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Notes

Conservation Easements and the Doctrine of Changed Conditions

by

JEFFREY A. BLACKIE*

Concern for the environment and decline of open space in the United States have led to a number of innovative land use devices in recent decades.\(^1\) One such device is the conservation easement.\(^2\) En-forceable by nonprofit or governmental agencies, conservation easements restrict the use of real estate for the purpose of retaining or protecting the natural, agricultural, scenic, or open-space value of the property.\(^3\) Be-

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2. The term "conservation easement" is used throughout this Note, although some statutes and scholars refer to such easements as conservation servitudes, conservation futures, less-than-fee interests, scenic easements and interests, or development rights. See, e.g., Korngold, Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements, 63 TEX. L. REV. 433, 437 (1984). Korngold suggests the term "conservation servitude" as "a neutral term that avoids the traditional categories." As is argued, however, in § I(B)(2)(a) infra, the term "easement" is chosen by legislatures precisely because it is not neutral. This Note uses the term "easement" because it is the prevalent term and is used in the Uniform Conservation Easement Act and the California Civil Code, the primary statutory references of this Note. See infra note 3.

3. Definitions of conservation easements vary widely among statutes and commentators. They differ primarily in the scope of real property covered. The definition stated here is broader than that contained in some (usually earlier) statutes since it includes agricultural and open-space areas, and paraphrases the Uniform Conservation Easement Act. The Act 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,
cause of increasing concern for the environment and beneficial tax laws, the use of conservation easements has grown dramatically in the last twenty years. Whether this growth will continue may depend upon the effect of changes in the area surrounding the land with the easement. At common law, the equitable doctrine of changed conditions allowed a court to terminate a real covenant or equitable servitude when changed conditions in or around the burdened land frustrated the purpose of the restriction or created an undue hardship on the owner of the burdened land. Courts found that the implied intent of the parties was to lift the restriction in the event such a change in circumstances occurred.

Currently, there is substantial debate about the applicability of the doctrine of changed conditions to conservation easements. Some have argued that courts should apply the doctrine to conservation easements just as they apply it to the common law servitudes. Yet, the conservation easement's public and environmental purposes appear to preclude termi-

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.

UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 64 (Supp. 1989). As of August 16, 1988, the following 14 states and the District of Columbia have adopted the Uniform Conservation Easement Act: Arizona, Arkansas, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Nevada, Oregon, South Dakota, Texas, Virginia, Wisconsin. California defines a conservation easement to mean any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

CAL. CIV. CODE § 815.1 (West 1982).

4. See infra notes 24-33 and accompanying text.

5. In 1975, 16 states had enabling statutes for conservation easements. By 1984, 44 states had enabling statutes. 3 R. POWELL, LAW OF REAL PROPERTY § 430.2[2] (1987). One author has expressed concern that the growth of conservation easements occurred too quickly. "Because their problems are easy to overlook, conservation easements are rapidly becoming the most misused and overused tool for land protection in the United States." Roush, What's Wrong with Easements? in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION, supra note 1, at 71. The "problems," according to the author, are that conservation easements can be unreliable, difficult to draft, and expensive to monitor. The possibility of losing current tax deduction status and the uncertainty of easement appraisals are additional problems. Id. at 71-72.

6. A real covenant is a promise respecting the use of land, which, when certain formalities are satisfied, will bind not only the parties to the original contract but successors to their real property rights. A. CASNER, 3 AMERICAN LAW OF PROPERTY § 9.1 (1952)

7. An equitable servitude is similar to a real covenant. Although it does not meet the formal requirements of a covenant, it will be enforced against successive owners who have knowledge of the original agreement. Id. § 9.24.

8. See, e.g., Korngold, supra note 2, at 485.
nation based on a judicially implied intent of the parties to limit their duration. In addition, conservation easements, unlike common law servitudes, exist now by virtue of state enabling statutes, are conveyed by a recorded deed, are granted in perpetuity, and generally do not provide any method for termination. The drafters of the Uniform Conservation Easement Act ("Uniform Act") have termed the issue "problematic" and left "intact the existing case and statute law of adopting states" as to the doctrine's applicability.

This debate has real world implications. Environmentalists have expressed concern that development-minded landowners will "attempt to use the lever of 'changed conditions' to roll away the conservation easement." This Note examines the applicability of the doctrine of changed conditions to conservation easements. Section I explains the characteristics and purposes of conservation easements. It argues that conserva-

9. The use of easement law to restrict land for conservation purposes was available before the enactment of enabling statutes but was considered highly risky. A. DUNHAM, supra note 1, at 19-22.
13. T. BARRETT & P. LIVERMORE, supra note 11, at 33-34.

Despite the likelihood of litigation, there is little scholarly comment regarding this concern. Professor Ginsberg, has stated that "[t]here is some question whether the doctrine of changed conditions is applicable to conservation easements or, if it is, whether it should be." 3 R. POWELL, supra note 5, at § 430.7[6]. He then argues for its inapplicability, relying largely on public policy reasons. Another author, in an article raising policy concerns about the growth of conservation easements, asks: "does the changed conditions rule ever apply to conservation servitudes? The answer is that it does, which has troubled some proponents of conservation servitudes, who have sought to avoid the rule's effect." Korngold, supra note 2, at 485 (citations omitted). While Korngold apparently believes the doctrine is applicable in some cases, he contends that his own policy arguments against privately held conservation easements would not be adequate to allow a court to terminate such an easement on changed conditions or hardship grounds. Id. at 485-89. Other commentators have observed that "a court might apply the doctrine of changed conditions to terminate an otherwise viable [conservation] easement that has become, to some degree, an economic hardship to the owner of restricted land. Whether a court should be permitted to do so is an important policy question still to be faced." T. BARRETT & P. LIVERMORE, supra note 11, at 33.

14. Conservation easements, of course, are not invulnerable. They can, unless prohibited by statute, be terminated by eminent domain (3 R. POWELL, supra note 5, § 430.7[2]); foreclosure of the burdened property (Kratoth, Tax Titles: Extinguishment of Easements, Building Restrictions, and Covenants, 19 Hous. L. Rev. 55, 55 (1981)); be declared unenforceable by marketable title acts, release, abandonment of the easement (Emory, Conservation Easements: Two Problems Needing Attention, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION, supra note 1, at 196-97); and merger of the holder of the easement and the burdened land (3 R. POWELL, supra note 5, § 430.7[5]). See also UNIF. CONSERVATION EASEMENT ACT § 2, 12 U.L.A. 65 (Supp. 1989); 3 R. POWELL, supra note 5, § 430.7.
tion easements are distinct from traditional land use restrictions because of their unique statutory nature and supporting policy concerns. Section II provides an overview of the nature, history, policies, and traditional considerations of the doctrine of changed conditions. Section III analyzes the application of the doctrine to conservation easements. This Note concludes that the doctrine should not apply as long as the easement serves its stated purpose. The policies and considerations supporting the changed conditions doctrine in traditional servitude cases are not present. When the purpose of the easement can no longer be fulfilled, however, the easement should be terminated. In such a situation, two options should be available to the courts. First, a court could apply the *cy pres* doctrine to reform the easement grant in accordance with the general intent of the original grant. Second, the fee owner could be required to pay the easement holder the fair market value of the easement.

I. Conservation Easements

Conservation easements do not fit easily into any previously existing category of property interests and, thus, application of rules that were designed to apply to traditional types of property interests can be problematic. To understand the extent to which the doctrine of changed conditions should govern conservation easements, we should first understand the history, nature, and purposes of this unique interest.

A. Growth of Conservation Easements

Although conservation easements first appeared in the late 1800s, they were not used extensively until after the 1930s. Early conservation easements were primarily highway or scenic easements purchased by the federal government or state governments for the purpose of preserving the natural scenic view. The lack of a solid statutory basis for these easements made the nature of the property interest granted unclear and created enforcement problems. A 1961 congressional study reported that "on the basis of 20 years of experience, such easements breed misunderstandings, administrative difficulties, are difficult to enforce, and cost only a little less than the fee."18

Gradually, state legislatures enacted statutes designed to remedy these problems. In 1959, California passed the first open space easement legislation in the United States. The California Scenic Easement Deed Act of 1959 authorized local governments to acquire fee or lesser inter-

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15. 3 R. Powell, *supra* note 5, § 430.2.
16. *Id.* § 430.2[1].
17. *Id.*
ests in real property for the purpose of conserving open space. As before, only public agencies could own the scenic easements. Unfortunately, the California Legislature provided neither guidelines for using the statute, nor incentives for granting the easements. As a result, the statute virtually went unused.

During the 1960s, Congress and the Internal Revenue Service provided great impetus for the growth of conservation easements. The Federal Highway Beautification Act of 1965 granted federal funds to the states for landscaping and scenic enhancement. At least twenty-nine states responded by enacting new or additional scenic highway legislation.

In 1964 the Internal Revenue Service ruled that taxpayers could deduct the value of easements donated to qualified charitable organizations. Subsequent statutory affirmation of that decision further encouraged states to pass enabling statutes. To qualify for the federal tax deduction, the Internal Revenue Code requires the donation must be a grant in perpetuity. This means that "at the time a gift is made, the possibility that it might be negated by some future event appears 'so remote as to be negligible.'" Thus, if the possibility of judicial termination of a conservation easement based on changed conditions is not so remote as to be negligible, then the gift of the easement will not be tax deductible.

