

January 2011

Not Losing the Forest for the Trees: Distinguishing Conservation Transfer Fees from Other Private Transfer Fees

Frank C. Aiello

Follow this and additional works at: <https://digitalcommons.maine.maine.edu/mlr>



Part of the [Common Law Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Frank C. Aiello, *Not Losing the Forest for the Trees: Distinguishing Conservation Transfer Fees from Other Private Transfer Fees*, 64 Me. L. Rev. 1 (2011).

Available at: <https://digitalcommons.maine.maine.edu/mlr/vol64/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

NOT LOSING THE FOREST FOR THE TREES: DISTINGUISHING CONSERVATION TRANSFER FEES FROM OTHER PRIVATE TRANSFER FEES

Frank C. Aiello

- I. INTRODUCTION
- II. DEFINING PRIVATE TRANSFER FEES, DEVELOPER TRANSFER FEES, AND CONSERVATION TRANSFER FEES
- III. A CONSERVATION TRANSFER FEE IS AN ENFORCEABLE SERVITUDE
 - A. *A Conservation Transfer Fee Meets the Common Law Requirements of a Real Covenant*
 - B. *A Conservation Transfer Fee Meets the Requirements of a Servitude under the Restatement (Third) of Property: Servitudes*
- IV. LEGISLATIVE AND REGULATORY BODIES SHOULD NOT RESTRICT CONSERVATION TRANSFER FEES WHEN RESTRICTING THE USE OF OTHER PRIVATE TRANSFER FEES
 - A. *A Conservation Transfer Fee does not Have the Negative Impact of a Developer Transfer Fee*
 - B. *States Should Continue to Allow Conservation Transfer Fees by Exempting them Completely from Private Transfer Fee Restrictions*
 - C. *Any Federal Legislation Restricting Private Transfer Fees Should Exempt Conservation Transfer Fees*
 - D. *The Federal Housing Financing Agency Should Expand the Exception for Conservation Transfer Fees in its Proposed Rule Restricting Private Transfer Fees*
- V. CONCLUSION

NOT LOSING THE FOREST FOR THE TREES: DISTINGUISHING CONSERVATION TRANSFER FEES FROM OTHER PRIVATE TRANSFER FEES

*Frank C. Aiello**

I. INTRODUCTION

Private transfer fee covenants against real property are increasingly under fire from Congress,¹ federal regulators,² and state legislatures.³ This fire has been fueled by strong advocacy from the National Association of Realtors.⁴ It will only be a matter of time before private transfer fees will also be challenged in state courts as not meeting the common law requirements for a servitude. As these bodies take aim at the private transfer fee, they literally must not lose sight of the forest for the trees. A private transfer fee that benefits conservation and environmental stewardship is consistent with the traditional use of a servitude and can provide a valuable benefit to property owners and the public.

This article argues that private transfer fees, when used to fund conservation and environmental stewardship, meet the historical and modern requirements for a valid servitude, that courts should hold them enforceable, and that policymakers should exempt them from general private transfer fee restrictions.

II. DEFINING PRIVATE TRANSFER FEES, DEVELOPER TRANSFER FEES, AND CONSERVATION TRANSFER FEES

A private transfer fee covenant requires payment of a fee to a third party upon sale of the property subject to the covenant.⁵ The fee is usually payable by the seller and calculated as a percentage of the purchase price.⁶ The function is similar

* Frank C. Aiello is an Associate Professor at the Thomas M. Cooley Law School, where he teaches Property Law, Secured Transactions and Land Use Planning and Zoning Law. Before joining the law school he represented financial institutions in complex commercial lending and real estate transactions. Associate Professor Aiello's current research interest is effective land use and conservation techniques. He has provided hundreds of hours of pro bono legal service to land trusts in Michigan, assisting them with the acquisition of real property held for natural preservation. Associate Professor Aiello also serves as the editor of the Michigan Model Conservation Easement, a project hosted by the Heart of the Lakes Center for Land Conservation Policy, where he is also a member of the Board of Directors. He is a J.D. graduate of Wayne State University Law School and a B.A. graduate of Michigan State University's James Madison College. Associate Professor Aiello thanks Andrew Roundtree, his Research Assistant, for his help in interviewing land trusts across the country regarding their use of private transfer fees in preparation for this article.

1. *See, e.g.*, H.R. 6260, 111th Cong. (2d Sess. 2010); H.R. 6332, 111th Cong. (2d Sess. 2010).

2. *See, e.g.*, Private Transfer Fees, 76 Fed. Reg. 6702 (proposed Feb. 8, 2011) (to be codified at 12 C.F.R. pt. 1228).

3. *See infra* notes 95-96 and accompanying text.

4. *Field Guide to Private Transfer Fees*, NAT'L ASS'N OF REALTORS, <http://www.realtor.org/library/library/fg350> (last visited October 11, 2011).

5. Private Transfer Fees, 76 Fed. Reg. at 6703.

6. *Id.*

to a real property transfer tax but with the proceeds instead going to a private party. This article will focus primarily on two different types of private transfer fees, referred to here as “developer transfer fees” and “conservation transfer fees.”

