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The Enforceability of Exacted Conservation Easements

Jessica Owley

THE ENFORCEABILITY OF EXACTED CONSERVATION EASEMENTS

Jessica Owley[*†]

INTRODUCTION

Conservation easements are nonpossessory interests in land that restrict a landowner's ability to use her land in an otherwise permissible way with the goal of yielding a conservation benefit.[1] Most conservation easements restrict development.[2] The most widely discussed and studied conservation easements are those that are donated or sold.[3] Landowners who donate qualifying perpetual conservation easements can deduct the value of the conservation easements from their income taxes as they do for other charitable donations.[4] In other situations, landowners receive cash in exchange for relinquishing their rights.[5] Donations and sales are not the only ways to create conservation easements, however. Conservation

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1. *See, e.g.*, OR. REV. STAT. § 271.715(1) (2009); UNIF. CONSERVATION EASEMENT ACT § 1(1) (1981); John G. Cameron, Jr., *Easements and Other Servitudes*, *in* MODERN REAL ESTATE TRANSACTIONS: PRACTICAL STRATEGIES FOR REAL ESTATE ACQUISITION, DISPOSITION, AND OWNERSHIP 815, 833 (ALI-ABA Course of Study, July 29–31, 2010), *available at* SS012 ALI-ABA 815 (Westlaw).

2. Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 484 (2004); Adena R. Rissman et al., *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 710 (2007).

3. *See, e.g.*, Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 123 (2010); Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47, 48 (2011); Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73, 73 (2010); James L. Olmsted, *Carbon Dieting: Latent Ancillary Rights to Carbon Offsets in Conservation Easements*, 29 J. LAND RESOURCES & ENVTL. L. 121, 121 (2009); Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements Over Public Land*, 77 U. CHI. L. REV. 341, 341 (2010); Ann Harris Smith, Note, *Conservation Easement Violated: What Next? A Discussion of Remedies*, 20 FORDHAM ENVTL. L. REV. 597, 602 (2010).

4. I.R.C. § 170(h) (2006) (outlining the rules regarding charitable deductions for conservation easements).

5. Many landowners also receive the benefit of reduced property taxes.

easements also arise in eminent domain proceedings,[6] through judicial settlements,[7] and by exaction.[8]

Exacted conservation easements arise in permitting contexts where, in exchange for a government benefit, landowners either create conservation easements on their own property or arrange for their creation on other land.[9] Exaction of conservation easements is popular throughout the country by all levels of government.[10] Exacted conservation easements exchange public

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6. *See* James A. Fellows, *Tax Issues*, 34 REAL ESTATE L. J. 349 (2005) (discussing tax issues surrounding the use of eminent domain to acquire conservation easements); Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin's Great River Road: A Progress Report on Perpetuity*, 66 J. AM. PLANNING ASSOC. 177, 182 (2000) (discussing the use of eminent domain to acquire conservation easements along Wisconsin's Great River Road).

7. United States v. A.T. Massey Coal Co., No. 2:07-0299, 2008 WL 1744630, at *4 (S.D. W. Va. Apr. 9, 2008); United States v. Bd. of Trustees of Univ. of Ill., No. 07-2188, 2008 WL 345542, at *1 (C.D. Ill. Feb. 7, 2008); United States v. Alcoa, Inc., No. A-03-CA-222-SS, 2007 WL 5272187, at *11 (W.D. Tex. Mar. 14, 2007).

8. *See, e.g.*, Short v. U.S. Army Corps of Eng'rs, 613 F. Supp. 2d 103, 104 (D.D.C. 2009) (involving a dispute that arose as a result of a real estate developer allowing a conservation easement on his property to protect wetlands in exchange for a developing permit); Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 481 F. Supp. 2d 1213, 1217 (D. Colo. 2007) (upholding a conservation easement exacted by a county board of commissioners); Lake Mary Villas, LLC v. Cnty. of Douglas, No. W2004-02124-CCA-R3-CD, 2006 WL 16315, at *1 (Minn. Ct. App. Jan. 3, 2006); Nat'l Ass'n of Home Builders v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 356 (D.N.J. 1999) (upholding the Hudson River Waterfront Area Rule, which conditioned development permits on exacted conservation easements for a thirty-foot-wide walkway on waterfront property).

9. Jessica Owley, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 310 (2004) [hereinafter *Exacted Conservation Easements*]. This terminology is perhaps a bit tricky—not only because there is a lack of clarity in the courts as to what constitutes an exaction, *see, e.g.*, St. John's River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 13 (Fla. Ct. App. 2009) (Orfinger, J., concurring) (discussing the nature and definition of exactions); Smith v. Town of Mendon, 822 N.E.2d 1214, 1219 (N.Y. 2004) (holding that conservation easements that do not require public access are not exactions); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 734 (2007) (discussing definitions and descriptions of exactions)—but also because of the placement of the conservation easements. Where a landowner is required to place a conservation easement on her own land, it clearly qualifies as an exaction. Where a landowner is required to buy a conservation easement from a willing seller, some would characterize the resulting restriction as a sold conservation easement. *See* Bldg. Indus. Ass'n. v. Cnty. of Stanislaus, 118 Cal. Rptr. 3d 467, 483 (Cal. Ct. App. 2010) (holding that conservation easements purchased from willing sellers are not exacted conservation easements); *see also infra* notes 127–35 and related discussion. I put these two types of conservation easements in the same category because the restriction would not exist but for the permitting requirement.

10. As of yet, there are no comprehensive studies cataloguing and describing conservation easements by acquisition method. *See generally* Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1239 (2009) (describing the absence of comprehensive conservation easement data because conservation easements are regarded as a private tool and not often communicated to the public). Moreover, it is often difficult to tell how a conservation easement was created. It may not be clear from the text of a conservation easement deed that it is an exaction. However, there are many ways that one

goods for private gain. For example, in exchange for allowing coastal vacation homes or suburban development into fragile ecosystems, the public gains the benefit of land conservation.

Despite their popularity, exacted conservation easements have undergone minimal scrutiny.[11] This Article explores enforceability concerns associated with exacted conservation easements. Uncertainty regarding the enforceability of exacted conservation easements calls into question their use as a method of land conservation. Furthermore, the questionable validity of exacted conservation easements indicates that the permits relying upon such exactions could be ill-advised and potentially in jeopardy.

Assessing the enforceability of exacted conservation easements requires inquiry into state conservation-easement statutes as well as state property law. Furthermore, the underlying permitting laws provide additional guidance. In some cases, exacted conservation easements are not enforceable under either state conservation-easement law or state property law but may be enforceable based on their status as exactions. Nonetheless, it can be difficult to determine which conservation easements are exactions or what underlying permit or statute the exactions are associated with.

This Article uses California law as a lens to examine the enforceability of exacted conservation easements. Part I begins by introducing and defining exacted conservation easements. Part II examines the enforceability of exacted conservation easements in California. By illuminating the details of the statutes, legislative history, and case law in California, this Article demonstrates a variety of concerns that emerge in the context of exacted conservation easements.

While this Article presents reasons to discourage the exaction of conservation easements, Part III concludes by offering suggestions for

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can see that the use of exacted conservation easements is widespread and growing. For example, the overall number of cases involving conservation easements has been steadily increasing (from twenty-two in 2000 to eighty-eight in 2010 for cases available on the Westlaw database). Many of these conservation easements result from permits and mitigation requirements and are, therefore, exacted conservation easements. *See, e.g.*, Motorsports Holdings, LLC v. Town of Tamworth, 993 A.2d 189, 192 (N.H. 2010) (concerning a conservation easement required to mitigate the environmental impact of the project); Unistar Props. v. Conservation & Inland Wetlands Comm'n, 977 A.2d 127, 134 (Conn. 2009) (discussing whether a permit application could be required to include proposals for conservation easements to be considered complete); Bowie-McCready v. Morristown Zoning Bd. of Adjustment, 2008 WL 4191237, at *3–4 (N.J. Super. Ct. App. Div. Sept. 12, 2008) (noting the permit required the applicant to preserve a historic home); *Rocky Mountain Christian Church*, 481 F. Supp. 2d at 1225–26 (describing a conservation easement required as a permit condition).

11. *But see Exacted Conservation Easements, supra* note 9, at 309–10 (discussing the benefits and burdens of exacted conservation easements); Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEBRASKA L. REV. 1043, 1089 (2006) (discussing the difference between conservation easements that are exacted and those that are sold or donated) [hereinafter *Emergence*].

improvement. First, states should clarify their positions on exacted conservation easements by expressly addressing exaction in their conservation-easement statutes. However, as the discussion of California law demonstrates, this language must be clear. Second, to further clarify the elements and uses of exacted conservation easements, government agencies that exact conservation easements should promulgate regulations related to their use. These regulations should ensure that permit issuers retain, at a minimum, third-party rights of enforcement in the conservation easements they exact. This will keep the permitting agency involved even if it is not the holder of the exacted conservation easement.

In the event that a state conservation-easement statute is unclear or prohibits exaction, another law must explicitly authorize exacted conservation easements for them to be enforceable. Therefore, each exacted conservation easement should include (1) the name of the underlying law that authorizes the exaction and (2) the name or number of the associated permit. Including this information will assist courts in the course of enforcement actions or conservation-easement challenges. Together, these changes will protect the public benefits associated with exacted conservation easements and help ensure their long-term viability.

I. EXACTED CONSERVATION EASEMENTS

All fifty states now have conservation-easement statutes affecting over nine million acres of land nationwide.[12] The oldest identifiable conservation-easement statutes were adopted in Massachusetts (1956)[13] and in California (1959).[14] Originally, the California and Massachusetts statutes

12. KATIE CHANG, LAND TRUST ALLIANCE, 2010 NATIONAL LAND TRUST CENSUS REPORT 5 (2011). The Land Trust Alliance's census calculates the amount of land protected by conservation easements held by land trusts but does not include national land trusts like The Nature Conservancy. Furthermore, because the acreage protected by government entities is unknown, the total number of protected acres is likely much higher. The acreage protected by land trusts through conservation easements increased by over 275% between 2000 and 2010. *Id.* Thus, the current figures are likely much higher. A new census is expected to be released in October 2011. *2010 National Land Trust Census*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/land-trusts/land-trust-census (last visited Dec. 1, 2011).

13. 1956 Mass. Acts 565.

14. The Scenic Easement Deed Act of 1959, CAL GOV'T CODE §§ 6950–6954 (West 2011). Although these are the oldest conservation-easement statutes, scholars have shown that conservation easements date back much further. The first American conservation easement appears to have been written in the late 1880s to protect the parks and parkways of Boston designed by Frederick Law Olmstead. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9, 9 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter PROTECTING THE LAND]. These

only authorized government entities to hold conservation easements,[15] but in 1969, Massachusetts became the first state to allow nonprofit organizations to hold conservation easements.[16] Many states with conservation-easement statutes modeled their legislation on the Uniform Conservation Easement Act (UCEA),[17] which the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved in 1981.[18]

Conservation easements are property rights in land held by someone other than the landowner that must have a conservation purpose. The UCEA defines a conservation easement as:

> [A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[19]

When an owner places a conservation easement on her land, whether by donating it, selling it, or creating it to meet legal requirements, she is agreeing to refrain from exercising certain rights.[20] These rights can include

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older conservation easements did not have statutory authorization and many conservationists were hesitant to use a tool that appeared to conflict with common-law restrictions on servitudes. Although there is a rich history of conservation easements, they were still considered an obscure tool until recently. Indeed, the first publication using the term "conservation easement" did not appear until 1959. William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. 8 (1959).

15. 1956 Mass. Acts 631; CAL GOV'T CODE §§ 6950–6954.

16. Mary Ann King & Sally Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 72 (2006).

17. *Legislative Fact Sheet – Conservation Easement Act*, UNIF. LAW COMM'RS, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act (last visited Dec. 1, 2011).

18. UNIF. CONSERVATION EASEMENT ACT (1981).

19. *Id.* § 1(1).

