

Condemnation: Coming to an Easement Near You?

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CONDEMNATION

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Tactics for fighting a growing threat to conserved land

by Jon Halpin

A town official pores over a map, searching for land on which to site some essential public service. The town is crowded with buildings, outer residential areas are too dense with houses, but there, on the outskirts, is open space. Green, undeveloped fields. He doesn't know that there is a conservation easement on the land; he may never have even heard of conservation easements, or of the land trusts that steward them. What the official sees is land that can be taken and used to fill a public need.

Land trusts increasingly face threats of condemnation from all levels of government. Eminent domain, also known as condemnation, is the taking of land for public use and for the public good. While not yet widespread, condemnation of conservation easements is on the rise because condemning authorities see open space and agricultural land as easy targets.

Condemnation can happen when there is the need to widen or build roads, locate schools and firehouses, place utility poles and transmission corridors. Condemnation requires only that there will be some public benefit resulting from the taking. Property owners must be compensated, but that is the sole duty owed by government or the condemning authority.

The condemning authority rarely pays full fair market value, and even if the land trust is fully compensated, the land resource is still lost. The land trust can attempt to maximize value by retaining its own appraiser to value the property and then negotiate for increased compensation based on that evidence. The validity of the public use or the public good claimed by the condemning authority can be challenged, although these challenges do not usually prevail. A few states have additional layers of review before a conservation easement can be condemned, offering some protection.

Land trusts have no certain *legal* recourse against condemnation, but that is not to say that there is *no* recourse. Several land trusts have managed to preserve their easements, or at least to limit losses through negotiation, public outcry, and strategic alliances. As Camilla Herlevich, founder and executive director of the North Carolina Coastal Land Trust,

Meeting the Condemnation Challenge

Anticipating an increase in condemnation and other legal challenges to conserved land and easements, the Land Trust Alliance has launched a national conservation defense initiative. The Alliance will create a legal defense fund, recruit pro-bono attorneys, and launch a legal clearinghouse

and an attorney locator. The Alliance is also researching the feasibility of a litigation insurance program to help land trusts defend their easements.

Land trusts can be more effective with condemnation—and other challenges—if we all share information and experiences. The Alliance can help by providing a forum for national information sharing. Let us know if your land trust has faced, or is facing, significant condemnation challenges. The Alliance will use the information to monitor condemnation efforts and connect affected land trusts to each other.

The Alliance is also looking for private attorneys who have expertise in condemnation. If you practice extensively in this area, please let us know.

Contact Leslie Ratley-Beach, conservation defense director, on any conservation defense topics at lrbeach@lta.org, 802-262-6051.



LESLIE RATLEY-BEACH,
the Land Trust Alliance's
new conservation
defense director

described the lesson she learned after dealing with a condemnation threat: “You have to look at a combined strategy—how and when to talk to the media, and use litigation and political contacts. Condemnation is not just a technical legal problem.”

Skillful and early negotiation coupled with smart and timely community response can save the day.

Keeping a Farm Protected

When condemnation threatened a conserved farm in Pennsylvania, Christopher Kocher found himself unprepared for the reality of it. “I was amazed at how easy it is for a municipality to condemn a conservation easement. Shocked. Once they’d filed a taking, it would have been done.”

Kocher is president of the Wildlands Conservancy, which in 1996 accepted a donated agricultural easement on Mary Leister’s 104-acre farm in Lower Macungie Township, Pennsylvania. She intended to conserve the Leister Farm forever, limiting its use to agriculture.

The township had other ideas. After Leister’s death the farm was condemned by the township. At that point only the land itself was condemned, not the easement. But it wasn’t long before the township went after that as well.

In August 2007, when Kocher went to the township to ask for money to preserve another piece of property, they in turn asked him how much it would cost to purchase the Leister Farm easement. When Kocher explained that Wildlands Conservancy had no intention of selling the easement, that such an action would go against his land trust’s mission, the township declared its intention to pass a resolution for a declaration of taking at the next township meeting in three weeks. The township’s plan was

to use the land for recreational purposes, specifically to build ball fields. Coming out of that encounter, Kocher faced a short deadline and nothing in the way of legal options.

But Kocher knew the township meeting would provide a very public forum for making a case for the Leister Farm. “We made a decision to fight this from a public relations side first,” he said. “We contacted legislators, various local conservancies, and farm groups.” The result was an outpouring of support from the community, the county government, and from the local paper, which went on record in support of the Wildlands Conservancy.

