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Private Land Use Controls and Biodiversity Preservation in Kentucky

RONALD R. SCOTT*

It is axiomatic to say that things are not exactly what they used to be concerning Kentucky's environment. From the time that the first settlers crossed into Kentucky through the Cumberland Gap, development and urbanization have been occurring at an ever-increasing rate.[1] As the population of the Commonwealth grew and technological advancements increased, the landscape changed and the variety of flora and fauna that inhabited the state diminished. By the beginning of the twentieth century, in large areas of the state the clearing of cane brakes and woodlands for cultivation had turned to the harvesting of timber for sale and the development of the coal industry.[2] The rapid increase in residential and industrial development resulted in significant alterations, almost always ecologically adverse to the natural environment.

Prior to the settlement of Kentucky, there were over 1.6 million acres of wetlands, two million acres of native prairie, and twenty-four million acres of mixed mesophytic forest covering the state.[3] Today, there exist only 26,000 acres of wetlands habitat in public ownership, while another 360,000 acres remain unprotected.[4] In addition, approximately 1.2 million acres of wetlands habitat have been lost.[5] Only 200 acres of scattered and degraded prairie can be found in the state, and less than ten acres of that is protected.[6] Almost 53% of Kentucky's forests have been cleared, and only 850 acres of near virgin forest (of which 252 acres are protected) remain.[7]

What do these statistics mean for biological diversity in Kentucky? And, more importantly, what can be done to address the situation? The

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1 HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 7 - 31 (1962).

2 *Id.* at 61-76.

3 *See* Kentucky Department of Fish & Wildlife Resources, *Habitat is the Key*, KENTUCKY AFIELD, SPECIAL WILDLIFE HABITAT ISSUE, at 3.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

answer to the first of these questions is that these changes indicate a significant loss in the biological diversity existent in the state. Biological diversity, or "biodiversity" as it is commonly called, consists of four separate concepts: genetic diversity between species and among individuals within a particular species; species diversity, evidenced by the existence of different kinds and varieties of plant and animal species; ecosystem diversity, relating to the presence of differing types of natural communities and the biota that exist there; and landscape diversity on a larger, more regional scale.[8]

Regarding the significance of biodiversity loss, it has become increasingly clear that these changes are of considerable importance. Just *how* important is somewhat more difficult to answer with certainty and precision. It has been said that from a purely human self-interest (anthropocentric) perspective, biodiversity is important for two basic reasons: as a potential source of new substances such as food and medicine that will be of benefit to mankind; and, as the source of water purification, soil fertilization, and many other benefits.[9] That Kentucky's state government believes these are important issues is evidenced by the creation of the Kentucky Nature Preserves Commission,[10] and more recently, the Kentucky Biodiversity Task Force.[11]

Unfortunately, in addressing the second interrogatory—"What can be done about Kentucky's diminishing biodiversity?"—there is probably little that can actually be accomplished to "correct" the problem in the sense that, once a species is lost to extinction, it is gone forever. However, there are means available by which habitat can be restored and natural areas[12] protected so as to at least arrest the rate at which biodiversity is currently being depleted. This Article is directed at answering, at least in part, the increasingly important question of what

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[8] *See* David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 HARV. ENVTL. L. REV. 303, 304-05 n.2 (1995).

[9] *Id.* at 305.

[10] *See* KY. REV. STAT. ANN. § 146.425 (Banks-Baldwin 1996); 400 KY. ADMIN REGS. 2:060-:100 (1996).

[11] The Biodiversity Task Force convened in May 1994, its 34 members having been appointed by then Governor Brereton C. Jones. One of the five fundamental issues addressed by the Task Force in its public meetings and deliberations was how landowners can be encouraged to conserve biodiversity. KENTUCKY BIODIVERSITY TASK FORCE, *Executive Summary*, Kentucky Alive! Report of the Kentucky Biodiversity Task Force, 1995, at 6.

[12] The term "natural areas," for the purposes of this Article, will be used generically to include open spaces, wetlands, forest and woodlands, wilderness areas, and threatened/endangered or environmentally significant habitat. Agricultural or farm land is expressly excluded from this definition. For statutory authority addressing the preservation of agricultural lands, *See* KY. REV. STAT. ANN. §§ 262.900-.918 (Banks-Baldwin Supp. 1996); 16 U.S.C. § 3831 (1994).

can be done to prevent biodiversity loss.

Traditionally, preservation of natural areas has fallen on the shoulders of the state and federal government.[13] To their credit, a variety of programs and agencies exist for which this objective is either a primary or ancillary goal.[14] It has been asserted, however, that governmental programs alone have not been, and perhaps cannot ever be, completely effective in accomplishing this task.[15] In the words of Aldo Leopold, one of the most respected conservationists of the twentieth century:

> There is a clear tendency in American conservation to relegate to government all necessary jobs that private landowners fail to perform .... At what point will governmental conservation, like the mastodon, become handicapped by its own dimensions. The answer, if there is any, seems to be in a land ethic, or some force which assigns more obligations to the private landowner.[16]

The notion of developing a "land ethic" among private landowners is especially crucial in Kentucky because almost all of the land in the Commonwealth—93.5%—is owned by either individuals or corporations.[17] These are lands that are not currently held in the public trust and thus state and federal governmental control over how these lands are used is indirect and inherently limited in both scope and effectiveness. Similar criticisms exist concerning the limited role played by local government; these focus primarily on the lack of financial resources to procure natural areas and the inherent disincentive to remove property from the tax rolls.[18] Fortunately, the preservation of natural areas, along with the concomitant reduction in biodiversity loss, is a task particularly well suited for both individual and corporate private landowners.

