

# SUBDIVISION AND CONSERVED FARMLAND

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*Limiting subdivision of conserved farmland is often a critical component of an agricultural conservation easement project's design. These restrictions are critical for ensuring that a protected farm remains of sufficient size and scale to continue to be viable for agricultural use. This form of restriction, however, is often undervalued by courts reviewing agricultural conservation easements as being secondary or incidental to the agricultural conservation easement's stated goal of preventing this land from being developed or converted to non-agricultural use. The purpose of this Article is to place subdivision restrictions in their appropriate context and to consider options for increasing their enforceability in light of recent judicial scrutiny.*

*To this end, Part I will provide an overview of agricultural conservation easements and the common law barriers that have historically and, in some cases, continue to apply to subdivision restrictions. Part II will explore subdivision restrictions generally and the challenges of drafting appropriately tailored restrictions that balance farm viability and economic considerations. Part III will review three recent decisions involving subdivision restrictions which each demonstrate a specific consideration courts grapple with in addressing their enforceability. Last, Part IV will consider a few options for improving state enabling legislation and conservation holder drafting, acquisition and ultimately stewardship of conserved*

*lands to better ensure these lands remain protected as an integrated whole. Ultimately, subdivision limitations or restrictions have a critical role in enabling agricultural conservation easements to achieve their goals of ensuring farmer and farmland viability and the future health of the working landscape, which merits additional attention to this important function.*

*“Our course led right across the grounds, in an out among the trenches and pits with which they were scored and intersected. The whole place, with its scattered dirt heaps and ill-grown shrubs, had a blighted, ill-omened look which harmonized with the black tragedy which hung over it.”<sup>1</sup>*

#### INTRODUCTION

Conservation easements are designed to protect a specific resource—whether farm, forest, historic property, or wetland.<sup>2</sup> These protective mechanisms seek to secure a specific land management objective—generally in perpetuity.<sup>3</sup> For agricultural conservation easements,<sup>4</sup> or those conservation easements specifically focused on protecting farmland, the goal is to prevent the farm from being converted to non-farm use and to protect the working landscape for its future productive capacity.<sup>5</sup> Agricultural conservation easements

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1. Arthur Conan Doyle, *The Sign of the Four*, in I THE ANNOTATED SHERLOCK HOLMES 610, 646 (William S. Baring-Gould ed., Clarkson N. Potter, Inc. 1967) (1890).

2. See Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 93 (2006) (profiling this conservation tool and the debate over how to characterize it as a form of property interest).

3. See Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 218 (2013). Perpetuity, however, is not an easy drafting target or goal to actually secure. See Nancy A. McLaughlin, *Tax-Deductible Conservation Easements and the Essential Perpetuity Requirements*, 37 VA. TAX REV. 1, 1 (2017) (profiling the often complex requirements to secure a perpetuity as defined by the Internal Revenue Service in the context of tax-incentivized conservation easements).

4. See Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992 ANN. SURV. AM. L. 235, 237–40 (profiling this tool generally).

5. See THOMAS L. DANIELS & JOHN C. KEENE, THE LAW OF AGRICULTURAL LAND PRESERVATION IN THE UNITED STATES 1 (2018) (arguing that “[t]he primary purpose of agricultural land preservation is to prevent the conservation of privately

also secure a whole host of other social objectives, including protecting the land's conservation and open space attributes.<sup>6</sup> Farmland preservation, however, is increasingly complex as farming evolves,<sup>7</sup> and one size does not fit all within the farmland preservation movement given the variability of agricultural forms and the diversity of goals of the varied entities involved in these efforts.<sup>8</sup> Balancing preservation considerations with the production and business goals of the working farm is also becoming more difficult as the scale and intensity of some agricultural operations challenge historic assumptions regarding farming and the farmed landscape.<sup>9</sup> Specifically, as farming consolidates with increasingly concentrated production and environmental impacts, the continued wisdom of treating this sector differently than others from a regulatory standpoint is questioned. This feeds into farmland preservation efforts, which ultimately have to balance the tension between production and conservation goals that is inherent within these protective agreements.<sup>10</sup> Additionally, while agricultural

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owned farms and ranches to nonfarm uses (housing subdivisions, shopping malls, factories, and office parks) and, in the process, prevent sprawling development.”); see also Catherine Brinkley, *Fringe Benefits: Adding Rugosity to the Urban Interface in Theory and Practice*, 33 J. PLAN. LITIG. 143, 145–48 (2018) (profiling farmland preservation group strategies in protecting farmland near urban areas in connection with this goal).

6. See Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 ECOLOGY L.Q. 627, 631–43 (2017) (discussing the multiple purposes/objectives behind these conservation agreements); see also John C. Becker, *Promoting Agricultural Development Through Land Use Planning Limits*, 36 REAL PROP. PROB. & TR. J. 619, 631–32 (2002) (profiling the use of the conservation easement to keep land available for agricultural use). See generally Jeffrey Kline & Dennis Wichelns, *Public Preferences Regarding the Goals of Farmland Preservation Programs*, 72 LAND ECON. 538 (1996) (exploring, in Rhode Island, the disconnect between the stated goals of farmland preservation programs and the amenities most often valued by the state's citizens).

7. See Jess R. Phelps, *Defining the Role of Agriculture in Agricultural Conservation Easements*, 45 ECOLOGY L.Q. 647, 649–50 (2018); see also Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 164 (2007) (profiling this tension in the land use policy arena).

8. See, e.g., A.M. Merenlender et al., *Land Trusts and Conservation Easements: Who Is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 65 (2004).

9. See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 269–70 (2000) (profiling the intensification of farming practices and the exemptions afforded agriculture under environmental laws).

10. See, e.g., Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195 (2016) (exploring this issue within the Safe Drinking Water Act context).

conservation easements are often viewed as a private land use conservation tool (outside of governmental involvement), the reality is much more complex given the degree of governmental funding and, as a result, government oversight over these conservation projects at a local, state, and even federal level.<sup>11</sup>

Regardless of motivation, goal, or outcome, farmland preservation has, over the past several decades, received increasing policy attention from policymakers seeking to protect the working landscape in the face of development pressure.<sup>12</sup> Agricultural conservation easements have played a leading role in these efforts.<sup>13</sup> One primary way that farmland preservationists have sought to secure farmland is by including restrictions on subdivision within agricultural conservation easements (in addition to protecting the farm against being sold for development).<sup>14</sup> Behind this view is the idea that,

The conversion of agricultural land is a complex process, often taking place over a period of fifteen or twenty years. It involves such factors as farm profitability, urban growth pressures, land values, personal decisions about work and retirement, community expectations, taxes and government programs, incentives, and regulations. . . . At some point, the

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11. See generally Amy Wilson Morris, *Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism*, 39 GEOFORUM 1215 (2008) (exploring the divide between private and public involvements in conservation easement projects). The divide between the private/public interests in conserved lands plays out in every conservation project and in every farm bill—as the balance between protecting the public’s interest versus the landowner’s continued interests in their conserved land play out across legislation and conservation projects nationally.

12. See, e.g., Max J. Pfeffer & Mark B. Lapping, *Farmland Preservation, Development Rights and the Theory of the Growth Machine: The Views of Planners*, 10 J. RURAL STUD. 233 (1994) (charting the integration of farmland preservation into land use planning generally).

13. See, e.g., *Farmland Protection*, AM. PLAN. ASS’N, <https://www.planning.org/knowledgebase/farmlandprotection/> (last visited Jan. 30, 2020). There is a distinction between farmland protection (via land use regulation) and farmland preservation (largely the result of voluntary restrictions). See DANIELS & KEENE, *supra* note 5, at 10 (profiling this distinction). This Article primarily focuses on preservation, or the use of agricultural conservation easements to accomplish land use objectives, rather than other land use tools and policies designed to secure farmland.

14. See Jerry Johnson & Bruce Maxwell, *The Role of the Conservation Reserve Program in Controlling Rural Residential Development*, 17 J. RURAL STUD. 323, 330 (2001) (noting the role of agricultural conservation easements in preventing subdivision).

process becomes irreversible, and farm after farm is subdivided and developed.<sup>15</sup>

These restrictions essentially try to lock the farm into its current land use form or pattern and prevent the landowner from selling off smaller parcels out of the protected whole, which, in turn, has spillover impacts on the entire agricultural district.<sup>16</sup> Restrictions on subdividing protected farmland have been considered to be a valuable tool towards ensuring that the farm remains intact as a viable economic unit and to avoid the issue of farm fragmentation.<sup>17</sup>

The subdivision restrictions embedded in agricultural conservation agreements, however, are not without their challenges. Courts are often skeptical of this form of restriction and view this component of an agricultural conservation easement as not integral, or at least secondary, to the easement's structure in protecting these lands from being developed.<sup>18</sup> If the land remains protected, in some courts' views, the fact that the underlying ownership has been divided further is somewhat immaterial.<sup>19</sup> This reading of these restrictive agreements is, in part, attributable to the common law principles of property that require interpretative questions to be resolved in favor of the free alienability of the land and against the drafting party.<sup>20</sup> While historically these common law precepts made sense and were supported by the needs of the time,<sup>21</sup> property law has increasingly

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15. ROBERT E. COUGHLIN ET AL., *THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS* 11–12 (1980).

16. See ELIZABETH BYERS & KAREN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 396 (2d ed. 2005) (explaining that “[t]he principal objective of many easements is to prohibit or control subdivision. A subdivision prohibition can prove useful even on land on which residential development is not permitted, because it tends to foster unified management of natural resources, and eases the administrative burden on the easement-holder.”).

17. See Elizabeth Brabec & Chip Smith, *Agricultural Land Fragmentation: The Spatial Effects of Three Land Protection Strategies in the Eastern United States*, 58 *LANDSCAPE & URB. PLAN.* 255, 255–56 (2002) (exploring various farmland preservation efforts and their ability to prevent fragmentation of rural working lands).

18. See *In re Strieter*, No. 14-56980, 2015 WL 2215418, at \*2 (Bankr. E.D. Mich. May 11, 2015).

19. See *id.* at \*2–3.

20. See Nancy A. McLaughlin, *Interpreting Conservation Easements*, 29 *PROB. & PROP.* 30 (2015) (discussing judicial interpretation of conservation easements and arguing against applying common law rules as being inapt given their public purpose).

21. See, e.g., Neil E. Harl, *A Long-Term Concern: Repealing the Rule Against Perpetuities*, 28 *AGRIC. L. DIG.* 105, 106 (2017) (critiquing the repeal of the rule against perpetuities as short-sighted).

evolved to meet the goals of contemporary society—particularly in managing land and natural resources—and to address the non-economic considerations and externalities associated with the difficult work of natural resource protection.<sup>22</sup> Where once property law focused narrowly on protecting the future transferability of land, states have modified the common law in some respects to reflect other objectives, such as conservation considerations, that have increasing societal importance.<sup>23</sup>

In many ways, conservation easements are among the more substantial departures from our common law understandings of property.<sup>24</sup> As a secondary, and less understood subcomponent of these interests, restrictions on subdividing conserved lands can be instructive for considering how courts are balancing traditional views of private property against evolving efforts to protect or secure important noneconomic attributes of working lands.<sup>25</sup> To explore this issue, several recent decisions provide insight into how property law principles have either: (1) been comparatively slow or reluctant to adapt to these changing understandings and values that shape contemporary land use planning; or (2) how state legislatures have been imprecise or have left the critical question of how to interpret these property interests open-ended.<sup>26</sup> Specifically, recent judicial trends undervalue the integral role that subdivision restrictions play in the overall protective scheme that an agricultural conservation

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22. See K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 775–76 (“The Commissioner’s Prefatory Note explains that the [Uniform Conservation Easement Act] ‘has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easement’s validity, particularly those held in gross.’”).

23. See Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 307–09 (2004) (explaining that the societal benefits of conservation easements were eventually viewed as these overriding common law concerns).

24. See Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 446–49 (2002).

25. See, e.g., Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23, 24–27 (2007) (discussing the impacts of moving away from common law principles).

26. See Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 2013 UTAH L. REV. 811, 827–29 (profiling state enabling legislation and conservation easement interpretation).

easement is intended to implement.<sup>27</sup> This conflict has important ramifications in contemporary land conservation efforts and provides a lens into some of the tensions present in these increasingly complex transactional forms.<sup>28</sup> Balancing the ongoing wisdom and logic of common law property principles against the need for integrated resource management within the context of contemporary perpetual agricultural conservation easements presents a challenge for courts and for land trusts seeking to ensure that protected lands remain protected.

The purpose of this Article is to investigate recent decisions involving subdivision of conserved farms, place these rulings in their historical context, and provide recommendations for securing more favorable future judicial treatment for subdivision restrictions moving forward. To this end, Part I will provide an overview of conservation easements (primarily agricultural conservation easements) and where these interests fit in contemporary property law. Part II will examine subdivision restrictions of agricultural conservation easements generally. Part III will examine the recent decisions in this area and how and why courts have ruled against these restrictions. Last, Part IV will provide some recommendations to better address the subdivision question through state-enabling legislation as well as to assist land trusts in their acquisition, drafting, and stewardship roles. Ultimately, subdivision restrictions or barriers against subdivision as typically found in agricultural conservation easements have an important role to play in the farmland preservation movement in keeping farmers and farmland viable moving forward. Adapting law and policy to define the need for this form of restriction is critical to better ensuring that the increasingly significant societal investment in the protection of working farmland is actually meeting its intended objectives.<sup>29</sup>

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27. See Judy Anderson & Jerry Cosgrove, *Drafting Conservation Easements for Agriculture*, 21 AGRIC. L. UPDATE 4, 6 (2004) (discussing the role subdivision restrictions play in reducing farmland fragmentation). *But see* Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 820–21 (2016) (arguing that subdivision restrictions can, alternatively, impair farm transfer and create complications for the farmer operator).

28. See generally Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Land Uses*, 51 LAND USE POL'Y 76 (2016) (discussing trends in private-land conservation agreements).

29. For just one example of the level of investment made in this area, see *Farm Policy Update: The 2018 Farm Bill*, AM. FARMLAND TR., <https://www.farmland.org/blog/farm-policy-update-the-2018-farm-bill> (last visited

## I. UNDERSTANDING CONSERVATION EASEMENTS AND THEIR EVOLUTIONARY FORM

One, if not the primary, motivation of the farmland preservation movement is to keep these lands in active production, or at least available for this use, to ensure the future of the agriculture sector.<sup>30</sup> Depending upon the initial landowner and the easement holder, preservation efforts may focus on the abstract protection of the working land as fungible units divisible at will or the preservation of a specified farm as a cohesive and narrowly defined unit.<sup>31</sup> The calculus in defining whether and how to allow or not allow division of protected lands can be difficult, and there may be reasons to allow subdivision to occur.<sup>32</sup> To examine this issue, this Part defines agricultural conservation easements to provide necessary context and background; examines the common law restrictions that led to the creation of this form of interest and can still provide challenges to enforceability; and explores some of the arguments for and against allowing subdivision within agricultural conservation easements generally.

### A. *Defining the Term and a Working Overview*

At an elemental level, a conservation easement is simply a legal agreement between a landowner and an easement holder (a

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Jan. 30, 2020) (profiling the 2018 Farm Bill and its increased funding for this area to total \$2 billion over the next ten years).

30. This mission is perhaps best summed up by the American Farmland Trust's, the prominent national umbrella farmland preservation advocate, bumper sticker "No Farms No Food." See *No Farms No Food*, AM. FARMLAND TR., <https://www.farmland.org/no-farms-no-food> (last visited Jan. 30, 2020). For information regarding the challenges in addressing the decision-making processes involved in converting farmland to development and farmland loss in the United States, see Richard K. Olson, *Introduction*, in UNDER THE BLADE: THE CONVERSION OF AGRICULTURAL LANDSCAPES 1–13 (Richard K. Olson & Thomas A. Lyson eds., 1999) [hereinafter UNDER THE BLADE]; Richard K. Olson & Allen H. Olson, *Farmland Loss in America*, in UNDER THE BLADE, *supra*, at 15–22.

31. See generally Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1089 (2005) (contrasting the family farm perception of these transactions with the large-scale complex conservation transaction that these often entail).