20. Although we generally think of conservation easements as negative restrictions preventing landowners from undertaking certain actions, conservation easements may also involve affirmative obligations such as requiring restoration projects. Alexander R. Arpad, Comment, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 112–21 (2002) (explaining that the affirmative aspect of conservation easements is often ignored). States often explicitly recognize both negative restrictions and affirmative duties in their state conservation-easement statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-271(1) (2007); KY. REV. STAT. ANN. § 382.800 (LexisNexis 2002); OR. REV. STAT. § 271.715(1) (2009); S.C. CODE 1976 § 27-8-20(1) (2007); WIS. STAT. ANN. § 700.40(1)(a) (West 2001).

the right to develop, the right to farm in a certain manner, or the right to fill in wetlands. Conservation easements are essentially rights of enforcement. The holder of the conservation easement has the right to bring an action against the landowner if the landowner violates the terms of the conservation easement. Under most state laws, the conservation-easement holder can be either a government entity or a nonprofit conservation organization.

Conservation easements vary in duration, but most are perpetual.[21] Indeed, the desire to make long-term and perpetual land-conservation restrictions is one of the chief reasons states passed conservation-easement statutes.[22] Because one of the UCEA's goals is to enable perpetual conservation easements, it makes perpetuity the default duration.[23] This also allows donated conservation easements to qualify for federal tax benefits, as the IRS requires perpetuity.[24]

Many landowners donate conservation easements burdening their land. They may do so for many reasons, the chief of which are usually a desire to preserve the land's character or to receive a tax break.[25] Conservation easements, like other property rights, can also be sold.[26] Because no clearinghouse for conservation easements yet exists, the percentage sold is unknown.[27] The chief motivation for selling conservation easements is

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21. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1083 (1996). Cheever and others contend that most conservation easements are perpetual. While this seems likely to be true, there is little data on conservation easements to confirm the percentage of perpetual versus term conservation easements.

22. Jean Hocker, *Foreword* to PROTECTING THE LAND, *supra* note 14, at xvii–xviii (explaining that states adopted such statutes because the long-term enforceability of negative easements in gross was questionable); *see also Emergence*, *supra* note 11, at 1075–77.

23. UNIF. CONSERVATION EASEMENT ACT § 2(c) ("[A] conservation easement is unlimited in duration unless the instrument creating it otherwise provides.").

24. I.R.C. § 170h(5)(A) (2006).

25. Julie Ann Gustanski & Roderick H. Squires, *Preface* to PROTECTING THE LAND, *supra* note 14, at xxi.

26. A.M. Merenlender, L. Huntsinger, G. Guthey & S.K. Fairfax, *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 67 (2004). *But see infra* note 97 and accompanying text for a discussion regarding a possible prohibition on selling conservation easements in California.

27. *See generally* Morris & Rissman, *supra* note 10, at 1239. As Morris and Rissman note, there is a tension between public interest (and rights) in conservation easement enforcement and landowners' concerns about privacy. Their article examines recordation and tracking of conservation easements in California, explaining the lack of information about conservation easements and offering suggestions to improve tracking systems. James Olmsted has also explored the challenges regarding lack of information about conservation easements. He refers to the large body of protected lands for which the public lacks information as "the invisible forest." James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 L.

likely profit,[28] but landowners who sell them may also be motivated to retain both the character of their land and their way of life or to gain some property-tax benefits.[29]

In some states, conservation easements may be condemned.[30] Various federal and state laws allow government entities to take such action.[31] In these cases, the government agency taking the conservation easement pays the underlying landowner just compensation for the loss of the property right. Acquisition of conservation easements via eminent domain can be an important component of land-conservation programs.[32] However, a few states have specifically prohibited state and municipal governments from using their eminent domain powers to acquire conservation easements.[33]

Increasingly, instead of remaining relevant only to private decisions about the future of the family farm, conservation easements are becoming part of large development projects with complex permitting programs.[34] When developers and individual landowners want to make changes to the land, there are often local, state, and federal permit requirements.[35] Many of these permit programs require the permittees to incorporate mitigation measures.[36] Conservation easements are common methods of meeting these

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& CONTEMP. PROBS. 51 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id= 1690007.

28. *See* Terri Marie Mashour, Assessing Landowner Perceptions and Prices of Conservation Easements in Florida 76–79 (2004) (unpublished Master's thesis) (on file with author).

29. Paul Elconin & Valerie A. Luzadis, Evaluating Landowner Satisfaction with Conservation Restrictions 8–9 (1997) (unpublished Master's thesis) (on file with author).

30. *See, e.g.*, Hardesty v. State Roads Comm'n of the State Highway Admin., 343 A.2d 884, 887 (Md. 1975) (discussing a state program condemning scenic easements); Ohm, *supra* note 6, at 182 (discussing a similar program along the Great River Road in Wisconsin).

31. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 12:2 (2011).

32. *See, e.g.*, Kamrowski v. State, 142 N.W.2d 793, 795–96 (Wis. 1966) (sustaining the use of the eminent domain power to acquire scenic easements along the St. Croix River in Wisconsin).

33. ALASKA STAT. § 34.17.010(e) (2010); OR. REV. STAT. § 271.725(1) (2009); UTAH CODE ANN. § 57-18-7(1) (LexisNexis 2010); ALA. CODE § 35-18-2(a) (1997). *But see* ALA. CODE § 35-18-2(e) (explaining that the state cannot prevent the federal government from condemning conservation easements).

34. *Emergence*, *supra* note 11, at 1099.

35. *See* FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 1–4 (1971).

36. Many articles have discussed and assessed various mitigation programs. *See, e.g.*, David C. Levy & Jessica Owley, *Preservation as Mitigation under CEQA: Ho-hum or Uh-oh?*, 14 ENVTL L. NEWS 18 (2005); Kelly Chinners Reise, Erica Hernandez & Mark T. Brown, *Evaluation of Permit Success in Wetland Mitigation Banking: A Florida Case Study*, 29 WETLANDS 907 (2009); J.B. Ruhl, James Salzmann & Iris Goodman, *Implementing the New Ecosystem Services Mandate of the Section 404 Compensatory Mitigation Program—A Catalyst for Advancing Science and Policy*, 38 STETSON L.

mitigation requirements.[37] These mitigation conservation easements are a form of exaction.

Government agencies often condition permit issuance on exactions.[38] An exaction generally occurs when a unit of government requires a property owner to contribute money or dedicate land to a municipality as a condition of the municipality granting a permit to develop land.[39] Exactions enable governments to transfer the costs associated with development to developers and future residents of projects.[40] Exactions for streets, sidewalks, and utilities within a subdivision are common examples.[41]

Although largely similar to other conservation easements, exacted conservation easements differ in key ways. If conservation easements are voluntary, private agreements made by groups or individuals seeking to protect land outside of a governmental context, *exacted* conservation easements are the opposite. Exacted conservation easements do not arise out of personal motivations to protect land or conserve species. Exacted conservation easements do not result in charitable tax deductions.[42] Instead,

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REV. 251 (2009); Mark Stevens, *Implementing Natural Hazard Mitigation Provisions: Exploring the Role that Land Use Planners Can Play*, 24 J. PLANNING LITERATURE 362, 362 (2010).

37. *See, e.g.*, Stevens, *supra* note 36, at 363 (listing conservation easements as one of several ways for local governments to address natural hazard risks in development management programs); Bldg. Indus. Ass'n. of Cent. Cal. v. Cnty. of Stanislaus, 118 Cal. Rptr. 3d 467, 481 (Cal. Ct. App. 2010) (stating that mitigation requirements are satisfied by the "acquisition of a farmland conservation easement").

38. *See* Fenster, *supra* note 9, at 733–34.

39. *See id.* at 734 n.34; Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 479–81 (1991).

40. Fenster, *supra* note 9, at 733–34.

41. *See* Lawrence A. McDermott & David L. Taylor, Jr., *Subdivision Ordinance, Site Plan Regulations, and Building Codes*, *in* LAND DEVELOPMENT HANDBOOK 147, 148 (3d ed. 2008).

42. That is to say that they should not. I.R.S. Priv. Ltr. Rul. 9612009 (Mar. 22, 1996) (explaining that mitigation conservation easements are treated as sold, not donated); *see also* I.R.S. Priv. Ltr. Rul. 201109030 (Mar. 4, 2011) (stripping a land trust of its nonprofit status for, among other things, accepting donated conservation easements that do not qualify as donations, including some conservation easements associated with local land-use permits). While it is hard to interpret this private letter ruling because it is stripped of identifying information, it appears that a landowner "donated" a conservation easement that was required to meet a local permitting requirement. The IRS has been increasingly diligent in its assessment of conservation easements and land trusts. Earlier, the IRS addressed conservation-easement-related concerns by closely examining the appraisals of conservation easements (many of which turned out to be inflated). This letter ruling indicates that the IRS also looks at the actions of land trusts accepting conservation easements. For a recent assessment of IRS activities and recommendations for improvement, see the two part series, Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 1: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010); Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 REAL PROP. TR. & EST. L.J. 1 (2011).

exacted conservation easements are a government tool—negotiated and often held by government entities. They are not entered into willingly; landowners are coerced into creating or contributing to exacted conservation easements.

II. ENFORCEABILITY OF EXACTED CONSERVATION EASEMENTS IN CALIFORNIA

Enforceability of exacted conservation easements is a threshold question of analysis for the continued use of this tool. Given their widespread use, exacted conservation easements must be valid, legal agreements. Assessing the validity, and thus legal enforceability, of the exacted conservation easements in California requires a close examination of the state's conservation-easement statutes and state servitude law.

A. State Conservation-Easement Statutes

The first step in analyzing whether an exacted conservation easement is enforceable is to examine the state conservation-easement enabling act. In California, three statutes govern the creation of conservation easements: the Scenic Easement Deed Act (SEDA), the Open Space Easement Act (OSEA), and the California Conservation Easement Act (CalCEA).[43] Determining the validity of exacted conservation easements in California requires an examination of the statutory background of each law and the general rules regarding exacted conservation easements.

1. Scenic Easement Deed Act

In 1959, pressure from landowners in Monterey County who wanted to protect the coastline from development led to the enactment of the Scenic Easement Deed Act (SEDA).[44] This law allows local governments to accept grants of scenic easements from landowners who wish to preserve specified scenic and aesthetic values of their lands. SEDA was the first legislation of its kind in the United States.[45] It recognized open-space protection as a valid public asset even when there was no public access to that open space.[46]

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43. Most states have one central conservation-easement statute, but there may be additional statutes regarding agricultural, open-space, scenic, or historic conservation easements. California serves as an excellent case study because it offers three statutes, each with a slightly different approach and focus.

44. The Scenic Easement Deed Act of 1959, CAL. GOV'T. CODE §§ 6950–6954 (West 2011).

45. Whyte, *supra* note 14, at 61.

46. CAL. GOV'T. CODE §§ 6950–6951.

Only a qualified set of conservation easements are enforceable under SEDA. Specifically, a city or county must be the holder of the conservation easement (or as SEDA labels them, "lesser interest[s] . . . in real property"). Furthermore, conservation easements made under SEDA must protect scenic and aesthetic values.[47]

2. Open Space Easement Act

Further reaching than SEDA, the Open Space Easement Act (OSEA)[48] allows local governments to accept and enforce open-space easements and to withhold building permits for construction that would violate such agreements.[49] Originally passed in 1969, the state legislature amended OSEA in 1977 to expand ownership of open-space easements to nonprofit organizations (i.e., land trusts).[50] The grant of an open-space easement to a land trust under OSEA must meet the approval of the county or city where the property is located.[51] Approval is contingent upon consistency with the local general plan and a finding that the open-space easement in question will serve a public interest.[52]

OSEA's definition of open-space easement states that the right or interest defined by the conservation easement must "preserve for public use or enjoyment the natural or scenic character of . . . open-space land."[53] Open-space easements under OSEA must meet at least one of the following requirements:

> (1) That the land is essentially unimproved and if retained in its natural state has either scenic value to the public, or is

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47. *Id.* §§ 6950, 6954. The statute allows protection for "open space" or "open areas," which it defines as

> any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

Id. § 6954. The emphasis is on beauty and openness.