“That meeting was a watershed moment,” said Kocher. “It was the point at which the community came together. We had 150 people show up at that meeting.” Most tellingly, the Youth Association—for whom the fields would ostensibly be built—came to the meeting and said they did not want the farm used for ball fields.

As a result of the meeting, the town supervisors gave the Wildlands Conservancy 60 days to find an alternative site for the ball fields, noting that if the conservancy failed to do so, then condemnation proceedings would begin. Kocher took the opening and ran with it. “It wasn’t hard to come up with a laundry list of sites that would work better,” he said.

While looking into alternatives, Kocher moved to further secure the easement. He identified other recreational activities that would be allowed under the easement, passive rather than active recreational possibilities, such as walking paths, fishing

BY TAKING ITS FIGHT PUBLIC, Wildlands Conservancy (PA) garnered support for saving the Leister Farm from condemnation.



Wildlands Conservancy / TL Gettings

and nature-watching. A month after the meeting he implemented ‘Plan B,’ donating half the interest in the easement to Lehigh County. County commissioners accepted the Wildlands Conservancy’s offer. While such a move did not secure the easement against condemnation, it added a layer of protection, as it is more difficult to condemn land held by another government entity than land held by a land trust.

The conservancy’s actions will have saved much more than just one farm. Kocher noted that in response to the condemnation threat, many local residents began asking why they should conserve their farms if the government could just take them through condemnation. By fighting the condemnation, the Wildlands Conservancy may have saved both the community perception of conservation effectiveness, as well as conservation easement donor confidence in the land trust’s resolve to uphold their conservation gifts.

As of press time, the decision of what to do with the land is



Ben Taylor

Resources

- *Land Conservation Case Law Summaries*, compiled and edited by Rob Levin, Esq., www.LTAnet.org; also search “condemnation” on the site
- Land Trust Standards and Practices 11J, www.lta.org/sp/index.html
- Nichols on Eminent Domain (Matthew Bender: Revised 3rd. ed. 2004)
- “When Forever Proves Fleeting: The Condemnation And Conversion Of Conservation Land,” © 2001, 2003, Robert H. Levin, New York University Environmental Law Journal at 9 NYU Env’tl.L.J. 592 (2001)
- Massachusetts Land Trust Coalition Legal Advisories: www.massland.org/pages/tools/legal_advisoryexist2.html
- White paper on eminent domain from the California Council of Land Trusts, available in March at www.calandtrusts.org
- Check out our condemnation section, including a list serve, at www.lta.org

THE NORTH CAROLINA COASTAL LAND TRUST protected this property from condemnation by offering up an alternative site.

under a second 60-day delay. An alternative site has been identified but not yet approved, but Kocher feels confident that the Leister Farm will escape unscathed.

Offering an Alternative Location

Futch Creek was a success story for North Carolina. It had been the focus of cleaning efforts since 1996 and by 2002 was a pristine tidal creek, clean enough to be reopened for shell fishing.

To protect Futch Creek, the North Carolina Coastal Land Trust bought a conservation easement on Foy Creek, a tributary of Futch Creek, from the Claudia Taylor Family. The family then donated an easement on another 95 acres to the land trust.

As the N.C. Coastal Land Trust and Clean Water Management Trust Fund were securing the preservation of the creeks, the state department of transportation was engaged in a massive road project: the construction of the U.S. 17 Wilmington Bypass. On one section of the bypass the state planned a storm water runoff on the Taylor Family’s land, exactly where the land trust had just acquired conservation easements.

When Camilla Herlevich talked to the transportation

department, they initially thought she represented an environmental advocacy group. “When we first went to them, they were completely clueless as to why we were there,” she remembered. “We said ‘We’re here like any other property owner would be.’”

At first she attempted to negotiate, suggesting the runoff move from the east of U.S. 17, where the tidal creeks were located, to the west of the highway. “We tried to take a political route, get officials to voluntarily locate an alternative site,” she said. “That didn’t work so we went to our second option, taking them to court.” The lawsuit the land trust filed concerned the water permit to discharge storm water into a natural waterway. “They had the right to condemn, so we had to find something else as grounds for contesting the taking. We ended up contesting the storm water permit; we took an environmental tack rather than a property tack.”

The lawsuit had dual merit: it attacked the environmental damage that could be caused by the storm water runoff and it also delayed condemnation of the easement, allowing time for the land trust itself to discover alternative sites. With opposition to the location of the storm water runoff organizing, both sides were eager to find a solution to what was becoming a costly choice.

“The real way we got the project stopped was by identifying an alternative site for it,” Herlevich said. “We didn’t want to continue in litigation, but they wouldn’t leave unless they had a place to go.”