This Article will attempt to illustrate a variety of land use control techniques suitable for the purpose of conserving natural areas, both

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[13] *See, e.g.*, Farrier, *supra* note 8, at 310-16.

[14] *See, e.g.*, Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1994); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70d (1994); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 to 84 (1995).

[15] ALDO LEOPOLD, A SAND COUNTY ALMANAC 228 (1949).

[16] *Id.*

[17] Kentucky Department of Fish & Wildlife Resources, *Wildlife on Private Lands*, KENTUCKY AFIELD, Special Wildlife Habitat Issue, 1994, at 3.

[18] Itzchak E. Kornfeld, *Conserving Natural Resources and Open Space: A Primer on Individual Giving Options*, 23 ENVTL. L. 185, 186-87 (1993).

large and small, which in turn will contribute to the preservation of the Commonwealth's biological diversity. As each individual method of land use control is discussed, it will be analyzed in terms of its effectiveness and applicability to the goal of natural area preservation.

Initially, transfers of land in fee and transfers in trust will be considered. Next, common law real covenants, equitable servitudes, and easements are examined. Finally, statutory conservation easements, in particular the Uniform Conservation Easement Act[19] as adopted by the Kentucky General Assembly,[20] will be analyzed. The Article concludes that while the involvement of the federal and state government via command and control regulation and stewardship of public lands is essential for the preservation of biological diversity, it is equally critical—particularly in eastern states like Kentucky where there is relatively little publicly owned land—that private landowners participate in the process. In comparing the strengths and weaknesses of the various land use controls available to private landowners seeking to preserve their property, it is clear that fee transfers, transfers in trust and conservation easements provide the greatest assurance of achieving the desired effect.

I. TRANSFERS OF FEE SIMPLE ESTATES

A. Transfers in Fee Simple Absolute

One property transfer option available to a private landowner is to convey property in fee simple absolute. A fee simple absolute is an estate without limitation or condition, entitling the transferee to the entire property with an unconditional right of disposition.[21] The fee simple absolute is potentially unlimited in duration and consists of the transferor's entire "bundle" of property rights.[22] Absent the retention of an easement or the inclusion of a restriction (both of which will be discussed later in this Article), the preservation-minded transferor must have confidence that the transferee will use the property in a manner consistent with the transferor's wishes.[23] Accordingly, it is recommended that the property be transferred to a land trust or land preservation organization whose purpose is to hold title to and manage real estate

[19] Uniform Conservation Easement Act, 12 U.L.A. § 66 (1996).

[20] KY. REV. STAT. ANN. § 382.000-.860 (Banks-Baldwin 1989).

[21] *See, e.g.*, OLIN L. BROWDER, JR. ET AL., BASIC PROPERTY LAW 226 (4th ed. 1984).

[22] *Id.*

[23] Kornfeld, *supra* note 18, at 189.

for the purpose of natural resource conservation.

1. The Nature Conservancy

The most widely-recognized and successful land preservation organization in the Commonwealth is the Kentucky Chapter of The Nature Conservancy (TNC). Founded in 1975, TNC's Kentucky Chapter was able to establish six nature preserves in the state by the close of its first year of operation.[24] Currently, the TNC maintains and manages nineteen preserves covering roughly five thousand acres within Kentucky.[25] TNC seeks to obtain by both purchase and donation, land which is of "ecological significance," as well to serve in an advisory capacity for individuals and corporations considering their preservation options.[26] Due to TNC's rigid qualifications relating to ecological significance, not every donation of land is accepted. However, for the landowner with qualified property, a sale to TNC may prove advantageous, as TNC is frequently willing to purchase such land at or near fair market value.[27]

While the variety of programs administered by TNC and the giving options available are beyond the scope of this Article, two in particular are worth mentioning. One is TNC's "Trade Lands" program whereby a gift of ecologically insignificant land is sold, with the proceeds being used to procure land of ecological significance.[28] The second noteworthy option is the use of a retained life estate, in which fee simple title is conveyed, gratuitously or for consideration, to TNC with the transferor retaining a life estate in the property.[29] This technique accommodates the goal of long term preservation while allowing the owner to remain living on the property until death. Finally, in the event an owner of ecologically significant land does not wish to sell or give away the parcel, TNC can enter into a "Cooperative Management Agreement" with the landowner in order to provide stewardship assistance to a land- owner who desires it.[30]

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[24] The Nature Conservancy, *The Kentucky Chapter Celebrates 20 Years of Conservation*, KENTUCKY NEWS, Summer 1995, at 1.

[25] Interview with James A. Aldrich, Director/Vice-President, Kentucky Chapter of The Nature Conservancy, in Lexington, Kentucky (Nov. 13, 1995).