48. Open Space Easement Act of 1974, CAL. GOV'T. CODE §§ 51050–51097 (West 2011). The 1974 act amended the 1969 version of the statute, which only applied to open-space easements created before 1974. *See id.* § 51050.

49. *Id.* § 51058.

50. *Id.* § 51075(d), (f).

51. *Id.* § 51083.

52. *Id.* § 51084(a), (b).

53. *Id.* § 51075(d).

> valuable as a watershed or as a wildlife preserve, and the instrument contains appropriate covenants to that end.
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> (2) It is in the public interest that the land be retained as open space because such land either will add to the amenities of living in neighboring urbanized areas or will help preserve the rural character of the area in which the land is located.
>
> (3) The public interest will otherwise be served in a manner recited in the resolution and consistent with the purposes of this subdivision and Section 8 of Article XIII of the Constitution of the State of California.[54]

If a city or county violates or fails to enforce an open-space easement, any local landowner or resident may sue the open-space easement holder to seek enforcement.[55] The only way an OSEA easement can be terminated (other than by expiration)[56] is by abandonment.[57] However, abandonment cannot occur without the approval of the holder. This means approval either from the governing board of the land trust or from the local government entity holding the open-space easement.[58] The governing body of the city or county must always provide approval before abandonment proceedings can

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54. *Id.* § 51084(b)(1)–(3). Section 8 of Article XIII of the California Constitution states:

> To promote the conservation, preservation and continued existence of open space lands, the Legislature may define open space land and shall provide that when this land is enforceably restricted, in a manner specified by the Legislature, to recreation, enjoyment of scenic beauty, use or conservation of natural resources, or production of food or fiber, it shall be valued for property tax purposes only on a basis that is consistent with its restrictions and uses.

CAL. CONST. art. XIII, § 8. This constitutional provision enables landowners to lower their tax liability when encumbering their land with conservation easements. It also outlines permissible public goals for such restrictions.

55. CAL. GOV'T CODE § 51086(a).

> In the event the county or city fails to seek an injunction against any threatened construction or other development or activity on the land which would violate the easement or to seek a mandatory injunction requiring the removal of any structure erected in violation of the easement, or if the county or city should construct any structure or development or conduct or permit any activity in violation of the easement, the owner of any property within the county or city, or any resident thereof, may, by appropriate proceedings, seek such an injunction.

Id.

56. Open-space easements under OSEA are not required to be perpetual. Section 51075(d) explains that easements may be perpetual or for a term of years. *Id.* § 51075(d). The 1969 version of OSEA stated that a term could not be less than twenty years. *Id.* § 51053. The current version shortens that term to ten years. *Id.* § 51081.

57. *Id.* § 51091(b).

58. *Id.* § 51093(a).

begin regardless of who holds the open-space easement.[59] The statute does not address what happens if a land trust goes out of existence, and the statute is silent on transferability.

3. California Conservation Easement Act

The third California statute providing a potential route for enforcing conservation easements is the California Conservation Easement Act (CalCEA) of 1979.[60] The law enables nonprofit organizations to obtain and hold conservation easements without requiring approval from the county or city in which the conservation easements are located. Originally, CalCEA only allowed land trusts to hold conservation easements, but the 1981 amendments enabled all levels of state and local governments to be holders.[61] CalCEA was amended again in 2004, adding federally recognized California Native American tribes to the list of permissible holders[62] but not giving the federal government itself this right.[63] Under CalCEA, conservation easements must be perpetual.[64]

Even proponents of CalCEA see problems with the law and its coverage.[65] The statute leaves certain vital elements of conservation easements to the discretion of courts, including release, merger, abandonment, prescription, and the applicability of the doctrine of changed conditions.[66] It is silent on the subject of modification and termination. Earlier drafts referenced termination, but these references were dropped, supposedly to strengthen the perpetuity aspect of the law.

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59. *Id.* § 51093(b).

60. California Conservation Easement Act of 1979, CAL. CIVIL CODE §§ 815–816 (West 2007).

61. Act of Sept. 16, 1981, ch. 478, sec. 1, § 815.3, 1981 Cal. Stat. 1818 (codified as amended at CAL. CIVIL CODE § 815.3(b)).

62. Act of Sept. 30, 2004, ch. 905, sec. 2, § 815.3, 2004 Cal. Stat. 88 (codified as amended at CAL. CIVIL CODE § 815.3(c)) (adding to the list of permissible holders a "federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed").

63. *Id.* §§ 815–816.

64. *Id.* § 815.2(b).

65. THOMAS S. BARRETT & PUTNAM LIVERMORE, THE CONSERVATION EASEMENT IN CALIFORNIA 30–33 (1983).

66. *Id.* at 32.

Table 1: California Conservation Easement Laws

Name of Law	Authorized Holders	Purposes
Scenic Easement Deed Act (SEDA)	Local governments	Scenic and aesthetic values
Open Space Easement Act (OSEA)	Local governments and non-profit organizations	Open space values
California Conservation Easement Act (CalCEA)	Non-profits, local and state governments, and certain tribes	Conservation values

B. Exactions and California's Statutes

To be valid under one of these statutes, an exacted conservation easement must adhere to all of the basic requirements of the statute, and the statute must allow exactions.

Both SEDA and OSEA are silent on the issue of exaction, so the exacted nature of a conservation easement may not automatically remove it from the purview of those laws. Indeed, in *Paoli v. California Coastal Commission*, a California Court of Appeal upheld the Commission's ability to exact an OSEA open-space easement as a condition of a building permit.[67]

Enforceability under SEDA turns on whether the goals of the exacted conservation easements are in line with SEDA's scenic goals.[68] For exacted conservation easements to be enforceable under OSEA, a local government must approve the open-space easement, and the agreement's goals must coincide with OSEA's enumerated acceptable goals.[69]

At first glance, it appears that no exacted conservation easements may be enforced under CalCEA, but a closer examination of the statute, legislative history, and case law presents a more complicated picture. The statute begins by declaring the legislature's intention to "encourage the *voluntary* conveyance of conservation easements to qualified nonprofit

67. Paoli v. Cal. Coastal Comm'n, 223 Cal. Rptr. 792, 798 (Cal. Ct. App. 1986).
68. *Id.*
69. *Id.*

organizations."[70] The statute further details the nature of conservation easements in section 815.2, explaining that "[a] conservation easement is an interest in real property *voluntarily* created."[71] Section 815.3 provides the most important language for assessing the validity of exacted conservation easements under CalCEA. It reads:

> Only the following entities or organizations may acquire and hold conservation easements:
>
> (a) A [qualifying] tax-exempt nonprofit organization . . . .
>
> (b) The state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and *if the conservation easement is voluntarily conveyed.* No local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter.
>
> (c) A [qualifying] California Native American tribe . . . *if the conservation easement is voluntarily conveyed.*[72]

Read together, these provisions create a confusing picture. The statute repeatedly mentions that conservation easements are to be voluntarily created and conveyed, suggesting that exactions are not permitted. In defining conservation easements, section 815.2(a) states that they must be voluntarily "created."[73] The statute also includes the phrase "voluntary conveyance."[74] According to section 815, the statute's purpose is "to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations."[75] In section 815.3's delineation of permissible holders, the statute states that conservation easements must be "voluntarily conveyed" to government and tribal holders.[76] The statute places no such requirement on nonprofit holders (perhaps because the purposes section already references voluntary conveyances to nonprofits or because the

70. CAL. CIVIL CODE § 815 (West 2007) (emphasis added).
71. *Id.* § 815.2(a) (emphasis added).
72. *Id.* § 815.3 (emphasis added).
73. *Id.*
74. *Id.* § 815.3(b).
75. *Id.* § 815.
76. *Id.*

legislature did not contemplate any form of involuntary conveyance to land trusts).[77]

The legislative history provides little insight into why this distinction amongst holders exists in the law.[78] The 1979 version of CalCEA (A.B. 245) only permitted nonprofit organizations to hold conservation easements.[79] When the Senate amended A.B. 245, the word "voluntary" first appeared.[80] In one round of amendments, the Senate added "voluntary" before "conveyance" in section 815 and the requirement that conservation easements be "voluntarily created" to section 815.2.[81] These were the only two substantive changes that day. The fact that both of these changes occurred at the same time suggests that the Senate was seeking to make a distinction between voluntary conveyance and creation. Unfortunately, without a more complete legislative history, there is no guidance on this distinction.

The 1981 amendments to the statute only complicated this issue further. In 1981, the California Legislature amended CalCEA to expand the list of potential holders.[82] The East Bay Regional Park District sponsored the legislation (A.B. 470), which was supported by the California Department of Parks and Recreation.[83]

The preliminary Legislative Counsel's Digest explained that the goal of the amendment was to "enable local governmental entities to acquire and hold conservation easements."[84] The Assembly Energy and Natural Resources Committee contended that it was only "logical" to allow governmental entities to hold conservation easements as they could already

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77. *Id.* § 815.3(a) (West 2007) (Historical and Statutory Notes). Thus, the statute opens by stating its intention to encourage voluntary conveyance to nonprofits but does not require conveyance to be voluntary for nonprofits in its section describing permissible holders. The state legislature has amended the holder section twice (in 1981 and in 2004) without adding a voluntary conveyance requirement for nonprofit holders, indicating perhaps that this was a purposeful choice. Act of Sept. 30, 2004, ch. 905, sec. 2, § 815.3, 2004 Cal. Stat. 88 (codified as amended at CAL. CIVIL CODE § 815.3(c)); Act of Sept. 16, 1981, ch. 905, sec. 1, § 815.3, 1981 Cal. Stat. 1818 (codified as amended at CAL. CIVIL CODE § 815.3(b)).

78. This distinction may be based on a presumption that a nonprofit organization would not be able to force the creation of conservation easements. Because nonprofit organizations have neither the ability to exact conservation easements nor eminent domain power, it may have seemed unnecessary. However, this does not explain the distinction between voluntary conveyance and voluntary creation.

79. A.B. 245, 1979–80 Gen. Assemb., Reg. Sess. (Cal. 1979).

80. *Id.* (as amended by Senate, June 5, 1979).

81. *Id.*

82. A.B. 470, 1981–82 Gen. Assemb., Reg. Sess. (Cal. 1981).

83. OFFICE OF PLANNING & RESEARCH, ENROLLED BILL REPORT, A.B. 470, 1981–82 Gen. Assemb., Reg. Sess. (Cal. 1981).

84. A.B. 470, 1981–82 Gen. Assemb., Reg. Sess. (Cal. 1981).

hold open-space easements under OSEA and there was "little practical difference in the kind of land" that might be subject to each type of restriction.[85] The Enrolled Bill Report discussed open-space easements under OSEA extensively, highlighting some of their cumbersome requirements.[86] It appears that the East Bay Regional Park District, along with other government agencies, wanted the ability to make OSEA-type easements without the cumbersome processes mandated by OSEA.[87]

The 1981 amendments complicate the story for exacted conservation easements. The Assembly amended the preamble to clarify that the purpose of the bill was to enable state and local governmental entities to hold a conservation easement but only "*if the conservation easement is voluntarily conveyed.*"[88] Perhaps the Assembly saw this addition to the preamble as necessary because section 815 only mentioned voluntary conveyance in the context of nonprofit organizations. To reinforce the voluntary conveyance requirement, A.B. 470 was amended to also include this requirement in the subsection enabling governments to hold conservation easements.[89]

Thus, the legislature required conservation easements held by governmental entities and nonprofit organizations to be voluntarily *conveyed* as well as voluntarily *created*.[90] What is the distinction between creation and conveyance?[91]

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85. ASSEMB. OFFICE OF RESEARCH, ASSEMBLY THIRD READING, A.B. 470, 1981–82 Gen. Assemb., Reg. Sess. at 22/rk/AFA-2:102 (Cal. 1981).