Real estate developers have embraced private transfer fees as a way to create a long term revenue stream from a real estate development or to finance a development by securitizing such an income stream.⁷ As used in this article, a “developer transfer fee” shall describe the typical scenario when a developer includes a private transfer fee in a declaration associated with a new development.⁸ The declaration includes a private transfer fee covenant intended to bind subsequent owners for 99 years.⁹ After the initial sale, the covenant requires that the initial buyer and any future seller pay a small percentage of the purchase price to a party designated by the developer.¹⁰ The failure to pay the fee will result in a lien against the property to satisfy the private transfer fee obligation.¹¹ The developer may retain the right to receive the fee over time or may sell the right.¹²

Many charitable organizations have also embraced private transfer fees as a way to fund their work. Of particular interest to this article are private transfer fees that benefit land trusts.¹³ This article will use the term “conservation transfer fee” to refer to a private transfer fee covenant that requires payment of the fee to a land trust.

A land trust is defined as “a nonprofit organization that, as all or part of its mission, actively works to conserve land by undertaking or assisting in land or conservation easement acquisition, or by its stewardship of such land or easements.”¹⁴ The federal government has recognized the unique and important role of land trusts by providing a generous tax deduction for land trust donors.¹⁵ Land trusts have conserved thirty-seven million acres of land in the United States, an area roughly equal to all of New England.¹⁶ A conservation transfer fee may be connected to a land trust’s holding of a conservation easement against the property. A conservation easement is a unique easement, enforceable in perpetuity, where the owner transfers his right to develop the property to a land trust.¹⁷

The proceeds of a conservation transfer fee may be utilized by a land trust for different purposes, depending on the terms of the covenant.¹⁸ Typically, the proceeds are utilized for environmental stewardship of the land subject to the covenant, environmental stewardship of land in the land trust’s service area,

7. *Id.*

8. See R. Wilson Freyeremuth, *Putting the Brakes on Private Transfer Fee Covenants*, PROB. & PROP., July/Aug. 2010, at 20, 21.

9. *Id.*

10. Private Transfer Fees, 76 Fed. Reg. at 6703; see also Freyeremuth, *supra* note 8, at 21.

11. Freyeremuth, *supra* note 8, at 21.

12. *Id.*

13. The term land trust and land conservancy are generally interchangeable.

14. *Types of Land Trusts*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/land-trusts/types-of-land-trusts> (last visited October 11, 2011).

15. 26 U.S.C. § 170 (2006).

16. *Land Trusts*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/land-trusts> (last visited October 11, 2011).

17. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a (2000).

18. *Id.* § 1.6(1).

acquisition of other natural lands, or administrative expenses incurred by the land trust upon transfer of the property to a new owner.

III. A CONSERVATION TRANSFER FEE IS AN ENFORCEABLE SERVITUDE

In those instances where a private transfer fee is not explicitly prohibited by statute or regulation, it must still survive the traditional requirements of a servitude¹⁹ under real property law. And to the extent policymakers continue to evaluate the value of private transfer fees, their characterization under real property law may be instructive. This article argues that a developer transfer fee falls short of the requirements necessary to be an enforceable servitude, but a conservation transfer fee does not.

In order for any promise to bind a party simply as a result of its ownership of land (as distinct from being a party to the original agreement), the promise must meet the requirements of an enforceable servitude under real property law. According to the Restatement, “[s]ervitudes may be used whenever an arrangement that does not require renegotiation on transfer of the land is desired.”²⁰ Servitudes will then “run with the land” and bind subsequent owners.²¹ Like most real property concepts, the requirements for a servitude to run with the land are modernizing at glacial speed. This article will walk through both the traditional and modern legal tests that exist at this time for a servitude to “run with the land,” paying particular attention to those requirements that bear on the issue of a private transfer fee’s enforceability.

A. A Conservation Transfer Fee Meets the Common Law Requirements of a Real Covenant

For a servitude to bind the subsequent owners of land who were not party to the original agreement, the servitude must satisfy the elements of a real covenant under the common law. The common law doctrine providing for the enforceability of a real covenant against a successor in interest to the original covenanting party is a complicated and often misinterpreted mess. The Author is hesitant to wade into these waters at all. Nonetheless, there are a few common truths that bear on the question at hand.

Without getting distracted by too much nuance, a fair survey of the requirements for a covenant to “run with the land” include that it (i) be enforceable between the original covenanting parties,²² (ii) in a majority of jurisdictions, meet the statute of frauds,²³ (iii) be intended by the parties to run to successors in interest,²⁴ (iv) enjoy vertical privity between both the benefited and burdened party

19. Unless specifically addressing the common law requirements of a real covenant or equitable servitude or their modernized conception as a simple “servitude” under the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, this article will refer to all of these concepts inclusively as servitudes.

20. RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 1, intro. note.

21. *Id.*

22. WILLIAM B. STOEBCUK & DALE A. WHITMAN, THE LAW OF PROPERTY § 8.14, at 473 (3d ed. 2000).

23. *Id.*

24. *Id.* § 8.16, at 481.

back to the original parties to the covenant,²⁵ (v) have horizontal privity for the burden to run,²⁶ and (vi) touch and concern the land.²⁷ The equitable servitude, a cousin to the real covenant that was born in the courts of equity, has similar requirements.²⁸ But an equitable servitude does not require horizontal privity amongst the original covenanting parties.²⁹

A private transfer fee can easily meet the requirements of a real covenant or an equitable servitude with one critical exception, which is whether a private transfer fee touches and concerns the land. A developer transfer fee rarely will meet the touch and concern requirement, whereas a conservation transfer fee clearly does meet the requirement.³⁰

The “touch and concern” requirement has been characterized as “a concept, and like all concepts has space and content that can be explored and felt better than it can be defined.”³¹ Generally, a covenant touches and concerns the land if the promise affects the use, enjoyment, or value of the property.³² Covenants that require doing a physical thing to land or to refrain from doing a physical thing usually are found to touch and concern the land.³³ Promises to pay a sum of money are more suspect of meeting the touch and concern requirement,³⁴ although covenants for the payment of money for improvements to the land have been found to touch and concern the land.³⁵ Annual assessment fees have been upheld when the proceeds are utilized in a way that will benefit the encumbered property.³⁶

Whether a private transfer fee meets the touch and concern requirement has not yet been tested in the courts. Just as in the cases that have upheld an ongoing association fee,³⁷ the ultimate use of the private transfer fee proceeds will be critical. If the private transfer fee proceeds are utilized in a way that “touches and concerns” the land, the private transfer fee will be enforceable as a real covenant.

Some argue, for good reason, that developer transfer fees do not meet the touch and concern requirement.³⁸ The proponents of developer transfer fees

25. *Id.* § 8.17, at 482.

26. *Id.* § 8.18, at 486.

27. *Id.* § 8.15, at 475.

28. *Id.* § 8.23, at 493.

29. *Id.* § 8.26, at 498-502.

30. The Federal Housing Financing Administration characterized it as an “open question” whether a private transfer fee that funds conservation efforts, but is not restricted to use for the encumbered property, meets the “touch and concern” element. *See Private Transfer Fees*, 76 Fed. Reg. 6702, 6706 (proposed Feb. 8, 2011) (to be codified at 12 C.F.R. pt. 1228).

31. STOEBUCK & WHITMAN, *supra* note 22, at 475.

32. *See* HERBERT T. TIFFANY & BASIL JONES, *THE LAW OF REAL PROPERTY* § 854, at 455 (3d ed. 2009).

33. STOEBUCK & WHITMAN, *supra* note 22, at 475.

34. *Id.* at 476.

35. *See, e.g.,* Neponsit Prop. Owners’ Ass’n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 797 (N.Y. 1938) (finding that a covenant touched and concerned a particular tract of land where the covenant included an annual fee for maintenance of surrounding properties accessible to the owner of the tract by an easement included in the conveyance of the tract).

36. *Id.* at 794, 798.

37. *See, e.g., id.*

38. *See generally* Marjorie Ramseyer Bardwell & James Geoffrey Durham, *Transfer Fee Rights: Is the Lure of Sharing in Future Appreciation a Flawed Concept?*, *PROB. & PROP.*, May/June 2007;

counter that they benefit the encumbered property owner by decreasing the price paid for the property.³⁹ Another argument in favor of developer transfer fees is that they provide a financing vehicle, without which the project would not have been possible. Even so, these reasons do not rise to the unique requirement of touching and concerning the land. Association and similar fees, traditionally collected annually, do touch and concern the land as they provide for the maintenance of common elements and infrastructure of benefit to the property encumbered by the fee. The fee may go to the maintenance of the development's common road and thus benefits the property by providing for this well-maintained ingress. A similar argument cannot be made for a developer transfer fee. The proceeds of a developer transfer fee will go to the developer or his assignee without reinvestment into the development or subject property. This private benefit does not touch and concern the encumbered property.⁴⁰

In contrast, a conservation transfer fee that restricts use of the fee's proceeds to the stewardship of the subject land clearly meets the touch and concern requirement. For example, a real covenant that requires payment of a fee for the maintenance of a subdivision wastewater system would easily pass muster under traditional real covenant requirements.⁴¹ Similarly, a conservation transfer fee, amongst other uses, may provide for the maintenance of a natural area providing for freshwater recharge of the properties' watershed. The preservation of this environmental infrastructure directly benefits the subject property in the same way that man-made infrastructure does. Or perhaps the funds from the conservation transfer fee are utilized to remove an invasive plant species from the subject property that would otherwise result in the destruction of a forested area. This protection of the property's natural resources should be considered to touch and concern the land because it benefits the land. Still early in their response to private transfer fees, policymakers have found great importance in whether the proceeds of a conservation transfer fee are used exclusively on the subject property or if they are used elsewhere.⁴² While this is an understandable initial reaction given the context of servitude doctrine, the emphasis on this distinction is misplaced. A conservation transfer fee meets the touch and concern requirement even if the fee is not restricted to use on the subject property. In some cases, a conservation transfer

Freyermuth, *supra* note 8; R. Wilson Freyermuth, *Private Transfer Fee Covenants: Cleaning up the Mess*, 45 REAL PROP. TR. & EST. L.J. 419 (2010).

39. *Process Overview*, FREEHOLD CAPITAL PARTNERS, <http://freeholdcapitalpartners.com/overview.php> (last visited Oct. 11, 2011).

40. *See* Private Transfer Fees, 76 Fed. Reg. 6702, 6703 (proposed Feb. 8, 2011) (to be codified at 12 C.F.R. pt. 1228). ("In response to questions at congressional hearings, FHFA expressed concerns that private transfer fees may be used to fund purely private continuous streams of income for select market participants either directly or through securitized investment vehicles, and may not benefit homeowners or the properties involved.").