[26] *Id.*

[27] *Id.*

[28] Telephone interview with Anne E. Nash, Planned Giving Officer, Southeast Region, The Nature Conservancy (Nov. 6, 1995).

[29] *Id.*

[30] Interview with James A. Aldrich, *supra* note 25.

2. The Nature Preserves Commission

Another possible option is for the landowner to transfer the property to a government entity whose function is natural area management, protection and preservation. In Kentucky, the Nature Preserves Commission (Commission) serves this function.[31] According to the regulations promulgated by the Commission, upon the determination that the land donated is worthy of protection, the owner may have his entire interest in the land or a portion thereof dedicated as a nature preserve.[32] A nature preserve is defined as:

> a natural area, and land necessary for its protection, any estate, interest or right which has been formerly [sic] dedicated under the provisions of KRS 146.410 to 146.530 to be maintained as nearly as possible in its natural condition and to be used in a manner and under limitations consistent with its continued preservation, without impairment, disturbance, or artificial development, for the public purposes of present and future scientific research, education, aesthetic enjoyment, and habitat for plant and animal species and other natural objects.[33]

A "natural area" for the purposes of the regulation is defined as an area "which either retains or has reestablished to some degree, in the judgment of the Commission, its natural character, though it need not be completely natural and undisturbed . . . ."[34] Thus, it would appear that the qualifications used by the Nature Preserves Commission are less exacting than those utilized by The Nature Conservancy. An additional measure of flexibility is reflected in the provision allowing for the custodian of the preserve to be selected by the landowner, subject the Commission's rules and regulations "and the articles of dedication for the nature preserve."[35]

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[31] *See* KY. REV. STAT. ANN. § 146.485 (Banks-Baldwin 1996) (requiring the Commission to develop regulations for and oversee the selection, acquisition, management, protection, and use of natural areas and preserves within the state).

[32] 400 KY. ADMIN. REGS. 2:080 (1996).

[33] *Id.* at 2:060.

[34] *Id.*

[35] *Id.* at 2:080.

Advantages associated with the transfer of a fee simple absolute to a government agency or land preservation organization include the relatively strong assurance that qualifying land will in fact be maintained in its natural state. Moreover, government agencies and land preservation organizations typically possess the requisite expertise and resources to provide adequate stewardship services. An additional benefit to the landowner who donates or sells land below fair market value to a qualifying private organization or governmental body is the availability of the charitable gift deduction for federal income tax purposes.[36]

The disadvantages of this method of land use preservation are two-fold: First, not all land that the owner wants preserved will meet the standards required by the acquiring entity; and, second, absent the retention of a life estate or an easement reserving the right of use and enjoyment, the landowner is giving up the entire interest in the property.

B. Transfers of Defeasible Fee Simple Estates

In the event a landowner possessing property that does not meet Nature Preserve Commission's or TNC's standards for preservation desires that a particular parcel be preserved, the landowner may consider using a defeasible fee simple. A defeasible interest or estate is one that may be terminated upon the happening of a particular event or the failure to meet a particular condition to which the transfer is subject, with title to the property returning to the transferor or his heirs.[37] There are two types of defeasible fee simple estates whereby title may be regained by the transferor—the fee simple determinable and the fee simple subject to condition subsequent.[38] In Kentucky, however, the fee simple determinable estate has been abolished by statute, and where words are used which at common law would have created such an estate, the result will be the creation of a fee simple subject to condition subsequent.[39] A fee simple subject to condition subsequent is created by a grant such as, "Blackacre to A and his heirs, but if A ever develops or improves the land, the grantor or his heirs may reenter and take possession of Blackacre."[40]

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[36] 26 U.S.C. § 170 (1994 & Supp. 1995).

[37] *See* BROWDER ET AL, *supra* note 21, at 228.

[38] BROWDER ET AL, *supra* note 21, at 228.

[39] KY. REV. STAT. ANN. § 381.218 (Banks-Baldwin 1989).

[40] *See, e.g.*, Jesse Dukeminier, Jr., *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 1, 72-75 & nn. 3-13 (1960) (commenting on Kentucky's abolition of the distinction between a fee simple determinable with possibility of reverter and fee simple subject to condition subsequent with right of reentry for condition broken).

While the penalty of forfeiture for violating the condition subsequent provides strong incentive for the transferee to abide by the terms of the conveyance, the utility of using defeasible fee simple estates is severely constrained by inherent problems and potential pitfalls. First, because forfeiture may not be commensurate with the severity of the breach, courts typically will strictly construe the condition purported to have been created. In addition, because the right of reentry must be affirmatively exercised, title does not automatically vest in the grantor upon breach of the condition. This characteristic necessitates a duty of continual vigilance on the part of the grantor—an obligation his or her heirs may not embrace quite so enthusiastically. Finally, besides being subject to the Rule Against Perpetuities[41]—always a potential trap for the unwary draftsman—the Kentucky General Assembly has limited the duration to which a fee simple estate can remain subject to the condition subsequent to a term of thirty years.[42] Consequently, other than utilizing a condition subsequent to provide additional guarantees of performance when transferring property to a land preservation organization or government agency, there are relatively few occasions where a fee simple subject to condition subsequent will prove to be particularly useful.