The search for alternative locations paid off. Nearby property was donated by the R.L. Foy family for the runoff, and the creeks were out of danger. What Herlevich took from the ordeal was that while success in fighting a condemnation threat was possible, “enforcement of our easements was going to be a whole lot more difficult than we thought.”

Triage in a Utility Corridor

While the land trusts in North Carolina and Pennsylvania faced condemnations of single properties, the Vermont Land Trust faced condemnation on a much bigger scale. The Vermont Electric Power Company

(VELCO) was expanding its transmission corridor between West Rutland and South Burlington. Almost 20 parcels of conserved land fell within the proposed corridor.

The corridor expansion was controversial from the beginning, with local residents, environmentalists and farming groups all voicing concerns about the effects on towns, scenery,

National Utility Corridors Threaten Conserved Land

A National Interest Electric Transmission Corridor (NIETC) “threatens over 400,000 acres of roadless forest in southern California,” according to the California Wilderness Coalition. Another NIETC designation by the U.S. Department of Energy threatens more than 116,000 square miles from upstate New York through Ohio. The Department of Energy and private utilities propose similar corridors in the Midwest and in other dense population centers.

Designation gives private utilities federal condemnation authority to site transmission lines. NIETC designation is exempt from all environmental review and preempts traditional state regulation of transmission lines and local land use laws. Conserved land is likely to be a target for condemnation.

“The corridor designations threaten thousands of open space properties that have been protected with public funds from local, county, state and federal agencies, raising the specter that public monies will have been spent to protect critical lands only to have those lands condemned by private interests,” said Molly Morrison, president of the Natural Lands Trust, a Pennsylvania land conservation organization.

The Department of Energy’s Mid-Atlantic corridor designation spans 10 states and over 220 cities and counties. Fifty-two Pennsylvania counties and the entire state of Delaware are included in the Mid-Atlantic NIETC. The Department of Energy expects that the entire East Coast will be designated as an area for federal condemnation.

The power companies have told the Department of Energy they want these transmission line corridors stretching all the way to Ohio and West Virginia because of “increasingly strict environmental controls” along the East Coast.

Environmental, land protection and historic preservation groups have filed suit in federal court asking the Middle District of Pennsylvania to find the corridor designation invalid due to DOE’s failure to study the potential impacts of the designation on air quality, wildlife, habitat and other natural resources.

In the Southwest, the transmission corridor “covers 45 million acres and threatens extraordinarily special public lands, including the Sonoran Desert National Monument and the Kofa National Wildlife Refuge in Arizona, California’s Carrizo Plain National Monument, and the Havasu National Wildlife Refuge, which straddles the border of both states,” said Nada Culver of The Wilderness Society. “Legislation introduced by Senator Reid would both spur development of renewable resources and specifically exempt these types of places from development, which is a blueprint the Energy Department should follow.”

FOR MORE INFORMATION on what your land trust can do to address this urgent conservation threat, contact Liese Dart at Piedmont Environmental Council (Mid-Atlantic corridor) at ldart@pecva.org or Nada Culver at The Wilderness Society (Southwest corridor) at nada_culver@tws.org.

—Leslie Ratley-Beach

Go here to see a map of the threatened corridor in California and Arizona: www.lta.org/newsroom/sw_corridor.pdf and here to see the threatened corridor in the Mid-Atlantic: www.lta.org/newsroom/midatlantic_corridor.pdf

farms and the environment. Several groups tried to block the corridor, and the first choice VLT faced was whether to join them in opposing it.

VLT concluded that the expansion had scenic impacts, but that scenic impacts were not the primary public purpose of the farmland easements at stake. The land trust, which primarily

conserves working farmland and forestland, wanted to ensure that the land continued to be used for farming. Assessing the threat from this viewpoint, VLT found that the impact of the

THE MAP SHOWING the threatened corridor of protected land in Vermont.



Vermont Land Trust

After the analysis, VLT decided not to oppose the corridor, and focused instead on minimizing adverse effects on farming. The first step was to educate the utility about the land trust's role in the proceedings. "We had to teach the utility about conservation easements, what the rights and responsibilities are, about the fact that we co-held a legal interest in that land," said Gil Livingston, VLT president.

With that legal interest VLT could engage in site specific negotiations about the direct impact of the corridor on individual parcels. These included details such as limiting the amount of land to be condemned, moving pole locations to minimize the effects on farms, locating guywires, and ensuring pesticides and herbicides weren't used around poles where the corridor crossed organic farms. Right-of-way easements were secured and utility maintenance agreements ensured that workers wouldn't trample crops on their way to the poles and would provide advance notice to farmers. Temporary and permanent access roads were drawn to limit interference with farm operations.

