocuous, positive statement. And a person eager to convey the trustworthiness of their organization and the conservation process may repeat such statements without critical examination of what they are actually saying.

This guide examines the public trust assertion. It finds that, although conservation may be in the public interest, no legal precedent exists in Pennsylvania for finding that a conservation easement acquired by a private land trust is a public trust.[1] Should such a claim be asserted by a government, this would constitute a taking for which compensation would be due to the land trust.

The companion guide *Not a Charitable Trust: The Conservation Easement in Pennsylvania*[2] investigates the false notion that all conservation easements are charitable trusts.

The guide *The Nature of the Conservation Easement and the Document Granting It*[3] describes what a conservation easement actually is and how it operates under the law. In exploring holder covenants and the roles of beneficiaries and the attorney general, it identifies the powerful mechanisms available under the law for promoting trust and ensuring the responsible management of conservation easements in the public interest.

The Public Interest

The Pennsylvania General Assembly, in enacting the Conservation and Preservation Easements Act,[4] established the public's interest in preserving the viability of conservation easements as an instrument for the protection of natural

[1] The applicability of the public trust doctrine (or its partial codification in the Donated or Dedicated Property Act) to *government-held* conservation easements is beyond the scope of this guide.

[2] First published by WeConservePA in 2014.

[3] First published by WeConservePA in 2014.

[4] The Pennsylvania Conservation and Preservation Easements Act, the act of June 22, 2001 (P.L. 390, No. 29) (32 P.S. §§5051-5059) was enacted in its final form as House Bill 975, PN 2294. See the WeConservePA guide at https://conservationtools.org/library_items/957.

and scenic resources.[5] The people of Pennsylvania established in the state constitution the imperative for the state to conserve public natural resources, which buttresses the public interest in conservation easements to the extent they protect public resources (e.g., water, air, wildlife).

The public interest in the viability of conservation easements and the conservation achieved by them extends to all easements, whether held by land trusts or government. It forms the basis for intervention by the Attorney General when holder covenants are not enforced due to the absence or dereliction of duty on the part of holder.

This *public interest* in conservation easements is entirely different in concept from viewing a conservation easement as a *public trust*. The recognition of a public interest in the viability of conservation easements does not imply that they have become public trust property.

The Public Trust Concept in Law

Public trust concepts date back to ancient times. Sixth century Rome's Institutes of Justinian, which were a codification of still older law, recognized that:

> Things common to mankind by the law of nature, are the air, running water, the sea, and, consequently, the shores of the sea; no man therefore is prohibited from approaching any part of the seashore whilst he abstains from damaging farms, monuments, [and buildings], which are not in common as the sea is.[6]

The common law public trust doctrine in the United States has a direct lineage with the English common law: the Crown held title to submerged lands in tidal waters, ensuring open navigation. The Crown was said to hold the lands in trust for the benefit of the public. In America, with many navigable rivers not subject to tides, the doctrine expanded to include fresh waters on which commerce occurred. Over time, and varying by state, the public trust doctrine has evolved. This doctrine may have more or less applicability to resources viewed as being held as public trusts.

In Pennsylvania, public trust concepts are manifest in Pennsylvania's constitution and in the Donated or Dedicated Property Act (DDPA).[7]

Article I §27 of the Pennsylvania Constitution reads:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

The DDPA applies to real estate interests donated to *political subdivisions*[8] for use as public facilities[9] or dedicated for public use, whether or not there is a formal record of the political subdivision's acceptance of the dedication.[10] The DDPA provides that the donated or dedicated property must stay in trust—its original use must continue—unless the use "is no longer practicable or possible and has ceased to serve the public interest."

No evidence is forthcoming in the Pennsylvania Constitution or the DDPA, nor in Pennsylvania common law, that a privately held conservation easement[11] can somehow be construed as a public natural resource, public facility, or public trust.

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[5] §2 of the Conservation and Preservation Easements Act: "The General Assembly recognizes the importance and significant public and economic benefit of conservation and preservation easements in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open-space and scenic resources of this Commonwealth."

[6] Justinian, *The Institutes of Justinian*, 67 (Thomas Cooper ed. & trans., 1841).

[7] Act of December 15, 1959 P.L. 1772, 53 P.S. §§3381-3386.