41. The Restatement has explicitly acknowledged the appropriateness of a similar covenant. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 3.7 illus. 7 (2000) (noting that a developer-imposed servitude requiring that subsequent purchasers exclusively obtain water and sewer services from a municipal water utility in exchange for installation of services would not be an unconscionable tying arrangement).

42. *See* Private Transfer Fees, 76 Fed. Reg. at 6706 (the FHFA declined to endorse private transfer fees that finance activities that do not provide a "direct benefit" to the encumbered property but rather benefit the general community).

fee's proceeds may be restricted to use by a land trust (not including general operations), acquisition of other natural land, or environmental stewardship of other land in the land trust's service area. Even if the fee proceeds are not directly utilized for the benefit of the property subject to a conservation transfer fee, the proceeds will likely fund environmental protection efforts in an environmentally connected area. Environmental threats outside the boundaries of the property may represent a threat to the quality of the land inside the property's borders. Courts must recognize that environmental protection outside of the property's borders has the potential to directly benefit the subject property. A failure to acknowledge the value that this environmental protection adds to the property is a rejection of the advances made in understanding environmental science since the doctrines of real covenants originated.

A conservation transfer fee also meets the touch and concern requirement because, unlike a developer transfer fee, the beneficiary of a conservation transfer fee itself is likely holding an interest in the property subject to the fee. Remember that a conservation transfer fee may be connected to a land trust's holding of a conservation easement against the subject property. This conservation easement, a unique easement in gross, is providing the land trust with an actual interest in the property subject to the conservation transfer fee covenant. The courts' usual wariness in providing a personal benefit like a developer transfer fee to a party not holding an interest in the subject property or adjacent land is unfounded against a land trust benefited by a conservation transfer fee.

B. A Conservation Transfer Fee Meets the Requirements of a Servitude under the Restatement (Third) of Property: Servitudes

As mentioned previously, the law of property modernizes at glacial speed. The Restatement (Third) of Property's attempt to synthesize and modernize the law of servitudes is not yet widely adopted. Thus an examination of how conservation transfer fees might be evaluated under the Restatement is instructive on how the Restatement suggests we treat these interests but may not be reflective of most states' doctrine at this time.

The Restatement suggests a shift away from the formalistic requirements of an enforceable real covenant to an approach focused on the intent of the parties and the historical policy concerns of real property law.⁴³ Toward this end, the Restatement has abandoned the distinction between real covenants and equitable servitudes as irrelevant under modern law, grouping both interests under the general category of servitudes.⁴⁴ A private transfer fee's enforceability will be judged as a servitude under the Restatement as it is a "legal device that creates a right or an obligation that runs with the land or an interest in land."⁴⁵

43. RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 2, intro. note.

44. *See id.* ch. 1, intro. note ("Continuing use of the dual terminology of real covenant and equitable servitude is confusing because it suggests the continued existence of two separate servitude categories with important differences. In fact, however in modern law there are no significant differences. Valid covenants, like other contracts and property interests, can be enforced and protected by both legal and equitable remedies as appropriate, without regard to the form of the transaction that created the servitude.").

45. *Id.* § 1.1.

The requirements for an enforceable servitude under the Restatement are different than those for a real covenant or equitable servitude under traditional real property doctrine to the extent that the Restatement has abandoned the touch and concern requirement.⁴⁶ The Restatement instead finds that a servitude is valid unless it is illegal, unconstitutional, or violates public policy.⁴⁷ A servitude is also invalid if it lacks rational justification.⁴⁸ Amongst other criteria, a servitude violates public policy if it imposes an unreasonable restraint on alienation⁴⁹ or is unconscionable.⁵⁰

A private transfer fee is not invalid as a direct restraint on alienation.⁵¹ “A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint.”⁵² An analysis of reasonableness is not required, however, because the Restatement clearly identifies a private transfer fee as an indirect, rather than a direct, restraint on alienation.⁵³

A developer transfer fee is invalid as an unconscionable, indirect restraint on alienation. As an indirect restraint on alienation, a private transfer fee will be enforceable “even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property, or by otherwise reducing the value of the property.”⁵⁴ But a servitude is invalid if it is “unconscionable.”⁵⁵ The illustrations accompanying the Restatement explicitly identify a developer transfer fee as unconscionable.⁵⁶

While a developer transfer fee is invalid as an unconscionable indirect restraint on alienation, a conservation transfer fee is valid. The Restatement illustrations specify only a developer transfer fee as unconscionable and do not extend this commentary to any other type of private transfer fee.⁵⁷ As the illustrations do not

46. *Id.* § 3.2.

47. *Id.* § 3.1.

48. *Id.* § 3.5(2).

49. *Id.* §§ 3.1(3).

50. *Id.* §§ 3.1(5), 3.7.

51. *Id.* § 3.4.

52. *Id.*

53. *See id.* § 3.4 illus. 2 (“O, the owner of Blackacre, conveyed it to A. The deed provided that in the event A transferred Blackacre to another, A would pay O \$10,000. The deed provision is an indirect restraint on alienation, subject to the rule stated in § 3.5.”).

54. *Id.* § 3.5(1).

55. *Id.* § 3.7.