The negotiation proceedings were, in effect, a massive triage effort by VLT, to minimize the damage done to the conserved land. "In each case we looked to minimize impact, parcel by parcel, pole by pole," said Livingston.

VLT's biggest victory came when VELCO proposed taking a farm field to build a new substation. The farm is owned by John DeVos, and is one of Vermont's premier organic dairies. To be certified organic, the farm must have a certain number of acres per cow, a ratio threatened by any taking of land for the substation. Negotiations between the trust, the town,

Practical Pointers

—Leslie Ratley-Beach

No one-size-fits-all response is appropriate for condemnation threats. Land trusts however have many opportunities **early** in the condemnation process to anticipate, divert and minimize damage to conservation permanence.

Land trusts need to discuss any condemnation situation with experienced legal counsel. The Land Trust Alliance does not provide legal advice. These practical pointers are distilled from a wide variety of sources experienced with condemnation and are strategic suggestions only for consideration as your land trust faces condemnation threats.

1 The earlier the better. Start the conversations immediately upon first learning of a possible condemnation threat. The condemning authority often works more than two years to produce a public proposal. If you wait for public hearings to make your land trust known to the government agency, you may find that you are too late to propose alternative solutions. If you wait until the legal proceedings, then all that will be left is a dispute over valuation.

2 Educate the condemning authority. Condemning authorities are usually unaware that land is conserved. Emphasize the public investments in and use of the conserved land.

3 Ask what they need. Find out what the particular public need is and find less damaging alternative routes or locations to satisfy that need. Press the conversation. You need to stay prominently but professionally in the process.

4 Find alternatives. Finding the alternative location to conserved land is essential. Demonstrate that conserved land is not the path of least resistance.

5 Remember to explain valuation. Condemning authorities see conserved land as an inexpensive acquisition because it often has no structures and has a lower fair market value. They forget to account

for compensation to the land trust. You need to show them legal arguments that conserved land is valued as much as unrestricted land.

6 Involve landowners. Coordinate owners of conserved land early. Hearing from local residents who are unwilling to give up their property for the proposed use makes a difference to state and local government. Landowners may not get notice until late in the process. Advise your owners of conserved land as soon as you have a communications plan.

7 Think strategically and create partnerships. Think of condemnation as a political exercise—find the crack and pry it open. Provide GIS maps of your conserved land in the condemnation area so that political leaders understand the importance of your work to the community. Inform potential allies and advocacy groups early.

8 Involve the media appropriately. Tell the story of what makes this a critical community quality of life issue.

9 Use your full toolkit. You need to anticipate, move, minimize or mitigate takings, and sometimes use all techniques at once. You will need money to pay consultants to help identify alternatives, so have a legal defense fund you can draw on. Averting condemnation takes skill, time and money early in the process. Preventing condemnation is a success. It is worth the effort to try!

10 Co-holding and case law. Conservation easements co-held with government agencies may impede condemnation by other agencies, but politics may have more impact than case law. Imposing a federal interest may override state and local powers, and may also not be as influenced by local politics. Case law in some states may also provide an argument that condemnation may be blocked because the land is already used for public purposes.

the utility, and the dairy's neighbors resulted in locating the substation on a commercial parcel next to the dairy.

After a year and a half, negotiations on half of the parcels are concluded and the rest ongoing. Describing the experience as "really hard," Livingston doesn't imagine it will be the last condemnation VLT handles. "The path of least resistance may be conserved land. In Vermont, conserved land is the least fragmented land. I think we'll see more of this, not just here, but across the country."

Advocacy in Perpetuity

Land trusts need to be prepared to face condemnation of land on which they hold an easement. Consistently in the cases described above, government agencies did not know about conservation easements before the disputes began, did not fully

understand them when they learned about them, and did not appreciate the extent to which the land trusts would fight for them. Each condemnation case will require land trusts to educate the condemning entity, and to strongly advocate for ensuring the permanence of conserved land.

Kocher wonders if his experience in Lower Macungie is a sign of things to come as land gets scarcer and the needs of communities squeeze against the goals of conservation. "We may start to spend a lot more time protecting easements than getting them," he said. "We need to become more aware of the potential for condemnation, the speed with which it takes place, and start developing plans for when it comes to pass." 

Jon Halpin is a writer in Vermont.