Preparing for Future Litigation of Conservation Easements

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Conservation easements ("CE") present a unique challenge to those who seek to uphold them in court. Given the nature of perpetuity, it is possible that the individuals involved in preparing and negotiating a CE will be deceased when it comes time to enforce its provisions at a trial many years from now. The CE deed may not contain terms that adequately define or describe the original intent of the parties or the condition of the land. The land trust and public agency (collectively, "holder") seeking to defend or enforce a CE in court will need to introduce evidence in the form of supporting documents such as photographs, maps, monitoring reports and correspondence to establish the critical elements of its case.

To afford the best possible chance of success in court, every CE holder should consider today how its documents are created and maintained to minimize challenges to their admissibility as evidence in future legal proceedings. This article will discuss the rules of evidence most relevant to the admission of the particular documents that will likely be involved in CE litigation, and will highlight current best practices by holders in their administration of CE records. The Federal Rules of Evidence are referenced, as many states' evidentiary rules are modeled after the federal rules to some degree. Of course, the practitioner should also be versed in the state and local laws that govern CE litigation and real estate transactions in his or her region.

Several of the recommendations contained in this article were informed by a gathering of approximately 40 attorneys and experienced land trust professionals at a seminar on evidence at the 2004 National Land Conservation Conference last fall. While helpful in highlighting the issues that may be at play in litigation, none of the recommendations given should be adopted as a policy by a holder without thorough consideration by the board of directors and advice of counsel.

I. Exceptions to the Hearsay Rule for Documentary Evidence

"Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." (See Rule 801 of the Federal Rules of Evidence.) A statement may be oral or written, or nonverbal conduct by an individual who intends it as an assertion. Hearsay is not admissible except as provided by law. (See Rule 802 of same.)

A typical land conservation transaction involves many documents, including the CE deed, baseline documentation and monitoring reports. Admitting the content of these documents will often be critical to establishing the purpose of why the land was conserved, as well as the scope of reserved rights and prohibited uses that will no doubt be at issue in CE litigation in the future. Absent an exception to the hearsay rule, the contents of these documents would not be admissible as evidence to prove the truth of what they say.

If the individual who prepared the document to be admitted is available to testify and be cross-examined, then hearsay is not an issue. The more likely scenario is that the "declarant" of the written statements will no longer be employed by the holder, or even

be alive, as easement-encumbered land is conveyed many times over to successional owners. Hence, the written statements would be subject to the hearsay rule.

Considering the three main categories of documents involved in a conservation land transaction—the deed, baseline documentation and monitoring reports—one or more of the following exceptions to the hearsay rule may apply, thus allowing the content of the document into evidence to prove the truth of what it states. There are many more exceptions to the hearsay rule than are discussed in this article, and the practitioner should not rely on the following as a comprehensive list. The applicable rules for authentication are also discussed. Not addressed in this article are the broader issues of relevancy and weight to be given the evidence, which, of course, will apply to the admissibility and probative value of the document regardless of whether it falls under an exception to the hearsay rule or not.

A. Records of Documents Affecting an Interest in Property.

Rule 803.14 of the Federal Rules of Evidence provides that the record of a document purporting to establish or affect an interest in property is not excluded by the hearsay rule if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office. This hearsay exception allows admission of a record of a title document to prove not only the contents of the document, but also its due execution and delivery by each person by whom it purports to have been executed. When the record is offered for the purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder is presented. This problem is solved by local statute qualifying for recording only those documents complying with a specified procedure, such as acknowledgment by a notary public of proper execution. In addition, a presumption exists as to delivery of an executed and recorded document. (See, generally, 5 Wigmore, Evidence §§1647-1651.)

Clearly, the contents of the CE deed will fall under this exception. The more challenging practice question is whether the CE holder should attempt to record reports that it generates, such as baseline documentation reports, at the registry of deeds along with the CE to avoid hearsay issues in future litigation.

The pros and cons of recording baseline reports were discussed at the Rally seminar on evidence. In addition to the obvious reason for not recording—some registries of deeds will not accept appendices to deeds, especially lengthy reports with photographs and maps—the following reasons for not recording were offered. A baseline report is a critical document to a conservation transaction and to subsequent monitoring, with the primary purpose of documenting the condition of the land at closing. A holder should not diminish the effectiveness or contents of a baseline report solely with an eye toward avoiding the hearsay rule. Better to create a comprehensive baseline report including maps and photographs and as many pages as necessary, rather than creating a baseline with the primary purpose of meeting local recording statutes.