56. *See, e.g., id.* § 3.7 illus.3 (providing that “[t]he declaration of covenants for Green Acres, a residential subdivision, includes a provision obligating the owner of each lot to pay the developer, or its assigns, a royalty of one percent of the gross sales price on each resale of each lot in the subdivision in perpetuity. In the absence of unusual circumstances, the conclusion would be justified that the provision is unconscionable. If not unconscionable, the covenant would be subject to termination under the rule stated in § 7.12.”). Additionally, the Joint Editorial Board for Uniform Real Property Acts “is of the view that transfer fee covenants payable to a developer serve no useful purpose in land development and thus create an unreasonable restraint on the alienability of land.” Joint Editorial Bd. for Unif. Real Prop. Acts, Position Paper on Transfer Fee Covenants (April 2010) [hereinafter JEBURPA Position Paper], available at http://www.fhfa.gov/webfiles/18844/2074_Joint_Editorial_Board_for_Uniform_Real_Prop_Acts_and_Attach.pdf (attached to an October 12, 2010 letter written by JEBURPA).

57. RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 3.7 cmts. c-d, illus. 1-8.

directly condemn a conservation transfer fee, it is valid if it meets the other requirements of an indirect restraint: that it has rational justification⁵⁸ and is not unconscionable.⁵⁹

The Restatement does not identify specific examples of servitudes that lack rationality, but given the Restatement's strong embrace of conservation easements,⁶⁰ it is difficult to imagine a conservation transfer fee failing the low hurdle of rationality.

Other than a developer transfer fee, the Restatement also identifies the following examples of unconscionable servitudes: a prohibition against bringing legal action against a developer,⁶¹ an indemnification of a developer,⁶² and a requirement to utilize a certain real estate broker or pay a penalty.⁶³ A common thread amongst these illustrations, including a developer transfer fee, is the lack of reciprocal benefit to the property encumbered by the servitude. In contrast, and as explained in the context of real covenants above, a conservation transfer fee provides great benefit to the property subject to the fee. As a conservation transfer fee will provide such a reciprocal benefit, it is not unconscionable.

Even if a court found that a conservation transfer fee was analogous to a developer transfer fee and thus unconscionable under the Restatement's characterization, it is important to note that the Restatement anticipates circumstances where even a developer transfer fee is not unconscionable if there are "unusual circumstances."⁶⁴ Certainly the unique nature of conservation and environmental stewardship, undertaken by a charitable organization, should qualify as an unusual circumstance removing unconscionability.

The Restatement indirectly endorses fees for conservation purposes, and perhaps conservation transfer fees, as valid servitudes. Section 7.12 of the Restatement provides for modification and termination of certain servitudes to pay money or provide services if the servitude does not specify the total sum due or termination point⁶⁵ or if the obligation becomes excessive in relation to the cost or value received by the burdened estate.⁶⁶ Tellingly, the Restatement provides that the ability to modify or terminate these covenants does not apply to an obligation imposed by a conservation servitude.⁶⁷ The Restatement anticipated a fee funding conservation in this provision and made it explicit that such a fee should not be terminable or modifiable.⁶⁸ It is a fair assumption that the drafters intended a fee benefiting conservation to be a valid servitude. It is hard to see a reason that a conservation transfer fee would be distinguishable from any other fee benefiting

58. *See id.* § 3.5(2).

59. *See id.* § 3.7.

60. *See, e.g., id.* §§ 1.6 cmt. b (discussing the public's interest in conservation easements); 7.11 cmt. a (noting the importance of conservation easements will increase with population growth); 8.5 cmt. a (noting the "strong public interest" in conservation easements).

61. *Id.* § 3.7 cmt. c, illus. 1.

62. *Id.* § 3.7 cmt. c, illus. 2.

63. *Id.* § 3.7 cmt. d, illus. 6.

64. *Id.* § 3.7 cmt. c, illus. 3.

65. *Id.* § 7.12(1).

66. *Id.* § 7.12(2).

67. *Id.* § 7.12(3).

68. *Id.*

conservation under the Restatement.

In further support of distinguishing a conservation transfer fee from a developer transfer fee, note that the Restatement recognizes the unique nature of conservation in multiple other contexts. The Restatement recognizes that (i) the social value of limiting the development of land outweighs the social harm caused by removing the property from commerce,⁶⁹ (ii) a conservation servitude is uniquely perpetual in contrast to other servitudes,⁷⁰ (iii) a conservation servitude will generally only be transferable to a governmental body or conservation organization,⁷¹ (iv) modification of a conservation servitude by a court should be consistent with the *cy pres* doctrine⁷² and not subject to the Restatement's rules regarding changed conditions,⁷³ and (v) a conservation servitude is not terminable under a marketable-title act.⁷⁴

IV. LEGISLATIVE AND REGULATORY BODIES SHOULD NOT RESTRICT CONSERVATION TRANSFER FEES WHEN RESTRICTING THE USE OF OTHER PRIVATE TRANSFER FEES

A. A Conservation Transfer Fee does not have the Negative Impact of a Developer Transfer Fee

Commentators are critical of private transfer fees beyond their enforceability as valid servitudes, arguing that they should be prohibited by legislative or regulatory action.⁷⁵ As discussed below, many states have already restricted the use of private transfer fees.⁷⁶ Federal legislation has also been introduced that would prohibit Freddie Mac and Fanny Mae from dealing with properties restricted by private transfer fees,⁷⁷ and the Federal Housing Finance Agency has proposed a regulation that would also restrict Freddie Mac and Fanny Mae from dealing in such properties.⁷⁸ It is important that these legislative and regulatory initiatives do not confuse developer transfer fees with public-benefiting transfer fees such as conservation transfer fees. This section identifies the policy arguments against developer transfer fees that were not already addressed in the servitude discussion above and explains how these arguments do not apply to conservation transfer fees.