86. OFFICE OF PLANNING & RESEARCH, ENROLLED BILL REPORT, A.B. 470, 1981–82 Gen. Assemb., Reg. Sess., at 1 (Cal. 1981).

87. Additionally, tax implications differed between OSEA and CalCEA. Special tax assessment provisions for open-space easements result in a preferential tax assessment through an income capitalization procedure. Furthermore, OSEA has a specific provision regarding condemnation. When land burdened by an open-space easement is condemned, the landowner is compensated based on the value of the property without the open-space easement. Governmental entities wanted to be able to have conservation or open-space easements without these implications for public coffers. *See id.* at 1–2.

88. A.B. 470, 1981–82 Gen. Assemb., Reg. Sess. (Cal. 1981) (as amended by Assembly, Mar. 16, 1981 & Apr. 6, 1981) (emphasis in original).

89. *Id.* (as amended by Assembly, Mar. 16, 1981).

90. In 2004, the California Legislature amended the bill yet again to add California tribes to the list of permissible holders. Again, the voluntary conveyance language popped up without further explanation or definition. Act of Sept. 30, 2004, ch. 905, sec. 2, § 815.3, 2004 Cal. Stat. 88 (codified as amended at CAL. CIVIL CODE § 815.3(c)).

91. Perhaps the California Legislature did not intend to make a distinction between these two things. Maybe it is just clumsy drafting. Canons of statutory interpretation caution us both to be wary of sloppy drafting and to carefully consider the word choice of lawmakers. WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 257–71 (2000). Essentially, it is unclear whether the drafters of this statute intended anything by this word choice. Indeed, because interpreting this law in the context of exacted conservation easements is so difficult, the drafters probably did not think enough about the potential impact of this language. Interestingly, these

"Conveyance" may refer to the transfer of conservation easements after creation. Section 815.2 explains that conservation easements are to be "freely transferable."[92] Perhaps the requirements for conveyance refer to the transfer of conservation easements. If so, "voluntary conveyance" may relate to the intent of the original conservation-easement holder seeking to transfer the conservation easement. If so, this provision works to prevent the forced transfer of conservation easements from land trusts to tribes or governmental entities. This is a somewhat surprising requirement, however, because it is not clear how governments could force conveyance without exercising eminent domain, which the statute already appears to prohibit with its requirement of voluntary creation. Theoretically, a conservation easement could be created through donation or sale, and a government could then seek to obtain it through condemnation or exaction. This would not change the voluntary nature of the creation, but requiring voluntary conveyance would prevent such actions. This seems an unlikely and cumbersome scenario. There would be little motivation for government agencies to take on the burden of holding a conservation easement if nongovernmental organizations were willing to do the heavy lifting. Furthermore, such conservation easements would not be useful as exactions because the public would not gain any additional land protection—merely a transfer of enforcement power for existing land protection.

Alternatively, the requirements of voluntary creation and voluntary conveyance could overlap. When the statute requires voluntary conveyance of a conservation easement, it may refer to the original conveyance of the property interests. If so, it would appear that the limitations on voluntary conveyance in section 815.3 are superfluous. Principles of statutory interpretation caution against such an interpretation. For reasons of textual integrity, a reader should assume that the legislature's specific choice of different phrases was intended to convey separate ideas.[93] Presumably, the legislature did not mean merely to repeat itself. Because the statute already explained that conservation easements must be voluntarily created, the requirement of voluntary conveyance placed on certain categories of holders should have a separate meaning.[94]

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phrases not only remained in place upon amendment, but the 2004 amendment adding tribes to the list of permissible holders added the phrase yet again.

92. CAL. CIV. CODE § 815.2(a) (West 2007).

93. *See* ESKRIDGE ET AL., *supra* note 92, at 376; Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) (finding "[a] reluctance to treat statutory terms as surplusage").

94. However, if the state only meant to prohibit exercise of eminent domain to create conservation easements, why not just say so? Justifications for using this confusing term are not apparent.

No California case or statute refers to voluntary creation, but there is a long history surrounding the phrase "voluntary conveyance." Early California case law explains that a voluntary conveyance occurs when landowners give their property away. In this sense, a voluntary conveyance is a conveyance of land via gift or devise.[95] That is, the current property holder did not purchase the land. Courts described voluntary conveyances as those "made without the necessity of consideration"[96] or made "without a valuable consideration."[97]

If the California Legislature intended this meaning to apply, conservation easements could not be exacted or purchased—only donations would satisfy the voluntary conveyance requirement. This phrase would then be the only indication that in 1979, California conservation easements had to be donated to nonprofit organizations. Some language deleted from the statute might support this contention. The first version of the bill (A.B. 245) included discussions of the tax breaks involved with conservation easements. The bill explained both that the restrictions involved in conservation easements should work to reduce property taxes and that grants of conservation easements will qualify for tax deductions.[98] As the IRS provisions enabling tax deductions for donated conservation easements

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95. Washington v. Harrington, No. A119424, 2009 WL 161979, at *5 (Cal. Ct. App. Jan. 13, 2009) (examining property gifted to plaintiff and stating a rule that "equity will reform a voluntary conveyance where by mistake a larger estate was granted than intended"). In another California Court of Appeal case, the court opined:

> It is old and well-established law that equity, at the instance of a grantor, his heirs, devisees, or representatives, will reform a voluntary conveyance, where, by mistake of law or fact, a larger estate or more land has been granted than was intended to be conveyed; and it is immaterial that the grantee is cognizant of the mistake. *The grantee has given nothing for the conveyance; he is deprived of nothing*; and he cannot complain if the mistake is corrected.

In re Estate of Powell, No. E043464, 2008 WL 544354, at *6 (Cal. Ct. App. Feb. 29, 2008) (emphasis added) (quoting Tyler v. Larson, 235 P.2d 39, 41 (Cal. Dist. Ct. App. 1951)); *see also* Baker Cmty. Servs. Dist. v. RBJ Baker, Inc., No. E034968, 2005 WL 635057, at *16 (Cal. Ct. App. Mar. 17, 2005) (contrasting a voluntary conveyance with a purchase, suggesting that a purchase would not be a voluntary conveyance); Sierra-Bay Fed. Land Bank Ass'n v. Super. Ct., 227 Cal. Rptr. 753, 757 (Cal. Ct. App. 1991) (using the term "voluntary conveyance" to describe when a property owner gives property in anticipation of foreclosure); Mountain Home Props. v. Pine Mountain Lake Ass'n, 185 Cal. Rptr. 623, 629 (Cal. Ct. App. 1982) (endorsing respondents' assessment that a foreclosure is not a voluntary conveyance). *But see* Claridge v. The Pine Resorts, No. B119180, 2001 WL 1636838, at *3 (Cal. Ct. App. Dec. 20, 2001) (describing the sale of property as a "voluntary conveyance").

96. Brown v. Fix, 150 Cal. Rptr. 431, 433 (Cal. Ct. App. 1978); Neumeyer v. Crown Funding Corp., 128 Cal. Rptr. 366, 373 (Cal. Ct. App. 1976) (holding that under the Uniform Fraudulent Conveyance Act, "a voluntary conveyance[] [is] one made without fair consideration") (overruled due to a change in California's Fraudulent Conveyance Act).

97. Enos v. Picacho Gold Mining Co., 133 P.2d 663, 670 (Cal. Ct. App. 1943) (citation omitted).

98. A.B. 245, 1979–80 Gen. Assemb., Reg. Sess. (Cal. 1979).

predated CalCEA, it may be that the authors of A.B. 245 originally intended to enable such donations under California law without considering the possibility that conservation easements could be created by other methods.[99] It is also possible that the legislature wanted to avoid the implication that conservation easements always qualify for tax breaks.

Although one could construe CalCEA as permitting only the donation of conservation easements, this construction seems untenable. Under all of the laws previously discussed, conservation easements, scenic easements, and open-space easements have been purchased by nonprofit organizations. No court considering conservation easements has suggested that the purchase of such restrictions invalidated them under CalCEA. Indeed, in the 1981 Enrolled Bill Report for A.B. 470, the analysis section explains that landowners often sell scenic, open-space, and agricultural easements.[100]

If voluntary conveyance does not require donation, what does this phrase mean? More recently, California courts have contrasted voluntary conveyance with eminent domain. In this realm, however, the case law is contradictory. Transfers under eminent domain proceedings are undoubtedly involuntary.[101] In a few cases, courts call it a *voluntary* conveyance when landowners sell their property to a public entity in anticipation of an exercise of eminent domain.[102] Most courts, however, characterize transfers under threat of an exercise of eminent domain as *involuntary*.[103] Thus, "voluntary conveyance" suggests that the conservation easement may not be condemned or created based on the threat of eminent domain. This sounds persuasive but for the fact that this language appears in the statute *before* governments were permissible holders. Only nonprofit organizations could hold voluntarily conveyed conservation easements in California in 1979, and they had no eminent domain power.

The California Department of Conservation recommended that the Governor sign A.B. 470 in 1981 because "[c]onservation easements must

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99. All the language referring to property and income taxes was removed during the amendments in the Assembly. A.B. 245, 1979–80 Gen. Assemb., Reg. Sess. (Ca. 1979) (as amended by Assembly, Mar. 8, 1979 & Mar. 22, 1979). This may have been because other state and federal laws already outline the various tax implications.

100. OFFICE OF PLANNING & RESEARCH, ENROLLED BILL REPORT, A.B. 470, 1981–82 Gen. Assemb., Reg. Sess., at 2 (1981).

101. Johnston v. Sonoma Cnty. Agric. Prcs. & Open Space Dist., 123 Cal. Rptr. 2d 226, 234 (Cal. Ct. App. 2002).

102. *See, e.g.*, Lake Merced Gold & Country Club v. Ocean Shore R.R. Co., 23 Cal. Rptr. 881, 889 (Cal. Ct. App. 1962) (contrasting condemnation with voluntary conveyances).

103. *See, e.g.*, *Johnston*, 123 Cal. Rptr. 2d at 234 (holding that the transfer of a utility easement over property preserved for open space was involuntary as it was made under the credible threat of condemnation).

be entered into voluntarily between a landowner and the government organization, and will protect against 'unreasonable taking' of property rights."[104] Thus, the Department seems to have read the voluntary language as a way to avoid takings concerns. Perhaps the use of conservation easements appeared a way to avoid some of the Fifth Amendment concerns associated with land-use regulation.

In the early 1980s, the California Legislature may have simply been uncertain regarding its regulatory power. Policymakers often avoided proposing environmental regulations for fear that the laws would be held unconstitutional.[105] Conservation easements could serve as an alternative to such controversial regulations. Some commentators view conservation easements as preferable to regulation because they avoid regulatory takings problems.[106]

Conservation easements may be viewed by some government entities as an antidote to takings because they enable governments to enter into deals that would be impermissible takings if done through regulation.[107] For example, with a conservation easement, a government can enter into an agreement with a landowner that would restrict all development rights on a parcel. This would likely be impermissible under the Fifth Amendment as a complete deprivation of all economic value.[108] Conservation easements also enable governments to obtain public-access rights over land, while doing so via land-use regulation may be a compensable taking if interpreted as a permanent physical occupation.[109]

With this background in mind, we can examine whether the California Legislature intended "voluntary conveyances" to encompass exactions. The United States Supreme Court has indicated that exactions are not voluntary

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104. OFFICE OF PLANNING & RESEARCH, ENROLLED BILL REPORT, A.B. 470, 1981–82 Gen. Assemb., Reg. Sess., at 2 (1981).

105. *Emergence*, *supra* note 11, at 1054.

106. Joshua P. Welsh, Comment, *Firm Ground for Wetland Protection: Using the Treaty Power to Strengthen Conservation Easements*, 36 STETSON L. REV. 207, 213 (2006) ("While environmental regulation, regardless of its basis in the Constitution, can sometimes prompt takings litigation, conservation easements are immune to claims of regulatory takings because they arise out of a voluntary conveyance by a private landowner.").

107. Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulations Working in Concert*, 372 FORDHAM ENVTL. L. REV. 273, 297 (2007).

108. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (explaining that complete deprivation of economic use of land by government action is compensable).

109. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (describing public-beach access across a property as a permanent physical occupation); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432–33 (1982) (explaining the rule that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine").

because complying with an exaction is not a voluntary act.[110] In fact, in many cases, the Supreme Court uses the term "exaction" when it is describing a payment as involuntary.[111] The California Legislature, however, might consider exactions voluntary. California courts generally characterize exactions as "voluntary" because a developer makes a "voluntary decision" to construct her project.[112]

Turning away from the use of "voluntary" in the statute, however, we see that there is other informative textual language. In section 815.3(b), the legislature appears to have intended to prohibit local governments from exacting conservation easements, explicitly stating that "[n]o local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement."[113] Although CalCEA does not define "entitlement for use," other California statutes offer instruction. For example, the California Environmental Quality Act provides examples of entitlements for use: "lease, permit, license, certificate."[114] Additionally, courts addressing this phrase have accepted without debate the idea that issuance of a permit is an entitlement for use.[115] If the definition of conservation easement ruled out the possibility of exactions, then this subsection would be unnecessary.

Two California Courts of Appeal have examined the language of section 815.3(b) while considering the validity of exactions under CalCEA. In *San Mateo County Coastal Landowner's Ass'n v. County of San*

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110. *Nollan*, 483 U.S. at 833 n.2 (stating that requiring the exchange of a property right for a permit is not a voluntary exchange).

111. *See, e.g.*, United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 511 n.4 (1992) (characterizing taxes as exactions and contrasting them with "voluntary contributions" (quoting Comm'r v. Newman, 159 F.2d 848, 851 (2d Cir. 1947) (L. Hand, J., dissenting))); Comm'r v. First Sec. Bank of Utah, 405 U.S. 394, 398 n.4 (1972) (same); Atl. Coast Line R.R. v. Phillips, 332 U.S. 168, 173 (1947) (same); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 240 (1977) (describing required union payments as exactions) (citing Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Allen, 373 U.S. 113, 122 (1963)); *see also* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 666 (2006) (holding that "involuntary exactions" are the equivalent of taxes (quoting New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund, 886 F.2d 714, 718 (4th Cir.1989)).

112. Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468, 477 (Cal. Ct. App. 1993) (quoting Carlsbad Mun. Water Dist. v. QLC Corp., 3 Cal. Rptr. 2d 318, 325 (Cal. Ct. App. 1992)) (explaining that an exaction is triggered by the voluntary decision of the developer to construct the project and is directly tied to the increase in burdens that the construction will possibly generate); *see also* Santa Monica Beach, Ltd. v. Super. Ct., 968 P.2d 993, 1009 (Cal. 1999) (stating that exactions are not per se takings because they are "technically . . . voluntary").

113. CAL. CIVIL CODE § 815.3(b) (West 2007).

114. CAL. PUB. RES. CODE § 21065(c) (West 2007).

115. Bldg. Indus. Ass'n. v. Cnty. of Stanislaus, 118 Cal. Rptr. 3d 467, 481 (Cal. Ct. App. 2010); San Mateo Cnty. Coastal Landowners' Ass'n v. Cnty. of San Mateo, 45 Cal Rptr. 2d 117, 133 (Cal. Ct. App. 1995).

Mateo,[116] plaintiffs challenged the validity of a county initiative that required voter approval for any amendments to the Local Coastal Program. In 1986, San Mateo County voters enacted Measure A.[117] Essentially, the measure prevented any increase in nonagricultural development, density, or use without a county-wide popular vote.[118] These policies required an applicant for land division to grant the County conservation, open-space, or agricultural easements as a condition of approval.[119] Plaintiffs argued that this requirement violated CalCEA section 815.3(b).[120]

The issue turned on whether these required easements were in fact conservation easements under CalCEA. Presumably finding the text of the statute unclear, the court relied exclusively on a letter from the Legislative Counsel to Assemblyman Tom Bates (the author of the section).[121] That letter addressed the question of whether the code restricted the ability of a local government to require dedications of easements.[122] The Legislative Counsel concluded that the law did not prevent local governments from exacting easements (even arrangements resembling conservation easements) under other provisions of law.[123] The counsel emphasized that the prohibition related only to conservation easements under CalCEA, not other types of easements.[124] The Counsel also emphasized section 815.9, which states that the law does not restrict the ability of a local governmental entity to require the dedication of an easement under other provisions of law.[125]

Essentially, the court concluded that even if servitudes look like CalCEA conservation easements, they will not be considered as such as long as the local government does not refer to section 815.3(b). Thus, to avoid CalCEA's prohibition on exaction of conservation easements by local governments, all a local government must do is call it something different. Additionally, according to the Legislative Counsel, section 815.9 further

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116. *San Mateo Cnty.*, 45 Cal Rptr. 2d at 117.

117. *Id.* at 121.

118. *Id.*

119. *Id.* at 129.

120. *Id.* at 129–30.

121. *Id.* at 132. Although courts commonly look to legislative history, this Legislative Counsel letter is not part of the statute's legislative history. This letter was written after the enactment of the statute. Although the court took judicial notice of this letter, letters from the Legislative Counsel's office to individual politicians are generally protected by attorney-client privilege and are not part of the public record (or subject to state FOIA requests). *In re* Cnty. of Erie, 473 F.3d 413, 422–23 (2d Cir. 2007) (holding e-mails between in-house counsel and county officials regarding policy advice to be privileged).

122. *Id.* at 132–33.

123. *Id.* at 133.

124. *Id.*

125. *Id.*

bolsters the ability of local governments to exact conservation easements. As long as the local government has a law enabling the exaction of conservation easements, it does not matter that section 815.3 seems to prohibit such an action. This case sent a clear message to local governments seeking to exact conservation easements: (1) do not call them conservation easements and (2) pass a local law saying that it is okay to exact conservation easements.

More recently, in *Building Industry Ass'n (BIA) v. County of Stanislaus*,[126] the court took a different approach. In 2007, Stanislaus County had updated its general plan, including the creation of a Farmland Mitigation Program.[127] The goal of the Program was to ameliorate the loss of farmland throughout the county by requiring permanent protection of farmland.[128] Essentially, where a development project would result in a loss of agricultural land, the Program required the developer to permanently protect other agricultural land. The Program allowed developers to meet this mitigation requirement by (1) placing conservation easements on agricultural land that the developer owns; (2) purchasing conservation easements over other lands; or (3) making a payment to the county to be used to purchase conservation easements over agricultural land.[129]

The Building Industry Association of Central California challenged the Program on several grounds. One of the BIA's main arguments was that the Program conflicted with CalCEA's prohibition of conditioning the issuance of land-use approvals on the granting of conservation easements in section 815.3.[130] Following the logic of *San Mateo County Coastal Landowner's Ass'n v. County of San Mateo*, Stanislaus County argued that their "agricultural conservation easements" were not conservation easements as contemplated by CalCEA.[131] The court rejected the *San Mateo County* court's reasoning, holding that the servitudes were conservation

126. Bldg. Indus. Ass'n. v. Cnty. of Stanislaus, 118 Cal. Rptr. 3d 467, 467 (Cal. Ct. App. 2010).

127. *Id.* at 471.

128. *Id.*

129. *Id.* at 480–81. The guidelines indicate that in some cases, permit applicants may receive permission to pay an in-lieu mitigation fee instead of creating a conservation easement. This possibility is only available where the converted area is less than twenty acres and the applicant can show that it made a "diligent, but unsuccessful, effort to obtain an agricultural conservation easement or banked mitigation credits." *Id.* at 481. However, the main thrust of the program is developer creation of conservation easements. For projects that will convert over twenty acres of land, the developer must acquire conservation easements. It can do so by placing them on land that it owns, buying them from willing sellers, or purchasing credits from an established mitigation bank. *Id.*

130. *Id.* at 480.

131. *Id.* at 471–72.

easements as contemplated by CalCEA and calling them something else would not change that fact.[132]

If calling the restriction an agricultural conservation easement did not remove it from the purview of CalCEA, it would appear at first that the Program conflicts with CalCEA by exacting conservation easements. The court viewed things differently, however, holding that the conservation easements were not exactions because the Program allowed permit applicants to arrange for them on land not owned by the applicant.[133] The permit applicants could thus purchase conservation easements from willing sellers. The actual creation of the conservation easements then is not involuntary. Nor were the conservation easements exchanged for an entitlement (they were exchanged for money). Thus, in the court's eyes, the resulting conservation easements did not violate section 815.3(b).

Because this was a facial challenge to the county law, the court did not consider whether there might be circumstances in which no willing sellers were available.[134] The court did not rule out the possibility that an as-applied challenge to the statute could be successful. Presumably, a situation where a developer had to create conservation easements on its own property due to lack of available mitigation banks or willing sellers would constitute a violation of section 815.3(b) of CalCEA.

The opinion in *BIA* is a challenging one. It seems to indicate that a local government can avoid any problems under section 815.3(b) by simply including an option for purchasing conservation easements instead of placing them on the permit applicant's property. Although the *BIA* court disagreed with *San Mateo County*, both of these cases indicate a judicial willingness to circumvent the prohibition on exactions in CalCEA. The opinions offer local governments somewhat simple remedies for avoiding exaction problems. *San Mateo County* tells us that we can simply re-label the conservation easements, and *BIA* tells us that all we need to do is provide permit applicants with an option to purchase conservation easements instead.

What is missing from both cases is a true assessment of legislative intent. What did the California Legislature intend when it prohibited local governments from exchanging entitlements for conservation easements? Was it simply contemplating the narrow instance where local governments

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132. *Id.* at 478.

133. *Id.* at 483.

134. The Program guidelines contemplated this occurring because they contain a provision enabling developers of smaller projects to pay an in-lieu mitigation fee when they are unable to find willing sellers. *See id.* at 480–81. The guidelines do not contain similar provisions for projects over twenty acres but indicate that other mitigation methods may be authorized. *Id.* at 481.

refer to the exactions as CalCEA conservation easements and do not provide an option for purchasing them? This seems somewhat unlikely, but the legislature provides no guidance as to its intent in enacting the provision. Perhaps the legislature was trying to prevent CalCEA from serving as a sole basis for local exaction of conservation easements—requiring local governments to enact ordinances before such exactions could occur? If so, it seems odd that there was no similar requirement for state agencies. It seems possible, even likely, that the California Legislature did not fully consider exacted conservation easements and did not understand how entrenched such exactions are in local governments. The lack of debate over this provision or outcry from local governments may be the best evidence that the legislature did not fully consider the implications of the prohibition.[135]

The *BIA* case also embodies an interesting view of exacted conservation easements. The court did not consider purchased conservation easements or conservation easements in mitigation banks to be exacted conservation easements. Yet, these conservation easements would not exist but for the permits. There are reasons to label such restrictions as exacted conservation easements. Where state legislatures have taken a stance on exacted conservation easements or exactions in general, whether favoring or disfavoring the practice, understanding which are created from permit processes may help uphold, and at times reassess, that determination. Furthermore, acknowledging such conservation easements as exactions may better serve to link the conservation easements to the permits. This is important because there may be heightened public interest in exacted conservation easements compared to willing sales or donations of conservation easements. Where the public has given up a public good (for example agricultural land, coastal ecosystems, or endangered-species habitat), there is a greater interest in ensuring that the agreements are both enforceable and enforced. Linking the conservation easement to the underlying permit might (1) provide additional routes of enforcement; (2) influence a court considering the restrictions during an amendment or extinguishment proceeding; and (3) provide a greater understanding to the

135. Another state law appears to condone exacted conservation easements, however. California Government Code section 65965 states that where a state or local government agency exacts a conservation easement for mitigation, the agency can transfer the conservation easement to a nonprofit organization. CAL. GOV'T CODE § 65965(b) (West 2007). The Legislative Counsel's digest accompanying that law acknowledges that "[a] state or local public agency has the authority to impose conditions upon the issuance of a permit to mitigate any adverse impact caused by a permitted activity." 2006 Cal. Legis. Serv. Ch. 577 (West).

legislature and the public of what communities receive in exchange for land-use permits.[136]

The confusion surrounding CalCEA, its legislative history, and the relevant case law indicate that exacted conservation easements may be enforceable in California where local governments carefully tailor their programs to follow the guidelines of *San Mateo County* and *BIA*. Additionally, if the "voluntary" designation does not prohibit all exacted conservation easements, then some exacted conservation easements are enforceable under CalCEA without needing to meet the requirements of *San Mateo County* or *BIA*. CalCEA section 815.3(b) does not apply to conservation easements *exacted by* the state, federal, or tribal governments.[137] The exacted conservation easement could be *held by* a state, local, or tribal government, or by a qualified nonprofit organization.[138]

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136. In an earlier article, I examined conservation easements exacted under the federal Endangered Species Act and discussed potential additional routes of enforcement under that statute by the permit issuer (in that case the U.S. Fish and Wildlife Service or NOAA Fisheries, neither of whom hold the conservation easements that they exact) and by citizens through citizen-suit provisions. *Exacted Conservation Easements, supra* note 9. A tricky remaining question is whether permit applicants retain any responsibility regarding such exacted conservation easements. Generally, governments only require applicants to establish the conservation easements, not to become involved in the event of a violation. *See, e.g.*, Ojavan Investors v. Cal. Coastal Comm'n, 32 Cal. Rptr. 2d 103, 107 (Cal. Ct. App. 1994) (involving a permit applicant who received the benefit of a conservation easement but was not a party to the case).