21. T. BARRETT & P. LIVERMORE, supra note 11, at 34.
24. Rev. Rul. 64-205, 1964-2 C.B. 62. Qualified charitable organizations include churches, educational organizations, hospitals and medical research organizations, government agencies that receive a substantial part of their support from federal or state government or from public contributions for the purpose of benefitting an educational organization, and trusts and foundations supported by contributions from the general public. I.R.C. § 170(h)(3) (West Supp. 1989).
26. 3 R. POWELL, supra note 5, § 430.2[2].
28. T. BARRETT & P. LIVERMORE, supra note 11, at 60 (quoting Treas. Reg. § 1.170A- a(e) (1989)).
deductible. The likelihood of the success of a changed conditions challenge, then, has significant tax implications.

State tax benefits on real property also have contributed to the growth of conservation easements. Land with a conservation easement generally is less valuable on the open market than land without the restriction, and therefore usually is assessed at a lower value.\textsuperscript{29} Although the right to reduced assessments is often statutorily required,\textsuperscript{30} courts generally grant this right even when it is not codified. In \textit{Village of Ridgewood v. Bolger Foundation},\textsuperscript{31} for example, the court followed the majority view, stating that

by giving up in perpetuity the right to do anything with the property other than keep it in its natural state, [the landowner] has, as the County Tax Board found, seriously compromised its value as a marketable commodity. . . . \[T\]he adverse impact of such an encumbrance on market value must be taken into account in arriving at an assessed valuation.\textsuperscript{32}

Reductions in estate taxes also are available. An heir to a large estate that includes vast tracts of open space, for example, has to pay taxes on the estate based on the fair market value of the land. "The resulting tax can be so high that the heirs must sell the property to pay the taxes."\textsuperscript{33} If the land is restricted by a conservation easement, however, the property’s market value (and therefore assessed value) will be less.

In sum, conservation easements are of relatively recent origin. Their use for land use regulation has grown significantly with the rise of enabling statutes and tax incentives by both state and federal governments.

\section{The Nature of the Conservation Easement}

Application of the doctrine of changed conditions often depends on the type of interest that is sought to be terminated. Generally, a positive, appurtenant easement, such as a right of access across a neighbor’s prop-
Property, cannot be terminated by a changed conditions challenge. A negative covenant, such as a restriction on subdivision lot owners from using their property for any use other than for residential purposes, is more likely to be terminated due to changed conditions. For this reason, an examination of the nature of the conservation easement is necessary.

(1) Types of Conservation Easements

Although the modern conservation easement is a creature of statute, nonstatutory easements were used for conservation purposes at common law as well. The characteristics of such easements, however, raised serious doubts about their durability and made their use risky and thus rare. Courts disfavored these easements for they not only impeded land use but they could be held in gross—that is, unlike other easements, these were enforceable by persons other than a neighboring landowner.

The statutory conservation easement prevalent today arguably is an entirely new type of property interest that does not fit into the traditional categories of easement, real covenant, and equitable servitude. Some commentators have contended that this development is the beginning of a long-awaited revolution in servitude law. The drafters of the Uniform Act, however, expressly rejected the proposal of creating a "novel additional interest . . . unknown to the common law" since such a development would be merely an "ill-defined . . . amalgam of the three traditional common law interests."

Enabling statutes vary widely in terms of what type of conservation easements may be obtained and who may own them. Generally, statutes allow for both positive and negative conservation easements. A positive conservation easement provides the public with the right to make some specified use of the property. Fishing easements adjacent to streams are an example. More commonly, conservation easements are negative in nature. A negative easement restricts the burdened landowner's right to use the land. For example, a common negative conservation easement prohibits the owner from developing the land contrary to the specifications made in the grant. The land is still hers, however, and she may use

34. A. Dunham, supra note 1, at 19-22.
35. Id. at 21-22. See also notes 66-67 and accompanying text.
36. An easement in gross is one which does not benefit land owned by the easement holder. A negative easement requires the owner of the burdened land to perform or refrain from performing some act. A positive easement, by contrast, allows the easement holder to use the land in some way. A. Casner, supra note 6, § 8.9.
38. See, e.g., Dunham, Statutory Reformation of Land Obligations, 55 S. Cal. L. Rev. 1345, 1346 (1982) (citing conservation easements as evidence that the use of statutes is "the modern trend in reforming property law.").
the land in any manner not inconsistent with the requirements of the easement. Thus, while the landowner might be prohibited from constructing condominiums, she might be able to add a room to her house.\textsuperscript{41}

The open-space easement is the least complex type of conservation easement. The owner of land burdened by an open-space easement has pledged to restrict development on his property. For example, an open-space easement might involve a fee owner of agricultural or ranch land in an area of economic and population growth.\textsuperscript{42} Because the land could be subdivided for development, it is assessed at a value far above its value as ranch land. The owner, however, does not intend to change its use and does not wish to sell. He may grant a conservation easement to a qualified nonprofit agency and then receive a charitable tax deduction, have the property assessed at a lower value, and still use the land as he desires.

While the most common type of conservation easement is the scenic or open-space easement, historic or facade easements, which prohibit the owner of an historic building from altering the architectural features of the exterior of the building, are available in many states.\textsuperscript{43} Although early conservation easements could be owned only by the state or federal government,\textsuperscript{44} and often did not include provisions for conserving open space, the trend is to allow both private nonprofit conservation organizations and governmental agencies to hold easements,\textsuperscript{45} and to expand the types of easements that can be held.\textsuperscript{46}

(2) Is the Interest an Easement?

Courts traditionally have applied the changed conditions doctrine only in cases involving real covenants and equitable servitudes. In contrast, easements, viewed as distinct property rights and not merely promises concerning land, traditionally have been resistant to, if not immune from, the doctrine. A determination that a conservation easement is an easement in fact as well as name, therefore, could preclude, or at least inhibit, the application of the changed conditions doctrine. An ex-

\textsuperscript{41} In contrast, a facade or historic easement may restrict not only the use the owner can make of property, but in addition may require that the owner do some affirmative act such as maintain the property.

\textsuperscript{42} For example, productive dairy farmland in Whatcom County, Washington, between Seattle and Vancouver is protected from development pressures by conservation easements. J. DIEHL & T. BARRETT, supra note 33, at 26.

\textsuperscript{43} See Comment, supra note 25.

\textsuperscript{44} E.g., California Open Space Easement Act of 1974, CAL. GOV'T CODE §§ 51070-97 (West 1980).


amination of the language used in the Uniform Act and state enabling statutes, and the essential characteristics of the conservation easement is required to fully explore this issue.

a. Statutory Language

Because modern conservation easements are created through enabling statutes, legislative intent is an important consideration in determining the applicability of the changed conditions doctrine to conservation easements. Legislative intent is often revealed by statutory terminology; thus, the fact that conservation easements are called “easements” is significant. A legislature is presumed to know the implications of the terminology used in its statutes. If a legislature in a jurisdiction that does not apply the changed conditions doctrine to easements names the conservation interest an “easement,” a court in that jurisdiction could conclude that the legislature intended to prevent application of the doctrine of changed conditions in a suit to terminate the easement. Similarly, if a jurisdiction does allow the doctrine’s application, but gives the holder of an easement greater protection from the doctrine than it would the beneficiary of a real covenant or equitable servitude, a holder of a conservation easement would be given similar increased protection.

This rationale is apparently one reason the drafters of the Uniform Act decided to use the term “easement”:

The interests protected by the Act are termed “easements.” The terminology reflects a rejection of ... suggest[ions] in existing state acts dealing with non-possessory conservation and preservation interests. [One such suggestion] removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements.

The drafters did not want to remove all common law disabilities, as this suggestion urged, but rather, by calling the interest an easement, they sought to retain only those common law disabilities associated with easements. According to the Prefatory Note to the Uniform Act the drafters sought to “sweep[] away certain common law impediments which might


48. Professor Korngold warns, however, that “choosing the ‘easement’ label for a conservation interest and following the classical rules could lead an uncritical decisionmaker to a quick and rigid result without the necessary policy analysis.” Korngold, supra note 2, at 436. This Note does not suggest that a court should not look beyond the labeling of the interest as an easement, but merely that the court give the legislature’s “labeling” its due weight.

49. See Comment, supra note 25, at 436-40.

50. UNIF. CONSERVATION EASEMENT ACT Prefatory Note, 12 U.L.A. 61-62 (Supp. 1989). The drafters also rejected suggested terminology that would “create a novel additional interest which, although unknown to the common law, is in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.” Id.
otherwise undermine the easements' validity, particularly those held in
gross."\textsuperscript{51} One method used to eliminate such limitations was to term the
interest an easement. Since the doctrine of changed conditions was a
significant method of terminating common law servitudes and covenants,
one can conclude that it was one of the impediments meant to be "swept
away."

Moreover, the Uniform Act provides that "a conservation easement
may be created, conveyed, recorded, assigned, released, modified, termi-
nated, or otherwise altered or affected in the same manner as other ease-
ments."\textsuperscript{52} This language further suggests that the drafters intended to
have the individual state's law of easements, rather than the law of cove-
nants or equitable servitudes, govern alterations of the conservation
easement.

The Uniform Act also states that "[e]xcept as provided in Section
3(b), a conservation easement is unlimited in duration unless the instru-
ment creating it otherwise provides."\textsuperscript{53} Section 3(b) states that the "Act
does not affect the power of a court to modify or terminate a conserva-
tion easement in accordance with the principles of law and equity."\textsuperscript{54} At
first glance, the drafters' use of the word "equity" may appear to indicate
an intent to apply equitable servitude law, including the doctrine of
changed conditions to the conservation easement. In the comment to
this section, however, the drafters point out that the changed conditions
document "is applicable to real covenants and equitable servitudes in all
states, but its application to easements is problematic in many states."
They add that enactment of the Uniform Act "leaves intact the existing
case and statute law of adopting states as it relates to the modification
and termination of easements."\textsuperscript{55} Reading these provisions and com-
ments together suggests that, while the applicability of the doctrine
clearly is left to the adopting jurisdiction, the applicable law is the juris-
diction's law of easements, not covenants and equitable servitudes.