C. Transfers in Trust

Another avenue a private landowner may choose to pursue in preserving her property for conservation purposes is a transfer in trust. A trust creates a fiduciary relationship between the grantor of the property (settlor) and the individual/organization (trustee) obligated to hold and maintain the property for the benefit of another (beneficiary).[43] The transfer of the landowner's property in trust may be accomplished either by conveying the property to another to act as trustee or by appointing himself in that capacity.[44] The settlor, as the creator of the trust, determines the terms of the trust arrangement and may impose either restrictions on how the property may be used or affirmative obligations relating to stewardship of the trust property.[45] Furthermore, a charitable trust, unlike a private express trust, will be exempt from the requirement that there be individually identifiable beneficiaries in

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[41] *See* KY. REV. STAT. ANN. § 381.215 (Banks-Baldwin 1989 & Supp. 1996).

[42] KY. REV. STAT. ANN. § 381.219 (Banks-Baldwin 1989).

[43] GEORGE T. BOGERT, TRUSTS § 1 (6th ed. 1987). *See also* Kornfeld, *supra* note 18, at 198-99.

[44] Kornfeld, *supra* note 18, at 198-99.

[45] *Id.*

existence at all times.[46] The general public in effect functions in the capacity of beneficiary.

As a fiduciary, the trustee is held to a strict standard in maintaining the property in accordance with the terms of the trust agreement.[47] As a result, transfers in trust are convenient and effective vehicles for conserving natural areas. Due to their exclusive role in managing the trust property, however, extreme care should be used in selecting a trustee who possesses not only the necessary reliability and trustworthiness, but also the expertise to provide adequate management of natural areas. In some instances it may be feasible for an individual trustee to satisfactorily perform these obligations, but in most situations it is advisable to consider one of the numerous land trust organizations in existence which specialize in this particular field.

Land trusts are usually private, non-profit, tax exempt charitable organizations whose purpose is acquire, restore, and manage natural areas and open space for the benefit of the public at-large.[48] Land trusts have been operating in the United States since the mid-1800s, but have rapidly increased in number in the past thirty to forty years.[49] In 1992, there were approximately nine-hundred local/regional land trust organizations operating in the United States.[50] Unfortunately, land trust organizations have been relatively inactive in Kentucky, thus limiting the practical application of this preservation technique in the state.[51]

II. REAL COVENANTS, EQUITABLE SERVITUDES, AND COMMON LAW EASEMENTS AS A MEANS OF NATURAL AREAS PRESERVATION

A. Real Covenants

A real covenant is a promise made by the grantee of a piece of property to the grantor to either affirmatively do or refrain from doing what is the subject matter of the promise.[52] A covenant, like a contract,

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[46] BOGERT, *supra* note 43, § 55.

[47] Kornfeld *supra* note 18, at 199.

[48] *Id.* at 202-03.

[49] *Id.*

[50] Farrier, *supra* note 8, at 346.

[51] Interview with James A. Aldrich, *supra* note 25. TNC itself is not a *land trust* in the classic sense, because it typically holds fee title to the properties it stewards. However, the term *land trust* has a less than precise common meaning and is frequently used to describe any organization which oversees land held for conservation purposes.

[52] William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 864 (1977).

has two sides to the transaction. One side is that of the covenantor, who agrees to do or refrain from doing something—typically referred to as the "burden" side. The other is the covenantee's right to have a duty performed, commonly described as the "benefit" side.[53] Most often in the context of conservation and preservation, the promise will be for the grantee to refrain from doing something to or with the land conveyed (i.e., not to develop or improve the land). This type of covenant is referred as a "negative" or "restrictive" covenant.[54] However, an "affirmative" covenant,[55] such as one requiring the grantee to provide particular stewardship services incident to preserving the current natural state of the land, also may be crafted. Indeed, such an obligation may prove extremely effective in achieving the desired goal of the grantor.

The grantor, as the covenantee, may legally enforce a covenant against the grantee/covenantor.[56] However, in order for the covenant to "run with the land" and bind subsequent owners or possessors of the land, there are several requirements which must be met. These elements generally include: a writing indicating that the real covenant is intended to run to and bind subsequent owners of the property; the necessity that the covenant "touch and concern the land;" and the requirement of privity of estate.[57] So long as these elements are satisfied, both negative and affirmative real covenants "run with the land."[58]

While a real covenant may not actually create an interest in land,[59] the majority of jurisdictions require that the covenant be in writing to conform with the Statute of Frauds.[60] Though some jurisdictions have dispensed with the writing requirement, in most cases this becomes a moot issue, as more than ninety percent of all real covenants are included in a deed, lease, or easement agreement.[61] Kentucky falls in line with those jurisdictions that require a writing. The writing is required not only to satisfy the Statute of Frauds, but also to provide for enforceability

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[53] ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.13 (2d ed. 1993) [hereinafter THE LAW OF PROPERTY].

[54] DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 505 (3d ed. 1985).

[55] *Id.* at 505-06.

[56] Stoebuck, *supra* note 52, at 887.