137. CAL. CIVIL CODE § 815.3(b) (West 2007).

138. The federal government is not permitted to hold a conservation easement under any of the California statutes. *But see id.* § 815.9 (stating that CalCEA should not be construed to impair any rights of political subdivisions to hold partial interests in land under other statutes). However, under the Property Clause of the U.S. Constitution, the federal government can make its own rules for conservation easements that it will hold. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). When a government agency holds a conservation easement, it holds a property right. The rules about federally owned property are different than the rules for other types of property. The federal government's rights as a property owner go beyond mere proprietorship. *See* Kleppe v. New Mexico, 426 U.S. 529, 539–40 (1976) (holding that the federal government's rights as a landowner go beyond the rights of an ordinary proprietor because of the Property Clause's broad instruction to make all needful rules); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981) (extending protection of federal property rights to control actions on private land); Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 4 (2001) (noting that cases conclude "that the federal government possesses both proprietary and sovereign powers over its property, can regulate activities on privately owned lands that affect its lands, and exercises the equivalent of the police power in this area"). In *United States v. Albrecht*, the Eighth Circuit held that conservation easements negotiated and held by the United States Fish and Wildlife Service did not have to conform to state law because they were part of a federal scheme. 496 F.2d 906, 911 (8th Cir. 1974). In examining a similar situation, the Supreme Court held that North Dakota could not restrict the federal government's ability to acquire easements and prohibited the North Dakota Legislature from placing any restrictions on acquisitions by the federal

The purposes of the exacted conservation easement would also have to fall under the guidelines of CalCEA, and it would have to be perpetual. If an exacted conservation easement meets all of these requirements, then CalCEA provides a potential route of enforcement.

Table 2: Exacted Conservation Easements
Under Conservation Easement Statutes

Name of Law	Authorized Holders	Purposes	Term	Exactions
Scenic Easement Deed Act (SEDA)	Local governments	Scenic and aesthetic values	Perpetual or term	Not specifically prohibited
Open Space Easement Act (OSEA)	Local governments	Open space values	Perpetual or term	Not specifically prohibited
California Conservation Easement Act (CalCEA)	Non-profits, local and state gov'ts, and certain tribes	Conservation values	Perpetual	Not clear if prohibited

C. State Servitude Law

Where statutory requirements for conservation easements cannot be met, state servitude law may provide enforcement options. California servitude law recognizes easements, real covenants, and equitable servitudes. All three of these common-law categories may be applicable to exacted conservation easements, but the restrictions regarding these categories limit their effectiveness for enforcing exacted conservation easements.

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government. North Dakota v. United States, 460 U.S. 300, 321 (1983). Although it is not clear whether these holdings extend to situations where the federal government is not the conservation easement holder, the Court relied heavily on the presence of a federal scheme to protect birds that North Dakota seemed to be interfering with instead of invoking the federal government's rights as a property owner under the Property Clause. *Id.* at 319.

1. Easements

California common law defines an easement as "an incorporeal interest in the land of another that gives its owner the right to use the land of the other person or to prevent the other property owner from using [his or her] land."[139] Easements in California may be affirmative or negative.[140] They may be appurtenant or in gross.[141] In many jurisdictions, easements-in-gross are not transferable. Fortunately, in California an easement-in-gross is clearly alienable, assignable, and inheritable.[142] Unfortunately, California statutory law specifically delineates potential easement purposes and none of these purposes address habitat protection or conservation goals.[143]

California law states:

> The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances and then called easements:
>
> 1. The right of pasture;
> 2. The right of fishing;
> 3. The right of taking game;
> 4. The right-of-way;
> 5. The right of taking water, wood, minerals, and other things;
> 6. The right of transacting business upon land;
> 7. The right of conducting lawful sports upon land;
> 8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
> 9. The right of receiving water from or discharging the same upon land;
> 10. The right of flooding land;
> 11. The right of having water flow without diminution or disturbance of any kind;
> 12. The right of using a wall as a party wall;

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139. HENRY D. MILLER & MARVIN B. STARR, CALIFORNIA REAL ESTATE § 15:1 (3d ed. 2006); *see also* Mehdizadeh v. Mincer, 54 Cal. Rptr. 2d 284, 290 (Cal. Ct. App. 1996) ("An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be *less* than the right of ownership.") (citing Meschick v. Caton, 228 Cal. Rptr. 779 (Cal. Ct. App. 1986)).

140. 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 382 (10th ed. 2005); CAL. CIVIL CODE § 801 cmt. 3 (West 2007).

141. *See* Porto v. Vosti, 288 P.2d 618, 619 (Cal. Ct. App. 1955) (appurtenant easement); Roth v. Cottrell, 246 P.2d 958, 960 (Cal. Ct. App. 1952) (same); LeDeit v. Ehlert, 22 Cal. Rptr. 747, 754 (Cal. Ct. App. 1962) (easement-in-gross).

142. CAL. CIVIL CODE §§ 802, 1044; BARRETT & LIVERMORE, *supra* note 65, at 113.

143. CAL. CIVIL CODE § 801.

13. The right of receiving more than natural support from adjacent land or things affixed thereto;
14. The right of having the whole of a division fence maintained by a coterminous owner;
15. The right of having public conveyances stopped, or of stopping the same on land;
16. The right of a seat in church;
17. The right of burial;
18. The right of receiving sunlight upon or over land as specified in Section 801.5.[144]

This list of traditional easements includes both appurtenant and in-gross easements.[145] While there is judicial language regarding the non-exclusiveness of the statutory list of *appurtenant* easements,[146] California courts have not expressly stated whether the list of easements-*in-gross* is exclusive. Courts have, however, recognized two types of easements-in-gross not listed in the statute. First, common law recognizes an easement-in-gross related to navigation and the public trust.[147] The public has a navigation easement across any navigable lake, stream, or other water within the state even if the land under that water is privately owned.[148] Second, courts have recognized utility easements.[149] Thus, a California court could recognize and enforce a conservation easement even though it is not on the list of permissible easements-in-gross, but no court has yet addressed the question. Notably, both of these judicially recognized easements-in-gross are affirmative easements. Conservation easements are negative, and courts may be less amenable to approving them as an additional permissive category of easements given the traditional restrictions on negative easements.

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144. *Id.*

145. Section 802 specifically explains that items 1–5, 16, and 17 can be held in gross. It also added the "right of taking rents and tolls" to the list of permissible easements-in-gross. *Id.* § 802.

146. Right v. Best, 121 P.2d 702, 711 (Cal. 1942) ("Although an easement of pollution is not among the servitudes specified in section 801 of the Civil Code, that section does not purport to enumerate all the burdens which may be attached to land for the benefit of other property." (citing Jersey Farm Co. v. Atlanta Realty Co., 129 P. 593, 593 (Cal. 1913))).

147. People v. Sweetser, 140 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

148. *Sweetser*, 140 Cal. Rptr. at 85; *Marks*, 491 P.2d at 380.

149. MILLER & STARR, *supra* note 140, § 15:7.

2. Real Covenants

Real covenants are burdens on property "intimately and inherently involved with the land" that have the ability to bind subsequent landowners indefinitely.[150] Unlike contractual covenants, real covenants have the power to bind persons who were not parties to the original agreement. In California, real covenants must benefit a particular parcel of land.[151] The statutory requirements for real covenants are laid out in the California Civil Code.[152] Sections 1460 and 1462 explain that only appurtenant covenants contained in grants of estates in real property will run with the land.[153] Section 1468 lays out the requirements for permissible covenants and section 1468(c) details the list of permissible restrictions.[154]

The limitation to appurtenant covenants means that the benefit of the restriction must be tied to property. This is an arrangement between neighbors. A restriction on your neighbor's property, such as a prohibition on trash accumulation, benefits your property, often by maintaining a neighborhood's appearance and affecting land values. Such restrictions could theoretically include things like habitat preservation. Protecting open space and iconic landscapes could also increase property values and benefit a particular parcel of land. The constraint is that the owner of the benefited property must be the one who enters into the agreement.

Real covenants could provide an avenue for enforcing exacted conservation easements, but only a very limited set. Where the land in question borders public land, the public entity could hold an exacted conservation easement.[155] Transfer to another holder would jeopardize the enforceability of the agreement. The appurtenancy requirement would also reduce the number of exacted conservation easements that could be held by nonprofit organizations. Although such nonprofits, called land trusts, sometimes own protected lands in fee, stringent appurtenancy requirements limit the availability of property land trusts could protect as real covenants.

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150. BLACK'S LAW DICTIONARY 421 (9th ed. 2009).

151. CAL. CIVIL CODE § 1468 (West 2007); Marra v. Aetna Const. Co., 101 P.2d 490, 492 (Cal. 1940); Cal. Packing Corp. v. Grove, 196 P. 891 (Cal. Ct. App. 1921).

152. CAL. CIVIL CODE §§ 1460–71.

153. *Id.* §§ 1460, 1462. *Accord* Richland Calabasas v. City of Calabasas, 45 F. App'x. 661, 663 (9th Cir. 2002).

154. CAL. CIVIL CODE § 1468(c).

155. However, public entities should be cautious about this approach. In an unpublished case, the Ninth Circuit has held that where the public entity is entering into the agreement based on its regulatory power instead of in its role as landowner, the real covenant does not meet appurtenancy requirements under state law. *Richland Calabasas*, 45 F. App'x. at 663. No California court has reached such a holding, however.

The limitation on transferability may be particularly worrisome for the viability of real covenants held by land trusts, some of which have short histories. Permitting agencies should be hesitant about designating land trusts as holders of exacted conservation easements that may only be enforced as real covenants.

California Civil Code section 1471, added in 1995, describes a situation where covenants requiring a landowner to refrain from an action are permissible.[156] Specifically, this section creates a category called "environmental restrictions."[157] While this sounds promising for exacted conservation easements, the section only applies to restrictions that work to protect the environment from hazardous materials as defined by the California Health and Safety Code.[158] The fact that the legislature contemplated environmental restrictions but chose to severely limit their scope suggests an intent not to broadly allow conservation easements under state real-covenant statutes.