The California Conservation Easement Act\textsuperscript{56} ("California Act") is
not as clear as the Uniform Act regarding whether or not the interest is
an easement. Although terming the interest an "easement," the Califor-
nia Act refers to a conservation easement as an "interest in real prop-
erty."\textsuperscript{57} Traditionally, an easement was an interest in property while a
covenant was merely a promise respecting the use of land. California

\textsuperscript{51} Id.
\textsuperscript{52} Id. § 2(a), at 65 (emphasis added).
\textsuperscript{53} Id. § 2(c), at 65.
\textsuperscript{54} Id. § 3(b), at 67.
\textsuperscript{55} Id. § 3 comment, at 68.
\textsuperscript{56} CAL. CIV. CODE §§ 815-16 (West 1982 & Supp. 1988)
\textsuperscript{57} Id. § 815.2(a) ("A conservation easement is an interest in real property voluntarily
created and freely transferable in whole or in part for the purposes stated in Section 815.1 by
any lawful method for the transfer of interests in real property in this state."); § 815.2(c) ("A
case law, however, obfuscates this rule, leaving unclear whether the reference is intended to give the interest the status of an easement.

In *Friesen v. Glendale*,58 the California Supreme Court followed the traditional view and held that for purposes of compensation in eminent domain proceedings, an easement is a compensable *property right*, while a restriction on development "does not rise to the dignity of an estate in the land itself[,]" but is essentially only a *contractual right*.59 Under this view, the use of the term "an interest in property" appears to give conservation easements the status of easements even though they might appear to be merely contractual restrictions on development. In *Southern California Edison Co. v. Bourgerie*,60 however, the same court expressly overruled *Friesen*61 and held that a building restriction, which was traditionally not a property right, constitutes property for eminent domain purposes.62 By broadening the class of rights in property, the *Bourgerie* court muddied the rule that an interest in property could refer to an easement but not a covenant or servitude. Thus, classifying a conservation easement an "interest in real property" might have given it the status of an easement under *Friesen*, but after *Bourgerie* this conclusion is less certain. Because the California Conservation Easement Act was passed six years after *Bourgerie*, the term "interest in property" by itself does not assure that any extra protection given to easements would carry over to conservation easements. Of course, the interest's title, conservation *easement*, still implies easement status.

The California Act also differs from the Uniform Act by containing no exceptions to the easement's perpetual duration. California's Act provides that "[a] conservation easement shall be perpetual in duration."63 This unequivocal statement appears to preclude judicial termination regardless of whether a conservation easement is categorized as an easement, a covenant, or an equitable servitude. Without this strong statutory declaration, a court might find that a public purpose, such as promoting the productive use of property, should override a grant of a real covenant or equitable servitude, despite a provision for perpetual du-

58. 209 Cal. 524, 288 P. 1080 (1930).
59. *Id.* at 531, 288 P. at 1083 (emphasis added).
60. 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).
61. *Id.* at 175, 507 P.2d at 968, 107 Cal. Rptr. at 80.
62. *Id.* at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.
63. CAL. CIV. CODE § 815.2. (West 1982); *Cf.* UNIF. CONSERVATION EASEMENT ACT § 2(c), 12 U.L.A. 65 (Supp. 1989), and supra text accompanying notes 53-55. For other statutes permitting perpetual duration, see MASS. GEN. LAWS ANN. ch. 184, § 31 (West Supp. 1983); MINN. STAT. § 84.64 (1982); MONT. CODE ANN. § 76-6-202 (1983). For statutes indicating a presumption of unlimited duration, see COLO. REV. STAT. § 38-30.5-103(3) (1982); GA. CODE ANN. § 44-10-4 (1982); IND. CODE ANN. § 35-5-2.6-2(c) (1984); WIS. STAT. ANN. § 700.40(2)(c) (West Supp. 1988).
ration in the grant. The statutory declaration, however, serves as a clear public demand for the courts to uphold conservation easement grants regardless of their classification.

b. Nonstatutory Character of Conservation Easements

While conservation easements have a distinctly statutory nature, their nonstatutory characteristics also must be examined to determine whether a court should find the modern conservation easement protected by easement law. Two authors, writing before the passage of most modern conservation easement statutes covering open space, stated that “the type of interest needed to accomplish open-space preservation is so unlike any easement and so like most restrictive covenants that one can expect the courts to treat them as covenants.” As this section will argue, however, these authors may have underestimated the flexibility of the easement category and overstated the interest’s similarity with covenants.

The primary difference between the character of the conservation easement and that of the traditional easement is that the former is both negative and in gross. At common law, there could be only four types of negative easements: easements for light, air, support of buildings, and flow of artificial streams. Unlike a conservation easement, held by a nonprofit or governmental agency, the benefit of each of the traditional negative easements is held by a neighboring landowner. The type of restriction that is now termed a conservation easement could have been achieved at common law only by a covenant, which would have been subject to the doctrine of changed conditions.

One problem with the prediction that courts will treat conservation easements as covenants is that the boundary between easements and restrictive covenants has evolved. Regarding the Restatement of Property’s definitions of easements, covenants, and servitudes, one scholar has noted: “Unfortunately, very little substance lies behind these phrases

64. In addition to the discussion of the Uniform Conservation Easement Act, at text accompanying supra notes 47-54, see, UNIF. CONSERVATION EASEMENT ACT § 4, 12 U.L.A. 68 (Supp. 1989) (“A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; . . . (3) it is not of a character that has been recognized traditionally at common law.”).


67. One author has suggested that whether a conservation easement is analogous to a traditional easement or covenant depends on the type of grant in the conservation easement. For example, prohibiting billboards would be similar to a negative easement, prohibiting subdivision for commercial development is closer to a traditional real covenant, while prohibiting excavation or dumping of trash is closer to a restriction. Comment, supra note 25, at 436.
and using such definitions to distinguish between the forms is virtually impossible."

A "traditional" easement allows the holder to make some use of the servient owner's land, while a restrictive covenant restricts the servient owner's use of his land. Under this simplified view, most conservation easements are indeed similar to covenants. But even traditional easements did not always match this "traditional" easement definition, as evidenced by the four common law negative easements. The hesitation to allow more than four negative easements primarily reflected a fear that a purchaser of land would not receive notice of such an encumbrance because no recording system existed. With modern recording statutes, however, the justification for not allowing negative easements has disappeared and the types of allowable easements have expanded. In 1928 the Michigan Supreme Court gave building restrictions easement status, stating that "the category of easements must expand with the circumstances of mankind." Today, the deterioration of the environment requires the expansion of easement classification through the enactment of conservation easement statutes.

The Uniform Act acknowledges this expansion by providing that a "conservation easement is valid even though . . . it is not of a character that has been recognized traditionally at common law." Thus, the drafters have made clear that although the character of a conservation easement may have precluded its recognition in seventeenth century England, the interest should be considered an easement by modern courts.

Finally, the characteristics that exclude conservation easements from the category of "true" easements, also prevent them from being valid real covenants. Just as easements traditionally could not be held in gross, neither, in the majority of jurisdictions, could real covenants.

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70. J. Dukeminier & J. Krier, supra note 66, at 962.
72. Unif. Conservation Easement Act § 4(3), 12 U.L.A. 68 (Supp. 1989); see also id. Prefatory Note ("By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in [private ownership of the easements].").
73. A. Dunham, supra note 1, at 17; see also Cortese v. United States, 782 F.2d 845 (9th Cir. 1986) (stating that a covenant is "an agreement by one party to do or not to do an act; the act usually concerns the use of his land and affects the land of the party to whom the promise is made." ) (quoting 4 H. Miller & M. Starr, Current Law of California Real Estate 25:1 at 154 (1977)) (emphasis added).
category, a court should have little basis for finding the interest is a
covenant.

In sum, although conservation easements are unlike classical eas-
ements, several factors indicate that courts may treat the interests as ease-
ments. The category of easements has been expanded when courts deem
it necessary to give certain interests greater protection recognizing that
the rationale for limiting the category of easements no longer applies.
Also, the difficulty of fitting conservation easements into the real cove-
nant category should lead a court to rely on the statutory definitions.
Although case law concerning conservation easements is scarce, the few
courts that have directly addressed the nature of conservation easements
have generally treated them as easements, rather than covenants or equi-
table servitudes.74

C. The Purpose and Policy of Conservation Easements

Because the impossibility of fulfilling the purpose of a restriction on
land is often the basis for a court's use of the changed conditions doctrine
to terminate the restriction, it is important to understand the purposes of
conservation easements. Statutory provisions and case law discussing
these purposes reflect the important policies that support conservation
easements.

(1) Statutory Provisions Regarding the Purpose of Conservation Easements

The purpose of a statutorily authorized conservation easement is
found both in the enabling statutes and in individual easement deeds.
Because the statement of purpose in a deed usually mirrors the language
in the statute, this Note will focus on the general statement of purpose
found in the statutes.75

The Uniform Act provides that the purposes of a valid conservation
easement must “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 histori-
cal, architectural, archaeological, or cultural aspects of real property.”76
Similarly, California's statute requires that the interest “retain land

74. E.g., Village of Ridgewood v. Bolger Found., 104 N.J. 337, 340, 517 A.2d 135, 137
(1986) (holding that for purposes of property tax assessment, "conservation easements of the
kind here considered are easements in gross.").

75. Compare the statement of purpose language in a sample easement ("to assure that the
Property will be retained forever predominantly in its natural, scenic and open space condition
and to prevent any use of the Property that will significantly impair or interfere with the
natural, scenic, open space and ecological values of the Property," T. BARRETT & P.
LIVERMORE, supra note 11, at 137) with statutory language in text at notes 76 & 77 infra.

76. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 64 (Supp. 1989).
predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition."\textsuperscript{77}

There are two significant aspects of the purposes that a conservation easement must have under the California and Uniform Acts. The first is their distinctly public nature. No specific parcel of land benefits from the easement, nor does any private individual benefit—the beneficiary is the public. Only recently have entities other than publicly accountable government agencies been allowed to acquire conservation easements and in many states, conservation easements still can be held only by state agencies. In states adopting the Uniform Act, the interest can be held only by a government agency or a charitable organization having among its responsibilities, “retaining or protecting the natural, scenic, or open-space values of real property.”\textsuperscript{78} The charity does not obtain any benefit to itself (beyond the benefits enjoyed by the general public) for holding the easement, but rather, acts as a trustee holding the interest for the benefit of the public. The drafters of the Uniform Act believed the provision allowing private charitable groups to own the easements would not decrease the public purpose of conservation easements.\textsuperscript{79} The California Act states that “it is in the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.”\textsuperscript{80} A public purpose also is required in order for grants to qualify for the federal income tax deduction.\textsuperscript{81}

In addition, the public purpose is evidenced by the third-party right of enforcement provided in many conservation easement statutes. If the charitable holder fails in its obligation as public trustee to enforce the restriction, any other organization that could qualify as a holder can seek enforcement of the restriction.\textsuperscript{82}

The easement’s required purposes are significant because they conflict with the traditional policy of encouraging the most profitable land use. Rarely does preservation of open space result in profit. Usually the owner of land restricted by a conservation easement does not benefit from any financial gain beyond the value of income or property tax deductions. If social policy always mandated the most profitable use of land, few conservation easements would exist. In this sense, the passage of enabling statutes is evidence of a rejection of policy favoring development over nondevelopment, at least with regard to land burdened by conservation easements.

\textsuperscript{77} CAL. CIV. CODE § 815.2 (West 1982).
\textsuperscript{78} UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. 64 (Supp. 1989).
\textsuperscript{79} Id., Prefatory Note at 61-62.
\textsuperscript{80} CAL. CIV. CODE § 815 (West 1982).
\textsuperscript{82} UNIF. CONSERVATION EASEMENT ACT § 1(3), 12 U.L.A. 64 (Supp. 1989).
(2) Strength of Policy

These statutory provisions reflect significant policy support for conservation easements. This support is evident also in other provisions and in case law. Although easements or covenants for the purpose of conservation were available prior to the statutes, the statutes help secure the status of conservation easements. As the Uniform Act states, "[O]ne of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends." The California Act includes a legislative finding that "the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California." Another California statute, the California Open-Space Easement Act of 1974, declares that "open-space lands, if preserved and maintained, would constitute important physical, social, economic or aesthetic assets to existing or pending urban development."

The strength of public policy favoring conservation easements is evidenced also by provisions for reduced property assessments. Such provisions further encourage the use of conservation easements at the public expense in the form of lower property taxes. A reduced assessment, where no party obtains a corresponding property value increase (e.g., when an access easement is granted to a neighboring property owner) is, in effect, a public subsidization of the easement.

When the state does not require reduced property tax assessments by statute, courts have relied on legislative findings similar to the California provision cited above to require them. Even without a statutory policy statement, a court may rely on public support for conservation easements to require a reduced assessment. In a recent Massachusetts case, the state supreme court upheld the denial of an abatement sought by the owner of land restricted by a conservation easement because the

83. Id. § 4 comment at 68.
84. CAL. CIV. CODE § 815 (West 1982).
85. CAL. GOV'T CODE § 51072 (West 1983).
86. See supra notes 28-31 and accompanying text.
87. See, e.g., Village of Ridgewood v. Bolger Found., 104 N.J. 337, 341-42, 517 A.2d 135, 137 (1986). Ordering the state to reduce the property tax assessment for conservation easements; the court cited the preamble statement to N.J. STAT. ANN. § 54:4-3.63 (West 1983): the legislature hereby finds and declares that natural open space area for public recreation and conservation purposes are rapidly diminishing; that public funds for the acquisition and maintenance of public open space should be supplemented by private individuals and conservation organizations; and that it is therefore in the public interest to encourage the dedication of privately—owned open space to public use and enjoyment as provided for in this act.

Id. See also City of Newark v. Township of Vernon, 1 N.J. Tax 90, (1980) ("The benefits received by lower taxes may be the best economic incentive to insure private participation in the conservation of open space.").
easement did not benefit another parcel of land. The Massachusetts Attorney General applied for a rehearing because of the case's importance "to the cause of environmental conservation" and its precedential value. Sixteen charitable organizations joined in an *amicus brief* and the court reversed itself on rehearing.

The policy favoring the most economically productive use of land began with the rise of the industrial revolution in the 1800s. At a time when the natural resources of the country appeared boundless, a social policy favoring conservation of the environment over economic exploitation of land was unthinkable. The benefits of economic growth were too great and the ecological cost unforeseen. Concern over the ecological costs of favoring industrial growth arose only recently. Even early conservation easements provided merely "an aesthetic luxury good for the mind and soul but little else." The general public has only recently begun to realize the importance of open space to support our environmental systems. Today, "[t]he preservation of open space is a necessity, not a luxury."

In one sense, the emphasis on productive land use is not different from the policy favoring environmental protection. The underlying commitment of both policies is that land be put to its "best" use. Thus, the issue becomes: What use is best? The answer to this problem should consider that the best use might not depend solely on profitability. As some commentators have observed, "[l]ands should be put to their best use, and development should be channeled away from those lands whose best use can only be achieved if they are left open." The best use of a river may not be to dam it up and then distribute the water to irrigate farmland, but rather, allow it to run unfettered to the sea. The diversion of its historical path may have tragic consequences on ecosystems vital to our environment. The best use of forestland may not be timber supply but rather support, in an undisturbed state, of the ecosystems that depend on it. In short, best use should not always be determined by the highest market price.

90. Id.
91. Id. at 344, 495 N.E.2d at 297.
93. The beginning of broad public awareness of the modern threat to the environment can be traced to the publication of Rachel Carson's classic book, R. Carson, Silent Spring (1962).
95. Id.
96. Id. at 2.
97. Id.
II. Doctrine of Changed Conditions

Despite statutory and judicial support for conservation easements, there is concern about their ability to withstand a "changed conditions" challenge.98 This section examines the nature and purpose of the doctrine of changed conditions to analyze whether its application to conservation easements is appropriate.99

A. History

The doctrine of changed conditions developed at common law long before the appearance of conservation easements. It developed as an equitable response to the creation of real covenants and equitable servitudes. Some historical background is useful to understand the scope and limits of this doctrine.

(1) Development of Servitude Law

Courts created real covenants and equitable servitudes in response to the inflexible nature of common-law easements (i.e., as exceptions to easement law). Two theories explain this development and also reflect the inability of traditional easement law to afford use restrictions the pro-

98. The changed conditions doctrine is also known as the "change of neighborhood" or "change in circumstances" doctrine. 5 R. Powell, supra note 5, § 679[2] & n.50.
99. The Restatement of Property provides the following under the heading of "changed circumstances":

Injunctive relief against violation of the obligations arising out of a promise respecting the use of land cannot be secured if conditions have so changed since the making of the promise as to make it impossible longer to secure in a substantial degree the benefits intended to be secured by the performance of the promise.

Restatement of Property § 564 (1944). See generally A. Casner, supra note 6, § 9.39 ("[A] change in character of the surrounding neighborhood, that would render the enforcement of a building restriction oppressive and inequitable, has resulted in a termination of the covenant, so that the burdened landowner is no longer under any duty to comply with the restriction.") (citations omitted); 5 R. Powell, supra note 5, § 679[2] ("This so-called 'doctrine of changed circumstances' provides an important defense against a covenantee who is seeking injunctive relief where a restriction can be proved to have outlived its usefulness") (footnotes omitted).

Although developed in the courts, at least one state has codified the doctrine. New York authorizes a court in any action seeking relief against a restrictive covenant, or a declaration with respect to its enforceability, to terminate the restriction

if the court shall find that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.

tection given to easements. The first theory holds that real covenants evolved from an expansion of warranty and contract law into the arena of property law during the 1800s. Two landowners, for example, would enter into a contract respecting the use by one landowner of the other's land. This contract would then influence the real property rights held by the owners. A second theory holds that real covenants and equitable servitudes originated in the judicial enforcement of "equitable easements." The granting of a right to enter land might have been deemed an equitable easement or servitude despite nonconformity with the requirements of an easement deed. Regardless of these theories, it appears that neither real covenants nor equitable servitudes would have developed, "[i]f the law had let the list of negative easements expand naturally with the changes that took place in urban development."  

Traditional easement law allowed only four negative easements, or restrictions, on the use of land: those that protected the easement holder's right to light, air, support for a building, or a flow of water. Other private land use restrictions could not be enforced under the law of easements. Rather, they could be enforced only by covenant or equitable servitude. Because restrictions labeled real covenants or equitable servitudes did not develop under easement law, they were not accorded the protection that easements had. Common-law courts viewed covenants and servitudes as mere equitable interests or contract rights, but considered easements as "property, of which its owner [could not] lawfully be deprived without his consent."  