32. See BYERS & PONTE, *supra* note 16, at 397–99 (profiling various options for drafting this language and some of the reasons why subdivision provisions might want to consider additional flexibility).

governmental agency or non-profit land trust) whereby the landowner conveys away certain rights to modify or alter the property without the easement holder's approval.<sup>33</sup> "Using the traditional 'bundle of sticks' metaphor for property, we can describe the landowner as . . . taking a stick out of the bundle and giving it to someone else"—the easement holder.<sup>34</sup> As far as terminology, this Article will refer to this form of protective interest collectively as "conservation easements."<sup>35</sup> When referring to the subset of conservation easements protecting farmland, this Article will refer to these interests as "agricultural conservation easements."<sup>36</sup> These interests can be flexible in design to protect a variety of resources—from historic houses, wetlands, open space, and farms.<sup>37</sup> Although a landowner's motivations for granting this interest can vary, these transactions typically involve either a tax deduction,<sup>38</sup> the outright purchase of the value of the conserved land from the landowner, or some combination of financial incentives to provide compensation for the foregone development potential that is essentially being surrendered or forfeited in perpetuity.<sup>39</sup>

In exchange for the donated or purchased conservation easement, by virtue of their governmental or charitable status, a conservation

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33. See Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 2013 UTAH L. REV. 687, 719.

34. Lippmann, *supra* note 23, at 298.

35. State enabling laws refer to these interests as restrictions, covenants, and easements because of their hybridity of attributes. See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 436 (1984) (discussing the substantial issue of how to characterize these interests); Michael Allan Wolf, *Conservation Easements and the "Term Creep" Problem*, 2013 UTAH L. REV. 787, 795–96 (charting the definitional issues associated with this property form).

36. See FARMLAND INFO. CTR., AGRICULTURAL CONSERVATION EASEMENTS 1–2 (2016), [https://www.farmlandinfo.org/sites/default/files/Agricultural\\_Conservation\\_Easements\\_AFT\\_FIC\\_01-2016.pdf](https://www.farmlandinfo.org/sites/default/files/Agricultural_Conservation_Easements_AFT_FIC_01-2016.pdf) (discussing agricultural conservation easements).

37. See John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. L. 319, 335 (1997) (exploring the flexibility of this tool to address various resource types).

38. There are myriad issues surrounding tax incentivized conservation easements, including appraisal challenges and increasing Internal Revenue Service (IRS) scrutiny of many of these donations. In response, the Land Trust Alliance has devoted considerable effort in legal reforms to preserve the defensibility of this tool. See, e.g., *Shine a Bright Light*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/blog/shine-bright-light> (last visited Jan. 30, 2020) (profiling the organization's advocacy efforts).

39. See Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 L. & CONTEMP. PROBS. 29, 29–30 (2011).

easement holder makes the long-term (typically perpetual) commitment to safeguard the protected property, pursuant to the terms of the conservation easement.<sup>40</sup> The cost of performing this role is not insignificant and, to defray the costs of their long-term stewardship obligations, non-profit land trusts often require stewardship funds to provide the resources necessary to fulfill their obligations.<sup>41</sup>

Conservation easements generally consist of: (1) a preamble or purposes section, explaining what purpose the conservation easement is trying to protect; (2) restrictions and reserved rights, stating what requirements are imposed on the landowner going forward; (3) a definition of agriculture, which provides flexibility to conform with changing practices; and (4) amendment provisions/discretionary approvals, laying out the process for amending the terms (which is a highly complex and involved process legally) or obtaining discretionary approval from the easement holder.<sup>42</sup> Subdivision restrictions generally fit within the sections of the conservation easement that impose restrictions (what the landowner can and cannot do) and the reserved rights sections (where the landowner retains specific continued use rights) if the landowner has reserved rights to divide their land in the future.

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40. See Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 48 (2005); see also Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 758 (2005) (discussing the easement holder's responsibility of perpetual enforcement of the easement terms).

41. See Nancy A. McLaughlin, *A Constructive Reformist's Perspective on Writing Voluntary Conservation Easements*, LANDCAN, <https://www.landcan.org/article/A-Constructive-Reformist-Perspective-on-Voluntary-Conservation-Easements/162> (last visited Jan. 30, 2020) (discussing these requirements and advocating for requirements that cover these expenses upfront to ensure that resources are available to monitor and enforce these restrictions).

42. See Paige Madeline Gentry, Note, *Applying the Private Benefit Doctrine to Farmland Conservation Easements*, 62 DUKE L.J. 1387, 1396 (2013) (profiling the basic attributes of agricultural conservation easements). If the conservation easement is being acquired with Natural Resources Conservation Service (NRCS) funding, additional federal requirements will apply, including requiring that the easement provide the U.S. Department of Agriculture (USDA) with a right of enforcement (to step in if the easement holder fails to meet its stewardship burden). See *Agricultural Conservation Easement Program*, NAT'L SUSTAINABLE AGRIC. COALITION, <http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/> (last visited Jan. 30, 2020). For a more complete recitation of the elements of an agricultural conservation easement, see DANIELS & KEENE, *supra* note 5, at 305–22.

Overall, conservation easements provide an important mechanism for protecting privately-owned lands, where land use regulations may not be as focused on resource protection, and also provide a level of protection that goes beyond many public and regulatory land use tools.<sup>43</sup> Although conservation easements are often described as a private land use tool, the line between public and private involvement in these protective arrangements, given the high levels of government funding, is not always as clear as it might seem upon initial analysis.<sup>44</sup> It has also been long recognized that the resource protection interests often function best when used in connection or concert with other land use planning tools as part of an overall conservation strategy or approach, which further demonstrates the public versus private balancing at play in these protective arrangements.<sup>45</sup> Despite criticisms and some issues with abuses in utilizing the available incentives,<sup>46</sup> conservation easements have become one of the most significant tools for conservation organizations seeking to protect resources—and particularly for working lands protection<sup>47</sup>—where public ownership may be less

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43. See, e.g., Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209, 212–16 (1998) (exploring the role of easements); Lily A. Sweikert & Larry M. Gigliotti, *Evaluating the Role of Farm Bill Conservation Program Participation in Conserving America's Grasslands*, 81 LAND USE POL'Y 392, 392–93, 397 (2019) (profiling conservation easements and attitudes towards their use).

44. See SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY* 4–7 (2005) (discussing the lines between private and public protection in the conservation arena).

45. See Mryl L. Duncan, *Toward a Theory of Broad-Based Planning for the Preservation of Agricultural Land*, 24 NAT. RESOURCES J. 61, 62 (1984) (discussing the need for integrated farmland preservation planning efforts); John C. Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621, 624–25 (1980) (same).

46. See, e.g., Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reforms*, 2013 UTAH L. REV. 755, 760–70 (profiling some of the issues with the use of this tool and offering options for reform).

47. Working lands are different than some other resource forms in that the land is typically designed or intended to remain in use. While this could be possible in governmental ownership through leasing arrangements, keeping these lands in private ownership and protected by conservation easements is generally the preferred approach in the farmland preservation movement. See, e.g., *Easement Purchase*, PA. DEPT' AGRIC., [https://www.agriculture.pa.gov/Plants\\_Land\\_Water/farmland/Easement/Pages/default.aspx](https://www.agriculture.pa.gov/Plants_Land_Water/farmland/Easement/Pages/default.aspx) (last visited Jan. 30, 2020).

capable of providing the desired land management outcomes.<sup>48</sup>

### *B. Conservation Easements at Common Law*

Although easements are a well-established legal tool, conservation easements are a comparatively new legal construct and represent a substantial departure from common law property principles.<sup>49</sup>

In pre-industrial England, land was the major incident of wealth and its transferability was an important aspect of early commerce. Practices which hampered the marketability of land were discouraged. Since easements and real covenants are held by third parties, and at that time, there was no land title registry, their existence was difficult to ascertain. Characterized by one judge as “novel incidents,” creation of covenants and easements was severely limited by impediments designed to curtail any long-term effect.<sup>50</sup>

The common law barriers existed in three layers: (1) negative restrictions; (2) restrictions in gross; and (3) limits on perpetual property interests.

#### 1. Negative Easements

First, conservation easements are generally negative easements as they seek to modify or limit a landowner’s ability to change or use their land.<sup>51</sup> Negative easements were not favored under the common law because they are expressly designed to limit the rights of the landowner.<sup>52</sup> Affirmative easements, or the right to actually do something with the land of another, were the only generally

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48. See Rachel Fovargue et al., *A Landscape of Conservation Philanthropy for U.S. Land Trusts*, 33 CONSERVATION BIOLOGY 176, 176–77 (2019) (profiling giving and the impact of giving in this field).

49. See Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1080–81 (1996).

50. Ellen E. Katz, *Conserving the Nation’s Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 369, 377 (1986).

51. See Lippmann, *supra* note 23, at 300.

52. See Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC’Y 107, 135 (2015).

acceptable limitation, as they are tied to active land management.<sup>53</sup> This limitation on negative restriction, again, related to the idea that negative restrictions could impact or interfere with the future alienability of the land and the related concerns about dead hand control.<sup>54</sup> Up until comparatively recently, only a few specific negative restrictions, such as view protection or the protection of air rights, were actually permitted.<sup>55</sup> Twentieth century legislative efforts, however, attempted to modify this historical and common law dichotomy to allow for conservation easements to restrict the economic use of working lands to meet environmental or conservation objectives.<sup>56</sup>

## 2. Easements in Gross

Second, conservation easements are easements in gross, which means they do not expressly benefit an adjacent parcel, but instead benefit a party with no property interests related to the specific parcel, such as a conservation organization or governmental body seeking to protect the land for its conservation attributes (and not secure a benefit to adjacent landholdings).<sup>57</sup> Not surprisingly,

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53. See Glenn F. Tiedt, *Easements and Artifacts: An Archaeological Investigation of the Internal Revenue Code*, 47 AM. ANTIQUITY 376, 378–79 (1982).

54. See, e.g., Jeffrey M. Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 278 (2002) (profiling common law risks to conservation easements).

55. See Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1267 (1982).

56. See *id.* at 1267–69 (exploring these common law limitations); see also Shea B. Airey, *Conservation Easements in Private Practice*, 44 REAL PROP. TR. & EST. L.J. 745, 752–58 (2010) (exploring the common law limitations and legislative efforts surrounding conservation easements). Conservation easements also include a variety of negative and affirmative obligations. See Airey, *supra*, at 753. Negative obligations restrict a landowner from doing something with their land, while affirmative obligations require a landowner to carry out an action. See *id.* Affirmative obligations, in contrast to affirmative rights, have encountered some legal hurdles. See, e.g., Marcia E. Hepford, *Affirmative Obligations in Historic-Preservation Agreements*, 51 GEO. WASH. L. REV. 746, 746–50 (1983) (profiling this issue within the context of historic preservation easements).

57. See C. Timothy Lindstrom, *Changes in the Law Regarding Conservation Easements: An Update*, 5 WYO. L. REV. 557, 557–58 (2005); see also Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199, 210–11 (2011) (profiling the issues with dominant/burdened parcels in examining conservation easements). Some conservation organizations were able to work around this restriction by creating anchor parcels. See Lindstrom, *supra*, at 558. Essentially, this strategy involved conveying to the conservation organization a small

easements in gross were disfavored under common law.<sup>58</sup> Historically, only easements which were appurtenant, or those connected to a neighboring property, were permitted.<sup>59</sup> The rationale for this type of limitation was, again, to ensure that any land use rights established through common law easements remained in direct connection with an identifiable piece of land.<sup>60</sup> If rights could be obtained without a connection to some adjacent land, unanticipated consequences could result, which required a change in priorities to cause legislatures to consider changes to enabling legislation to allow for easements in gross to advance conservation goals and objectives.<sup>61</sup>

### 3. Perpetual Duration

Last, conservation easements depart from the common law Rule Against Perpetuities (RAP) principles and allow for perpetual protection of resources.<sup>62</sup> At common law, the RAP barred perpetual restrictions as impermissible dead hand control of assets—and restricted or related these interests to the lifetime of a person plus twenty-one years.<sup>63</sup> Although the RAP has been limited or modified

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portion of land—for example, one acre for a one thousand-acre ranch—which then gave the entity an adjacent parcel to define the conservation easement as appurtenant rather than in gross. *Id.* These strategies were used in some states, such as Wyoming, until recently to comply with state law requirements for protective easements. *Id.*

58. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a (AM. LAW INST. 2000).

59. See Lippmann, *supra* note 31, at 1076–77.

60. See generally Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 14 (1989) (discussing the types of easements recognized under common law).

61. See Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 126–28 (2010) (generally charting the common law obstacles to conservation easements as well as the statutory authorization for conservation easements); see also Ross D. Netherton, *Environmental Considerations and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 543–44 (1979) (examining the likely reasons these distinctions arose).

62. See Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2523–24 (2006). See generally W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954) (describing the rule against perpetuities as “a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today.”).

63. See Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 79–80 (2015); see also French, *supra* note 62, at 2526 (profiling the benefits and potential concerns and costs of perpetual resource protection).

by statute in most states,<sup>64</sup> the ability of conservation easements to have perpetual duration is still relatively unique and represents a substantial shift in thinking about how to balance current and future considerations regarding societal land use.<sup>65</sup> Perpetuity, however, has been a difficult target and is perhaps easier to secure in concept than in reality.<sup>66</sup> For one example, the Internal Revenue Service (IRS) requires tax-incentivized conservation easements to be of perpetual duration in order to qualify for tax benefits and often intensely examines donated conservation easements to determine whether the provisions actually protect the conservation values that are secured by the grant for that period (which can be challenging).<sup>67</sup>

In sum, there were public policy reasons why the common law historically restricted easements to being affirmative, appurtenant, and non-perpetual, as the goal from a public policy standpoint was to limit the creation of property restrictions that violated or impaired the free marketability of land as an economic concern and primary source of wealth.<sup>68</sup> This economic focus represented a view that the real value of land was as a financial or business asset tied to the individual, rather than the broader social concerns of the greater society.<sup>69</sup>

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64. See Weisbord, *supra* note 63, at 81.

65. See Julia D. Mahoney, *Perpetual Restrictions on Land Use and the Problem of the Future*, 88 VA. L. REV. 739, 744–53 (2002) (discussing the benefits and potential concerns and costs of perpetual resource protection).

66. See generally Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 1: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010) (analyzing the Internal Revenue Service (IRS) requirement that a tax incentivized conservation easement be granted in perpetuity); Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 2: Comparison to State Law*, 46 REAL PROP. TR. & EST. L.J. 1 (2011) (same).

67. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 472 n.165 (2005).

68. See Richard B. Collins, *Alienation of Conservation Easements*, 73 DENV. U. L. REV. 1103, 1104 (1996) (discussing judicial treatment of obsolete land use restrictions).

69. See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387 (2006) (exploring early American views of property, “the effect of which was to ‘make land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property.’”).

C. *The Origins of a Shift: The Rise of Conservation Easements and Farmland Preservation*

By the late twentieth century, the policy motivations for these changes had already begun to shift.<sup>70</sup> With the closing of the “frontier,” land was no longer infinite, inexhaustible, or purely viewed in terms of its economic value.<sup>71</sup> Additionally, the environmental impacts of the post-Industrial Revolution economy were apparent across the urban and suburban landscape, which was itself a product of changing land use patterns and social change during this period of substantial upheaval.<sup>72</sup> During this period, restrictive covenants (a form of negative restriction) gained broad acceptance as a private land use tool that could provide urban and suburban homeowners assurances that their substantial investment would remain protected against changes they viewed as incompatible with their neighborhoods.<sup>73</sup> Covenants of this type, protecting residential neighborhoods against change, were part of a twentieth century desire—or need—for additional control as types of land use became more varied and common law nuisance principles were often

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70. See, e.g., Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 54 (2012) (explaining, in the context of a proposal to create a new conservation credit, that “[a]lthough perpetuity offends some core property law principles, perpetual easements are like affirmative action for conservation; normal rules are switched off to redress a perceived imbalance in favor for development.”); see also Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 712–21 (1955) (profiling the case against the rule against perpetuities as not actually addressing economic concerns in contemporary society).

71. See Timothy P. Duane, *Growing Green Communities: Infrastructure Development and the Environment*, 10 VT. J. ENVTL. L. 379, 381, 381 n.6 (2009) (profiling the frontier mentality and Frederick Jackson Turner’s thesis regarding its impact on the American mentality within the land use arena).

72. See Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 YALE L.J. 617, 632–33, 636 (1991) (profiling pre-zoning land use and arguing for the effectiveness of the tool). *But see* Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New Haven*, 115 YALE L.J. 116, 119–23 (2005) (taking a different view of the effectiveness of these private land controls in New Haven during this period).