3. Equitable Servitudes

If the requirements for a real covenant are not met, a court might enforce an agreement as an equitable servitude.[159] Yet, California case law on the enforcement of equitable servitudes indicates that such agreements are not enforceable when they are personal.[160] In other words, as with real covenants, unless the agreement benefits a parcel of land instead of a person or entity, it will not be enforceable in equity.[161]

These requirements for real covenants and equitable servitudes will likely prevent their use for validating exacted conservation easements. A California court would have to be persuaded to reject the rule that the burden will not run with the land where the benefit is in gross or be willing to carve out an exception to the rule. This seems unlikely considering the justification for the prohibition. Although the courts have not been entirely

156. CAL. CIVIL CODE § 1471.

157. *Id.*

158. *Id.*

159. Moe v. Gier, 2 P.2d 852, 855 (Cal. Ct. App. 1931).

160. Anthony v. Brea Glenbrook Club, 130 Cal. Rptr. 32, 33–34 (Cal. Ct. App. 1976).

161. *See* Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275, 1285-87 (Cal. 1994) (explaining that the law of equitable servitudes in California involves enforcing conduct related to a particular parcel of land); Hunt v. Jones, 86 P. 686, 688 (Cal. 1906) (upholding an agreement to provide irrigation water as an equitable servitude where it benefited a parcel of land).

clear,[162] the prohibition appears to stem from a desire to promote the free use of land.[163] Conservation easements create perpetual restrictions on land, which the California Legislature has only allowed in specific situations.

Table 3: Enforceability of Exacted Conservation Easements Under Servitude Law

Servitude	Application to Exacted Conservation Easements
Easement	Unlikely – Only enforceable if a court is willing to expand the list of permissible easements
Real Covenant	Unlikely – Only if appurtenant
Equitable Servitude	Unlikely – Only if appurtenant

D. Enforceable As Exactions

There is another possibility beyond state conservation-easement statutes or servitude law for enforcing exacted conservation easements under California law. Courts might choose to uphold exacted conservation easements *because* they are exactions. A few California cases seem to point to the conclusion that conditions of conditional-use permits may be enforceable regardless of state property-law rules.

In *Ojavan Investors v. California Coastal Commission,* a California Court of Appeal indicated that California property-law definitions of covenants do not apply to exactions.[164] In that case, two developers received permits for residential construction activities in the coastal zone under the California Coastal Act[165] in exchange for, among other things,

162. *See, e.g.*, Marra v. Aetna Constr. Co., 101 P.2d 490, 492 (Cal. 1940) (upholding the rule for reasons of stare decisis, but never explaining the original justification); Chandler v. Smith, 338 P.2d 522, 523–24 (Cal. Ct. App. 1959) (same).

163. Kent v. Koch, 333 P.2d 411, 415 (Cal. Ct. App. 1958) (quoting Wing v. Forest Lawn Cemetery Ass'n, 101 P.2d 1099, 1103 (Cal. 1940)) (resolving any doubts about the enforceability of servitudes in favor of the free use of land).

164. Ojavan Investors v. Cal. Coastal Comm'n, 32 Cal. Rptr. 2d 103, 109 (Cal. Ct. App. 1994).

165. California Coast Act of 1976, CAL. PUB. RES. CODE, § 30000 (West 2007).

extinguishing development rights over certain parcels by creating scenic easements.[166] Activities on these parcels that should have been prevented by the scenic easements and development restrictions led the California Coastal Commission to bring actions against the infringers.[167]

The infringers in this case were neither permittees nor permit issuers. The developers who obtained the permits purchased development rights over other parcels rather than burden their own land.[168] Essentially, they paid two landowners, Sophisticated Investments and Dan Buchner, *not* to develop their land.[169] These landowners were supposed to hold the restricted land as whole parcels.[170] Dan Buchner, however, subsequently subdivided his land and sold several parcels,[171] and those purchasers then sought to sell them again.[172] The parties in *Ojavan* purchased the land from Buchner.[173] They were neither associated with the permit (indeed they had no knowledge of it) nor involved in structuring the covenants or scenic easements. When the Coastal Commission learned of the parties' intention to further subdivide and sell the parcels for residential development, it issued a cease-and-desist order.[174] The *Ojavan* case arose when the purchasers challenged this order.[175] Neither the permit holders nor the original landowners who agreed to the development restrictions were parties in the case.[176]

Among other arguments, the landowners contended that the restrictions were not valid covenants under California property law, citing California Civil Code section 1457.[177] The court made short work of that argument by explaining that the restrictions in question were not covenants as contemplated by that statute and therefore did not need to follow those

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166. *Ojavan*, 32 Cal. Rptr. 2d at 109. The restrictions in this case were called scenic easements and "declarations of restrictions." *Id.* at 105.

167. *Id.* at 106. The developers had recorded the restrictions in the Los Angeles County Recorder's office. *Id.* That office alerted the Coastal Commission of the violations when some of the lots were divided and sold. *Id.* The restrictions specifically indicated that they were related to the issuance of conditional-use permits under the California Coastal Act. *Id.* Such mention of relation to underlying permitting schemes and structures does not always occur, but this example demonstrates why inclusion of such information is a good idea.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 108.

174. *Id.*

175. *Id.* at 107.

176. *Id.*

177. *Id.* at 109.

rules.[178] The court explained that the property-law statutes referenced apply only to covenants "contained in grants of estates in real property."[179]

According to the court, the California statutes concerning covenants do not apply to "conditions contained in coastal development permits."[180] The Coastal Commission conditioned the issuance of the permit on extinguishment of development rights. The permit applicants could demonstrate extinguishment either by getting scenic easements or by submitting declarations. The permit applicants pursued both strategies, paying for both scenic easements and declarations of restrictions. The declarations explained that development rights were extinguished and that each restriction

> "shall constitute a covenant running with the land . . . [and] shall bind the [landowners] and their successors, heirs, and assigns in perpetuity and shall benefit the People of the State of California," and that any breach of the declarations of restrictions shall render the landowners "or their successors liable pursuant to the provisions of [the Coastal Act]."[181]

This language is particularly interesting because it purports to bind a landowner to the Coastal Act. The actual permit holder is thus not responsible for compliance. That duty has now passed to the owners of the land burdened by that restriction. This will be true even when the new landowners were unaware of the permit and received no clear benefit for the restriction. In theory, those landowners benefit from the restriction because the purchase price of the land is lower. In practice, however, this only holds true sometimes. Often, purchasers are unaware of easements and other restrictions on land.[182] In many cases, the restrictions do not affect or sometimes even increase land values.

Ultimately, the court held that the covenant was not covered by the Civil Code because it was based on a permit condition.[183] This is an

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178. *Id.*

179. *Id.* (explaining that California Civil Code section 1457 applies only to those real covenants described by California Civil Code section 1461).

180. *Id.*

181. *Id.* (quoting Declaration of Restrictions, No. 81-661205, L.A. Cnty. Recorders' Office, Jul 2, 1981; Declaration of Restrictions, No. 84-875361, L.A. Cnty. Recorders' Office, Jul. 23, 1984; Declaration of Restrictions, Nos. 90-1020016 & 90-1020017, L.A. Cnty. Recorders' Office, Jun. 7, 1990).

182. *See, e.g.*, Feduniak v. Cal. Coastal Comm'n, 56 Cal. Rptr. 3d 591, 597 (Cal. Ct. App. 2007) (discussing how landowners were unaware of native landscaping and botanic easements on their property despite a diligent title search).

183. *Ojavan*, 32 Cal. Rptr. 2d at 109.

interesting interpretation of the restrictions. The use of the term covenant did not matter. The fact that the restriction was part of a permit trumped California property law. The Coastal Commission required the permit holders to extinguish development rights on certain parcels, in this case parcels owned by someone else. The court upheld enforcement of the restrictions as permit conditions even though the details of the extinguishment agreements were not actually part of the permits. The permits required establishment of the extinguishment agreements without outlining the exact properties or terms.

Although somewhat radical, this argument is also logical. The court indicated that permit conditions create obligations different from traditional property-law arrangements. In *Ojavan*, the California Coastal Commission had the freedom to set permit conditions containing mechanisms like exacted conservation easements. Applying the logic of the *Ojavan* court, exacted conservation easements need not follow any particular California property-law structure and could be enforced against the violator based upon the underlying permit. The action need not be brought against the actual permit holder. Thus, a violation of a conservation easement could result in action against the violator (not the permit holder, whose ability to proceed with permitted activities would not be affected). Because it is likely that permitted activities will have already occurred, this may be the only sensible resolution for the California Coastal Commission.

This ruling's implication has potential to be far-reaching, but it is not clear whether the idea will spread. Although the *Ojavan* decision may seem promising as a method to ensure the enforceability of exacted conservation easements, the question has gone largely unexamined by other courts.[184] Further, the *Ojavan* decision was not published and therefore provides little precedential value.

One published case may give hope to parties interested in enforcing exacted conservation easements in California based on their status as exactions. In *Rossco Holdings, Inc. v. State*, a California Court of Appeal stated that a landowner could not challenge a condition imposed upon the granting of a permit after acquiescence to the condition.[185] In the eyes of the *Rossco* court, acquiescence can occur either by specifically agreeing to a permit or by failing to challenge a permit's validity and accepting the

184. *But see* Serra Canyon Co. v. Cal. Coastal Comm'n, 16 Cal. Rptr. 3d 110, 113 (Cal. Ct. App. 2004) (discussing a takings case where the court found a subsequent landowner bound by permit agreements regarding that land).

185. Rossco Holdings, Inc. v. State, 260 Cal. Rptr. 736, 743 (Cal. Ct. App. 1989).

benefits afforded by the permit.[186] Thus, if you benefit from a permit, you cannot later challenge its terms. Once an exacted conservation easement is agreed to, put in place, and not challenged within the statute of limitations described by the permit, it is valid. A landowner would no longer be able to challenge the validity of the restrictions.

This could prevent challenges to conditions that do not conform to traditional California property law. The case law in this area is slowly developing, but courts might enforce exacted conservation easements even where the permits do not follow state property laws as long as the permit holder accepted the permit benefit.

In both the *San Mateo County* and *BIA* cases discussed above, the courts considered whether permit conditions were exacted conservation easements and therefore impermissible under CalCEA section 815.3. *Ojavan* suggests another route. It suggests that a conservation easement could be enforceable precisely because it is an exaction.

The conservation easements in *Ojavan* would not have run into a section 815.3 problem, however, because the exaction was done by a state agency, not a local one. It is not clear whether California courts would (or should) extend *Ojavan* to apply to conservation easements exacted by local governments. CalCEA's prohibition on exactions by local governments would be meaningless if one could simply get around the prohibition by saying that exacted conservation easements can be enforced because they are exactions. But of course, the only two published cases on this issue suggest a similar outcome if not a similar legal theory. In *San Mateo County*, the court upheld the exacted conservation easements by simply giving them a different name. In *BIA*, the court acknowledged that a conservation easement by any other name still smelled as sweet but allowed the exaction to go forward because the landowners were given choices. The landowner could place a conservation easement on her land, purchase a conservation easement on other land (as occurred in *Ojavan*), or pay an in-lieu fee. The court reasoned that the presence of these three options meant that the landowners did not have to place a conservation easement on their land, thereby making any such conservation easements wholly voluntary and beyond the purview of section 815.3. Reading all of these cases together suggests that section 815.3 is essentially meaningless. Perhaps such a result is acceptable, however. If the legislature's goal was land conservation, enabling local governments to use conservation easements under their permitting scheme makes sense. Without understanding what

186. *Id.*

harm the California Legislature was seeking to prevent, it is hard to assess how far these cases stray from legislative intent.

An unpublished federal case presents a less hopeful outlook for the enforcement of exacted conservation easements. In *Richland Calabasas v. City of Calabasas*,[187] Richland owned land subject to a development agreement. The development agreement was between the City and a previous landowner.[188] The Ninth Circuit declined to uphold the agreement against the new landowner as either a restrictive covenant or an equitable servitude.[189] The court looked to California property law and essentially held that the benefit of the agreement did not run with the land because it was not an appurtenant agreement.[190] In other words, the City entered into the agreement with the developer in its regulatory capacity, not as a neighboring landowner. Thus, the benefit[191] that the City gained from the agreement could not run with the land. The agreement did not continue once the land changed hands because the burden and benefit were not both tied to the land. Here, the landowner may have been disappointed in the result, but in some situations, a landowner may be quite pleased to get out from under restrictions a former landowner agreed to.[192]

In sum, the Ninth Circuit held that a city operating in its regulatory capacity cannot enter into a real covenant running with the land under California law.[193] Thus, Richland could not obtain the benefits of the agreement based merely on its status as a subsequent purchaser. Following this logic, governments can only enter into real covenants or equitable servitudes in California when they make the agreements as landowners rather than as regulatory entities.[194]

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187. Richland Calabasas v. City of Calabasas, 45 F. App'x. 661, 662 (9th Cir. 2002).