[57] Ellen Edge Katz, *Conserving the Nation's Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 369, 378 (1986). *See, e.g.*, Oliver v. Schultz, 885 S.W.2d 699 (Ky. 1994).

[58] MANDELKER & CUNNINGHAM, *supra* note 54, at 507.

[59] Stoebuck, *supra* note 52 at 867-68.

[60] *Id.* at 868; Kornfeld, *supra* note 18, at 191.

[61] Henry U. Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 27-30 (1944).

against subsequent possessors of the burdened estate.[62]

One of the most critical shortcomings in the use of real covenants for conservation purposes arises with regard to the requirement that the covenant touch and concern the land of the grantor/covenantee. This requirement is a problem primarily in situations where the covenant does not benefit a particular dominant estate retained by the grantor, but rather is of the nature of a personal benefit, such as where the grantee/covenantor promises to drive the grantor/covenantee to church every Sunday. Covenants of this nature are said to be held "in gross."[63] A covenant which benefits the covenantee's retained estate, such as a promise to refrain from operating a noisy sawmill on the burdened premises, is considered to be held "appurtenant."[64] Put another way, a covenant is appurtenant when the benefit is conferred by virtue of the fact the covenantee is a landowner.

Under the common law, a real covenant which was not appurtenant could not run with the land and bind the original grantee's successors in interest.[65] This is an extremely serious limitation on the effectiveness of a real covenant used for conservation purposes, because frequently there will be no dominant tract of land in existence. Hence, a strict interpretation of the "touch and concern" the land requirement operates as an impediment to the long term enforceability of the restriction. In the United States, however, unlike in England, the burden associated with *easements* in gross generally has been permitted to run to subsequent owners and possessors of the burdened estate.[66] Thus, a colorable argument could be made that the burden should run with *covenants* in gross, as well. Nevertheless, one can anticipate that Kentucky courts would reject such an argument as unpersuasive, given that the obligation resembles a personal service contract enforced against subsequent owners of the servient estate.

Similarly, the privity of estate requirement may also prove to be troublesome in the context of enforcement of the covenant against subsequent owners of the encumbered property. According to the Restatement of Property, privity of estate exists when either:

(a) The transaction of which the promise is a part involves a

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[62] Oliver v. Schultz, 885 S.W.2d 699, 701 (Ky. 1994).

[63] Kemble Hagermann Garrett, *Conservation Easements: The Greening of America?*, 73 KY. L.J. 255, 256-57 (1984-85).

[64] *Id.*

[65] *Id.*

[66] MANDELKER & CUNNINGHAM, *supra* note 54, at 508.

> transfer of an interest either in the land benefited by or in the land burdened by the performance of the promise; or
> (b) The promise is made in the adjustment of the mutual relationships arising out of the existence of an easement held by one of the parties to the promise in the land of the other.[67]

There are two types of privity which may be involved in analyzing a real covenant's ability to run with the land—horizontal and vertical. Vertical privity of estate refers to the requirement that in order to enforce a real covenant against a remote party, the present owner of the burdened estate must have obtained the original covenantor's estate by conveyance, assignment, or some other means of transfer.[68] Similarly, the benefit can only be enforced by one who has succeeded to the estate of the original grantor/covenantee.[69] Horizontal privity of estate refers to the relationship between the original covenantor and covenantee.[70] In order for the *burden* of a covenant to run with the land, the most widely accepted interpretation of the application of the horizontal privity requirement prescribes that it must have been created contemporaneously with a transfer of an interest in land which created privity of estate between the two parties, such as a lease (landlord-tenant) or a deed (grantor-grantee).[71] Generally speaking, there is no requirement of horizontal privity in order for the *benefit* to run to successors of the covenantee.[72]

The advantages to using real covenants as a land use control mechanism stem primarily from the ease with which they may be employed.[73] The grantor merely incorporates the terms of the covenant into the conveying instrument and ensures that it is recorded in the county clerk's office. In addition, while real covenants often attempt to effectuate the same objectives as defeasible fee transfers,[74] because the remedy does not involve forfeiture of the land pursuant to a power of reverter or right of reentry, they are typically more strictly enforced.[75]

There are, however, numerous disadvantages regarding the use of real covenants as a means for conserving open space and natural areas

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67 RESTATEMENT OF PROPERTY § 534 (1944).
68 Stoebuck, *supra* note 52, at 876.
69 *Id.*
70 *Id.* at 877-78.
71 *Id.* at 879.
72 *Id.* at 880-81.
73 Kornfeld, *supra* note 18, at 194.
74 *See supra* text accompanying notes 39-42.
75 Kornfeld, *supra* note 18, at 194.

which significantly limit their utility. First, the landowner must recognize that a sale of property subject to such restrictions will bring a lower price in the real estate market when compared with fair market value of the property free of this encumbrance. Likewise, the landowner will forego the advantage of a charitable gift deduction for federal income tax purposes.[76] Second, while theoretically capable of long term enforcement, real covenants are subject to the common law requirements previously discussed.[77] A successor or assignee of the original grantee may challenge enforcement of the covenant on the ground that one or more of these requirements has not been met. If circumstances relating to the original purpose of the covenant have been substantially altered or modified, thus neutralizing its benefit or defeating its purpose, the current landowner may assert the equitable defense of changed circumstances in order to preclude continued enforcement of the real covenant.[78] Finally, the right to enforce the covenant may also be lost to waiver or abandonment.[79]