73. See Valerie Jaffee, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 YALE L.J. 1302, 1304–07, 1312 (2007) (profiling the use of restrictive covenants in a New Haven neighborhood over time); see also Stephen R. Miller, *Ending the Single-Family District Isn’t So Simple*, STARTRIBUNE (Jan. 2, 2019, 5:53 PM), <http://www.startribune.com/ending-the-single-family-district-isn-t-so-simple/503820202/> (profiling the impact of private covenants on efforts to increase density and mixed uses within residential zoned districts).

insufficient or not well suited for addressing the land use needs of landowners and their respective communities before and after the adoption of zoning.<sup>74</sup>

By the post-World War II period, the pace of change increased as technology and population trends created the suburban sprawl dynamic that defined middle to late twentieth century land use across the American landscape, based on the idea of infinite expansion and technological progress.<sup>75</sup> “Yet, by the early 1960s, evidence of a growing problem of soil degradation and urban sprawl prompted the first academic rumblings of concern about the true productive capacity of North American agricultur[e] . . . .”<sup>76</sup> This concern led advocates to design and introduce tools capable of providing additional layers of protection to open space as the threats continued to intensify.<sup>77</sup> A number of tools, including cluster zoning and

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74. See Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Amber Realty Co.*, 51 CASE W. RES. L. REV. 617, 618–20 (2001) (profiling the rise of this land use tool during the early twentieth century). Common law conservation easements also began and grew out of this period, with some of the first conservation efforts being used by the City of Boston to acquire interests in land around the park system in the 1890s. See Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 71–72 (2006) (providing an overview of the early development of this legal tool).

75. See Michael E. Lewyn, *Suburban Spawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 301 (2000) (discussing the post-war shift from central cities to suburban neighborhoods); see also Julian Conrad Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 443–46 (1982) (summarizing and quantifying these threats to farmland). In fact, until recent decades, farmland loss was seen “as a rational response to economic geography, not as a cause for alarm” as eastern states became more industrial. Rutherford H. Platt, *The Loss of Farmland: Evolution of Public Response*, 67 GEOGRAPHICAL REV. 93, 93 (1977) (charting the growth of this movement in New England).

76. Michael Bunce, *Thirty Years of Farmland Preservation in North America: Discourses and Ideologies of a Movement*, 14 J. RURAL STUD. 233, 233 (1998). See generally Jerome G. Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591 (1984) (charting the early motivations and origins of the farmland preservation movement).

77. See WILLIAM H. WHYTE, JR., URBAN LAND INST., SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 7–10 (1959); see also William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521, 521, 533 (charting the growth of farmland preservation and the changing perspectives from the late 1970s through 1980s as food security concerns were replaced with large production surpluses).

farmland zoning,<sup>78</sup> began to enjoy widespread use in the growing movement towards farmland preservation because this land was often the logical development target as it was undeveloped, often highly buildable with good soils and drainage, and proximate to urban centers.<sup>79</sup>

Conservation easements are part of the mix of tools used for land preservation.<sup>80</sup> Early land preservation and open space advocates recognized the magnitude of their challenge and began to determine whether new forms of property tools were needed to protect against increasing threats to the future of the working landscape.<sup>81</sup> State enabling legislation first authorized governmental agencies to secure properties through conservation easements, which was quickly expanded to allow non-profit land trusts to protect lands through acquired conservation easements, leading to the explosive growth of this tool in protecting valued resources of all types over the last several decades of the twentieth century.<sup>82</sup> Federal agencies also became involved and brought funding and expertise to the acquisition

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78. See Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 292–98 (2004) (discussing various types of agricultural zoning tools).

79. See, e.g., Margaret Rosso Grossman, *Exercising Eminent Domain Against Protected Agricultural Lands: Taking a Second Look*, 30 VILL. L. REV. 701, 708–22 (1985) (providing an overview of various tools); Sean F. Nolon & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 597–636 (1997) (profiling several techniques to preserve agricultural lands); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland Strategies for Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 115–18 (1998) (same). There was also a push at the federal level to address farmland loss, which despite successes, largely fell short of the goals of farmland preservation advocates. See TIM LEHMAN, PUBLIC VALUES, PRIVATE LANDS: FARMLAND PRESERVATION POLICY, 1933–1985, at 177–78 (1995).

80. See John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 322–24 (1997); see also Tom Daniels, *Market-Based Instruments and Rural Planning in America*, in THE ROUTLEDGE COMPANION TO RURAL PLANNING 137–40 (Mark Scott et al. eds., 2019) (explaining the importance of this tool given the relative weakness of land use regulation in rural America).

81. See WHYTE, *supra* note 77, at 8 (advocating for the use and coining of the term “conservation easement”).

82. See Kelly Kay, *Breaking the Bundle of Rights: Conservation Easements and the Legal Geographies of Individuating Nature*, 48 ENV'T & PLAN. 504, 506–08 (2015) (charting this rate of growth); see also King & Fairfax, *supra* note 74, at 71–75, 73 n.28 (explaining that state enabling legislation ended up being varied based on the political and ecological contexts each state was attempting to address).

of conservation easements.<sup>83</sup> Despite some concerns regarding the costs associated with managing protected lands (as being roughly equivalent to the costs of stewarding fee owned lands), conservation easements allowed land conservation advocates to protect lands that remained in private ownership and they became a popular protective mechanism, particularly after the use of the charitable tax deduction for these donated interests was firmly established.<sup>84</sup>

Contemporaneously with the mainstream land conservation movement, the farmland preservation movement gained momentum.<sup>85</sup> Farmland preservation advocates became involved in this work for a variety of reasons,<sup>86</sup> including keeping land available for future farming,<sup>87</sup> protecting local food production,<sup>88</sup> and protecting the family farm.<sup>89</sup> In the middle to late 1970s, there was growing concern over resource scarcity and the continued ability of the land to provide the necessary food supply going forward, which resulted in action at the federal and state level.<sup>90</sup> Agricultural conservation easements, in many ways, came to be viewed as the preferred tool for farmland preservation as agricultural conservation easements allowed the land to remain privately owned and managed (i.e.,

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83. See, e.g., Frank Schnidman, *The Evolving Federal Role in Agricultural Land Preservation*, 18 URB. LAW. 423 (1986) (charting the growth of federal involvement in this policy area).

84. See Kingsbury Browne, Jr. & Walter G. Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69, 70–71 (1975) (exploring IRS revenue rulings and the possibilities for utilization of the charitable deduction for conservation-related transactions).

85. See generally Julian Conrad Juergensmeyer, *Implementing Agricultural Preservation Programs: A Time to Consider Some Radical Approaches?*, 20 GONZ. L. REV. 701 (1984) (profiling the widespread interest in the farmland conservation policy arena).

86. See David M. Stoms et al., *Strategic Targeting of Agricultural Conservation Easements as a Growth Management Tool*, 26 LAND USE POL'Y 1149, 1149 (2009) (profiling motivations and the potential for agricultural conservation easements to serve land use planning objectives).

87. See Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237, 239 (1998) (making the food supply protection case for conservation efforts).

88. See Neil D. Hamilton, *Emerging Issues of 21st Century Agricultural Law and Rural Practice*, 12 DRAKE J. AGRIC. L. 79, 84–89 (2007).

89. See Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 DRAKE L. REV. 311, 311–12 (1997). For a general discussion regarding farmland preservation arguments, see Matthew J. Mariola, *Losing Ground: Farmland Preservation, Economic Utilitarianism, and the Erosion of the Agrarian Ideal*, 22 AGRIC. & HUM. VALUES 209, 209–10 (2005).

90. See LEHMAN, *supra* note 79, at 103–08 (charting this movement politically).

farmed), where land trust fee ownership of these working lands may have been a more difficult path for resource protection.<sup>91</sup> Across the country, the use of agricultural conservation easements in targeted areas (such as Long Island,<sup>92</sup> Lancaster County in Pennsylvania,<sup>93</sup> and Vermont<sup>94</sup>) became important tools for preserving farms and, in many ways, local identity.<sup>95</sup> Based upon early pilot efforts, by the mid-1990s, state and federal funding became available to cost-share or outright fund these acquisition efforts, leading the movement's substantial growth in the use of agricultural conservation easements to protect working farmland.<sup>96</sup>

#### *D. Farmland Preservation and Agricultural Conservation Easements Today*

In the intervening years, farmland preservation has become a popular policy objective for local governments.<sup>97</sup> Today, nearly five

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91. See TOM DANIELS & DEBORAH BOWERS, *HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 193-95* (1997). See generally David F. Newton & Molly Boast, *Preservation by Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENVTL. L. 189 (1978) (discussing the early use of agricultural conservation easements used by Suffolk County for farmland preservation).

92. See Craig A. Peterson & Claire McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447, 447 (1977); Mark R. Rielly, Comment, *Evaluating Farmland Preservation Through Suffolk County, New York's Purchase of Development Rights Program*, 18 PACE ENVTL. L. REV. 197, 197-98 (2000); Yvette DeBow-Salsedo, *Suffolk County Farmland Preservation Programs Saved for Now*, PECONIC LAND TR. (Apr. 18, 2018), <https://peconiclandtrust.org/blog/suffolk-county-farmland-preservation-program-saved-for-now> (providing summary of the farmland preservation movement in this area from its origins in the 1970s).

93. See Tom Daniels & Lauren Payne-Riley, *Preserving Large Farming Landscapes: The Case of Lancaster, Pennsylvania*, 7 J. AGRIC. FOOD SYS. & COMMUNITY DEV. 67, 70-71 (2017) (examining efforts to preserve this farmed landscape); Timothy Jay Houseal, Comment, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 DICK. L. REV. 527, 527-28 (1990).

94. See JAN ALBERS, *HANDS ON THE LAND: A HISTORY OF THE VERMONT LANDSCAPE* 284-86 (2000) (profiling the work of the Vermont Land Trust in this area); Rebecca Rice-Osterhoudt, Note, *Farmland Preservation in Vermont and the Creative Use of Land Trusts*, 11 VT. L. REV. 603, 604 (1986).

95. See FAIRFAX ET AL., *supra* note 44, at 175.

96. See Henry E. Rodegerdts, *Land Trusts and Agricultural Conservation Easements*, 13 NAT. RESOURCES & ENV'T 336, 337 (1998).

97. See Keith Schneider, *Farmland Preservation: What's Behind the Growing Interest?*, 63 PLAN. COMMISSIONERS J. 1, 1 (2006) (profiling the local preservation efforts and the interests and motivations for these efforts).

million acres of farmland have been protected by agricultural conservation easements.<sup>98</sup> As of 2010, 61% of land trusts identified protecting farms and ranches as part of their mission and this percentage is on the rise.<sup>99</sup> These agricultural conservation easements are funded in three primary ways: (1) tax-incentivized charitable donations of conservation easements from landowners;<sup>100</sup> (2) agricultural conservation easements acquired from farmers through the funding of the Agricultural Conservation Easement Program (administered by the Natural Resources Conservation Service (NRCS));<sup>101</sup> and (3) easements acquired by state purchase of agricultural conservation easement (PACE) programs.<sup>102</sup> Frequently,

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98. See AM. FARMLAND TR., SAVING AMERICAN FARMLAND: 2017 NATIONWIDE SURVEY OF LAND TRUSTS THAT PROTECT FARM AND RANCH LAND 2 (2018), [https://www.farmlandinfo.org/sites/default/files/AFT\\_FIC\\_Land\\_Trust\\_Survey\\_lo%20res\\_01.03.2019.pdf](https://www.farmlandinfo.org/sites/default/files/AFT_FIC_Land_Trust_Survey_lo%20res_01.03.2019.pdf); FAQ, FARMLAND INFO. CTR., <https://www.farmlandinfo.org/how-we-help/faq> (last visited Jan. 30, 2020).

99. See Jane Ellen Hamilton, *Beyond Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, SAVING LAND, Summer 2013, reprinted in Jane Ellen Hamilton, *Beyond Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/news/beyond-agricultural-conservation-easements-ensuring-future-agricultural-production> (last visited Jan. 30, 2020).

100. See, e.g., *Donating an Easement*, VT. LAND TR., <https://www.vlt.org/donate-easement/> (last visited Jan. 30, 2020) (stating that thousands of acres have been conserved by the donation of conservation easements and profiling the steps in a tax incentivized conservation made to the Vermont Land Trust); see also Edith Pepper Goltra, *A Good Incentive to Save Land*, SAVING LAND, Winter 2018, at 14, <https://tlc.lta.org/topclass/uploads/documents/274423/SavingLandMagazineWinter2018.pdf> (providing an overview of the impact of the “enhanced tax incentive” for conservation easement donations and case studies of its impact nationally).

101. See *Agricultural Conservation Easement Program*, USDA NAT. RESOURCES CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited Jan. 30, 2020) (providing an overview of this significant federal acquisition program); see, e.g., *Vermont Agricultural Land Easement*, USDA NAT. RES. CONSERVATION SERV. VT., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/easements/acep/?cid=nrcs142p2\\_010532](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/easements/acep/?cid=nrcs142p2_010532) (last visited Jan. 30, 2020) (providing information on the administration and role of the program in Vermont).

102. See FARMLAND INFO. CTR., STATUS OF STATE PACE PROGRAMS 1 (2016), [https://www.farmlandinfo.org/sites/default/files/State\\_Purchase\\_of\\_Agricultural\\_Conservation\\_Easement\\_Programs\\_2016\\_AFT\\_FIC\\_09-16.pdf](https://www.farmlandinfo.org/sites/default/files/State_Purchase_of_Agricultural_Conservation_Easement_Programs_2016_AFT_FIC_09-16.pdf) (stating that as of 2016, twenty-eight states have PACE programs designed to protect farmland and providing an overview of these programs and spending levels and acres protected); see also JILL CLARK, CTR. FOR FARMLAND POLICY INNOVATION, THE OHIO STATE UNIV., OHIO'S AGRICULTURAL EASEMENT PURCHASE PROGRAM: FROM PILOT TO PERMANENT PRESENCE A SURVEY OF AEPP PARTICIPANTS 1 (2010), <http://glenn.osu.edu/farmland->

a working lands conservation project leverages all three of these sources to provide a mix of funding to accomplish the landowner's and the land trust's combined goal of protecting the targeted farm.<sup>103</sup> A typical project could involve 50% funding from the NRCS, 25% from a state PACE program or a land trust's private funding, and 25% of the property value donated by the landowner as match.<sup>104</sup> These projects are often highly involved, multi-year, and multi-generational in dimension and increasingly sophisticated given the number of entities involved and the value of the underlying farm real estate.<sup>105</sup>

The mission of these land trusts is also evolving to capture a greater mix of goals and objectives through these conservation projects.<sup>106</sup> One increasingly frequent target is making farmland more affordable to new and beginning farmers.<sup>107</sup> This perhaps includes

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policy/papers/2010\_3.pdf (summarizing the development of Ohio's PACE program); THOMAS P. DINAPOLI, OFFICE OF THE STATE COMPTROLLER, N.Y., *BET ON THE FARM: FARMLAND PROTECTION AS A STRATEGY FOR ECONOMIC GROWTH AND RENEWAL 1* (2010), [https://www.osc.state.ny.us/reports/environmental/bet-on-the-farm\\_farmland-protection.pdf](https://www.osc.state.ny.us/reports/environmental/bet-on-the-farm_farmland-protection.pdf) (profiling New York's efforts).

103. See, e.g., Nancy Everhart, *Farmland Conservation in Vermont*, VT. HOUSING & CONSERVATION BOARD (Oct. 21, 2014), [https://www.farmlandinfo.org/sites/default/files/AFT%2010%2021%2014%20VT%20Farmland%20Conservation\\_NEverhart.pdf](https://www.farmlandinfo.org/sites/default/files/AFT%2010%2021%2014%20VT%20Farmland%20Conservation_NEverhart.pdf) (explaining that since the 2008 Farm Bill was passed, NRCS policies have shaped farmland preservation and collaborations in Vermont); see also Richard Peterson & LouAnna Perkins, *Professional Training for Farm Succession Advisors in New England: Farmland Conservation and Farm Transfer*, [http://landforgood.org/wp-content/uploads/CLE\\_Outline-for-Conservation-Session-Perkins-Peterson.pdf](http://landforgood.org/wp-content/uploads/CLE_Outline-for-Conservation-Session-Perkins-Peterson.pdf) (last visited Jan. 30, 2020) (profiling many of these funding mechanisms and the concerns/requirements imposed).

104. See AM. FARMLAND TR., *CONSERVATION OPTIONS FOR CONNECTICUT FARMLAND: A GUIDE FOR LANDOWNERS, LAND TRUSTS & MUNICIPALITIES 8–9* (2015) (profiling a typical Agricultural Conservation Easement Program Agricultural Land Easement (ACEP-ALE) project and its funding mix).

105. See FAIRFAX ET AL., *supra* note 44, at 216–20 (describing the increasing complexity of large-scale landscape level conservation projects from the 1990s on—including the deal involving The Conservation Fund and other partners in protecting the northern forest in New York, New Hampshire, and Vermont for over seventy million dollars).