188. *Id.*

189. *Id.* at 663.

190. *Id.*

191. The benefit and burden terminology can be tricky here. Generally, the restricted land is called the burdened land. Thus, the City gets the benefit of protected land. In this case, the landowner wanted to obtain the "benefit" of the agreement—meaning the right to develop unexercised by the previous landowner. Despite this confusing language in the opinion, in property-law terms, it is the City gaining a benefit, not the landowner.

192. This may be especially true where the purchase price was lower due to the restriction. Some developers may take the risk of buying burdened land with the hope of getting some restrictions removed (in the same way developers purchase land in areas where they hope to lobby for zoning changes or obtain zoning variances).

193. *Richland Calabasas*, 45 F. App'x at 663.

194. One mechanism to avoid this problem is to require the developer to give or sell an anchor parcel to the government entity. *See* Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1902 (2008). A government could obtain ownership over a small strip of land and use that ownership status to

A published state decision endorses the view that exactions must remain in the confines of state property law. In *Trancas Property Owners Ass'n v. City of Malibu*,[195] a California appeals court held that a city may not enter into a settlement agreement with a developer when it agrees to exempt the developer from zoning provisions. Thus, the City of Malibu could not enter into an agreement that would violate other laws. Following this logic, a city might not be able to exact conservation easements that run contrary to state property law. Local governments would not be able to create agreements that do not conform to other areas of law.

These exaction cases present two possibilities. On the one hand, courts might choose to enforce exacted conservation easements based on the underlying law that served as the basis for the exaction. Thus, *Rossco* and *Ojavan* join with *BIA* and *San Mateo County* to present a hopeful picture for the long-term enforceability of exacted conservation easements. In such cases, it does not appear to matter whether the exacted conservation easements follow the requirements outlined in CalCEA or other California property laws.

On the other hand, however, courts might refuse to enforce exacted conservation easements that do not follow the requirements of California property law, requiring any restrictions to adhere to the conservation-easement or servitude statutes. In this camp, *Richland Calabasas* and *Trancas Property Owners* instruct local governments to be cautious in exacting conservation easements. The result is a conflicting legal landscape with few published cases and little legislative history to guide courts, local governments, or citizens. The following section suggests some ways to improve this morass.

III. WAYS FORWARD

The enforceability of exacted conservation easements is uncertain. The above discussion of potential routes of enforcement in California illustrates the concerns that can arise with exacted conservation easements everywhere. Legislators, activists, and academics did not contemplate the proliferation of exacted conservation easements when enacting, advocating for, and writing about state conservation-easement statutes. Despite this

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demonstrate appurtenancy. One complication might be demonstrating that the servitude's goal is to benefit the anchor parcel. Although the practice of using an anchor parcel is not uncommon, a court may be reluctant to enforce such a servitude. Simply using an anchor parcel to circumvent the technical restrictions of property law may be unsatisfying to a court where a government entity appears to be acting in its regulatory capacity.

195. Trancas Prop. Owners Ass'n v. City of Malibu, 34 Cal. Rptr. 3d 334, 344 (Cal. Ct. App. 2005).

early oversight, exaction has become one of the most common ways that conservation easements are created. With the understanding that exacted conservation easements are here to stay, this section presents three suggestions to increase the likelihood of their enforceability.

First, states should explicitly address exaction in their state conservation-easement statutes. Even though exacted conservation easements might be upheld as exactions even when they conflict with state conservation-easement statutes or property law, the governing rules are hazy. As demonstrated above, it is not clear whether CalCEA permits exactions. It appears to permit some and prohibit others. The legislature should clarify its position on this issue. That way, permit issuers can assess what types of restrictions will follow which legal format. California is not alone in its lack of clarity on this issue. Most state conservation-easement laws are simply silent on the issue of exactions. Because legislators did not often contemplate exaction, legislative histories (if one can track them down) do little to illuminate the issue.

Second, drafters of exacted conservation easements should increase the precision and detail of the agreements.[196] At a minimum, they should acknowledge and explain the nature of the exaction and the underlying permitting law within the text. Increasing the transparency and availability of exacted conservation easements would address many concerns. Transparency can be improved by clarifying textual content. The text of exacted-conservation-easement agreements should indicate (1) that the conservation easement was exacted; (2) the permit associated with the agreement; (3) what has been exchanged for the conservation easement; (4) what underlying environmental law governed the transaction; (5) what state property law provides the foundation for the agreement; and (6) any other information that describes the background of the transaction.[197]

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196. This has generally been the direction in which conservation easements are heading. In New York, for example, early conservation easements were often fewer than ten pages, *see, e.g.*, BIG SIMONDS POND CONSERVATION EASEMENT (Apr. 30, 1975) (on file with author), while one of the state's most recent conservation easements is 242 pages, N.Y. DEP'T OF ENVTL. CONSERVATION, FINCH PRUYN PROJECT, S. 000089, 00008939 (2010) (on file with author). A balance needs to be struck between including enough information for subsequent landowners, enforcers, and courts to enforce the agreements and including so many pages and provisions as to make the agreements cumbersome and difficult for future landowners, enforcers, and courts to understand.

197. Of course, others may argue against this approach for some of the very reasons outlined in this Article. If there is concern that a court will not enforce an exacted conservation easement, parties to the agreement (especially conservation easement holders) may not want the agreement to indicate that it was exacted. In the end, perhaps exacted conservation easements will best avoid enforceability problems in the situations where no one realizes that they were exactions.

Where exacted conservation easements follow these requirements, any reader of the agreements can understand that they were exacted in exchange for permits. For example, where a conservation easement over agricultural land is exacted to meet program requirements, such as those outlined in *BIA v. County of Stanislaus*, one could look at the agreement and understand that farmland was converted in exchange for the conservation easement. This information could be useful to future holders making decisions to amend, to courts making enforcement determinations, and to members of the public trying to keep track of public benefit programs and to pressure holders to enforce agreements. This information could also be important for permitting programs with public enforcement provisions because it enables citizens to assess whether there is meaningful compliance with the permit terms.[198]

Third, to clarify the elements and uses of exacted conservation easements to both agencies and citizens, government agencies that use exacted conservation easements should promulgate regulations related to their use. Permitting agencies should also clarify and codify procedures relating to exacted-conservation-easement creation. It should be clear to the public and to courts what standards the agency employs. Although agencies would retain flexibility to craft agreements that address specific situations, some general elements could be made uniform.

Such regulations should ensure that permit issuers retain, at a minimum, third-party rights of enforcement in the conservation easements they exact. This will keep the permitting agency involved even if it is not the holder of the exacted conservation easement. To work against termination or substantial modification of valuable environmental protections, permitting-agency approval should be required for any changes to, or dissolutions of, exacted conservation easements.

This examination of exacted conservation easements in California presents a troublesome picture. It is not clear that exacted conservation easements are valid under state law, yet their use only continues to grow. Where public goods are exchanged for conservation easements, those agreements should be available and enforceable.[199] If the use of this tool is going to continue (and there is no reason to think it will not), state

198. *Exacted Conservation Easements*, *supra* note 9, at 345–49.

199. Public goods are exchanged in some way for most conservation easements, even those that were not exacted. Where a landowner receives a tax break for a donated conservation easement or where public funds go toward the purchase price of conservation easements, the public also has an interest in the agreements. The key is making these aspects of the agreements clear. Conservation easements can be a black box where the tradeoffs are hidden from view.

legislatures and permitting agencies should improve their processes and revisit statutes and regulations on these issues.

CONCLUSION

Exacted conservation easements are a large but uncertain crew. It is not clear whether state legislatures intended to enable their creation or whether the agreements are enforceable. These concerns are bolstered by uncertainty in statutory language, absence of legislative history on the issue, conflicting (and minimal) case law, and a lack of attention to exactions by scholars and others. Although few people seemed to contemplate exaction of conservation easements when states first began passing conservation-easement statutes, their use has been pervasive since the early days of conservation easements and only seems to be growing. Indeed, given the interests local governments have in land-use planning and exactions, it is strange that exaction of conservation easements has gone under-examined for so long.

Despite the questions raised in this Article about exacted conservation easements, it is unclear how extensive the problem actually is. We must begin by asking ourselves whether exacted conservation easements should be enforceable. The answer to this question is undoubtedly yes. We would not create conservation easements or grant permits in exchange for them if we did not hope that they would persist. This leads to two additional questions. First, does it matter whom we enforce against? For example, should permit holders be on the hook for the conservation easements they create and for how long? The length of the permit term or in perpetuity?

Second, is there actually an enforceability problem? At this stage, there are few studies regarding the prevalence of conservation-easement violations or challenges to enforcement. We do know, however, that challenges to conservation easements and violations of the agreements increase generally as the agreements age and the underlying property changes hands. What we cannot currently determine is whether this problem is greater for exacted conservation easements than for other types of conservation easements.

We might suspect that exacted conservation easements are more likely to have violations. Where a landowner donates a conservation easement, there may be a special connection with the land that is passed onto future generations. A similar connection to the land might arise when landowners sell conservation easements over their land in an attempt to keep a working landscape, like a forest or farmland, economically viable. Such conservation easements may be associated with a land protection ethos that continues beyond the current generation. However, there may be less motivation for

land protection where developers begrudgingly create conservation easements to obtain permits. Where such exacted conservation easements increase land values by increasing environmental and open-space amenities for the landowners and neighbors, violations and challenges may be few. However, where they constrain land attractive for development or other land uses, these agreements may face more problems compared to other conservation easements.

Additionally, exacted conservation easements are more likely to be held by government agencies than nonprofit organizations. While publicly held exacted conservation easements might appear to offer greater opportunities for transparency and public accountability, there is also some evidence that public entities are less diligent enforcers.[200]

Finally, even if the percentage of violations and challenges are the same for exacted conservation easements and other types of conservation easements, we may still have a heightened interest in the enforceability of exacted conservation easements. Because they are created in exchange for a public good,[201] there is public interest in ensuring their long-term viability. A greater understanding of the risks and benefits associated with exacted conservation easements will help better determine when to use this tool.

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200. *See, e.g.*, Feduniak v. Cal. Coastal Comm'n, 56 Cal. Rptr. 3d 591, 598 (Cal. Ct. App. 2007) (stating that the California Coastal Commission issues over 1,000 permits per year and does not have time to monitor compliance with servitudes exacted under those permits due to budgetary and time constraints); *see also* BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS 14 (1999) (studying violations of conservation easements in the San Francisco Bay Area and finding that although around 75% of land trusts monitored their conservation easements regularly, only 30% of public entities did the same).

201. Exacted conservation easements are not the only easements that involve public interest or money. Donated conservation easements often yield tax benefits for landowners. I.R.C. § 170(h) (2006) (outlining the rules regarding charitable deductions for conservation easements). Purchased conservation easements are often bought with public funding. *See, e.g.*, Jessica Owley, *Use of Conservation Easements by Local Governments*, *in* GREENING LOCAL GOVERNMENT (Patricia Salkin & Keith Hirokawa eds.) (forthcoming 2011); Jacqueline Geoghegan, *The Value of Open Spaces in Residential Land Use*, 19 LAND USE POL'Y 91, 92 (2002) (discussing public purchase of conservation easements). All categories of conservation easements commonly result in lower property taxes (thereby decreasing public revenues for other services); Daniel B. Stockford, Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 825–26 (1990) (discussing conservation easements and property tax assessments). Exacted conservation easements may be a special case because the public benefits are likely to be hidden, making it hard to determine from looking at an agreement that it was part of an exaction. Additionally, interests in preventing land conversion and habitat destruction may be quite high in relation to loss of public revenues because they are harder changes to reverse.