Remedies are another important issue to consider in the area of real covenants and their enforceability. Real covenants were developed in the English common law courts and are typically enforced by the common law remedy of damages.[80] While this form of relief generally restricts the utility of real covenants for the purpose of conserving natural areas, circumstances may exist where damages would prove to be grossly inadequate. In such a situation, equitable relief in the form of an injunction might be granted.[81] Additionally, an argument of equitable estoppel or part performance may be made in order to enforce a real covenant not in compliance with the legal requirements.[82] Indeed, a

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[76] This is because the land is being sold or passed to the owner's heirs rather than donated to the government or other charitable organization.

[77] *See supra* text accompanying notes 56-75.

[78] *See* Osborne v. Hewitt, 335 S.W.2d 922 (Ky. 1960) (holding a covenant restricting land to residential use was valid even though the abutting property had been converted to commercial use); Franklin v. Moats, 273 S.W.2d 812 (Ky. 1955) (declining to grant relief where a covenant requiring residential use still applied to the majority of the lots in a subdivision although the surrounding area and a portion of the subdivision had been converted to commercial use).

[79] *See* Bagby v. Stewart's Ex'r, 265 S.W.2d 75 (Ky. 1954) (concluding that the right of enforcement was lost by the grantee where three lots were conveyed free of covenants subsequent to the conveyance of a lot from the same tract subject to a covenant requiring residential use). The court also based its decision upon changed use of the surrounding area. *Id.* at 77.

[80] Stoebuck, *supra* note 52, at 865, 887.

[81] *Id.*

[82] *Id.*

sample of Kentucky case law[83] reveals a potential for judicial confusion regarding the distinction between real covenants enforceable at law and equitable servitudes. However, one must concede that the usual judicial reluctance to grant equitable relief to enforce real covenants is another serious defect associated with their use.

Finally, the inability to enforce a real covenant held in gross severely restricts the flexibility and utility of real covenants, particularly in view of the fact that frequently a dominant-servient estate relationship will not be created. When the grantor does, however, retain a benefited piece of land, this constraint on enforcement is removed, assuming that the promise itself is rationally related (as it would be in the context of natural area preservation) to the benefit of the retained estate.

In summary, while common law real covenants remain an available option for a landowner desiring to preserve the present natural character of his land, due to the potential problems relating to enforcement, viable employment of this method of land use control for long term conservation purposes is essentially limited to situations where the covenantee retains a dominant (benefited) piece of property so that the burden may run to subsequent owners of the encumbered (servient) land.

B. Equitable Servitudes

At Common Law, an inequitably harsh result occurred when a subsequent purchaser of land was able to defeat a covenant due to a failure of the real covenant to meet one of the necessary elements for running with the land. Such a failure often occurred notwithstanding the subsequent purchaser's knowledge of the restriction, but nevertheless resulted in frustration of the original owner's intent. In recognition of this fact, the English Chancery Courts developed the doctrine of "equitable servitudes."[84] The doctrine has been adopted in the United States[85] although in a somewhat modified form. Unlike the English rule, which only permits "negative" or "restrictive" burdens to run with the land, many American jurisdictions have allowed "affirmative" equitable

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[83] *See, e.g.*, McFarland v. Hanley, 258 S.W.2d 3 (Ky. 1953) (defining the terms covenants and servitudes).

[84] Tulk v. Moxley, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

[85] Katz, *supra* note 57, at 379-80.

servitudes to bind subsequent purchasers with notice of the restriction.[86]

Another major advantage to equitable servitudes is that, unlike real covenants, there is no requirement of privity of estate.[87] Furthermore, because enforcement is sought through a claim in equity, injunctive relief is an appropriate remedy.[88] This is a notable improvement over having the promise categorized as a real covenant, as an injunction is normally able to give effect to the original objective of the promise—preservation of the land in its natural state.

There are, unfortunately, several drawbacks which limit the effectiveness of equitable servitudes. In order for the burden to run with the land and be enforceable against subsequent purchasers of the servient estate, the requirement of the burden touching and concerning the land held by the party seeking enforcement must be met.[89] Moreover, equitable servitudes held in gross cannot be assigned to third parties such as a preservation organization.[90] Equitable servitudes also share the real covenant's vulnerability to equitable defenses against enforcement such as the doctrine of changed circumstances, laches, estoppel and part performance.[91] Hence, while certainly improving on the utility of common law real covenants, equitable servitudes also have features which restrict their benefit if the goal is perpetual conservation of natural areas.

C. Common Law Easements

Another means of attempting to restrict or control the use of land is to purchase an easement or convey property subject to an easement. An easement is a limited property interest in the land of another that entitles the owner of the easement to a limited use or enjoyment of the encumbered property and to protection against third persons from interference in such use and enjoyment.[92] It is not subject to the will of the possessor or owner of the encumbered fee estate.[93] Easements can

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[86] *See* Hunt v. DelCollo, 317 A.2d 545 (Del. Ch. 1974) (affirmative servitudes run with the land); Neponsit Property Owners' Ass'n. v. Emigrant Indus. Sav. Bank, 15 N.E.2d. 793 (N.Y. 1938); Peterson v. Beekmere, Inc., 283 A.2d. 911 (N.J. Super. Ct. Law Div. 1971); Fitzstephens v. Watson, 344 P.2d 221 (Or. 1959).