106. See SAMUEL N. STOKES ET AL., *SAVING AMERICA'S COUNTRYSIDE: A GUIDE TO RURAL CONSERVATION 1–8* (2d ed. 1997) (exploring the various goals for the use rural conservation programs within the farmland preservation movement); see also VT. LAND TR., *FARMLAND CONSERVATION*, <https://www.vlt.org/wp-content/uploads/2017/04/PDF-FarmlandConservation.pdf> (profiling Vermont Land Trust's program and the functions that this funding stream often plays).

107. See Jessica Beckett & Ryan E. Galt, *Land Trusts and Beginning Farmers' Access to Land: Exploring the Relationships in Coastal California*, 4 J. AGRIC. FOOD SYS. & COMMUNITY DEV. 19, 19 (profiling this role in land trusts focused both on

broadening the area of uses that relate to agricultural production that might help keep the farm viable over time—including bed and breakfast use, farm stays, or other agri-preneurial ventures within these protected lands.<sup>108</sup> Other goals include protection of a sense of place,<sup>109</sup> fostering conservation management,<sup>110</sup> facilitating farm transfer (which relates to making land more affordable to new entrants), and fostering local food networks.<sup>111</sup> The general trend in agricultural conservation easements is towards increasing the complexity of these easements as the nature of the resources that are being protected is better understood, and some of the perils of easement drafting have taught land trusts the necessity of carefully tailoring these agreements to achieve their goals (and landowner's counsel to ensure that the requirements, if a tax deduction is being sought, are met).<sup>112</sup> In short, agricultural conservation easements are trying to accomplish more and, as a result, are becoming more complex by virtue of the increasing demands that are being placed on their use as a legal tool.

## II. UNDERSTANDING SUBDIVISION RESTRICTIONS WITHIN AGRICULTURAL CONSERVATION EASEMENTS

Subdivision restrictions play an important role in agricultural conservation easements, and careful consideration on how to use these protections is a factor in the design of most conservation

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farming and on other conservation-related objectives); *see also* Erik Hoffner, *Local Food a Growing Trend for Land Trusts*, GRIST (Feb. 20, 2013), <https://grist.org/article/local-food-a-growing-trend-for-land-trusts/> (examining the related function of promoting local food pathways).

108. *See Farm Policy Update: The 2018 Farm Bill*, AM. FARMLAND TR. (Dec. 21, 2018), <https://farmland.org/farm-policy-update-the-2018-farm-bill/> (exploring options for obtaining additional certainty on the permissibility of this sort of activity within federally conserved lands).

109. *See* Weston M. Eaton et al., *Trouble with Sense of Place in Working Landscapes*, 32 SOC'Y & NAT. RESOURCES 827, 827–28 (2019) (exploring this goal in working landscape protection and some related challenges).

110. *See, e.g.*, Heather Tallis et al., *Five Financial Incentives to Revive the Gulf of Mexico Dead Zone and Mississippi Basin Soils*, 233 J. ENVTL. MGMT. 30, 31–32 (2019).

111. *See, e.g.*, Neil D. Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. ILL. U. L. REV. 657, 659–62 (1999).

112. *See* Owley & Rissman, *supra* note 28, at 76 (profiling the evolution of conservation easements through organizational learning and shifting land use goals and priorities of land trusts and landowners).

projects.<sup>113</sup> Being too permissive or too restrictive with the subdivision restrictions could materially hinder the project from actually accomplishing its goal of keeping the land in active agriculture.<sup>114</sup> Further, the underlying land use and development pressures associated with these properties fuel relative value and programmatic appeal.<sup>115</sup> This Part will provide an example of a typical subdivision restriction, the current options under the NRCS's programs (as these shape many of these projects as a condition of funding), and finally will explore the considerations in favor and against restrictive prohibitions of this form.

### A. General Provisions

As noted, efforts to bar or limit the division of farmland protected by an agricultural conservation easement are frequently included provisions in these agreements.<sup>116</sup>

For example, the template conservation easement contained in the *Conservation Easement Handbook* provides:

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113. See DANIELS & KEENE, *supra* note 5, at 309–11 (profiling these concerns and offering some standardized language to give land trusts control over future proposed divisions of the land); see also Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 284–85 (2004) (profiling the threat to agricultural lands through subdivision and exploring zoning techniques to address agricultural preservation).

114. See Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 821–23 (2016) (exploring these challenges within the context of promoting on-farm businesses and for farm viability). Affirmative agriculture requirements, despite being the goal, are not frequently included in agricultural conservation easements due to the challenges of enforcing this type of provision if the farm is no longer economically viable. Some land trusts, however, are using this form of requirement to try to keep the land actively farmed. See, e.g., Kendall Slee, *Keeping Farms and Ranches Working*, LAND TR. ALLIANCE (July 13, 2015), <http://www.landtrustalliance.org/blog/keeping-farms-and-ranches-working> (profiling the Marin Agricultural Land Trust's use of mandatory agricultural use provisions in their agricultural conservation easements).

115. See, e.g., Rachel Armstrong, *On Infertile Ground: Growing a Local Food System Through Agricultural Conservation Easements*, 19 DRAKE J. AGRIC. L. 149, 155–57 (2014) (profiling subdivision restrictions and the relative valuation issues associated with these protections).

116. See, e.g., AM. FARMLAND TR., COMMENTARY TO THE MODEL GRANT OF AGRICULTURAL CONSERVATION RESTRICTION 1–12 (2014), [https://workinglandsalliance.org/wp-content/uploads/2014/09/MODEL-AG-EASEMENT\\_COMMENTARY-FINAL.pdf](https://workinglandsalliance.org/wp-content/uploads/2014/09/MODEL-AG-EASEMENT_COMMENTARY-FINAL.pdf) (profiling these considerations).

Paragraph 2: SUBDIVISION

Most easements are designed to minimize or prohibit future divisions of ownership of the land, in order to preserve unified management of large parcels, and for administrative feasibility of monitoring and enforcing conservation easements.

2.A. Division Limitation

The Protected Property shall remain in unified ownership, which may be joint or undivided, but without division, partition, subdivision, or other legal or de facto creation of lots or parcels in separate ownership, . . . [*select additional options*:

notwithstanding that the Protected Property was acquired in separate parcels or lots or may be the subject of an approved subdivision; *OR*

except as may be required by law for the residential development permitted [in the STRUCTURES section of the Model Conservation Easement], provided that the remaining lots must remain in one ownership with the remainder of the Protected Property; *OR*

except that not more than three (3) separate lots, each of not less than one thousand (1,000) contiguous acres, may be established, all subject to the terms of this grant; *OR*

except that not more than one (1) lot or parcel for each of the principal residences permitted [in the STRUCTURES section of the Model Conservation Easement] may be established, provided that the dividing lines shall be located to avoid fragmentation or important agricultural soils [*or other named resource area*], subject to the prior written approval of Holder; *OR*

In the event of such a division, the deed of conveyance shall allocate any limited quantifiable land use right reserved herein between the lots, unless otherwise allocated herein.]<sup>117</sup>

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117. BYERS & PONTE, *supra* note 16, at 323–24.

It is clear from the subdivision options under the sample provisions contained in the *Conservation Easement Handbook* that there are several options a drafter can use to advance their specific objective. The path selected will be directly influenced by the character of the land being protected and the goals of the respective land trust and landowner seeking to secure its protection. If the goal is to prevent subdivision, merging lots or adding language that makes clear the parties' intent in regard to the various lots is a helpful tool to ensure that the lands are not subdivided against the wishes of the applicable land trust and landowner.<sup>118</sup> Best practices in the field, however, require that subdivision is addressed at the outset of the relationship and within the negotiated conservation easement.

### B. NRCS ACEP-ALE Options

Beyond the options available for conservation easement drafters, funding requirements fundamentally shape the design of these legal instruments. One of the primary funders of agricultural conservation easements is the United States Department of Agriculture (USDA) through the NRCS.<sup>119</sup> NRCS provides funding to land trusts working to protect farmlands through its Agricultural Conservation Easement Program—Agricultural Land Easements (ACEP-ALE) funding.<sup>120</sup> For

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118. *See id.* at 320–22.

119. *See* Sarina Katz et al., *Saving Farm Bill Conservation Programs*, SAVING LAND, Summer 2017, reprinted in Sarina Katz et al., *Saving Farm Bill Conservation Programs*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/news/saving-farm-bill-conservation-programs> (last visited Dec. 18, 2019) (profiling the impact of Farm Bill conservation programs generally); *see also* DANIELS & KEENE, *supra* note 5, at 191–96 (profiling federal spending programs for agricultural land preservation over time). The USDA also, under the authority of the USDA Forest Service, provides funding for the acquisition of forest conservation easements, through the Forest Legacy Program (FLP). *See, e.g.*, Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 PUB. LAND & RESOURCES L. REV. 47, 48–50 (2012) (profiling the FLP and the use of subdivision restrictions within FLP easements). Congress has also recently acted to continue its commitment to protect farmland through the 2018 Farm Bill. *See* Madeline Bodin, *The Farm Bill: Celebrating Passage of a Key Land Conservation Resource*, SAVING LAND, Spring 2019, at 14; *see also* AM. FARMLAND TR., OVERVIEW OF 2018 FARM BILL CHANGES TO ACEP-ALE AND RCPP (2018), <https://www.farmlandinfo.org/sites/default/files/ACEP%20and%20RCPP%20Overviews%20FINAL.pdf> (providing an overview of the principal statutory changes under the Agricultural Improvement Act of 2018).

120. *See* 16 U.S.C. § 3865b (2018) (amended by Agricultural Improvement Act of 2018). The 2018 Farm Bill, the Agricultural Improvement Act of 2018, was signed into law on December 20, 2018. *Id.* Regulations and rulemaking under the new farm bill

example, NRCS will provide 50% of the funding for a given acquisition, the land trust will provide 25%, and the landowner may provide 25% as matching funds through a bargain sale.<sup>121</sup> In exchange for the federal funding, the land trust's easement terms must conform to the purposes of the ACEP-ALE.<sup>122</sup> NRCS does not hold these easements itself, as again, it works through partnerships with land trusts and state agencies seeking to protect these lands,<sup>123</sup> but the agency does retain enforcement rights should the land trust fail to enforce the terms of the agricultural conservation easement.<sup>124</sup> The lands protected by the NRCS and the ACEP-ALE funding range from grassland conservation in the Midwest<sup>125</sup> to preserving greater sage-grouse habitat in the arid west.<sup>126</sup> In the 2018 Farm Bill, Congress increased funding for conservation easements substantially and authorized these programs to receive up to \$450 million annually for the life of the legislation, which is a substantial increase over the 2014 Farm Bill counterpart and will help ensure that these funds continue

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are underway, and there will likely be some changes in how ACEP-ALE in particular is administered given the statutory changes.

121. See DANIELS & KEENE, *supra* note 5, at 197; see also 16 U.S.C. § 3865b(b)(2) (discussing the scope of the cost-share assistance).

122. See *id.* § 3865b(b)(4)(c).

123. See *id.* § 3865b(a)(1)–(3). This section was modified in the 2018 Farm Bill to expressly recognize the agency's ability to fund "buy-protect-sell" transactions, where the land trust acquires the land, then sells the protected farmland to an eligible farmer subject to the terms of an agricultural conservation easement. See *id.*; see also *id.* § 3865a(2) (defining buy-protect-sell transactions).

124. See *id.* § 3865b(b)(4)(C)(iii). This contingent right of enforcement recognizes that the leadership role in enforcing these easements has been delegated to the land trusts, but also is intended to preserve the value of the very meaningful federal investment in protecting these resources. In the 2018 Farm Bill, this right was "clarified" to limit the Department's ability to utilize this right unless: (i) the land trust fails to timely provide its monitoring reports, or (ii) the Secretary has a "reasonable and articulable belief that the terms and conditions of the easement have been violated." *Id.* Before using the right, the Department has to provide notice of its inspection and provide a chance for the land trust and landowner to be present and participate. See *id.*

125. See, e.g., Sweikert & Gigliotti, *supra* note 43, at 392 (exploring the effectiveness of grassland conservation programs).

126. See, e.g., Michael Martinez, *Working Lands for Wildlife: Targeted Landscape-Scale Wildlife Habitat Conservation*, 29 NAT. RESOURCES & ENV'T 36, 37–38 (2015) (discussing this program and its role in preventing habitat fragmentation for several species).

to be a significant player in the working lands space for the next half decade.<sup>127</sup>

Prior to the 2014 Farm Bill, the general trend for agricultural conservation easements funded by the NRCS was to prohibit subdivision.<sup>128</sup> In the 2014 Farm Bill, the NRCS started to change its policy slightly to allow for some subdivision of protected lands under a defined framework. NRCS required the decision to be made upfront, allowing a few different potential paths: (1) complete restriction of subdivision; (2) subdivision in predetermined areas; or (3) future flexibility for subdivision at NRCS's discretion, provided certain conditions are met.<sup>129</sup>

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127. See *Farm Bill Policy Update: The 2018 Farm Bill*, AM. FARMLAND TR., <https://www.farmland.org/blog/farm-policy-update-the-2018-farm-bill> (last visited Jan. 30, 2020) (profiling the funding increase under the Farm Bill).

128. See, e.g., RENÉE JOHNSON, CONG. RESEARCH SERV., RS22565, FARMLAND PROTECTION PROGRAM: STATUS AND CURRENT ISSUES 2 (2007) (explaining that subdivision of these lands was barred under the Farm and Ranchland Protection Program (FRPP), the predecessor of today's ACEP-ALE). The 2018 Farm Bill, the Agricultural Improvement Act of 2018, was signed into law on December 20, 2018. See 16 U.S.C. § 3865b. Regulations and rulemaking under the new farm bill are underway, and there will likely be some changes in how ACEP-ALE in particular is administered given the statutory changes. See AM. FARMLAND TR., OVERVIEW OF 2018 FARM BILL CHANGES TO ACEP-ALE AND RCPP (2018), <https://www.farmlandinfo.org/sites/default/files/ACEP%20and%20RCPP%20Overviews%20FINAL.pdf> (providing overview of the principal statutory changes under the 2018 Farm Bill).

129. See Agricultural Conservation Easement Program, 81 Fed. Reg. 71,818, 71,824 (Oct. 18, 2016) (codified at 7 C.F.R. pt. 1468). There are other implications or factors that have to be accounted for based upon which subdivision option is chosen. First, subdivision options will have an impact on the ranking of the parcel for enrollment, as the subdivided options are evaluated at its subdivided size in determining whether the property rises to the top for funding in a given cycle, which may need to be considered when crafting the easement. See, e.g., JEROME FAULKNER, U.S. DEPT OF AGRIC., AGRICULTURAL CONSERVATION EASEMENT PROGRAM AGRICULTURAL LAND EASEMENTS (2018), [https://www.farmlandinfo.org/sites/default/files/ALEMarch2018\\_NRCSslides.pdf](https://www.farmlandinfo.org/sites/default/files/ALEMarch2018_NRCSslides.pdf); see also 7 C.F.R. § 1468.22 (2019) (discussing the ranking criteria for the Agricultural Conservation Easement Program). Second, the easement needs to include language indicating that impervious surface limits need to be allocated at the sub-parcel level, as agreed upon by NRCS and the easement holder, and will need to be adjusted and accounted for in the subdivision instruments. See U.S. DEPT OF AGRIC. NAT. RES. CONSERVATION SERV., AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP), AGRICULTURAL LAND EASEMENT, MINIMUM DEED TERMS FOR THE PROTECTION OF AGRICULTURAL USE 2 (2019).

### 1. A General Bar Against Subdivision

Under the first potential path, the:

Separate conveyance of a portion of the Protected Property or division or subdivision of the Protected Property is prohibited, . . . except where State or local regulations explicitly require subdivision to construct residences for employees working on the Protected Property. Grantor must provide written notice and evidence of such requirements to Grantee and the Chief of NRCS or his or her authorized designee (Chief of NRCS) prior to division of the Protected Property.<sup>130</sup>

This option is very restrictive in how it defines or allows subdivision, but it could be clearer in addressing the issue of separate tax parcels or deed parcels to ensure that these lots merge and cannot be conveyed out separately. There is a carve-out from this restrictive language in some state enabling legislation that expressly allows construction of worker housing on conserved land.<sup>131</sup>

### 2. Permission for Predetermined Divisions

The second option allows the land trust and the landowner to agree in advance to a certain number of predetermined divisions of the protected property.<sup>132</sup> This is designed to encourage flexibility and to allow a farmer to pass the land down to other operators, potentially their children, while helping ensure each respective tract remains of sufficient size to continue to be agriculturally viable. In this option, the landowner, land trust, and NRCS must agree to and identify in advance the specific divisions of the land that will be allowed in order to avoid long-term disagreement and to, again, validate and vet the land use allocations prior to executing the agricultural conservation easement. There is merit to this approach, but it requires the land trust, NRCS, and the landowner to spend considerable time thinking

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130. U.S. DEPT OF AGRIC. NAT. RES. CONSERVATION SERV., *supra* note 129, at 2; *see also* 16 U.S.C. §§ 3865–3965d.