The issue generally presented by such restrictions was whether they were enforceable against subsequent purchasers of the land. In the famous case of Tulk v. Moxhay, the court enforced a negative covenant on a successor to the covenantor when the purchaser took the land with knowledge of the covenant. Since Tulk v. Moxhay restrictions on land

100. See, e.g., H. SIMS, A TREATISE ON COVENANTS WHICH RUN WITH LAND OTHER THAN COVENANTS FOR TITLE, 45-49 (1901). This theory is summed up in the statement that covenants "are derived from warranty, and ... are not a species of easements." Id. at 174; see also J. DUKEMINIER & J. KRIER, supra note 66, at 1092 ("There is today no reason why real covenants, equitable servitudes, and easements should not be merged into a wider concept of servitudes.").

101. L. JONES, A TREATISE ON THE LAW OF EASEMENTS 97-104 (1898). On the different theories generally, see H. SIMS, supra note 100, at 48-49 (disagreeing with those (including Justice Holmes) who argue that covenants developed "from certain improper or spurious easements"); Stoebuck, Running Covenants: An Analytical Primer, 52 WASH. L. REV. 861, 888 (1977).


103. Id.

104. Sims refers to the interest as a "chose in action." H. SIMS, supra note 100, at 21.

105. L. JONES, supra note 101, at 17.

106. 41 Eng. Rep. 1143, 1145 (Ch. 1848).
beyond the four negative easements allowed at common law were, although not as secure as easements, potentially perpetual.

(2) Development of the Doctrine of Changed Conditions

The doctrine of changed conditions began as a defense to an action in equity seeking to enforce an equitable servitude.¹⁰⁷ A landowner could defend his decision to build a gas station on his property, though contrary to the language of an agreement with a neighbor, by claiming that the agreement is no longer enforceable because of a change in the area. The owner of restricted land may use the doctrine either as a defense in a servitude holder's action for an injunction, or as an affirmative action seeking a declaratory judgment that the restriction is no longer enforceable.¹⁰⁸

Once a restriction has been held unenforceable, it is unclear whether a claim for damages remains. Is the covenant actually extinguished or merely unenforceable in equity? Traditionally, if a court prohibited an injunction due to changed conditions, damages still were available and the restriction remained as a cloud on title.¹⁰⁹ Courts subsequently rejected this view, allowing termination of the restriction at law as well as in equity.¹¹⁰

Covenants and servitudes are often designed to restrict development in housing subdivisions and the changed conditions doctrine is commonly used in such situations.¹¹¹ In Barton v. Moline Properties,¹¹² the owner of a Miami Beach lot brought an action to remove restrictions that prohibited him from erecting any building other than a residence built according to certain specifications.¹¹³ The Florida Supreme Court accepted for purposes of appeal the plaintiff’s allegations that “at the time of the original deed . . . the locality of plaintiff’s land was suitable for private residential purposes . . . ; [and] that at that time the location of said land was private, quiet, and partook of the general nature and char-

¹⁰⁷. Stoebuck, supra note 101, at 903 (It is unclear whether this equitable doctrine applies to real covenants. Because of the declining use of covenants and their virtual replacement by equitable servitudes, however, this question has lost significance.).


¹⁰⁹. Restatement of Property § 563 comment b (1944); 5 R. Powell, supra note 5, § 679[2].


¹¹¹. For a general discussion of the doctrine of changed conditions, see A. Casner, supra note 6, § 9.22; 5 R. Powell, supra note 5, § 679[2].

¹¹². 121 Fla. 683, 164 So. 551 (1935).

¹¹³. Id. at 687, 164 So. at 553.
acteristics of the other restricted lots in said subdivision." At the time of the suit, however, the City of Miami Beach had grown and the areas adjoining the plaintiff's land had become predominantly commercial. As an example of the change in the neighborhood, the court cited the existence of "a casino known as 'Villa Venice,' wherein a cabaret, restaurant, and roadhouse is operated, patrons are furnished with food, entertainment, music and dancing, bathrooms and bathing suits, and bathing privileges for patronage of the public generally, which continues until the early hours of each morning . . . ." The plaintiff alleged that because of these changes in the character of the surrounding area, his land "had no value as a residential property, but had a great value and [was] readily usable and marketable as business and commercial property." In upholding the lower court's ruling, the Florida Supreme Court stated that:

> where the [duration of] a restrictive covenant . . . has not been expressly limited by the parties, it should be implied that some reasonable limitation adapted to the nature of the case was intended, and that such restrictions as the stated covenants imposed on the use of any particular grantee's property, being in derogation of the otherwise free use and enjoyment of same, should be construed as extending for no longer period of time than the nature of circumstances and purpose of their imposition would indicate as reasonable for the duration of their enforcement without undue and inequitable prejudice to the property rights purchased and acquired by the original grantee and his successors in title, subject to such restrictive covenants.

*Barton* contains both of the primary rationales for applying the doctrine. First, is an implied intention by the parties to terminate the restriction upon the occurrence of the originally unforeseen events. Second, and often, as in *Barton*, not expressly stated, is a preference for the most profitable or productive use of land over the language of the agreement. These rationales are discussed in the next section.

B. Purpose and Policy of the Doctrine

The most frequent basis courts use to apply the doctrine of changed conditions is an implied intent by the original parties to terminate the restriction in the event that the changed conditions or the hardship occurred. As one commentator has observed:

> The [changed conditions] cases proceed upon the theory that in all building restrictions there is an implied intention upon the part of the original parties that the restrictive covenants are only to last during the time that the basic purpose of the subdivision can be carried out; and

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114. *Id.* at 687-88, 164 So. at 553.
115. *Id.* at 686, 164 So. at 553-54.
116. *Id.* at 689, 164 So. at 554.
117. *Id.* at 690, 164 So. at 554.
118. *Id.* at 694, 164 So. at 556.
that when the change in the surrounding neighborhood has rendered it impossible to continue to carry out this basic purpose of creating and maintaining a restricted residential area, the parties contemplated that the covenants would come to their natural end.\textsuperscript{119}

In \textit{Barton v. Moline Properties}, the court stated the test for applying the doctrine as "whether or not the original purpose and intention of the parties to such restrictive covenants can be reasonably carried out, in the light of alleged materially changed conditions."\textsuperscript{120} While the courts place great emphasis on the parties' intent, at least one author believes that implying an intent to terminate the restriction on the changed circumstances is a fictitious justification for nullifying the restriction.\textsuperscript{121}

Clearly stating the purpose of a conservation easement in the deed and the easement's \textit{increasing} importance despite a change in the surrounding area probably would prevent a court from implying an intent to terminate. Even with clear drafting, however, as Professor Dunham (writing before the passage of modern conservation easement statutes) noted, "the risk is always present, and the desirability of more effectively utilizing land might weigh more heavily with the court than the desirability of effectuating the intention of the parties."\textsuperscript{122}

The second rationale for allowing parties to terminate covenants and equitable servitudes is the concern for marketability and efficient use of land. The rationale for New York's change of conditions statute is "the public interest in the marketability and full utilization of land."\textsuperscript{123} Courts generally interpret restrictive covenants "strictly against persons seeking to enforce them and in favor of the unencumbered use of the property."\textsuperscript{124} In \textit{Blakely v. Gorin},\textsuperscript{125} an injunction to prevent a violation of a building restriction was denied, though the purpose was not obsolete, because "continuation of the restriction . . . would impede reasonable use of the land for purposes for which it is most suitable, and would tend to impair the growth of the neighborhood or municipality in a manner in-

\textsuperscript{119} A. Casner, \textit{supra} note 6, § 9.22. \textit{See also} Restatement of Property § 564 (1944), quoted in note 99 \textit{supra}.

\textsuperscript{120} 121 Fla. 683, 695, 164 So. 551, 556 (1935); \textit{see also} AC Assoc. v. First Nat'l Bank of Fla., 453 So. 2d 1121, 1127 (Fla. Dist. Ct. App. 1984)

The test is whether or not the covenant is valid on the basis that the original intention of the parties can be carried out despite alleged materially changed conditions or, on the other hand, whether the covenant is invalid because changed conditions have frustrated the object of the covenant without fault or neglect on the part of the party who seeks to be relieved from the restrictions.

\textsuperscript{121} Reichman, \textit{supra} note 68, at 1259.

\textsuperscript{122} A. Dunham, \textit{supra} note 1, at 18.


consistent with the public interest." Underlying this statement is the belief that utilization and economic development furthers the public interest more than the restriction. The court apparently considered economic development more important than the policy of enforcing the intent of the parties.

As one commentator has described this policy framework: "Application of the [changed conditions] rule strikes a balance between the pressure for redevelopment and the desire for stability. The changed conditions doctrine thus assures that the permanency of servitudes does not prevent economic productivity of land." The policy of full utilization, however, can be overcome by policies supporting conservation and open space. Thus, if states begin to value the co-existence of economic development and conservation of natural and scenic resources, a fee owner's desire to develop might not be grounds for overriding the public interest in the availability of open space. Although land restricted by a conservation easement will always be less marketable, the advent of conservation easement statutes could represent a partial rejection of policies favoring the "full utilization" of land.

C. Factors to Determine Changed Conditions

Courts consider several factors in determining whether a restriction is unenforceable because of changed conditions. These factors include the intent of the parties, the foreseeability of the change in conditions, the loss of potential profits, economic burden on the land owner, the location of the changes, the benefit to the servitude holder, and the duration of the restriction.

In accord with the implied intent of the parties rationale, one of the primary factors is the actual intent of the parties. In AC Associates v. First National Bank of Florida, the court stated the test for cancelling a restrictive covenant as:

[whether or not the covenant is valid on the basis that the original intention of the parties can be carried out despite alleged materially changed conditions . . . .]