[87] MANDELKER & CUNNINGHAM, *supra* note 54, at 508.

[88] Stoebuck, *supra* note 52, at 905-06.

[89] Katz, *supra* note 57, at 379-80.

[90] *Id.*

[91] *See supra* text accompanying notes 78-79.

[92] RESTATEMENT OF PROPERTY § 450 (1944).

[93] *Id.*

be categorized as either "affirmative" (i.e., allowing ingress/egress, use, and enjoyment)[94] or "negative" (i.e., prohibiting the burdened land from being used in a particular manner).[95] Most easements designed to preserve and protect natural areas will be of a negative nature, aimed at preventing the possessor of the land from altering or developing the land subject to the easement.[96] Easements may be created in a variety of ways other than by written instrument. For example, easements by necessity, by prescription and by implication do not require a writing to be legally recognized.[97] However, for the purposes of planned conservation of natural areas, it is unlikely that any of these means of creation would apply. Thus, typically an express written easement will be involved.

Additionally, like real covenants and equitable servitudes, easements can be characterized as being either appurtenant or in gross.[98] Where an easement is appurtenant, it is said to burden the servient estate to the benefit of the dominant estate owned by the holder of the easement.[99] An easement appurtenant may be illustrated by the example of a right of ingress and egress existing over the encumbered servient property, enabling the easement holder to reach the benefited dominant tract. An easement in gross,[100] on the other hand, does not benefit a particular piece of property, but rather is in the nature of a personal benefit such as the right to enter the property in order to gain access to a river for the purpose of fishing. As previously stated, unlike real covenants and equitable servitudes, with regard to easements in gross the burden has generally been found to run to subsequent possessors of the servient or encumbered land. This is of great importance in terms of enforceability because it is not necessary that the party seeking enforcement actually own land which is directly benefited by the easement. However, it should be noted that because the benefit of an easement in gross was considered to be of a personal nature, such easements were not alienable or assignable.[101]

Therefore, while they are an improvement over real covenants and equitable servitudes in terms of not requiring ownership of a dominant parcel to insure subsequent possessors are bound, the traditional common

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[94] *Id.* § 451.

[95] *Id.* § 452.

[96] Katz, *supra* 57, at 382.

[97] *See* THE LAW OF PROPERTY, *supra* note 53, §§ 8.4, .5, & .7.

[98] *See supra* text accompanying notes 64-66.

[99] RESTATEMENT OF PROPERTY § 453 (1944). *See, e.g.*, Martin v. Music, 254 S.W.2d 701 (Ky. 1953).

[100] RESTATEMENT OF PROPERTY § 454 (1944).

[101] Katz, *supra* note 57, at 382; Thomas v. Brooks, 221 S.W. 542 (Ky. 1920).

law easements limited the party who could enforce the easement to the original easement holder. In order for the benefit of the easement to run, an appurtenant piece of property is required.[102] This requirement is burdensome in the context of preservation of natural areas because not only is it more expensive due to the necessity of fee ownership of an additional piece of property, but such an arrangement is not always feasible as a practical matter. Moreover, flexibility in stewardship is limited by the restriction on alienability and assignability of easements. While there exists a modern trend toward relaxing these restraints on alienation for easements in gross,[103] it is unclear whether the Kentucky courts would abandon the traditional rule.

III. THE CONSERVATION EASEMENT

Conservation easements developed through the enactment of legislation directed at offsetting the disadvantages relating to enforceability of real covenants, equitable servitudes, and common law easements. Specifically, statutory conservation easements emerged in response to judicial reluctance to allow "in gross" obligations to bind subsequent owners or possessors of the burdened estate, especially where the obligation created was an affirmative one.[104] In general terms, any easement designed to protect or preserve the environmental quality and natural character of the burdened land could be termed a "conservation easement." However, the term has taken on a somewhat more specialized meaning in recent years, following the development of the Uniform Conservation Easement Act[105] (UCEA) in 1981. As of December 1995, the UCEA has been adopted by seventeen jurisdictions,[106] including Kentucky. [107] As defined by the Kentucky statute, a conservation easement is:

> a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for

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[102] Katz, *supra* note 57, at 382.

[103] *Id.* at 383 n.68.

[104] *Id.* at 385.

[105] UNIFORM CONSERVATION EASEMENT ACT, 12 U.L.A. 66 (1996).

[106] Farrier, *supra* note 8, at 343 n.180.

[107] KY. REV. STAT. ANN. §§ 382.800-.860. The Kentucky version of the UCEA was adopted effective July 15, 1988.

> agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[108]

The UCEA states that a "holder" of a conservation easement may be either a governmental entity or a charitable corporation, association, or trust whose purpose includes the protection and preservation of natural areas.[109] Significantly, the Act also expressly provides for the right of third-party enforcement,[110] thus relieving the landowner of the burden of vigilance. For example, an action affecting the easement may be brought by: an owner of an interest in real property burdened by the easement; a holder of the easement; any person having a third-party right of enforcement; or any other person authorized by law to bring such an action.[111] Hence, the statutorily enabled conservation easement possesses distinct advantages over the common law variety in that it is much more flexible in enforcement and is adaptable for use by land preservation organizations such as The Nature Conservancy.

Conservation easements are recordable instruments; thus, in order to obligate subsequent bona fide purchasers for value of the burdened property, the creating instrument must be recorded with the appropriate governmental authority. In Kentucky, the conservation easement must be recorded in accordance with the general requirements of the Kentucky recording statutes[112] in the county clerk's office where the property is located. It should also be noted that the conservation easement statute stipulates that "[n]o rights or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement shall arise under a conservation easement before its acceptance by the holder and a recordation of the acceptance."[113] Furthermore, and perhaps not surprisingly, the Kentucky legislature modified the UCEA upon its adoption by engrafting the following:

> (1) A conservation easement shall not be transferred by owners of property in which there are outstanding subsurface rights without the prior written consent of the owners of the

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[108] KY. REV. STAT. ANN. § 382.800.

[109] *Id.*

[110] *Id.*

[111] KY. REV. STAT. ANN. § 382.820.

[112] *Id.* §§ 382.010-.990.

[113] *Id.* § 382.810.

> subsurface rights.
> (2) A conservation easement shall not operate to limit, preclude, delete, or require waivers for the conduct of coal mining operations, including the transportation of coal, upon any part or all of adjacent or surrounding properties; and shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist.[114]

Although this statutory provision may be of little practical significance in much of the state, it might limit the effectiveness of conservation easements in the coal producing regions of the state or in selected locales adjacent to other extractive industry activities, such as rock, sand, or gravel quarrying.

In an effort to overcome the limitations of the common law, the UCEA expressly provides that a conservation easement shall be valid: although it is neither appurtenant to another interest in real property nor touching and concerning real property; whether or not it can be or has been assigned to another holder; regardless of its character as a negative burden or if it imposes affirmative obligations on either the holder or on the burdened property; and irrespective of privity of estate or of contract.[115] Another important benefit incorporated in the Kentucky Act is the provision relating to alienability that provides, "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[116] Additionally, according to the Act, a conservation easement is to be considered of unlimited duration unless the creating instrument indicates to the contrary.[117]

It is clear that a conservation easement that qualifies under the terms of Kentucky Revised Statutes section 382.800 is vastly superior as a method for long term preservation of natural areas as compared to common law servitudes. Thus, for the individual or corporate landowner who desires to convey the property while concurrently ensuring the preservation of its present natural condition, the conservation easement is easily the most effective tool with which to accomplish such a goal.

Perhaps more common is the situation in which the private

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[114] *Id.* § 382.850.

[115] KY. REV. STAT. ANN. § 382.830.

[116] *Id.* § 382.810.

[117] *Id.*

landowner wishes to retain the title to and possession of the property, while simultaneously ensuring its long term preservation. Conservation easements are uniquely suited for such situations. The landowner merely grants a conservation easement to either a qualifying charitable organization or governmental body while retaining title, possession, and use—albeit subject to the conditions of the easement—of the property. Thereafter, the fee simple subject to the conservation easement can be conveyed, devised, or pass through intestate succession. Moreover, the grantor of a qualifying conservation easement is entitled to a federal income tax deduction based on a diminution in value of the thus encumbered property.[118] This favorable tax treatment can sometimes provide the requisite economic incentive to motivate a private landowner to create a conservation easement.

As previously stated, a conservation easement may be created in favor of a governmental body such as the Kentucky Nature Preserves Commission, or a private charitable organization whose purpose is to preserve natural areas. Typically, these private organizations not only solicit, supervise and enforce conservation easements, but also serve to collectively manage the lands under their supervision.[119]

CONCLUSION

A wide variety of land use controls currently exist that private landowners may utilize to perpetually preserve his land in its natural state. By so doing, the landowner will help protect Kentucky's biodiversity, even if only on a small scale. Private landowners should carefully evaluate these available options in light of their own particular circumstances—financial or otherwise; the specific goal they wish to accomplish; and the relative strengths and weaknesses of the various land use control methods from which they may choose.

With regard to less-than-fee interests in land, equitable servitudes, real covenants, and common law easements remain an alternative. However, because of the array of potential problems associated with their enforceability, they are far from being the optimal choice. Virtually anything in the realm of natural area preservation which can be accomplished with the aforementioned servitudes can be achieved with considerably more certainty through the use of a conservation easement.

In addition, transfers in trust should be given consideration,

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[118] 26 U.S.C. § 170(h) (1994).

[119] *See supra* text accompanying notes 24-30.

especially where the landowner does not wish to be burdened with the management and stewardship of the land. Finally, as in any endeavor, it is wise to seek the counsel of those who possess expertise and experience in the area of natural area preservation. Land trusts and preservation organizations fill this niche nicely and can provide vital assistance and stewardship services should the landowner opt for this route.