131. *See* Kendra Johnson, *Conserving Farmland in California: For What and for Whom? How Agricultural Conservation Easements Can Keep Farmland Farmed*, 9 SUSTAINABLE DEV. L. & POL'Y 45, 47 (2008) (citing CAL. HEALTH & SAFETY CODE § 17008 (West 2008)).

132. *See* U.S. DEPT OF AGRIC. NAT. RES. CONSERVATION SERV., *supra* note 129, at 3.

about the future of the land and trying to address unknown needs. This approach still does not provide much flexibility for future scenarios that the landowner could not foresee—including, potentially, having a house lot for a new farmer looking to take over the operation, where the exiting farmer wants to remain in place in the farmhouse, which is not an uncommon drafting issue in these transactions.

### 3. Permission, with NRCS Approval, for the Purpose of Keeping Land Actively Farmed

In the last option, where the boundaries of future subdivisions have not been preidentified, the farmer must seek NRCS approval and certify that the division is needed to keep all “farm or ranch parcels in production and viable for agricultural use.”<sup>133</sup> NRCS then makes the determination that the parcels will remain eligible for the ACEP-ALE program and that the parcels will not fall below the median farm size for the county as established by the National Agricultural Statistics Service.<sup>134</sup> This option is designed to provide land trusts and NRCS the ability to respond to changing circumstances, while ensuring that the land still meets basic requirements and will likely remain suitable for continued productive use.

Overall, the trend seems to be moving toward being slightly more permissive in allowing certain predetermined subdivisions, but requiring this decision be made at the outset as part of an overall and highly intentional conservation strategy.<sup>135</sup> This aligns with recent empirical scholarship showing that conservation easements are, over time, becoming more complex, prescriptive, and developing more

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133. *Id.*

134. *See id.* (providing an overview of the approval process for this form of subdivision request by the Chief of NRCS).

135. This also aligns with the general trend across farm bills to improve conservation performance of working lands and to streamline/promote greater partnerships with land trusts to deliver these programs. *See, e.g.,* Adam Reimer, *Ecological Modernization in U.S. Agri-Environmental Programs: Trends in the 2014 Farm Bill*, 47 LAND USE POL'Y 209, 213 (2015) (exploring this with the concept of the previous 2008 Farm Bill). Within this partnership arena, the 2018 Farm Bill gives more responsibility and less direct oversight to land trusts for program delivery. *See* Lori Sallet, *2018 Farm Bill a Victory for Farmland Protection, Environmentally Sound Farming Practices and Keeping Farmers on the Land*, AM. FARMLAND TR. (Dec. 11, 2018), <https://www.farmland.org/press-releases/american-farmland-trust-2018-farm-bill-a-victory-for-farmland-protection-environmentally-sound-farming-practices-and-keeping-farmers-on-the-land> (profiling the policy shifts in this direction).

complicated protective mechanisms, including providing additional reserved rights to the landowners.<sup>136</sup> This is potentially the result of more experience with the tool and awareness of some of the possible challenges perpetual land use protection presents to both the landowner and the land trust stewarding the land.<sup>137</sup> It is unclear, at this point, what the overall conservation impact is of this shift, but in the working lands context specifically, this movement to more flexible mechanisms is probably not unmerited.

### C. *The Case for Limiting Subdivision*

It is not uncommon for an agricultural conservation easement to bar all future subdivision of the land. This restrictive motivation is driven by a few significant considerations of the land trust, funders, and the individual landowner(s), including the desires of the donor to protect the farm, ensure future farm viability, reduce administrative costs, and avoid future land management challenges, which are addressed in turn.

#### 1. Donor Motivations

First, it may be the intention of the farmer, who has either donated or conveyed this interest to the land trust, to protect the farm in total.<sup>138</sup> For many, the family farm has an emotional attachment that has significant non-monetary value.<sup>139</sup> For some farmers,

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136. See generally Owley & Rissman, *supra* note 28 (charting the evolution in conservation easements in this direction).

137. See Margaret Claire Osswald, *Custom-Made Conservation: Resource-Specific Conservation Easement Implementation Unpaves the Path of Tax Abuse*, 32 J. ENVTL. L. & LITIG. 1, 1–4 (2016) (charting the role of organizational learning in the conservation field).

138. See, e.g., Cheever & McLaughlin, *supra* note 52, at 154–55 (profiling the Myrtle Grove controversy set off by the National Trust for Historic Preservation approving subdivision of a protected property, which ran afoul of the donor's heirs' wishes and expectations). For an overview of the mix of considerations that drive these transactions, see James R. Farmer et al., *Why Agree to a Conservation Easement? Understanding the Decision of Conservation Easement Granting*, 138 LANDSCAPE & URB. PLAN. 11, 11–19 (2015).

139. See, e.g., VINCE BOLDOC & HERB KESSEL, CTR. FOR SOC. SCI. RESEARCH AT SAINT MICHAEL'S COLL., VERMONT IN TRANSITION: A SUMMARY OF SOCIAL ECONOMIC AND ENVIRONMENTAL TRENDS 33 (2008), [https://www.vtrural.org/sites/default/files/content/futureofvermont/documents/VTTransitions\\_Ch3.pdf](https://www.vtrural.org/sites/default/files/content/futureofvermont/documents/VTTransitions_Ch3.pdf) (noting that in a 2005 land use survey of Vermont residents, maintaining family farms ranked high in collective importance). Keeping family farms intact is a prominent goal of many

ensuring that a specific farm remains together as a collective unit may be one, if not the, primary driver of the transaction (to prevent division as well as development of a protected farm).<sup>140</sup> While not an economic motivation or even a direct motivator for the land trust, place attachment to the land and the motivation to ensure that farm land remains together can be an important objective.<sup>141</sup> Additionally, a donor's conservation goals may further support a bar on subdivision—particularly if the property has significant natural habitats, such as wetlands or forests, and there is concern about habitat fragmentation.<sup>142</sup> The critical balance in discussions with donors is to be realistic as to the need for future flexibility and to not protect the property in such a fashion that makes it unmanageable or difficult to manage in the future—and to provide sufficient flexibility to address unknown future needs for the landscape.<sup>143</sup> In many cases, completely limiting subdivision may make sense, but in others it may not, and this needs to be realistically examined at the outset.

## 2. Preserving Agricultural Viability and Preventing Farm Fragmentation

Second, the easement holder obviously wants to ensure that the land remains viable for agricultural production, and this could be very

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land trusts. See Josh Lysen, *Keeping Working Lands in Family Hands*, LAND TR. ALLIANCE (Oct. 18, 2018), <http://www.landtrustalliance.org/blog/keeping-working-lands-family-hands> (profiling this objective).

140. See, e.g., *Nelson Ranch*, TR. FOR PUB. LAND, <https://www.tpl.org/our-work/nelson-ranch#sm.000075smjfn0acodtzf14wp92qrf9> (last visited Jan. 30, 2020) (profiling the Trust for Public Land's efforts to work with the Nelson family to ensure that the five-generation family farm was not subdivided).

141. See Courtney E. Quinn & Angela C. Halfacre, *Place Matters: An Investigation of Farmers' Attachment to Their Land*, 20 HUM. ECOLOGY REV. 117, 117–21 (2014) (profiling place attachment to the family farm). See generally Geoff Kuehne, *My Decision to Sell the Family Farm*, 30 AGRIC. & HUM. VALUES 203 (2013) (exploring the identity issues and connection of farm families to the land).

142. See, e.g., Sophia Veltrop, *Flag Hill Farm Works with Vermont Land Trust to Conserve Forest, Orchard, and Trail*, FARM TO PLATE (Feb. 1, 2018, 10:30 AM), <https://www.vtfarmtoplate.com/announcements/flag-hill-farm-works-with-vermont-land-trust-to-serve-forest-orchard-and-trail#.XI4-myJKhhE> (profiling the landowners' goals, including protecting habitat and preventing fragmentation).

143. See, e.g., ELLEN RILLA & ALVIN D. SOKOLOW, UNIV. OF CAL. AGRIC. ISSUES CTR., CALIFORNIA FARMERS AND CONSERVATION EASEMENTS: MOTIVATIONS, EXPERIENCES, AND PERCEPTIONS IN THREE COUNTIES 32 (2000), <https://aic.ucdavis.edu/research1/conease.pdf> (providing summary of the role of conservation easements from both the grantor and subsequent farmers' perspectives).

important to the organization leading the project and for the funders involved in securing the land's protection.<sup>144</sup> If protected land is broken into smaller and smaller pieces, eventually its long-term viability for certain types of agricultural production will be either impaired or even completely eliminated.<sup>145</sup> In some extreme instances, this could even lead to the agricultural conservation easement's extinguishment (through the cy pres process) if the protected land is no longer capable of providing the benefits that the agreement was initially intended to advance.<sup>146</sup>

Even in a case where limited subdivision is allowed, the conservation easement holder will want to make sure that the subdivisions make sense as far as management of the land (and that the borders and access issues make sense for its long-term stewardship).<sup>147</sup> Land trusts look at viability in a variety of ways depending on their goals.<sup>148</sup> For ranching parcels focused on grazing,<sup>149</sup> the goals likely look different than in the Northeast, with

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144. See NAT'L YOUNG FARMERS COAL., A PATH TO CONSERVATION AND FARM VIABILITY: FARM VIABILITY PROGRAMS (2016), [https://www.youngfarmers.org/wp-content/uploads/2014/06/FarmViabilityProgram\\_Final.pdf](https://www.youngfarmers.org/wp-content/uploads/2014/06/FarmViabilityProgram_Final.pdf) (profiling this shared goal of farm viability).

145. See, e.g., Teresa Opheim, *The Wilson Farm: What Is a Fair Farmland Transition?*, PRAC. FARMERS OF IOWA (Feb. 17, 2014), <https://practicalfarmers.org/2014/02/the-wilson-farm-what-is-a-fair-farmland-transition-2/> (discussing this issue within the context of Iowa farmland and future viability).

146. A discussion of the complex issues involved in the amendment and termination of perpetual conservation easements falls outside of the scope of this Article. For one example of the many articles addressing this issue, see generally Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1 (2009). For a short discussion of cy pres, see Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1040 (2006).

147. See BYERS & PONTE, *supra* note 16, at 396–97.

148. See, e.g., *Land Trusts*, CTR. FOR AGRIC. & FOOD SYS.: FARMLAND ACCESS LEGAL TOOLKIT, <https://farmlandaccess.org/land-trusts/> (last visited Jan. 30, 2020) (providing overview of land trusts and their respective missions). See generally John B. Wright, *Designing and Applying Conservation Easements*, 60 J. AM. PLAN. ASS'N 380 (1994) (charting regional trends in the use of land trusts as a protective mechanism).

149. See, e.g., ANTHONY ANELLA & JOHN B. WRIGHT, SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST 8–9 (2004) (profiling many of the unique considerations associated with this property form); see also Adena R. Rissman & Nathan F. Sayre, *Conservation Outcomes and Social Relations: A Comparative Study of Private Ranchland Conservation Easements*, 25 SOC'Y & NAT. RESOURCES 523, 526, 529–36 (2012) (charting the results of these conservation easements and the conservation outcomes achieved through these transactions).

its increasing focus on value-added agriculture.<sup>150</sup>

Next, an easement holder will want control over these subdivisions and to ensure that the easement's design makes sense from the perspective of future viability. Beyond the pure size bound, the subdivision has to make sense from an operational standpoint or perspective. Are water rights associated with the parcel? If so, are they properly allocated to the subparcels? Is access an issue?<sup>151</sup> Do easements need to be conveyed among the various lots to ensure that legal and physical access remains intact? Ultimately, either allowing or eliminating subdivision rights associated with the property requires careful examination to ensure that the agricultural viability goal is not diminished by the proposed division, so this factor can cut in both directions.

### 3. Reducing Administrative Costs

Third, the easement holder bears an administrative cost in stewarding conservation easements.<sup>152</sup> This involves monitoring and enforcing the conservation easement against the landowner. If the land is divided amongst different landowners, the complexity of these efforts, not to mention the cost and time, greatly complicate these efforts and lead to potential issues and management considerations going forward.<sup>153</sup> In response, some land trusts recently have been incorporating fees for the additional costs associated with monitoring the property if it is subdivided.<sup>154</sup>

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150. See, e.g., ANNETTE M. HIGBY ET AL., THE NEW ENGLAND SMALL FARM INSTITUTE, HOLDING GROUND: A GUIDE TO NORTHEAST FARMLAND TENURE AND STEWARDSHIP 7–9 (2004) (charting the unique issues New England farmers face).

151. See 7 C.F.R. § 1468.3 (2019) (defining access within the ACEP-ALE program).

152. See, e.g., CONSERVATIONTOOLS.ORG, PA. LAND TR. ASS'N, COSTS OF CONSERVATION EASEMENT STEWARDSHIP 2–4 (2011), <https://conservationtools.org/guides/86-costs-of-conservation-easement-stewardship> (summarizing the often-significant costs associated with monitoring and enforcing conservation easements).

153. See *id.* at 3–4 (explaining that “[a]llowing the subdivision of an eased parcel into two may nearly double the costs of stewardship if and when the landowner exercises this right. . . . As each new parcel moves into separate ownership, it essentially brings into existence an independent set of easement management issues—most notably landowner relations and easement enforcement—and associated liabilities.”).

154. See, e.g., *Fee Schedule for Easement Services*, VA. OUTDOORS FOUND., <https://www.vof.org/protect/easements/fee-schedule/> (last visited Jan. 30, 2020) (providing summary of their review costs for project approvals).

#### 4. Avoiding Potential Conflict of the Allocation of Reserved Rights

Fourth, there are other practical issues with preventing the subdivision of conserved lands. How are homestead or farm housing units divided? How are reserved rights separated out? Allowing subdivision to occur where there are limited reserved rights requires further allocation of these rights among the respective subdivided parcels, which can be difficult for both the fee owner and the easement holder in monitoring and enforcing this aspect of the easement. Keeping the land in an integrated whole avoids this issue of how to suballocate rights when the land is divided among various owners.

##### *D. The Case Against Restricting Subdivision*

Despite the benefits and the motivations that often prevent subdivision of conserved farmland, there are some benefits to allowing subdivision in certain identifiable and predetermined ways, including the need to adjust to farming changes, to facilitate conservation transactions, and to comply with some state law requirements.

##### 1. Preserving the Need to Tailor the Easement to the Farming Operation

First, farms are not one size fits all, and neither are agricultural operations.<sup>155</sup> For some farms, preventing subdivision could conceivably impair its long-term agricultural viability.<sup>156</sup> For example, if the farm is overly large, it could potentially be a challenge for a new operator to take over and manage at that scale.<sup>157</sup>

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155. See DANIELS & KEENE, *supra* note 5, at 29–34 (profiling farm size as a function of profitability and viability).

156. In Vermont, this is becoming a potential challenge as many of the early farmland conservation easements were specifically designed (and the protected land was utilized as such) for dairy production. As the dairy sector struggles and other farms fill in the void, this land use shift may pose problems to conserved lands as far as remaining economically viable and productive. See, e.g., Ryan Mercer, '2018 Is by Far the Worst Year the Dairy Industry Has Ever Been Through.' *It Might Get Worse*, BURLINGTON FREE PRESS (Jan. 9, 2019, 7:00 AM), <https://www.burlingtonfreepress.com/story/news/local/vermont/2019/01/09/trump-trade-war-vermont-dairy-farms-closed/2512230002/> (discussing the market trends and shrinking of Vermont's dairy industry).