[T]he issue . . . is not what the parties would do today, but rather whether the . . . restrictions remain substantially capable of serving purposes intended when the restrictions were imposed.\textsuperscript{129}

\textsuperscript{126} \textit{Id.} at 605, 313 N.E.2d at 912 (citing MASS. GEN. L. ch. 184, § 30 (West Supp. 1989)).
\textsuperscript{127} French, \textit{Toward a Modern Law of Servitudes: Reweaving the Ancient Strands}, 55 S. CAL. L. REV. 1261, 1300 (1982). \textit{See generally} Korngold, \textit{supra} note 2, at 447-67 (discussing the conflicting policies of "freedom and enforceability of contract versus free alienability and unrestricted use of land").
\textsuperscript{128} 453 So. 2d 1121 (Fla. Sup. Ct. 1984).
\textsuperscript{129} \textit{Id.} at 1127.
Intent will be strictly construed against the party seeking to enforce
the restriction, and therefore must be clear and provide for any foresee-
able later circumstance. 130 In Racine v. United States 131 the court inter-
preted a scenic easement grant which provided that, "only one residence
and one tenant dwelling are authorized within the easement area," so as
to allow the building of barns and corrals for a dude ranch. 132 The court
relied on the "plain language of the easement." The court stated:

It would have been easy for the Government's drafter to place lan-
guage in the deed prohibiting all dude ranching buildings otherwise
permitted by the regulations. . . . But the Government did not do so.
Because of this drafting failure, the Government is now essentially ask-
ing us to re-write the deed. 133

The foreseeability of the changed circumstances at the time the re-
striction was imposed might be used by courts to imply an intention to
terminate the restriction. In AC Associates, the court refused to termi-
nate the restriction, stating that, "[t]here ha[d] been no showing that
commercial development of the [property] was not foreseeable and, in
fact, foreseen at the time of the . . . agreement." 134 On the other hand, if
the purpose of the restriction is clearly stated and the purpose is no
longer served by enforcing the restriction, no such implication is neces-
sary and a court will not issue an injunction.

Parties seeking to have a restriction declared unenforceable often
cite the low value of the burdened land and the loss of potential profits.
These factors alone, however, are not enough to terminate the restriction.
In AC Associates, the plaintiffs sought to remove a restriction on their
land that allowed for parking spaces for a neighbor's store. The plaintiffs
claimed changed conditions and hardship. The court felt that the real
reason for the suit was to build a new office, retail, and hotel develop-
ment and stated that, "the law does not permit cancellation of property
restrictions for the purpose of accommodating the best or most profitable
use of a particular piece of property affected by the restriction." 135 The
fact that burdened land would be more profitable if the restriction were

130. One author has cited this fact as a disadvantage of conservation easements as a land
use device, stating,

[a conservation] easement's flexibility, while an advantage for negotiators, makes
lawyers lose sleep. They have to draft a document that will unflinchingly protect the
land forever but will also adapt to new owners, new ownership patterns, changes in
the physical environment, urban growth and decay, new land use regulations, and
every other unforeseen change. The cases in which this miracle is achieved are prob-
ably far fewer than we usually admit.

Roush, supra note 5, at 71.
131. 858 F.2d 506 (9th Cir. 1988).
132. Id. at 508.
133. Id. at 509.
134. 453 So. 2d 1121, 1127 (Fla. App. 1984).
135. Id. at 1125.
removed is thus an insufficient reason to terminate the restriction. Increased value may, however, "carry weight when other factors are also present." 136

Another factor is whether the changed conditions have occurred within the boundaries of the burdened land. A court is more likely to uphold a restriction when the changes are to the area surrounding the restricted land. 137 The rationale is essentially one of acquiescence on the part of the holder. If beneficiaries of a restriction do not object to a change in a housing subdivision and later another change is proposed, a court could assume that because the earlier change was unopposed, the beneficiaries "did not care very much if the servitude was relaxed." 138 Because the beneficiaries of a restriction never have such a claim when the changes occur outside the restricted area, the courts have been less willing to apply the doctrine in that situation. 139

Courts also consider the relative burden on the servient land owner and the benefit to the restriction's beneficiary. The weight a court gives to one side or the other varies widely among jurisdictions. Some courts hold that if any substantial value remains to the holder of a restriction, it should be upheld regardless of changed conditions. 140 The Restatement section on relative hardship 141 seems to take the opposite position, allowing a defense against an injunction merely when "the harm done by

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136. 5 R. POWELL, supra note 5, § 679[2]; Stoebuck, supra note 101, at 883-884 ("judicial opinions sometimes state that changes in zoning and loss of value to the benefitted land do not establish a sufficient change of neighborhood, though they may be evidence of it.").
137. Rose, supra note 69, at 1410-11.
138. Id. at 1410 & n.30 (citing cases).
139. Id. at 1411.
141. The doctrine of changed conditions is often distinguished from a related theory, the doctrine of relative hardship. As with changed conditions, this doctrine may be used either as a defensive tool by a landowner against an action to enforce a restriction, or by the beneficiary of a servitude in a declaratory relief action. The Restatement provides a separate rule for this theory: "[i]njunctive relief against violation of the obligation arising out of a promise respecting the use of land will be denied if the harm done by granting the injunction will be disproportionate to the benefits secured thereby." RESTATEMENT OF PROPERTY § 563 (1944). Courts generally have required that the harm be greatly disproportionate to the benefit.

Because a landowner usually relies on the changed conditions doctrine because of some hardship, e.g., Barton v. Moline Properties, 121 Fla. 683, 690, 164 So. 551, 554 (1935) (the development "made it impossible and impracticable to use plaintiff's land for residential purposes," the only purposes allowed by the restriction) and the hardship often is caused by a change in conditions, the two doctrines often overlap. See, e.g., A. CASNER, supra note 6, § 9.39; 5 R. POWELL, supra note 5, § 679[4] & n.79. Justice Kennedy, before his appointment to the Supreme Court stated: "[t]he doctrine of changed conditions operates to prevent the perpetuation of inequitable and oppressive restrictions on land use and development that would merely harass or injure one party without benefiting the other." Cortese v. United States, 782 F.2d 845 (9th Cir. 1986) (Kennedy, J.). One author points out that "the changed conditions doctrine is simply a reformulation of the relative hardship doctrine." French, supra
granting the injunction will be disproportionate to the benefits."\textsuperscript{142} Scholars have criticized this view,\textsuperscript{143} however, and courts generally have required a gross disproportion between the benefit and the harm.\textsuperscript{144} In examining the burden on the landowner, one must remember that the traditional restrictive covenant or servitude is intended to benefit both the holder of the servitude and the owner of the restricted land.\textsuperscript{145} The owner has an expectation that the restriction will continue to benefit her. If the owner has no such expectation, it is questionable whether this is a relevant factor.

Courts also consider the duration of the restriction as a factor in applying the doctrine of changed conditions.\textsuperscript{146} Generally, the longer the duration, the more likely that the restriction will be terminated. This rule follows from the desire to limit the control of the "dead hand."\textsuperscript{147} The longer the duration of a restriction, the longer decisions made by people no longer living will control the use of property. The longer a restriction's duration, the less likely it is to comport with the property's best use.

\textsuperscript{142.} RESTATEMENT OF PROPERTY § 563 (1944).
\textsuperscript{143.} See, e.g., C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 184-86 (1947).
\textsuperscript{144.} 5 R. POWELL, supra note 5, § 679[3] & n.73.
\textsuperscript{145.} Stoebuck, supra note 101, at 886.
\textsuperscript{146.} Note, Equity: Removal of Restrictive Covenants in California—What Constitutes Changed Conditions, 7 HASTINGS L.J. 209, 212 (1956) (authored by Donald C. Thuesen).
\textsuperscript{147.} The policy against allowing decisions made by people no longer living to control land use is most commonly associated with the rule against perpetuities. See, e.g., L. SIMES AND A. SMITH, THE LAW OF FUTURE INTERESTS § 1117, at 13 (2d ed. 1956) ("other things being equal, society is better off, if property is controlled by its living members than if controlled by the dead. Thus, one policy back of the rule against perpetuities is to prevent too much dead hand control of property."). The same policy has been used to terminate real covenants. See, e.g., In re Turners Crossroad Development Co., 277 N.W.2d 364, 369-71, 371 n.5 (Minn. Sup. Ct. 1979) (invalidating covenant not to compete because it was "inconsistent with the general policy against restraints on free alienation of property." Id. at 369); Copelan v. Acree Oil Co., 249 Ga. 276, 278, 290 S.E.2d 94, 96 (1982) (terminating covenant requiring operation of gas station on property because of "the sound policy that land use must be governed by its present owners, and should be subjected only in severely restricted circumstances to control by former owners").
D. Applicability of Changed Conditions to Easements

The changed conditions doctrine traditionally is applied only in cases involving real covenants and equitable servitudes. Easements, on the other hand, are viewed as distinct property rights, rather than promises concerning land, and traditionally are resistant to this equitable doctrine. As one commentator noted: "Courts have viewed easements as valuable and protected property rights, while treating real covenants with suspicion and subjecting them to greater barriers against enforcement." Although technically the doctrine of changed circumstances is not applicable to easements, commentators have used a similar rationale to justify the termination of easements, arguing that if an easement was created for a specific purpose and the purpose is accomplished or frustrated, the easement should be extinguished. Courts also have used this rationale. In *Hahn v. Baker Lodge, No. 47*, for example, the defendant owned a room in a two-story building and an easement through the building for ingress and egress. When the building was destroyed by fire, ingress and egress became impossible and the easement was extinguished.