Two other very good points were made at the seminar that holders should keep in mind when considering whether to attempt to record a baseline report: 1) the report may contain information about a parcel that a landowner does not want to become a public record, such as the location of endangered species; and 2) if the property contains unregulated amounts of hazardous wastes as documented in the baseline report, recording the baseline report and placing it in the chain of title may have an unintended

complicating effect on a landowner's ability to sell his or her land or obtain financing and title insurance. On balance, it seems better not to undermine the utility of a baseline report by seeking to comply with the recording statute in an attempt to avoid the hearsay rule.

B. Public Records and Reports.

Another hearsay exception that is similar to the recorded document rule and likely to be of use in land conservation litigation is the public records exception. Rule 803.8 of the Federal Rules of Evidence provides that unless there is some indication of lack of trustworthiness, records, reports, statements or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities are not excluded by the hearsay rule.

The reliability of a public record stems from the premise that a public employee has a duty to produce accurate records, and that records open to public inspection are more likely to be correct. A duty to record facts, however, is ordinarily not construed to include expressions of opinion, conclusions or statements as to causes and effects. So when seeking to admit a public record into evidence, it is important to first establish the duty to prepare the report or record, and then make sure the record speaks to fact and not just opinion.

An environmental agency's report of an environmental assessment and condition of the land, tax assessor maps and property valuation records, historical artifacts data such as the location of ancient remains, and U.S. Geological Survey (USGS) aerial photos and maps are a few examples of public records and reports that would fall under this exception to the hearsay rule. The land trust need only keep track of which public office has the document on file, how to properly request the document, and how to comply with the certification requirements for that type of record as specified by state statute. Usually the keeper of the records of the public agency must subscribe under the penalties of perjury that the records are true and correct.

To qualify for this exception the holder might consider compiling its baseline and monitoring report from maps and surveys and photographs that are existing public records and admissible by virtue of the fact that they are on file with a public office. Once properly certified, for example, a USGS topographical map should be admissible.

At the seminar on evidence, participants pointed out that many public agency records are outdated and therefore not useful for documenting the current condition of the land. In addition, public agencies frequently hire private consultants to prepare the agency's records. This practice should not be fatal to meeting the public records exception because the exception is not premised on the individual who prepares the record, but rather on the duty of the particular public agency to prepare the record. As long as the record is prepared pursuant to the public agency's guidelines and oversight, once accepted by the agency, it becomes part of the public record.

Land trusts should note that a privately authored report that is later filed with a public agency does not meet the criteria of a public record. When the public agency is the holder of a CE, its reports and appendices should be admissible as a public record. But what about the private nonprofit land trust as holder? Even if a land trust could compile the attachments to its baseline and monitoring report from duly certified public records and thus qualify them for admission into evidence in the future, the privately authored

report produced by the land trust, which is the meat of a baseline or monitoring report, would still be inadmissible as hearsay unless it meets another exception to the hearsay rule.

C. Business Records.

A third exception to the hearsay rule that will perhaps be the most useful to a land trust when litigating a CE is the business records rule. Rule 803.6 of the Federal Rules of Evidence provides in pertinent part that a memorandum, report, record or data compilation, in any form, made by a person with knowledge, is admissible if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, etc. To satisfy this exception, the custodian of the records or other qualified witness must testify to the creation and record-keeping activities of the business entity. "Business" includes a nonprofit corporation, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The crux of the business records exception is its requirement that writings be made in the "regular course of business." The reliability of a business record is based on the premise that the records are routinely made by those charged with the responsibility of making accurate entries and are relied on in the course of doing business.

Judicial opinions, which vary from jurisdiction to jurisdiction, shed some light on what documents will and will not be admissible under the business records exception to the hearsay rule. In a Texas Court of Civil Appeals case involving the contested admission of an aerial photograph prepared by the U.S. Department of Agriculture Soil Conservation Service (SCS), the photograph was admitted under the business records exception. (Kaufman Northwest, Inc. v. Bi-Stone Fuel Company, 529S.W.2d 281 (Tex.Civ.App., 1975).) Texas's business records statute, which is similar to the Federal Rule of Evidence 803.6, allows for admission of a document that was made a) in the regular course of business; b) by an employee with personal knowledge whose regular course of business is to make such record; and c) at or near the time of the act, event, or condition or reasonably soon thereafter. (Art. 3737e, Section 1, V.A.T.S.)