157. See generally Elizabeth Brabec & Chip Smith, *Agricultural Land Fragmentation: The Spatial Effects of Three Land Protection Strategies in the Eastern United States*, 58 LANDSCAPE & URB. PLAN. 255 (2002) (charting the issue of farm

Conversely, the farms, such as a grazing operations in the West, may need substantial size, landmass, or resources to remain viable over time.<sup>158</sup> As J.B. Ruhl has noted, there is nothing inherently environmentally beneficial about a small farm by virtue of its operative form,<sup>159</sup> although a smaller scale farm may use the types of agricultural practices that limit the ecological impacts and lessen the externalities that conventional agricultural practices are often responsible for as a byproduct.<sup>160</sup>

Locking in large farming tracts with no flexibility to scale down to meet the needs of a local foodshed may have unanticipated negative consequences and should be carefully evaluated to determine if there is sufficient flexibility to address future productive and operational needs.<sup>161</sup>

Additionally, farm worker and support housing is an increasing issue.<sup>162</sup> If a farm has been protected and housing is restricted to a single homestead parcel, what happens when the current farmer wants to transfer the land? Will there be sufficient flexibility to provide the incoming farmer an area to construct housing?

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fragmentation and evaluating the impacts of several land use tools in blunting this loss).

158. Water rights are obviously one prominent consideration. *See, e.g.*, Peter D. Nichols, *Do Conservation Easements and Water Mix (in Colorado)?*, 5 U. DENV. WATER L. REV. 504, 504–05 (2002) (profiling the challenges and issues facing land trusts seeking to protect open space and agricultural land in states where these issues predominate); *see also* Rebecca Price, *Can Conservation Easements Preserve Agriculture in Kentucky Without Expressly Protecting Water Rights?*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 425, 426 (2015).

159. *See* J.B. Ruhl, *Agriculture and the Environment: Three Myths, Three Themes, and Three Directions*, 25 ENVIRONS: ENVTL. L. & POL'Y J. 101, 104 (2002) (exploring this thread as a myth regarding farming).

160. Land trusts occasionally play a role in bridging the gap between farming and ecological impacts or promoting agri-environmental practices that can help lessen some of the external impacts. *See, e.g.*, Adrian White, *A Land Trust Asks Farmers to Change Their Ways*, CIVIL EATS (Mar. 30, 2017), <https://civileats.com/2017/03/30/a-land-trust-asks-farmers-to-change-their-ways/> (profiling the Sustainable Iowa Land Trust's early work in Iowa).

161. There are tradeoffs, of course, as allowing unmitigated subdivision can have habitat fragmentation consequences. *See* Adena R. Rissman et al., *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 710–11, 713–17 (2007) (profiling private uses of conservation easements that may result in land fragmentation and reviewing over 100 easements held by The Nature Conservancy, 85% of which allowed for additional subdivision to meet future needs).

162. *See Agricultural Protection Zoning*, CONSERVATIONTOOLS.ORG, <https://conservationtools.org/guides/67-agricultural-protection-zoning> (last visited Jan. 30, 2020).

Additionally, if land transitions from one agricultural form to another, it may be desired or necessary to provide housing adjacent to the farm, to either farm workers or family members.

## 2. Facilitating Conservation Transactions

Second, a landowner may consider the ability to subdivide necessary to their future plans for their land. It could be, in part, that they have multiple family members who want access to the land, and the farm could be capable of supporting that type of use.<sup>163</sup> In such cases, subdivision may be necessary to get the landowner to enter into the protective agreement but may also provide the degree of active farming that the land trust is seeking to promote. Obviously, in this circumstance, it is a challenge to draw the line between what is acceptable from a land management perspective and what a land trust should be seeking to accomplish within the context of the agricultural conservation easement. When flexibility is being incorporated into an easement, there are substantial drafting challenges in providing both flexibility and assurances that the conservation values secured through the transaction will remain in place, but allowing subdivision in some forms may be necessary to initially secure the land and land trusts are adept and attuned to this type of balancing.<sup>164</sup>

## 3. Conforming with State Law

Third, some state laws may permit subdivision of farmland to allow for farm worker housing or other social needs. For example, in California, farm worker housing is permitted.<sup>165</sup> Thus, a total bar of subdivision may not be advisable in some instances and must be addressed within the drafting process to ensure compliance with state enabling laws and other applicable laws.

Overall, allowing some form of subdivision can be an important feature of an agricultural conservation easement, but the language needs to be carefully discussed, evaluated, and vetted among the land trust, external funders, and the farmer to ensure that the collective

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163. See, e.g., DANIELS & KEENE, *supra* note 5, at 149–50 (charting subdivisions within the context of designing reserved rights to accommodate donor/grantor needs).

164. See *id.* at 107–08; see also BYERS & PONTE, *supra* note 16, at 38–39 (discussing approaching land owners with property that the easement holder would like to protect and the need for flexibility).

165. See Johnson, *supra* note 131, at 47.

long-term intentions of the group are actually being fulfilled. Subdivision restrictions, either an outright prohibition or allowing limited future flexibility, are an integral component of the protective design of farmland preservation projects in ensuring that the wide array of benefits these agreements seek to achieve are actually accomplished.

### III. EXPLORING RECENT SUBDIVISION CASE LAW INVOLVING CONSERVED FARMLAND

Over the past several years, courts have occasionally reviewed the enforceability of subdivision restrictions contained in agricultural conservation easements. Courts look to state law to determine how to define division or subdivision, and these cases often hinge upon how the provision has been drafted and the specific state's enabling legislation. This Part will examine three important cases that show how courts have grappled with interpretive issues in differing ways and offer some lessons to land trusts and funders working in this area.

#### A. Covered Bridge Farms II, LLC v. Maryland

One of the first cases to address the issue of subdividing conserved farmland involved Covered Bridge Farms II, LLC (Covered Bridge) in Maryland.<sup>166</sup> In 1984, the Grey family conveyed an easement to the State of Maryland through the Maryland Agricultural Land Preservation Foundation (MALPF).<sup>167</sup> The Greys actually began the conveyance process in 1980, as the state enabling legislation at that time required enrolling farms to meet certain soil and location criteria, including that the farm consist of more than fifty acres and be placed in an agricultural district.<sup>168</sup> The agricultural district requirement was met by the farmer entering into a district agreement, which in the Greys' case, "required that [they] . . .

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166. Covered Bridge Farms II, LLC v. Maryland, 63 A.3d 666, 667 (Md. Ct. Spec. App. 2013).

167. See *id.*; see also MARYLAND LAW ENCYCLOPEDIA, AGRICULTURE § 4 (2019) (providing overview of this state agency); Geritt-Jan Knaap & John W. Frece, *Smart Growth in Maryland: Looking Forward and Looking Back*, 43 IDAHO L. REV. 445, 465 (2007) (noting that MALPF, established in 1977, had protected more than 250,000 acres of farmland on around 2000 farms as of 2006); Nancy H. Russell-Forrester & Justin P. Hayes, *A Brief Explanation of the Maryland Agricultural Land Preservation Foundation*, 50 MD. B.J. 58, 58–60 (2017) (providing overview of MALPF and its statutory mission).

168. See *Covered Bridge Farms II, LLC*, 63 A.3d at 667.

maintain the property for agricultural use and prohibited the subdivision and development of the land for residential, commercial, or industrial purposes.”<sup>169</sup> A limited subdivision exception allowed for the Greys to convey to themselves and to their children one acre or less to each (here, the total farm consisted of roughly 130 acres).<sup>170</sup>

After entering into the district agreement, the Greys conveyed the agricultural conservation easement, which states that:

[I]t is an easement “in, on and over the hereinafter described tract or parcel of land . . . that is to say: All those three contiguous parcels of land . . . described as follows.” Throughout the rest of the deed, the three contiguous are referred to as the “described land.”<sup>171</sup>

As far as subdivision, the easement then provides that the Greys “relinquish the following rights: . . . [t]he right to subdivide the above described land for any purpose except upon written approval” of the MALPF.<sup>172</sup>

Subsequently, the Greys sold the farm, which was, in turn, conveyed into Covered Bridge Farms, LLC.<sup>173</sup> Through a Deed of Adjoinder Transfer and Deed After Adjoinder Transfer, the new owners reconfigured the parcel lines, the acreage, and the numbering of the parcels.<sup>174</sup> Covered Bridge Farms, LLC then, without the required MALPF approvals, reconveyed the new parcels to Covered Bridge Farms II, III, and IV.<sup>175</sup> In response, MALPF filed a complaint in state court against the entities for violating the agricultural conservation easement.<sup>176</sup> The trial level court granted MALPF’s cross-motion for summary judgment, agreeing with the State that these conveyances violated the subdivision prohibitions contained in the agricultural conservation easement.<sup>177</sup>

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169. *Id.*; see also *Md. Agric. Land Pres. Found. v. Claggett*, 985 A.2d 565, 579 (Md. 2009) (noting that district agreements are binding upon heirs, successors, and assigns).

170. See *Covered Bridge Farms II, LLC*, 63 A.3d at 667.

171. *Id.*

172. *Id.*

173. See *id.* at 668.

174. See *id.*

175. See *id.*

176. See *id.*

177. See *id.* The trial court also concluded that the reallocations of acres/parcel boundaries violated the district agreement and state regulations, showing that other layers of approval filtered into this. See *id.*

The Maryland Court of Special Appeals reviewed this agricultural conservation easement de novo.<sup>178</sup> A prior Maryland decision, *Stitzel v. Maryland*, previously addressed a similar question—concluding that land subject to a conservation easement under Maryland law could not be separately conveyed despite having separate parcel status prior to the conveyance.<sup>179</sup> The *Stitzel* court reached this determination by looking at the Maryland regulations defining subdivision in this context as “the division of land into two or more parts or parcels.”<sup>180</sup> The lower court also rejected *Stitzel*’s arguments that pre-existing parcels indicated that the land was already divided.<sup>181</sup> In all, the Maryland Court of Special Appeals upheld the circuit court’s determination that Covered Bridge Farms had violated MALPF’s agricultural conservation easement, “declaring the transfers null and void; requiring the land to be transferred to a common owner, and ordering the lot lines eliminated or restored” to their former status.<sup>182</sup>

In *Covered Bridge Farms II*, the court’s ruling shows how an easement-holding entity evaluates which parcels it wants to fund, which merited MALPF’s determination that the property should be protected as an integrated whole and contributed to the court’s willingness to uphold the remedy of reuniting the lands.<sup>183</sup> There were a few potential other factors at work in the decision that may not be present in all cases. First, Maryland has one of the oldest and best-established state-level farmland preservation programs.<sup>184</sup> The

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178. *See id.*

179. *Stitzel v. Maryland*, 6 A.3d 935, 937, 940 (Md. Ct. Spec. App. 2010).

180. *Id.* at 938 (quoting MD. CODE REGS. 15.15.01.01-2(B)(7) (2007)). As noted in the *Covered Bridges Farms II* decision, the State subsequently changed its regulations to be even more definitive in addressing what qualifies as subdivision, including leasing of lands and treating all enrolled lands as a single parcel. *See Covered Bridge Farms II, LLC*, 63 A.3d at 671.

181. *See Covered Bridge Farms II, LLC*, 63 A.3d at 668, 671. The appellant also tried to distinguish its agricultural conservation easement from the agricultural conservation easement in *Stitzel* based upon the legal description. *See id.* at 670. The court in *Covered Bridge Farms II* noted that in *Stitzel*, the parcel was described as a single “agricultural preservation parcel.” *Id.* However, in *Covered Bridge Farms II*, the parcel was described in one section as all three contiguous parcels of land and were described as the “land” or “subject property” in other sections of the easement. *Id.* The court rejected the argument that the easement describes three separate parcels, concluding the intent was for the land to be protected as a collective whole. *Id.*

182. *Id.* at 668.

183. *Id.* at 668, 671.

184. *See* Alyssa J. Domzal, Comment, *Preserving Preservation: Long Green Valley Association, Conservation Easements, and Charitable Trust Doctrine*, 73 MD. L. REV.

program's sophistication, ability to show the importance of its work, and its relative ranking of lands for preservation were likely persuasive to the court in undoing the prior conveyance and showing the underlying public policy reasons for its determinations.<sup>185</sup> Second, MALPF was able to demonstrate that it relied on the parcel as a whole to make its acquisition decision and that the subdivision restriction, despite the land consisting of separate discernible parcels, had been addressed in both the district agreement and the agricultural conservation easement.<sup>186</sup> As will soon be evident, it is not always possible for land trusts to convince courts value-wise of these forms of limitations or the impact of these clauses on prior existing boundary divisions.

### B. In re Strieter

Shortly following *Covered Bridge Farms II* came *In re Strieter*.<sup>187</sup> In *Strieter*, Carolyn Strieter owned 96.58 acres of land in Ann Arbor, Michigan.<sup>188</sup> In 2003, Legacy Land Conservancy (LLC), a local land trust, paid Strieter nearly \$200,000 for an agricultural conservation easement which would restrict this farmland to agricultural use in perpetuity.<sup>189</sup> The land consisted of two separate parcels, Parcel A (56.58 acres) and Parcel B (40 acres).<sup>190</sup> These parcels had separate tax treatment and legal status for over seventy years.<sup>191</sup> The easement protected all of Parcel A and about half of Parcel B, conserving about seventy-seven acres of the ninety-six acre farm.<sup>192</sup> The agricultural conservation easement had a single provision addressing subdivision: "Any division or subdivision of the Property is prohibited."<sup>193</sup>

As part of a bankruptcy proceeding, the debtor filed a motion with the bankruptcy court to sell off Parcel B separately from Parcel A.<sup>194</sup>

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986, 997–1000 (2014) (profiling MALPF's work within the context of the Long Green Valley Association litigation). See generally Mark Matulef & John Cannan, *Conservation Easements in Maryland: Three Decades Strong*, 38 MD. B.J. 19 (2005) (profiling the history conservation easements in Maryland).

185. See *Covered Bridge Farms II, LLC*, 63 A.3d at 668, 671.

186. See *id.* at 667–68, 671.

187. *In re Strieter*, No. 14-56980, 2015 WL 2215418 (Bankr. E.D. Mich. May 11, 2015).

188. *Id.* at \*1.

189. See *id.*

190. *Id.*

191. See *id.* at \*3.

192. *Id.* at \*1.

193. *Id.*

194. *Id.*

LLC objected based on the terms of its agricultural conservation easement protecting the parcel and the subdivision prohibition contained in the easement deed.<sup>195</sup> The bankruptcy court used contract principles to interpret the conservation easement (similar to how common law easements are evaluated).<sup>196</sup> In the court's view:

LLC's objection turns on a single provision in the 15-page conservation easement: "Any division or subdivision of the Property is prohibited." LLC argues that the proposed sale would impermissibly create two owners—a division in ownership. Debtor contends that the words "division" and "subdivision" relate strictly to the land—not to ownership. The Court agrees with Debtor.

....

Read as a whole, the conservation easement prohibits *uses* of the Property, which impair or interfere with the land's conservation values. There is no language that even suggests that the easement was intended to restrict ownership of the Property, in perpetuity, to a single owner.

....

At the time LLC purchased the conservation easement, Debtor's land had been divided into parcels A and B for more than 70 years. The easement expressly acknowledges this fact. Debtor's proposed sale does nothing to *further* divide or subdivide the property, and the Court will not depart from the easement's plain meaning.<sup>197</sup>

In the bankruptcy court's view, separating the parcel into separate, smaller pieces, resulting in multiple owners, would not violate the agricultural conservation easement, as the owner was conveying off already separate lots.<sup>198</sup>

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195. *See id.*

196. *See id.* at \*2.

197. *Id.* at \*1–3.

198. *See id.* at \*3; *see also* Nancy A. McLaughlin & Robert W. Swenson, *Bankruptcy Court Allows Sale of Part of "Property," Subject to Conservation Easement*, NONPROFIT L. PROF BLOG (May 14, 2015), <https://lawprofessors.typepad.com/nonprofit/2015/05/bankruptcy-court-allows-sale-of-part-of-property-subject-to->

There are a few factors here worth considering. First, the agricultural conservation easement protected all of one of the two parcels but only a smaller part of the second parcel.<sup>199</sup> This differential treatment may have been intentional to give future owners flexibility by excluding certain areas in Parcel B to allow for a home site or other use, but this separation may also have helped the court reach its conclusion that the parcels could be separately conveyed. Second, the court noted that there was only one provision in the agricultural conservation easement that addressed subdivision, which was limited to a single sentence.<sup>200</sup> While the purposes section of the easement is neither provided nor mentioned in the court's opinion, it seems that a more robust prohibition and a discussion of the purposes of this restriction in this section of the agricultural conservation easement could have assisted the land trust in making its case that these lands should not be further divided. The agricultural conservation easement also lacked merger language (expressly combining the two separate tax parcels), and the court relied on common law principles (here, Michigan's strict construction rules relating to subdivision restrictions and the concept that ambiguity in a contract, or here an easement, is construed against the drafter, as state law did not provide for differential evaluation of conservation easements based on their unique purpose) to reach its ultimate conclusion.<sup>201</sup>

### C. Taylor v. Taylor

More recently, in *Taylor v. Taylor*, siblings Janis and James Taylor and their mother Susan owned, as tenants in common, a seventy-seven acre property in Butler County, Ohio.<sup>202</sup> The property was protected by an agricultural conservation easement held by the Three Valley Conservation Trust, which was acquired by the land trust in 2003.<sup>203</sup> The agricultural conservation easement contained, in

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conservation-easement.html (providing a summary of the *Strieter* case and conclusions reached by the bankruptcy court).