148. *See, e.g.*, Cortese v. United States, 782 F.2d 845, 851 (9th Cir. 1986) (stating that the issue of applicability of changed conditions doctrine depended on whether restrictions were covenants or easements, "[t]he effect of the stipulation was to create covenants, not easements; and covenants are subject to the doctrine of changed conditions."); *AC Associates v. First Nat'l Bank of Fla.*, 453 So. 2d 1121, 1126 (Fla. Dist. Ct. App. 1984); *Waldrop v. Town of Brevard*, 233 N.C. 26, 31, 62 S.E.2d 512, 515 (1950); *First Nat'l Trust & Sav. Bank v. Raphael*, 201 Va. 718, 723, 113 S.E. 2d 683, 687 (1960); *A. Dunham*, *supra* note 1, at 20 (writing before the passage of modern conservation easement statutes, Dunham says that regarding the use of common law easements for preservation of open space: "the 'changed circumstances' doctrine has not been applied to easements, so the duration of such interests is not at the mercy of the courts.") (footnote omitted); *French*, *supra* note 127, at 1301; *Reichman, supra* note 68, at 1180.

149. *Korngold, supra* note 2, at 436 (citing RESTATEMENT OF PROPERTY § 450(b) & comment h (1944)). *See also* Waldrop v. Town of Brevard, 233 N.C. 26, 31, 62 S.E.2d. 512, 515 (1950); Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323, 1330 (1982) (stating that, "courts traditionally accord greater deference to easement rights than to rights which derive from covenants and servitudes.") (footnote omitted); Brewder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 35 (1978) (the author notes that regular options, while subject to the Rule Against Perpetuities, have "escaped the charge that they might unlawfully restrain alienation . . . [i]n contrast . . . most courts have not only subjected preemptive options to the Rule Against Perpetuities, but have declared that they may also constitute unreasonable restraints on alienation regardless of their duration.") (footnote omitted).


151. *L. Jones, supra* note 101, § 842-3; *R. Powell, supra* note 5, § 422.

152. 21 Or. 30, 31, 27 P. 166, 166 (1891).

153. *Id.* at 34, 27 P. at 167.
Unlike the changed conditions doctrine, however, the express purpose of the parties, not implied intent or balancing of hardships, controls the court's determination. An easement to take water from a particular well might specify that it will terminate if the well runs dry. Analogizing to conservation easements, commentators have stated that "[p]rotecting the habitat of an endangered species makes no sense if, despite such efforts, the species becomes extinct." A real covenant or equitable servitude, by contrast, can terminate despite the continued viability of its stated intent if a court finds a contrary implied intent or a hardship on one landowner that outweighs the benefit of the restriction.

Some courts, however, apply the less stringent requirements of the changed conditions doctrine to easements, while others ignore whether the interest in question is an easement or lesser interest, terminating it on changed conditions or hardship grounds. While a modern court may be more likely to terminate easements upon a change in conditions, as a general matter the barriers to terminate an easement on such grounds are much greater than those to terminate a covenant.

I. Effect of Reformation of Servitude Law

Conservation easements usually are intended to last forever. It is therefore necessary to address the possibility of changes in servitude law that may affect termination of conservation easements. If a conservation easement is more difficult to terminate because it is an easement and not a covenant or equitable servitude, then a change in the nature of these legal distinctions could make conservation easements either less or more resilient to a changed conditions challenge.

The distinctions between easements, covenants, and equitable servitudes have, with the development of contract law and recording laws, apparently outlived their usefulness. The law in this area has been called "the most complex and archaic body of American property law remaining in the twentieth century." Increasingly, commentators are calling for an overhaul of this area of property law. As one author has noted:

questions concerning easements . . . will continue to challenge the ingenuity of the judiciary, as an attempt is made to achieve sensible land

154. T. Barrett & P. Livermore, supra note 11, at 33. See infra text accompanying notes 166-68.
155. See, e.g., AC Assoc. v. First Nat'l Bank of Fla., 453 So. 2d 1121, 1126 (Fla. Dist. Ct. App. 1984) ("We need not deal in any detail with legal niceties which may surround distinctions between easement and restrictive covenants.").
156. See, e.g., Jackson v. Stevenson, 156 Mass. 496, 501-02, 31 N.E. 691, 693 (1892) (terminating a building restriction in deed without analysis of the nature of the restriction).
157. French, supra note 127, at 1261.
158. See generally Symposium, 55 S. Cal. L. Rev. passim (1982). See also J. Dukeminier & J. Krier, supra note 66, at 1092; French, supra note 127, at 1262 n.3 (listing literature criticizing servitude law).
use within the confines of not overly flexible rules of traditional property law. . . . [I]t may be anticipated that the next decade will witness long overdue progress in the field of easements, perhaps by way of federal, state and local legislation.159

Although this "long overdue progress" has not occurred, reform in this area is likely. Some form of unification of the three types of servitudes likely would emerge from this reform. Scholars disagree widely, however, on the question of what effect reform will have on the doctrine of changed conditions. Some suggest that the doctrine would be expanded from its traditional place in covenant and equitable servitude law to a prominent role in the termination of the unified servitude.160 Under this view, the primary inquiry would be "whether the arrangement has outlived it usefulness."161 When the restriction is still useful, the doctrine would not apply. One author argues that "[s]ervitudes . . . should be geared to the expected life of the development they serve," to be determined by the parties themselves or legislatures that "can state at least a presumptive life span of servitudes for different development purposes."162 Thus the conservation easement, because the expected life of the "development" it serves is the life of a habitat or ecosystem, would be an exception to the rule that "no servitude should be expected to last in perpetuity."163 Another commentator has suggested that unified servitudes should be treated like other possessory interests. Under this view, termination would be allowed only by eminent domain.164

Thus, although the result of any reform of servitude law is uncertain, the reasons supplied by scholars for determining whether to apply the doctrine of changed conditions to a future unified servitude appear to support the view that a conservation easement should withstand a changed conditions challenge.

III. Application of the Doctrine of Changed Conditions to Conservation Easements

There is no such thing as a typical conservation easement. There are several widely varying types of restrictions included under the title "con-

160. See French, supra note 127, at 1316-17; Reichman, supra note 68, at 1258-59.
161. French, supra note 127, at 1317.
162. Rose, supra, note 69, at 1414.
163. Id. at 1413-14 & n.43.
164. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. CAL. L. REV. 1353, 1367-68 (1982). The author proposes giving the new unified servitude even more protection than common law easements. "Possessory interests, like the fee simple absolute, are not defeasible because of changed conditions. Servitudes of infinite duration should be recognized as well." Id. at 1364.
servation easement," and even within categories an easement always is tailored individually to meet the needs and concerns of the grantor and grantee. Because the open space easement is most likely to come under a changed conditions challenge, the following analysis will examine this type of interest. Two hypothetical situations concerning conservation easements especially warrant analysis. The first involves a limited purpose conservation easement and the second concerns a general purpose conservation easement.

A. Limited Purpose Conservation Easements and the Effect of Frustration of Purpose

In the limited purpose context, suppose a conservation easement is granted for a specific purpose and the purpose becomes impossible to fulfill. If the easement's purpose is to provide a habitat for an endangered species and the species becomes extinct, the purpose can no longer be satisfied. Similarly, if land is restricted to provide a migratory waystation for a species of bird, the purpose cannot be fulfilled if the birds alter their migratory path and no longer use the land. Clearly, continuation of the easement in such situations would be fruitless. This determination, however, does not require the use of the traditional changed conditions rule. Rather, it falls within the more stringent requirements of the rule for terminating easements when their express purpose can no longer be fulfilled.

When courts declare easements invalid because their purpose has become frustrated, the landowner generally may use the land as he desires. This traditional result should not apply, however, if the easement was created for conservation purposes, since this type of restriction has a distinctly public nature. In this situation, courts should apply the cy pres doctrine and reform the grant of the easement in accordance with the intent of the original parties.

165. New York City's Greenacre Park, for example, is protected by a scenic easement that "prohibits any construction that would exceed the height of the current [four story building] and prohibits the use of the site's development rights to support construction on any other site that would shadow the park or block its view." J. DIEHL & T. BARRETT, supra note 33, at 112.

166. This situation can be avoided by including in the easement deed a provision allowing the grant to be amended. The parties must be careful in drafting the deed if they are seeking to qualify for tax deductions based on a grant in perpetuity. Id. at 205-06.

167. T. BARRETT & P. LIVERMORE, supra note 11, at 33.

168. Still, some statutes require or permit that the easement be perpetual, see supra note 63. If these were interpreted to disallow termination under any circumstances, the beneficiary would still retain the easement and the parcel would remain restricted. Under such circumstances, if the retention of the easement were of no value to the holder (i.e., the public for which it is the trustee), the holder could then grant it back to the owner and the restriction would be terminated by the holder's release. 3 R. POWELL, supra note 5, § 430.7[5][a].
The *cy pres* doctrine allows a court to “substitute another plan of administration which is believed to approach the original scheme as closely as possible”\(^{169}\) when the grantor’s original specific charitable intent becomes impossible to fulfill. It is designed to ensure that charitable trust assets are used for the purpose set forth in the trust.\(^{170}\) Accordingly, when a conservation easement can no longer serve its intended purpose, a court should apply the doctrine and reform the grant to support the general goal of conservation.

Courts also could permit the owner of the previously burdened land to buy back the easement. The availability of this option might depend on the success of applying the *cy pres* doctrine; that is, payment would be permitted only if the *cy pres* doctrine could not be used. A payment to the easement holder reflecting the increased value of the owner’s land would be fair to the landowner and would allow the holder to purchase another easement for the public benefit.

Skillful drafting of a conservation easement deed should include provisions that account for foreseeable circumstances. When the unforeseeable happens and continuation of an easement restriction would not serve the underlying purpose, the grant should be reformed to conform as closely as possible to the original intent of the parties. If reformation is not possible the fee owner should pay the easement holder for the value of the easement.