69. *Id.* § 3.1 cmt. i, illus. 19.

70. *Id.* § 4.3(3)-(4).

71. *Id.* § 4.6(b) (“The benefit of a conservation servitude held by a governmental body or conservation organization . . . is transferable only to another governmental body or conservation organization unless the instrument that created the servitude provides otherwise.”).

72. The *cy pres* doctrine is “the equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.” BLACK’S LAW DICTIONARY 444 (9th ed. 2009).

73. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11. (“Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.”).

74. *Id.* § 7.16(5).

75. See, e.g., Freyermuth, *supra* note 8, at 21.

76. See *infra* note 90 and accompanying text.

77. H.R. 6260, Cong (2d Sess. 2010).

78. Private Transfer Fees, 76 Fed. Reg. 6702, 6708 (proposed Feb. 8, 2011) (to be codified at 12 C.F.R. pt. 1228).

Proponents of private transfer fees, eager to minimize their potential harm, argue that a buyer can adjust its offer to purchase a property to account for the effect of a private transfer fee.⁷⁹ Opponents counter that buyers cannot accurately price the effect of a private transfer fee covenant over time and may underestimate its affect on the sale price of the property.⁸⁰ Regardless of its merits, this argument does not apply to a conservation transfer fee covenant. Most property subject to a conservation transfer fee covenant will already be subject to a conservation easement. The conservation easement, by removing any owner's ability to develop the property, will have greatly reduced the value of the property. All future buyers will purchase the property with notice of this restriction and the purchase price will be appropriately adjusted to reflect the restriction. The potential impact of a conservation transfer fee on the reduction in the price obtained by the buyer will be nominal once compared to that caused by the conservation easement.

Opponents of private transfer fees argue that they unreasonably hinder the alienability of land by imposing additional transaction costs necessary to identify the correct recipient of the fee and to release any lien interest of the payee.⁸¹ The purchaser of a property subject to a conservation easement will already be on notice of a very unique encumbrance on the property and be required to develop a relationship with the conservation easement holder as that holder continues to steward and enforce the restrictions against the eased property. The increased burden of the property owner becoming aware of a conservation transfer fee benefiting the easement holder will be minimal and will come naturally as they acquaint themselves with the terms of the conservation easement.

Opponents of private transfer fees also argue that they result in a reduction to the real property tax base.⁸² In most states, property subject to a conservation transfer fee will already have a reduced taxable value because a conservation easement restricts the future development of the property. Society has accepted this loss of value in exchange for the public good that results from the restriction. The federal government provides a very generous tax deduction to encourage such a donation.⁸³ Many states also provide tax deductions and even credits to encourage the donation of conserved land.⁸⁴ To the extent that a conservation transfer fee creates a greater reduction in value than otherwise exists because of the conservation easement, it is further distinguishable from a developer transfer fee. A developer transfer fee benefits only the developer or its assignee. A conservation transfer fee is utilized for the environmental stewardship and protection of the property, a function that otherwise reduces the burden of government.

It is also argued that private transfer fees add undesirable complexity to real estate transactions, requiring the discovery and disclosure of fees at the time of

79. *Process Overview*, *supra* note 39.

80. *See* Freyermuth, *supra* note 8, at 23.

81. *See id.*

82. *See id.* at 23-24.

83. *See* 26 U.S.C. §170 (2006). *See also supra* note 14 and accompanying text.

84. *State and Local Tax Incentives*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives> (last visited Oct. 11, 2011).

closing.⁸⁵ A purchaser of property subject to a conservation easement will already have notice of this unique encumbrance on its property and the relationship it will have with the easement holder. Discovery of the conservation transfer fee will only be a slight additional burden in this context.

Some have also argued that a private transfer fee robs homeowners of their equity by requiring payment of the fee upon the sale of their property.⁸⁶ This argument implies that the seller and property did not receive any value in exchange for the fee. This may in fact be true of a developer transfer fee. However, a seller whose land was subject to a conservation easement has, in contrast, benefited from the easement holder's environmental stewardship of the property.

B. States Should Continue to Allow Conservation Transfer Fees by Exempting them Completely from Private Transfer Fee Restrictions

The Joint Editorial Board for Uniform Real Property Acts ("JEBURPA") has proposed model legislation for the restriction of private transfer fees under state law.⁸⁷ While JEBURPA's position paper in support of the model legislation does not discuss the matter at length, the model legislation makes an exception to the prohibition on private transfer fees for charitable organizations in certain circumstances.⁸⁸ Nineteen states have adopted a restriction on private transfer fees,⁸⁹ some similar to that proposed by JEBURPA, and nine of those states have included some exception for charitable organizations.⁹⁰

85. See Private Transfer Fees, 76 Fed. Reg. 6702, 6703 (proposed Feb. 8, 2011) (to be codified at 12 C.F.R. pt. 1228).

86. *Id.*

87. JEBURPA Position Paper, *supra* note 56, at 11-12.

88. *Id.* at 12. The paper also states:

A transfer fee covenant recorded after the effective date of this section, or any lien to the extent that it purports to secure the payment of a transfer fee, is not binding on or enforceable against the affected real property or any subsequent owner, purchaser, or mortgagee of any interest in the property.