199. See *In re Strieter*, 2015 WL 2215418, at \*1.

200. See *id.*

201. See *id.* at \*2.

202. See *Taylor v. Taylor*, 110 N.E.3d 651, 652 (Ohio Ct. App. 2018); see also Gail Keck, *Court Ruling Allows Division of Protected Farmland*, FARMPROGRESS (July 5, 2017), <https://www.farmprogress.com/land-management/court-ruling-allows-division-protected-farmland> (providing background on the case and the potential impact on Ohio farmland protection efforts).

203. *Taylor*, 110 N.E.3d at 652.

its section on prohibited uses, an express restriction against subdivision, stating “[t]he legal subdivision of the Property, recording of a subdivision plan, partition, or any other division of the Property into two or more parcels, is prohibited.”<sup>204</sup>

Janis brought an action “seeking appraisal and sale of the property,”<sup>205</sup> because, in her view, sale of the property was required because it could not be legally divided (which would be the normal partition remedy).<sup>206</sup> James moved for partial summary judgment and argued that this provision should be null and void as an undue restraint against the alienability of land and as violating public policy.<sup>207</sup> Janis and the land trust opposed, arguing that this restriction against subdivision was enforceable under Ohio law.<sup>208</sup> The land trust argued that:

[T]he subdivision restriction helps ensure that the property has only one residence and related infrastructure in order to minimize impacts on the property, that the property will be managed by one owner to eliminate conflicts about land management between multiple owners, and that the property will not be developed . . . . It also reduces the administrative costs required to monitor the property.<sup>209</sup>

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204. *Id.* The easement’s expressed purpose is “to assure that the Conservation Values of the Property will be preserved, and that the Property will be retained forever in its natural and agricultural condition; and to prevent any use of the Property that will significantly impair or interfere with the Conservation Values of the Property.” *Id.*

205. *Id.* For additional background, it appears that Janis wanted to sell her half-interest, and the negotiations broke down over price—leading her to file this action. See *Family Battle Over Preserved Farmland Testing Easement Legalities*, OHIO’S COUNTRY J. (Feb. 19, 2018), <https://www.ocj.com/2018/02/family-battle-over-preserved-farmland-testing-easement-legalities/>.

206. See *Taylor*, 110 N.E.3d at 652. Under Ohio law, the typical remedy would be partition in kind (or dividing the land), which is favored over sale. See 19 OHIO JUR. 3D *Cotenancy and Partition* § 107 (2019) (stating that “commissioners have a duty to explore every reasonable opportunity of equitably dividing the property before forming the opinion that a division cannot be made without doing manifest injury to the property”). If a property cannot be divided, it must be appraised and sold at public auction, unless one of the parties elects to take the property at its appraised value. See *id.* § 112.

207. See *Taylor*, 110 N.E.3d at 652–53.

208. *Id.* at 653.

209. *Id.* at 654.

On a summary judgment motion, the trial court agreed with James, concluding:

[P]erpetual restrictions on partition are unenforceable . . . . [No] contractual provision, legal authority or even underlying policy purpose . . . which allows the Court to find a perpetual restriction on the right to partition the property to be valid in general, or even necessary in this case. While the conservation easement itself is valid, and may continue in perpetuity, the portion of the easement specifically restricting partition is not . . . .<sup>210</sup>

On appeal, the Court of Appeals of Ohio found:

Considered in light of the conservation easement statutes, the agreement restricting subdivision of the Property would not be contrary to public policy or inconsistent with the public policy expressed in the legislation. Moreover, the subdivision restriction does not amount to an undue restraint on alienability. The subdivision restriction . . . merely prohibits the owner from dividing the parcel into two or more parcels.<sup>211</sup>

The court also found that the subdivision restriction was closer to a restrictive covenant, permissible under Ohio common law precedent, than to an absolute restraint against alienability, which would have been rejected.<sup>212</sup>

The *Taylor* case is particularly interesting, as it demonstrates that both the trial court and the state court of appeals grappled with the public purposes behind this type of restriction. The trial court rejected the land trust's argument that this type restriction had a legitimate purpose based on its failure to include a temporal restriction out of hand (which is typically required in assessing restraints against alienation arguments)<sup>213</sup> and the court relied on the severability provision of the easement to excise it from the text.<sup>214</sup> The court of appeals, however, took greater pains to examine the language of the

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210. *Id.* at 653.

211. *Id.* at 656.

212. *See id.*

213. *See* 61 AM. JUR. 2D PERPETUITIES AND RESTRAINTS ON ALIENATION § 90 (2019) (summarizing the rules associated with unreasonable restraints against alienation).

214. *See Taylor*, 110 N.E.3d at 653.

subdivision restriction and the public policy rationale in favor of agricultural conservation easements.<sup>215</sup> The court of appeals also concluded that this property interest was more akin to a restrictive covenant, which was not as disfavored under common law, and could be upheld on that basis.<sup>216</sup>

#### *D. Takeaways from Recent Subdivision Case Law*

To summarize, the cases involving subdivision of conserved farmland have looked at this issue through somewhat different lenses. However, there have been a few common themes or lessons that can be learned from these cases.

First, the configuration of the property matters. If there are separately deeded lots protected under the umbrella of a single agricultural conservation easement, courts are more likely to permit subdivision. This should expressly factor into a land trust's strategy in conserving land, as considerations of how title to the property is held should influence whether merger of tax parcels or separately deeded parcels should be required prior to the conveyance of the conservation easement.

Second, the language of subdivision prohibitions also has an impact on the court's interpretation. In the context where a court may be reading an agricultural conservation easement and interpreting its provisions in light of common law interpretational principles, land trusts need to be very precise in defining what restrictions are permitted and under what circumstances. Failure to adopt a subdivision provision that covers the range of divisions allowed under state law may result in unanticipated consequences.<sup>217</sup>

Third, although courts are somewhat skeptical of subdivision prohibitions and often read these agreements in favor of alienability of land, some have been willing to enforce these terms. For example, in *Taylor*, the court of appeals expressly validated a restriction as not being an undue restraint against alienation, reversing a trial court's decision.<sup>218</sup>

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215. *See id.* at 654–55.

216. *See id.* at 656.

217. *See, e.g.*, Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1073–76 (profiling interpretational issues of conservation easements and subdivision clauses).

218. *See Taylor*, 110 N.E.3d at 656.

Fourth, the more an easement holder can do (in the terms of the actual drafting of the easement and, if required, in its advocacy) to explain its motivations for restricting subdivision, the more defensible this restriction will be in view of the court. Describing the motivations for why a specific agricultural conservation was designed to limit future division, despite separately deeded lots, will show: (1) the fee owner's agreement to this type of restriction; and (2) that limiting division is critical to the future viability of the land as a working farm. It is no longer enough to explain the conservation motivation; the motivation for preventing subdivision should be independently articulated.

In sum, while the case law is somewhat mixed as far as the durability and enforceability of subdivision provisions, if a provision is carefully tailored to state law subdivision requirements and adequately defines its rationale and need for this restriction, the land trust should be in a better position for enforcing this prohibition against future challenges.

#### IV. RECOMMENDATIONS FOR ADDRESSING THE SUBDIVISION ISSUE

For land conservationists interested in addressing this line of decisions and ensuring that their restrictions against subdivision remain intact, there are a few lines of potential intervention from a tax policy perspective, through federal acquisition policies, and through their own efforts. This Part explores some options and provides a few specific recommendations to land trusts seeking to better ensure that their subdivision restrictions remain enforceable: (1) through targeted amendments to state enabling legislation; and (2) through their own drafting and acquisition strategies.

##### *A. Explore Targeted Amendment of State Enabling Acts*

Ensuring the desired judicial treatment of restrictions against subdivision may merit amending state enabling legislation that authorizes the creation and holding of these unique property interests to expressly address their differential treatment from common law easements and to recognize the public policy considerations supporting restrictions against subdivision contained within these easements.

##### 1. Modify Common Law Interpretational Principles

States should consider modifying or addressing subdivision of agricultural conservation easements (or conservation easements more

globally) and the application of common law property principles to these requests. The application of common law property maxims, such as interpreting conveyance documents in favor of the alienability of land and against the drafter, may not make sense within the context of agricultural conservation easements—another valued state policy or priority. Several courts that have examined the issue of how to interpret agricultural conservation easements have relied on common law principles to reach their decision. For instance, in *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, the court was tasked with interpreting a provision of an agricultural conservation easement that allowed for agricultural structures and determining whether a wine tasting room qualified under this provision.<sup>219</sup> The court, rejecting arguments from Wetlands America Trust, Inc. and amicus from several conservation organizations arguing that common law interpretational doctrines should not apply given the express legislative distinctions made in creating this separate form of easement, interpreted this provision against the drafter (the conservation organization) and in favor of free alienability of land.<sup>220</sup>

To date, two states, Pennsylvania and West Virginia, have taken the step of amending their overall conservation easement enabling legislation to be “construed in favor of effecting their conservation purposes and the policy and purpose of the enabling statute.”<sup>221</sup> Pennsylvania’s enabling legislation provides that “conservation or preservation easements shall be liberally construed in favor of the grants therein to effect the purposes of those easements and the purpose of this act.”<sup>222</sup> West Virginia’s act uses nearly identical language.<sup>223</sup> A state seeking to ensure that conservation easements remain in place as intended by the parties should adopt similar

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219. *Wetlands America Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341, 342, 349–50 (Va. Cir. Ct. 2014).

220. *See id.* at 346–48, 357–58.

221. LAND TR. ALL., CONSERVATION DEF. INITIATIVE, ENABLING STATUTE PROVISION EXAMPLES 1 (2018), <https://s3.amazonaws.com/landtrustalliance.org/Enabling-Statute-Provision-Examples-2018.pdf>. In addition, “California’s act also contains a direction for liberal construction but this is tempered by a separate direction for all rights not specifically granted to remain with the landowner.” *Id.*

222. 32 PA. STAT. AND CONS. STAT. ANN. § 5055(c) (West 2019); *see also Guide to the Conservation and Preservation Easements Act, Pennsylvania Act 29 of 2001*, CONSERVATIONTOOLS.ORG, <https://conservationtools.org/guides/89-guide-to-the-conservation-and-preservation-easements-act> (last visited Jan. 2, 2020).

223. *See* W. VA. CODE ANN. § 20-12-2 (West 2019) (“The West Virginia Legislature recognizes the importance and significant public benefit of conservation and preservation easements . . .”).

modifications to ensure that these purposes, not common law principles, are used by the court to resolve interpretive issues.<sup>224</sup>

## 2. Incorporate Restrictions Against Subdivision Expressly into the Legislative Purposes

In addition, exploring how to integrate restrictions against subdivision as part of the conservation easement enabling legislation could prove helpful. For example, in *Taylor v. Taylor*, the court of appeals expressly noted that no party was challenging the enforceability of the conservation generally, only the application of the subdivision prohibition, concluding:

In sum, a review of the [enabling legislation] reveals that the Legislature enacted these provisions for the “public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition.” Considered in light of the conservation easement statutes, the agreement restricting subdivision of the [Taylor farm] would not be contrary to public policy . . . .<sup>225</sup>

Conservation easement enabling legislation is typically focused more on defining the conservation benefits that can be secured through these agreements and less about the specific details of how this will be accomplished. Addressing subdivision as a permissible activity within the state enabling law specifically could bridge this gap.

### *B. Land Trust Strategies to Minimize the Risk of Unintended Subdivisions*

As the parties in these transactions with the express goal of protecting the resource, land trusts should consider possible options for ensuring that their carefully crafted conservation outcome is achieved and remains in place. Depending on state law, there may be a few possible avenues for specifically addressing subdivision, including looking closely at the land that is being protected, drafting strategies, and last, responsibly evaluating subdivision requests.

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224. See Nancy A. McLaughlin, *Interpreting Conservation Easements*, 29 PROB. & PROP. 30, 33–35 (2015) (discussing interpretational principles regarding conservation easements secured under state enabling law).

225. *Taylor v. Taylor*, 110 N.E. 3d 651, 656 (Ohio Ct. App. 2018).

### 1. Parcel Considerations

First, easement holders should look at their state law and subdivision principles and ensure that their agreements are accomplishing their goals as far as allowing or blocking subdivision. It may be necessary, in some states, to eliminate separate tax parcels or merge these into a single lot before protecting the land. The Michigan tax court's decision in *In re Strieter* was heavily focused on the fact that the protected parcel already consisted of three separate tax parcels.<sup>226</sup> Where in the past it may have been enough to collectively protect these parcels without merging the lots, depending on the applicable state subdivision laws, this may now require additional drafting attention. Awareness of the configuration of the parcels, while always important, will be critical for ensuring that the agricultural conservation easement will be able to accomplish its conservation objectives.

### 2. Drafting Considerations

Additionally, easement holders should provide principles of interpretation with their agricultural conservation easements that indicate that these agreements are not to be interpreted as common law easements but for the unique purpose of protecting land in perpetuity.<sup>227</sup> To the extent that these agreements are vague or ambiguous, the areas of relative grey should be interpreted in favor of the agreement's intended purpose and land management objective. Beyond addressing interpretation of the agricultural conservation easement, attention again should be given to what constitutes

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226. *In re Strieter*, No. 14-56980, 2015 WL 2215418, at \*32 (Bankr. E.D. Mich. May 11, 2015).

227. This was one of the issues a study committee, focused on proposing potential amendments to the Uniform Conservation Easement Act, evaluated and determined that rather than amending through the UCEA, this could be accomplished in effective easement drafting. See STUDY COMM. ON THE ADVISABILITY OF FORMATION OF DRAFTING COMM. TO REVISE UNIFORM CONSERVATION EASEMENT ACT, DEC. 11, 2017 CONFERENCE CALL 1 (2017), <https://s3.amazonaws.com/landtrustalliance.org/UCEA-Call-Agenda-12-11-17.pdf>. Ultimately, the study committee elected to not proceed with amendments at this time for various reasons. See Memorandum from Stephen C. Cawood & K. King Burnett, Chair & Vice-Chair, Study Comm. on Amendments to the Unif. Conservation Easement Act, to Daniel Robbins, Chair, ULC Comm. on Scope & Program (Jan. 5, 2018), <https://s3.amazonaws.com/landtrustalliance.org/UCEA-final-report-1-5-18.pdf>.

subdivision in that jurisdiction. Would a court consider a boundary adjustment or “approval not required” lot adjustment to be a subdivision? Depending on the land trust’s goals for protecting against division of the underlying protected lands, understanding state property laws and potential arguments for dividing the fee without going through the subdivision process and tailoring the subdivision provision to address these possible routes can help to ensure that the land remains as an integrated whole.

### 3. Evaluating Requests to Subdivide

Easement holders should develop robust criteria for approving or evaluating subdivision requests if permitted under the terms of the agricultural conservation easement. Approving a subdivision request should not be done for the ease or convenience of the landowner, but it should be accomplished or considered with the express view of whether the request makes keeping the land in long-term production more or less viable as initially agreed to by the parties.<sup>228</sup> Ideally, if a land trust is looking at keeping land in production activities, subdivision language would provide sufficient flexibility to address changing agricultural practices and potentially productive activities (i.e., the transfer from a form of farming requiring larger acreage to more intensive production) while still securing sufficient land to keep the farm viable as an integrated whole, but this is admittedly a tough balance to strike.<sup>229</sup>

### 4. Funding the Costs of Evaluating and Approving Requests

It may make sense, if a land trust is going to have to consider subdivision requests, to build a mechanism into the agricultural conservation easement that requires the requesting landowner to pay the land trust’s review costs for this request moving forward.<sup>230</sup> The

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228. See generally Jennifer Anderson, *Protecting Land Through Conservation Development: Lessons from Land Trust Experience*, SAVING LAND, Summer 2014, reprinted in Jennifer Anderson, *Protecting Land Through Conservation Development: Lessons from Land Trust Experience*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/news/protecting-land-through-conservation-development-lessons-land-trust-experience> (last visited Jan. 1, 2020) (exploring different ways in which such compromises may be reached).