### B. General Purpose Conservation Easements and the Effect of Changed Conditions

In the case of a general purpose conservation easement, land is restricted for the purpose of retaining the current natural state of the fee owner’s land. The owner of such land in many cases may desire to have the easement judicially terminated in order to develop the property. The following illustration may be useful. \(O\) owns rural ranchland and although there has been some development in the area, \(O\) has no intention of leaving the ranching business. He discovers that by donating a conservation easement, he can receive a charitable deduction from his income taxes and a reduction in his rising property tax assessment. At this time, the restriction’s effect on the property value is insignificant. Consequently, \(O\) donates an easement with the stated purpose of retaining the land forever for agricultural or open-space purposes.

Time passes and the area surrounding \(O\)’s land experiences increasing growth. Although the property value of his restricted land has remained about the same, the value of his land without the restriction has skyrocketed. The property now abuts a four-lane highway and both sides

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of the street beyond the border of his property are lined with gas stations, office buildings, and shops. O decides to leave the ranching business and sells the land to P.

Twenty or thirty years pass and residents are concerned about housing shortages and the high costs of available space. Because of increased costs, operating a ranch in the area is now unprofitable. P receives many inquiries about developing her land or selling it for development, but prospective developers and purchasers lose interest when they discover the restriction on the property. One prospective buyer offers P $10,000,000 for the property, provided she can remove the restriction. With the restriction, the fair market value of the land is $500,000. P now has a strong financial incentive to attempt to have the restriction declared unenforceable under the changed conditions doctrine. This hypothetical leads to a discussion of both the policy and traditional factors underlying the changed conditions doctrine and their relation to conservation easements.

(1) Conservation Easements and the Policy Basis for Changed Conditions

Because of the common law nature of the changed conditions doctrine, there would appear to be little benefit in applying the doctrine when its underlying rationales would not be served. The next section argues that the policy basis for applying the doctrine is not served when the doctrine is used to terminate a conservation easement.

a. Policy Favoring the Intent of the Parties

The most common rationale for application of the changed conditions doctrine is that if the parties had foreseen the changes that occurred, they would have provided for the restriction's termination in the original covenant or grant. In the example above, however, the intent of the parties was to preserve the condition of the land when surrounding conditions changed. Thus, the parties anticipated development in the area and, presumably, the forsaken value of the land as time passed. As one commentator has noted, conservation easements "assume that open-space land is valuable simply because it is undeveloped, especially if it contests with surrounding land. Thus, if the neighboring area becomes developed (a 'changed condition'), the conservation [easement's] purpose is even better served than before." Consequently, it is illogical to imply an intent to terminate the easement upon development of the sur-

171. An even more extreme example can be drawn when the town zones the property for commercial use only, making agricultural use not only unprofitable, but actually impossible. Such an example would present a substantial question of a "taking" of both the land and of the easement itself.
172. See supra notes 119-21 and accompanying text.
173. Korngold, supra note 2, at 480.
rounding area because parties intend that easements persist in precisely such changed conditions. Moreover, "it would be ironic if the restrictions could be defeated because the very external changes that were predicted, did in fact occur." 174

One court used this rationale in a case involving light and air restrictions. In Blakely v. Gorin, 175 the court distinguished the case before it from the usual case of changed conditions involving housing subdivisions, finding that changed conditions had increased the value of the restrictions:

While restrictions requiring setbacks or prohibiting mercantile uses clearly have reference to maintaining the overall character of a neighborhood and can thus become obsolete as that neighborhood changes, . . . this restriction is intended to secure a specific benefit to each residence it affects. So long as any of those residences continues to exist, it cannot be called obsolete. As this urban area has grown and become ever more congested in the century since this restriction was first imposed, light and air have become more, not less, valuable. The restriction securing the respondents' rights to them is certainly not obsolete. 176

The restriction in Blakely, although similar to conservation easements in many ways, was not technically a conservation easement granted under an enabling statute. Yet, even without the statutory protection provided conservation easements, the court did not apply the changed conditions rule. The added protection given to conservation easements by enabling statutes and the accompanying public policy support should provide an even greater barrier against the doctrine's application to conservation easements.

b. Policy Favoring the Most Efficient Use of Land

There are two possible views of policy favoring the most efficient use of land restricted by conservation easements. Neither view supports the termination of conservation easements. The first states that policy favoring the preservation of natural and open spaces conflicts with traditional policy favoring the efficient use of land as measured in terms of economic productivity. Under this view, recent public policy supporting conservation easements is a partial rejection of the traditional policy favoring development. 177 Thus, policy supporting termination of restrictions in order to promote the most efficient use of land must be balanced against the traditional weight given the intent of the parties and the strong public policy favoring conservation.

174. 3 R. Powell, supra note 5, § 430.7[6].
176. Id. at 365 Mass. at 604, 313 N.E.2d at 912 (emphasis added).
177. See supra notes 75-81 and accompanying text.
A second view of the policy endorsing efficient use of land holds that conservation is, in itself, an efficient use. Open space, under this view, is not unproductive land. Rather, it is both useful and necessary to preserve our environment and the natural beauty of open space.\textsuperscript{178} When open space is not viewed as wasted land, but as a productive and efficient use of land, application of the changed conditions doctrine to terminate a natural state easement subverts the policy.

(2) Conservation Easements and Traditional Factors for Applying the Changed Conditions Doctrine

Notwithstanding the lack of a policy basis for application of the doctrine to conservation easements, a court may examine the easement according to the traditional factors in a changed conditions doctrine analysis. The consideration traditionally given to the intent of the original parties does not support the application of the doctrine. The purpose of a conservation easement is increasingly relevant and important precisely as the surrounding conditions change. The intent usually is made clear in the documents of the grant\textsuperscript{179} and it would be difficult for a court to imply another purpose. Also, the intent is indicated not only in the grant, but in enabling statutes. In order for the easement to receive protection provided by the Uniform Act, its purposes must "include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use."\textsuperscript{180}

Consideration given to relative harm to the owner and benefit to the public likewise does not support the doctrine's application. In the hypothetical example, once the ranching business is no longer economically viable, $P$ loses not only the potential profit from selling her land for its market value without the restrictive easement, but also the ability to use her land for any other profitable purpose. $P$ purchased the land with knowledge of the restriction, however, and the ability to foresee changes in the area. In contrast with the typical covenant or equitable servitude, the conservation easement is not designed to benefit the owner of the restricted parcel (except insofar as the owner is also a member of the general public). Thus, $P$ cannot now claim damage because the restriction was never intended to benefit her individually.

In addition, the price of the land when $P$ bought it presumably was discounted by the probability of eventual change in the area. To allow a court to lift the restriction upon such conditions would amount to a windfall to $P$ at the expense of the public. Furthermore, many courts do

\textsuperscript{178} See supra notes 92-97 and accompanying text.
\textsuperscript{179} See, e.g., T. BARRETT & P. LIVERMORE, supra note 11, at 136-37 (statements of intent in sample conservation easement document).
\textsuperscript{180} UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 64 (Supp. 1989).
not consider the harm to the owner if there is any benefit remaining to the holder of the easement. As one observer has noted, "[t]he ultimate test of a change sufficient to invoke the doctrine is most often stated to be such a change as has caused the restriction to be outmoded and to have lost its usefulness, so that its benefits have already been substantially lost." Changes in the area surrounding the burdened land, however, are unlikely to lead to this result. As another writer has stated, "as development pressures increase, the public receives a correspondingly greater benefit from the preservation of open space land." Thus, the greater the development, or change, the greater the benefit to the general public.

The duration of the restriction is another factor courts consider. As with the statutory rejection of any policy favoring unbalanced development of land over conservation of natural resources, however, the statutory provisions for perpetual duration should override the policy against control of the "dead hand" in the case of conservation easements.

In addition, the location of the changes also is relevant. Courts are less likely to enforce a restriction when the changes occur outside the restricted area. In the hypothetical, development has occurred outside the restricted area. The example does not avoid this issue, however, because the purpose of a conservation easement, to preserve the existing use of the land, would make any change inside the restricted area a violation of the easement. When the owner does develop the land in some way and the holder of the easement does not discover it, it is conceivable that a court would not enforce the easement. This situation is more like a case of acquiescence or abandonment than one of changed conditions. Even in such a case, damages for violation of the easement would be appropriate.

Because application of the doctrine of changed conditions to conservation easements would neither further the policies behind the doctrine nor be justified when the traditional factors for its application are ex-

181. Stoebuck, supra note 101, at 883.
183. See supra notes 146-47 and accompanying text.
184. See supra notes 137-39 and accompanying text.
185. One writer argues that conservation organizations inability to monitor conservation easements is a significant shortcoming of the device. Ineffective monitoring of existing [conservation] easements could prove to be the Achilles heel that nullifies all the effort to date. . . . Supposedly, conservation easements run in perpetuity. Failure to monitor and enforce an easement could cause a court to rule it legally abandoned. Conservation easement programs must devote more attention to assuring as well as possible that effective monitoring will be maintained as years and generations go by.

Emory, Conservation Easements: Two Problems Needing Attention, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION, supra note 1, at 196-97.
amined, the doctrine should not be used to terminate conservation easements.

Conclusion

Although a conservation easement is in many ways unlike a traditional common law easement, this should not preclude enabling statutes from giving it easement status. As an easement, it is either immune from the equitable doctrine of changed conditions or afforded much greater protection than that afforded traditional real covenants and equitable servitudes.

When a court does not preclude a changed conditions challenge to a conservation easement as a matter of law, an analysis of both the policy rationale for the doctrine and the factors favoring its applicability illustrates that the doctrine should not apply to a conservation easement unless the easement's purpose has become obsolete. In that case, the public nature of the easement requires either that the owner pay the holder the value of the easement or that the court reform the easement grant according to the *cy pres* doctrine.