Id. (quoting proposed model state legislation section 1(c)). The proposed model legislation further provides that

[t]he term 'transfer fee covenant' shall not include: . . . any provision of a document requiring payment of a fee or charge to an organization described in Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code, to be used exclusively to support cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the real property affected by the provision or the larger community of which the property is a part.

Id. at 11-12 (quoting proposed model state legislation section 1(a)(4)(D)).

89. ARIZ. REV. STAT. ANN. § 33-442 (2011); CAL. CIV. CODE § 1098.5 (West 2011); DEL. CODE ANN. tit. 25, § 319 (2011); FLA. STAT. § 689.28 (2011); HAW. REV. STAT. § 28-501 (2011); 765 ILL. COMP. STAT. 155/10 (2011); IOWA CODE § 558.49 (2011); KAN. STAT. ANN. § 58-3821 (2011); LA. REV. STAT. ANN. § 9:3133 (2011); MD. CODE ANN., REAL PROP. § 10-708 (West 2011); MINN. STAT. § 513.73 (2011); MISS. CODE ANN. § 89-1-69 (West 2011); MO. REV. STAT. § 442.558 (2011); N.J. STAT. ANN. §§ 46:30-28 to -30 (West 2011); N.C. GEN. STAT. § 39A-3 (2011); OHIO REV. CODE ANN. § 5301.057 (West 2011); OR. REV. STAT. § 93.269 (2011); TEX. PROP. CODE ANN. § 5.017 (West 2011); UTAH CODE ANN. § 57-1-46 (West 2011).

90. FLA. STAT. § 689.28; HAW. REV. STAT. § 28-501; 765 ILL. COMP. STAT. 155/10; MISS. CODE ANN. § 89-1-69; N.J. STAT. ANN. §§ 46:30-28 to -30; N.C. GEN. STAT. § 39A-3; OHIO REV. CODE ANN. § 5301.057; TEX. PROP. CODE ANN. § 5.017; UTAH CODE ANN. § 57-1-46.

The model law's exception allows for a conservation transfer fee when the proceeds of the fee are used directly to benefit the property subject to the fee or the "larger community of which the property is a part."⁹¹ The model legislation does not define what would constitute a "larger community," and it is unclear whether this would allow a conservation transfer fee when the proceeds are utilized for the general operations of the land trust.⁹²

As argued above, when discussing the benefits of environmental conservation, the distinction between a direct benefit to a specific piece of property or to a larger ecosystem is misplaced.⁹³ States adopting the model legislation should do away with this direct benefit requirement in the context of environmental and conservation purposes. Leaving the restriction as-is will also create an administrative burden on land trusts, requiring them to carefully account for how the proceeds of a conservation transfer fee are actually applied. This burden may discourage a land trust from using an otherwise appropriate and valuable tool for conservation and environmental stewardship.

C. Any Federal Legislation Restricting Private Transfer Fees Should Exempt Conservation Transfer Fees

Federal legislation was introduced in the 111th Congress to either restrict private transfer fees⁹⁴ or require an additional notice⁹⁵ of their existence in a property's chain of title. As a conservation transfer fee is a valid servitude and does not share the ill effects of the developer transfer fee, any proposed restriction on private transfer fees should include a broad exception for conservation transfer fees.

The proposed Homeowner Equity Protection Act of 2010⁹⁶ would make it illegal to collect a private transfer fee in connection with any federally related mortgage loan⁹⁷ or to enforce a lien for securing the payment of such fee.⁹⁸ Similar to JEBURPA's Model Legislation, the Homeowner Equity Protection Act would

91. JEBURPA Position Paper, *supra* note 56, at 12 (quoting proposed model state legislation section 1(a)(4)(D)).

92. *See id.* at 11-12.

93. *See supra*, pp. 6-7.

94. *See* Homeowner Equity Protection Act of 2010, H.R. 6260, 111th Cong. § 13 (2d Sess. 2010).

95. The proposed Homebuyer Enhanced Fee Disclosure Act creates a "presumption of validity" for any private transfer fee where (i) a unique notice is recorded contemporaneous to the recording of the document creating the fee, and (ii) the fee is not more than one percent of the gross sales price or effective for greater than 99 years. H.R. 6332, 111th Cong. § 3(c) (2d Sess. 2010). The Act also prohibits any property from being restricted by more than one transfer fee covenant. *Id.* § 3(d). The Act does not require this special notice for fees payable to homeowners associations, but any other private transfer fee, including a conservation transfer fee, would need to satisfy the bill's notice requirements to be "presumed valid." *Id.* § 4(3).

96. H.R. 6260.

97. A "federally related mortgage loan" is broadly defined under federal law and includes residential real estate mortgages provided by a federally insured financial institution or intended to be sold to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation. 12 U.S.C. § 2602(1) (2006).