229. See Anderson & Cosgrove, *supra* note 27, at 9, 11 (exploring subdivision considerations).

230. The land trust seeking to use this form of transfer fee should ensure that this form of mechanism complies with state law, as states have been generally addressing

costs could include the costs of legal review, conservation review, dividing up the allocated rights, and other professional and staff costs needed to ensure that the subdivision request is workable from the land trust's mission and that it advances the agricultural mission of the grant. In addition to paying the review costs, this could also provide some form of additional stewardship contribution associated with the incremental challenges of dealing with a new landowner, which will not be significant.<sup>231</sup> If using this cost-recovery mechanism, care should be utilized in how it is presented because the landowner's request will not be granted as a condition of payment, but it will only be approved if the grant meets certain defined characteristics as defined by the land trust, similar to those utilized by NRCS—such as minimum farm size for the county and that it furthers the viability of the land.<sup>232</sup>

##### 5. Consider Subdivision Within an Integrated Conservation Strategy

The subdivision discussion may present or offer insight into the overarching question of agricultural viability of conserved farmland and the challenge of keeping this land actively farmed.<sup>233</sup> The complications of subdivision requests may be a symptom of other issues, rather than the overarching issue itself. A land trust may need to expand its operations to consider new tools to shift some of the responsibility for keeping land farmed from the operator to the land trust—this may signal a shifting role for land trusts, which has been

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transfer fees across the spectrum in trying to regulate fees and provide clarity. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 155 (West, Westlaw through Pub. Act 101-603) (summarizing legislation prohibiting transfer fee covenants and the carve-out for land conservation transfer fees).

231. *See, e.g.*, DANIELS & KEENE, *supra* note 5, at 134 (discussing stewardship fees generally).

232. *See* 7 C.F.R. § 1468.25 (2019) (charting these factors).

233. *See, e.g.*, *Findings & Challenges*, AQUIDNECK LAND TR., <https://ailt.org/farmlink-aquidneck/farm-conservation-plan/findings-challenges/> (last visited Jan. 30, 2020) (profiling the challenges facing farmers in Newport County and the land trust's efforts to keep the land farmed). *See generally* Libby Christensen & Learner Limbach, *Finding Common Ground: Defining Agricultural Viability and Streamlining Multi-Organization Data Collection*, 8 J. AGRIC., FOOD SYS., & COMMUNITY DEV. 137 (2019) (profiling stakeholder efforts to collectively define viability within San Juan County, Washington).

happening in a few regions already—as a connector or bridge between entering and exiting farmers.<sup>234</sup>

An express transition role, as a facilitator, provides land trusts with the unique opportunity to shape regional agriculture by helping these farms cycle to new operators willing and able to take over the land.<sup>235</sup> There are several tools to accomplish this role through the use of agricultural conservation easements.<sup>236</sup> First, some land trusts are experimenting with different provisions in an effort to keep the land actively farmed.<sup>237</sup> For example, some organizations are using language that allows the land trust to lease the land to a new operator

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234. See, e.g., *Buy/Protect/Sell*, ME. FARMLAND TR., <https://www.maineFarmlandtrust.org/farmland-protection-new/buyprotectsell/> (last visited Jan. 30, 2020) (exploring Maine Farmland Trust's work in purchasing farmland, protecting it through conservation easements before selling it to new farmers, and the importance of this effort in preventing farmland from being developed); see also David Harper, *Partnering with Next-Generation Farmers*, SAVING LAND, Summer 2015, reprinted in David Harper, *Partnering with Next-Generation Farmers*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/news/partnering-next-generation-farmers> (last visited Jan. 2, 2020) (exploring these issues and opportunities for land trusts).

235. See, e.g., Carrie A. Scrufari, *Tackling the Tenure Problem: Promoting Land Access for New Farmers as Part of a Climate Change Solution*, 42 COLUM. J. ENVTL. L. 497, 508–12 (2017) (examining the use of conservation easements for farm transfer and transition). For many operations, the value of the conservation easement is an important farm transfer tool, allowing compensation of off-farm heirs and bridging the gap between its development level price and value as a working farm. See, e.g., Alecia Meuleners, *Finding Fields: Opportunities to Facilitate and Incentivize the Transfer of Agricultural Property to New and Beginning Farmers*, 18 DRAKE J. AGRIC. L. 211, 213–18 (2013) (exploring these issues); see also Ctr. for Agric. & Food Sys. at Vt. Law Sch., *Access Tools*, CTR. FOR AGRIC. & FOOD SYS.: FARMLAND ACCESS LEGAL TOOLKIT, <https://farmlandaccess.org/access-tools/> (last visited Dec. 30, 2019) (providing overview of farmland access and transfer tools, including conservation easements).

236. See Kenneth Miller & Adam Prizio, *Innovative Use of the Law for Small-Scale Producers*, 26 J. ENVTL. L. & LITIG. 131, 138 (2011) (exploring potential roles and land tenure options). It may require moving beyond conserved lands to accomplish this goal—to tackle some of the farm economy/infrastructure issues that directly relate to the ecosystems needed to ensure the viability of the farming sector in a given geography. See, e.g., DANIELS & KEENE, *supra* note 5, at 13 (explaining that “[i]deally, over time, enough agricultural land can be preserved in a community or region to maintain a ‘critical mass’ of farms and farmland to enable the farm support businesses—machinery dealers, feed mills, hardware stores, and transportation and processing companies—to remain profitable and in operation and help to sustain the overall farming industry”).

237. See Johnson, *supra* note 131, at 47–49 (exploring options for seeking to keep lands in active farm production); see also Hamilton, *supra* note 99 (same).

if the current farmer is not doing so.<sup>238</sup> Second, some land trusts are using options to purchase at agricultural value (OPAV) as a tool to facilitate transfers.<sup>239</sup> An OPAV allows a land trust to ensure that land is being transferred for farm use and to purchase it at its lower, agricultural value and then find a farmer to acquire the land if needed.<sup>240</sup> While an OPAV generally involves initial greater compensation to the landowner and cost to the land trust, it also provides a meaningful tool for keeping the land in agriculture.<sup>241</sup> Third, conservation and environmental goals are increasingly being included to improve the performance of working lands.<sup>242</sup> In all, these goals, designed to foster and promote local food systems, change not only the language utilized in the conservation easement but the parcels they actually target and look to protect.<sup>243</sup>

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238. See, e.g., Katie Hannon Michel, *Landless: Legal and Policy Tools for Transferring Vermont Farmland to the Next Generation of Stewards and Food Producers*, 39 VT. L. REV. 461, 481–82 (2014) (discussing the use of lease-to-own agreements by Vermont Land Trust (VLT)). For a breakdown on how revenue provided to farmers through the Agricultural Conservation Easement Program is actually spent, see ANDREW SEIDL ET AL., ESTIMATED ECONOMIC IMPACT OF FEDERAL AGRICULTURAL CONSERVATION EASEMENT PROGRAMS (ACEP) ON COLORADO, 2009–2017, at 12–14 (2018), <https://cowestlandtrust.org/wp-content/uploads/csu307173-RuralLandResearch-bk-www-1.pdf> (charting uses of the funding, with the predominant uses being to pay down operational debt and reinvest in the farm business).

239. See BOB WAGNER ET AL., LAND FOR GOOD, DOES THE OPTION AT AGRICULTURAL VALUE PROTECT FARMLAND FOR BEGINNING FARMERS? A POLICY ANALYSIS 2 (2013), <https://landforgood.org/wp-content/uploads/LFG-Does-The-Option-At-Agricultural-Value.pdf> (profiling the history and effectiveness of this tool).

240. See, e.g., Alexis Peters, *The New Crop Growing on the Hillside: Retaining Land in Agricultural Use Through the OPAV*, 18 VT. J. ENVTL. L. 485, 505–08 (2017) (charting VLT's experience and successes with the tool).

241. See VT. LAND TR., SELLING A FARM WITH A CONSERVATION EASEMENT THAT INCLUDES AN OPTION TO PURCHASE AT AGRICULTURAL VALUE 1 (2018), <http://landforgood.org/wp-content/uploads/Selling-an-OPAV-Farm.pdf> (providing overview of the function of the tool and VLT's use of the tool to keep land affordable and available for farming).

242. See, e.g., Mary Jane Angelo et al., *Small, Slow, and Local: Essays on Building a More Sustainable and Local Food System*, 12 VT. J. ENVTL. L. 353, 398–99 (2011) (examining the potential for conservation easements to address conservation considerations).

243. See, e.g., KENDRA JOHNSON, CONSERVATION FARMLAND . . . BUT FOR WHOM? USING AGRICULTURAL CONSERVATION EASEMENTS TO IMPROVE LAND OWNERSHIP BY NEXT GENERATION'S FARMERS 56–66 (Unpublished M.A. Thesis, U.C. Davis, Mar. 2008), <https://escholarship.org/uc/item/49z7905t> (profiling several California land trusts' shift in this direction); see also Osswald, *supra* note 137, at 2–3 (arguing for

To summarize, the increasing number of requests to subdivide conserved farmland represents a few issues. First, many farmers who entered into agricultural conservation easements are beginning to transfer out of agricultural production.<sup>244</sup> The tension on these easements is typically most acute at the point of transfer,<sup>245</sup> and the fact that easements are beginning to transition is likely playing a role in bringing new subdivision requests to the forefront. Second, earlier easements were likely less focused on subdivision than current negotiated agricultural conservation easements.<sup>246</sup> There has been a considerable organizational learning process for both land trusts and farmers in studying how to use agricultural conservation easements as effective tools for the preservation of working lands.<sup>247</sup> Older easements may have been either too restrictive or too permissive, which may be having an impact on disputes.<sup>248</sup> Third, farming itself is changing.<sup>249</sup> For example, in Vermont, many first generation

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greater standardization and more upfront planning with regard to the intended objectives and resources being protected through these projects).

244. See Harper, *supra* note 234 (discussing the large amount of turnover in farmland); see also DANIELS & KEENE, *supra* note 5, at 354 (explaining the challenges with transitions in ownership of conserved properties).

245. See Kimberley Seese, *Building Trust: Avoid Violations by Reaching Out to Successor Landowners*, SAVING LAND, Fall 2011, reprinted in Kimberley Seese, *Building Trust: Avoid Violations by Reaching Out to Successor Landowners*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/news/building-trust-avoid-violations-reaching-out-successor-landowners> (last visited Dec. 30, 2019) (“For years, your land trust . . . has been passed down from generation to generation. Now imagine . . . the landowners [tell you] . . . they are going out of farming and selling the land. . . . What’s a land trust to do?”). Many subdivision requests are actually driven by the farmer wanting to stay on the farm but bringing on a successor farmer to take over the operations. If there has not been careful planning to allow an additional building envelope that can also be subdivided, this can lead to some difficult decisions and greatly complicate the transfer. See BYERS & PONTE, *supra* note 16, at 186–89 (discussing easement amendment practices and the costs associated with amending an easement).

246. See Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, 63 RANGELAND ECOLOGY & MGMT. 167–68 (2010).

247. See Owley & Rissman, *supra* note 28, at 76–77, 80–84.

248. See Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145, 150–51, 170 (2011).

249. See, e.g., Laura Reiley, *The Organic Food Industry Is Booming, and that May Be Bad for Consumers*, WASH. POST (Mar. 14, 2019, 12:58 PM), [https://www.washingtonpost.com/business/2019/03/14/organic-food-industry-is-booming-that-may-be-bad-consumers/?utm\\_term=.bba391c42851](https://www.washingtonpost.com/business/2019/03/14/organic-food-industry-is-booming-that-may-be-bad-consumers/?utm_term=.bba391c42851) (exploring the growth of the organic sector and the impact of this sector going mainstream).

agricultural conservation easements were designed to protect lands associated with large dairy operations,<sup>250</sup> which are under extreme financial pressure.<sup>251</sup> The land mass associated with large-scale dairy may not make sense in light of the agricultural forms which are now able to profitably use this land mass—for instance, small-scale organic vegetable or value-added agriculture, which currently shows greater profitability.<sup>252</sup> Thus, a land trust has the perhaps unenviable role of determining how to balance the past (the conservation easements previously acquired), the current (the challenges of today and changing agricultural uses), and the future (trying to allow for sufficient flexibility to meet unknown future needs) within the context of each subdivision request.

#### 6. Consider New Forms of Ownership and Use of Protected Lands

Last, it is worth considering whether the subdivision question actually, in some ways, suggests that new corporate forms are needed to aggregate protected lands designed for the earlier farm uses. How do we bridge the gap between the protected farms of the past and the farms of the future? Could land trusts, with their stewardship obligations and relationship and multi-generational commitment to the future viability of farms, be posed to broker the transition of these lands and to help in this unprecedented intergenerational transition of working lands subject to agricultural conservation restriction under their common ownership? Challenge does create opportunity, and as land trusts also somewhat shift from being in their pioneering (or

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250. See, e.g., Rebecca Harris, *Kids, Cows and Conservation at Vermont's Chapman Family Farm*, USDA NAT. RESOURCES CONSERVATION SERV. VT., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/newsroom/stories/?cid=nrcseprd1404120> (last visited Jan. 30, 2020); see also *Dairy Farmers Work with DEC and Vermont Land Trust to Protect Stretch of Lewis Creek*, VT. LAND TR., <https://www.vlt.org/pressreleases/clifford-lewis-creek-pr> (last visited Jan. 30, 2020) (highlighting the ongoing work to protect land associated with dairy).

251. See, e.g., Paul Heintz, *Selling the Herd: A Milk Price Crisis Is Devastating Vermont's Dairy Farms*, SEVEN DAYS (Apr. 11, 2018), <https://www.sevendaysvt.com/vermont/selling-the-herd-a-milk-price-crisis-is-devastating-vermonts-dairy-farms/Content?oid=14631009> (explaining the multiyear downturn in dairy prices and the impact on Vermont's dairy sector).

252. See, e.g., Chuck Ross & Marli Rupe, *Agricultural Sources of Water Pollution: How Our History Informs Current Debate*, 17 VT. J. ENVTL. L. 811, 822–24 (2016) (charting this period of agricultural transition). See generally Kathryn A. Olson, *The Town that Food Saved: Investigating the Promise of a Local Food Economy in Vermont*, 24 LOC. ENV'T 18 (2019) (discussing the benefits and ongoing challenges of the local food movement in the sustainability arena).

period of explosive growth) to a more mature state, to use a forest succession analogy, their pivotal role could be critical to making sure these protective mechanisms actually fulfill their intended mission.<sup>253</sup> The model of community land trusts and more intentional forms of common ownership and corresponding lease options have been floated as potential mechanisms for bridging this divide, and the model could have real potential in land trust operations involving conserved farmland.<sup>254</sup>

### CONCLUSION

Farmland preservation efforts will always need to evolve to meet the needs of a changing productive economy and of the current generation—from providing adequate food supply to addressing a growing world population and to ensuring that the land remains in good environmental condition and capable of producing a sustainable food supply. As farmland preservation organizations continue to advance in sophistication based upon their experiences in crafting conservation-based solutions for the working landscape, there is additional recognition of the potential unintended consequences in being either under or over-protective with regard to subdivision clauses. Such groups, with their strong commitment and roots in making sure farms remained farmed, certainly are not intending to cause undue hardships or burdens on farms remaining viable, but often, particularly where the type of farming activity may no longer make sense and there is a need to make a larger shift, undue hardship has occurred and likely will continue to do so. Restrictions on subdivision continue to be an issue of concern with funders, land trusts, and landowners involved in the collective effort to preserve

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253. See generally Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 147–49 (2011) (charting public accountability and organizational learning considerations associated with conservation easement acquisition). In connection with this movement or expanded role, balancing privacy considerations with the need for public transparency given myriad layers of federal, state, and local financial support for these projects will be critical. See, e.g., Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1237–42 (profiling these concerns within private land conservation generally).

254. See ANNETTE HIGBY ET AL., HOLDING GROUND: A GUIDE TO NORTHEAST FARM TENURE AND STEWARDSHIP 11 (2004).

significant working lands.<sup>255</sup> There are, however, a variety of ways to address this issue—from a policy standpoint or through careful drafting and stewardship of working lands. By considering targeted modifications to state enabling laws and by engaging in critical analysis as to whether and how subdivision should be prohibited or allowed for a protected farm, agricultural conservation easements can continue to play an important role in keeping these lands farmed and in achieving the desired land management objective.

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255. See, e.g., LAND USE INST., VT. L. SCH. & LAND TR. ALL., PRACTICAL POINTERS FOR LAND TRUSTS 17 (2013).