[8] A political subdivision commonly refers to a county, city, township, or other municipality having legislative powers.

[9] §1(3) of the DDPA states that: '"Public facility" shall mean without limitation any park, theatre, open air theatre, square, museum, library, concert hall, recreation facility or other public use.'

[10] *In re Erie Golf Course*, 605 Pa. 484, 992 A.2d 75 (2010).

[11] This guide does not address the applicability of either the public trust doctrine or the DDPA (defined below) to conservation easements held by government.

Justifications for Application

One alleged justification for application of the public trust doctrine to conservation easements is to safeguard the benefits accorded to the public by conservation easements. Research for this guide has not disclosed any Pennsylvania case in which the charitable assets of an organization, no matter how beneficial to the public, were claimed by the Commonwealth of Pennsylvania as public trust assets.

Another alleged justification is to avoid the possibility of mismanagement of conservation easements. Research for this guide has not disclosed any case in which the government was permitted to take over the private assets of charities, without compensation, on the grounds that the directors of these charities may, in the future, mismanage the assets. Imposition of a public trust is a drastic step reserved for instances when compelling public necessity, not satisfied by other means, compels action.

Costs of Imposing Public Trust Doctrine

Advocates of the notion that the public trust doctrine will enable government to exercise oversight over management decisions by charitable organizations have not articulated the costs and risks arising from the imposition of public trusts on conservation easements.

Imposition of a public trust is an all-or-nothing proposition. If the government asserts control over property as trustee for the benefit of the public, then (if such assertion is upheld by the court), the government cannot pick and choose the rights that it wants to exercise. It is the owner of the trust asset (in the case of an easement, the holder of the easement) that bears total responsibility to own, operate, and manage it for the benefit of the public. There is no legal precedent in Pennsylvania for the picture painted by advocates of the public trust that imposition of a public trust will afford the state the benefit of control over easement decisions without the corollary burden: assumption of total responsibility for providing and paying for all management, administration, and enforcement of easements in perpetuity.

Takings

The state, or political subdivision, asserting that conservation easements are public trust property risks liability for a compensable taking if the courts decline to find a legally valid public trust in the claimed assets.[12] If the courts reject the claim, the usurpation of holder's rights to own and manage its charitable assets under otherwise applicable law is a compensable taking.[13]

Compelling Private Charity to Act as Public Trustee

To avoid the wholesale transfer of conservation easements to state or local government under the public trust doctrine, proponents of the public trust notion sometimes add a twist wholly unsupported by existing law. They assert that application of the public trust doctrine to conservation easements not only subjects private charitable assets to a public trust but *compels the private charity to*

[12] *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) held that imposition of a legally valid public trust is not a taking for which compensation must be paid by the state.

[13] If the government does not want to bear responsibility for taken easements in perpetuity, the government may seek to transfer the easements back to private land trusts subject to government controls (for example, controls on amendment). This may not be feasible, even with a willing transferee. A taking of property from one private owner for the purpose of transfer to another private owner is illegal under Pennsylvania law, whether or not compensation is paid. (Pennsylvania's Urban Redevelopment Law (the Act of May 24, 1945, Public Law 991, codified at 35 P.S. §1701 et seq.) and Pennsylvania's Eminent Domain Code (26 Pa. Cons. Stat.) were amended in 2006 in response to the Supreme Court decision in *Kelo vs. City of New London, 125 S. Ct. 2655 (2005)* which upheld such takings in the context of urban renewal projects.)

assume a quasi-governmental capacity as trustee for the benefit of the public.[14]

No evidence has been found that any private charity governed by Pennsylvania law has ever been compelled to act as an agent or instrumentality of the state as trustee of a public trust imposed on its assets. Conscription of a private charity to act as an instrumentality of the state, involuntarily and apparently for no compensation, may be expected to raise a number of statutory and constitutional issues.

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[14] Research for this guide has disclosed only one case (arising in New Jersey) in which not only was private property (beachfront) held to be subject to a public trust but the private owner was held to act as trustee for the benefit of the public. The owner was a community association that owned and controlled all of the streets and common areas in the oceanfront community and was described as a quasi-public entity functioning much like a municipality. *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306 (1984).