98. H.R. 6260 § 13(a).

not prohibit private transfer fees that benefit homeowner associations⁹⁹ or charitable organizations that utilize the fee exclusively to support activities benefiting the property subject to the fee or the community of which the property is a part.¹⁰⁰ The term “community” is not defined in the Homeowner Equity Protection Act as introduced, nor is it defined in the previously codified Real Estate Settlement Procedures Act,¹⁰¹ which the Homeowner Equity Protection Act intended to amend.¹⁰² It is thus unclear whether a conservation transfer fee, when the proceeds are used for the acquisition of land or stewardship of land not adjacent to the subject property, would be prohibited by the proposed act. If “community” is defined narrowly to include the development of which the property is contained, the act will prohibit a conservation transfer fee when the proceeds are not restricted to direct use on the subject property or the development. Again, as discussed above with respect to JEBURPA’s Model Legislation, the requirement of direct benefit to the subject property is not appropriate in the context of conservation or environmental stewardship.

D. The Federal Housing Financing Agency Should Expand the Exception for Conservation Transfer Fees in its Proposed Rule Restricting Private Transfer Fees

On February 8, 2011, the Federal Housing Finance Agency issued a second Notice of Proposed Rulemaking and Request for Comment on a prohibition of the Federal National Mortgage Association (commonly referred to as Fannie Mae) and the Federal Home Loan Mortgage Corporation (commonly referred to as Freddie Mac) from dealing in mortgages or properties encumbered by certain private transfer fee covenants.¹⁰³ Any such prohibition would dramatically curtail the use of private transfer fees given Fannie Mae’s and Freddie Mac’s role in the mortgage finance marketplace. The original rulemaking proposed a blanket prohibition of the agencies dealing in properties encumbered by any private transfer fee.¹⁰⁴ This total prohibition received a great deal of critical comment.¹⁰⁵

In response to these comments, the latest proposal provides that Fannie and Freddie “shall not purchase or invest in any mortgages or properties encumbered by private transfer fee covenants, securities backed by such mortgages or securities backed by the income stream from such covenants, unless such covenants are excepted transfer fee covenants.”¹⁰⁶ The revised rule provided for a number of exceptions from the prohibition,¹⁰⁷ including a conservation transfer fee¹⁰⁸ that is

99. *See id.* § 13(c)(1) (providing that private transfer fees would not include fees benefiting a “Covered Association.”).

100. *Id.* § 13(c)(5)(B)(iv).

101. 12 U.S.C §§ 2601-17.

102. H.R. 6260.

103. *See* Private Transfer Fees, 76 Fed. Reg. 6702, 6709 (proposed Feb. 2, 2011) (to be codified at 12 C.F.R. pt. 1228).

104. Private Transfer Fee Covenants, 75 Fed. Reg. 49,932, 49,932 (Aug. 16, 2010).

105. *See* Private Transfer Fees, 76 Fed. Reg. at 6703 (“FHFA received over 4,210 comment letters from a broad spectrum of individuals and organizations, including . . . conservation funds and land trusts and foundations.”).

106. *Id.* at 6708.

107. Also excluded from the prohibition are private transfer fees benefiting homeowners’ associations, condominiums, and cooperatives. *See id.* at 6707.

“used exclusively for the direct benefit of the real property encumbered by the private transfer fee covenants.”¹⁰⁹ A private transfer fee conveys a “direct benefit” under the rule that the benefit of the proceeds flows to the community comprising the encumbered properties and their common areas or to adjacent or contiguous property.¹¹⁰ Thus a conservation fee is not subject to restriction if its proceeds benefit the encumbered property, neighboring properties in the same development, or adjacent land. A conservation organization that allows its funds to be used for other purposes, such as acquisition of land or to support general operations, would be restricted by the rule.

The FHFA should be applauded for recognizing the unique nature of a conservation transfer fee and exempting it from the prohibition. The limitation of the use of such a transfer fee to direct benefit of the property, however, is inappropriate and should be removed. This limitation fails to recognize the great benefit to a property encumbered by a conservation transfer fee, even if the proceeds of such fee are not exclusively used for the direct benefit of the property encumbered. Imagine, for example, that the proceeds of a conservation transfer fee are used to steward and protect a nature preserve that is a few miles away but still a part of the same watershed. The protection of that watershed certainly benefits the property subject to the conservation transfer fee in a substantial way. Or perhaps the proceeds of the conservation transfer fee will be utilized to remove an invasive species that is moving into the region but has not yet reached the subject property. By requiring the proceeds of a conservation fee to only be used directly on the subject property, this rule will impede preventative action by an environmental organization that could greatly benefit the subject property in the long run.

V. CONCLUSION

Private transfer fees are in their infancy as a real property concept. Policymakers and courts will wrestle with their validity and value as they mature. While the developer transfer fee has put a bad taste in the mouth of many, it is important to recognize that this is just one flavor of private transfer fee. The conservation transfer fee, and perhaps many other iterations of the private transfer fee, are valuable tools to create benefit for the property owner and the public. Clear cutting the forest to eliminate the diseased developer transfer fee from the real estate landscape is an overreaction and will, quite literally, hurt many healthy trees.

108. “Excepted transfer fee covenant” means “a covenant to pay a private transfer fee to a covered association that is used exclusively for the direct benefit of the real property encumbered by the private transfer fee covenants.” *Id.* at 6708. “Covered association” means “an organization described in section 501(c)(3) . . . of the Internal Revenue Code.” *Id.* at 6707. Land trusts, the beneficiary of a conservation transfer fee as defined by this article, are traditionally 501(c)(3) organizations and would thus be included as a “covered association.”

109. *Id.* at 6708.

110. *Id.* at 6707.