An employee of SCS testified that 1) SCS keeps and maintains aerial maps of the entire county and that such records are within his custody and control; 2) that aerial maps with soil notations are regularly made and kept by the SCS; 3) that the maps are regularly used by SCS employees in developing conservation plans with landowners; 4) that the maps are kept in the regular course of business of SCS; 5) that the maps are prepared by a soil scientist after first-hand investigation and soil testing; and 6) that the particular map offered into evidence was made soon after the time the soil scientist investigated appellant's land. The court held that the map was admissible as a business record. (Kaufman, at 285.)

As stated at the outset, frequently more than one hearsay exception will apply to the same document. The Texas Court of Civil Appeals also held that the photograph would be admissible under Texas statute Article 3731a, V.A.T.S. which provides that any written instrument which is permitted or required by law to be made, filed or kept by an officer or clerk of the United States or his deputy or employee, shall, so far as relevant, be admitted as evidence of the matters stated therein. This is similar to the public records and reports exception discussed previously. The SCS photograph, being a United States

government report, was thus found also admissible under the Texas public records statute. (Id.)

Conversely, the Massachusetts Appeals Court did not allow a memorandum which it viewed as having been made in anticipation of litigation to be admitted into evidence under the business records exception. In Heavey v. Board of Appeals of Chatham, 58 MassApp.Ct. 401, 79 N.E. 2d 651 (2003), the Chatham assistant zoning officer authored a one-page memorandum addressed to the Chatham Conservation Commission which offered comment on a parcel and the opinion that the parcel did not have the required 20,000 square feet of buildable upland. The court held that the memorandum was not a business record, nor a public record, and was therefore inadmissible. (Heavey, at 406.) The memorandum was not prepared in the normal course of business; it was an opinion of an employee made in anticipation of litigation.

What is the "Regular Course of Business" for CE Holders?

The Internal Revenue Service requires documentation of the property's condition at the time of closing for certain easement donations. Land Trust Standards and Practices require a baseline report for all easements, whether purchased or donated, and annual monitoring. The existence of these industry standards increase the likelihood that a land trust's reports will be considered a business record—but only if the standards are adhered to. The accepted land trust practice is to prepare a baseline documentation report for all of its easements. In the past, this practice has not always been followed and some holders have CE's without a baseline report. In addition, while the majority of land trusts monitor annually, there are holders who monitor less frequently and/or do not document consistently.

A CE holder's inconsistencies in preparing baseline and monitoring reports and its failure to meet industry, or its own, standards could prove troublesome to a future argument that baseline and monitoring reports are the holder's business record. As one attendee of the Rally seminar stated, "Being in the easement business is serious business. If a land trust can't meet its obligations, it shouldn't be accepting easements."

To meet the business records exception, a land trust should have written policies regarding the preparation of baseline and monitoring reports that are consistent with the industry standard. The land trust should strive to comply with these standards. As a precautionary measure, the CE deed should contain a provision that clearly states that failure to discover a violation or initiate an action to enforce shall not be deemed a waiver of the holder's right to do so at a later time.

Additional recommendations garnered at the seminar on evidence for the creation and maintenance of records in order to satisfy the business records exception include:

- ∑ Do not leave multiple blank spaces on baseline or monitoring reports because it appears that the preparer did not undertake due diligence. Either customize the report form by eliminating blank spaces or write in "not applicable."
- ∑ The landowner and the person who prepared the baseline report should sign and date it as being a true and accurate representation of the condition of the property.
- ∑ The report should contain factual entries, as opposed to opinions, that may be relied on by experts testifying at trial.
- ∑ At the time the property changes hands, the holder should prepare a report of the current condition of the land. The new landowner should sign this updated

"baseline" as being true and accurate; this document may also serve as the basis for an estoppel certificate for the outgoing landowner.

- ∑ All reports should be produced in multiple copies with one set being properly stored and not tampered with.

Worth mentioning is Rule 801(d) of the Federal Rules of Evidence, which sets forth statements that are not hearsay, and thus admissible. A statement by a party-opponent that is offered against a party is deemed trustworthy enough to be admitted into evidence, regardless of the availability of the declarant to testify. In the context of CE litigation, a baseline or monitoring report that is signed by the landowner as an accurate representation of the condition of the land might later be used against that landowner, his heirs or assigns, by the holder. There are many imaginable instances when a holder will want to admit a baseline or monitoring report into evidence to use against the landowner. Having the landowner sign the report will eliminate the need for the report to come in under one of the hearsay exceptions discussed above. Holders should be forewarned, however, that their signature on the report means that the report may be used against them (the holders) as well.

II. Authentication

Even if a document is admissible under an exception to the hearsay rule, it still needs to be authenticated. Holders should bear in mind the rules of authentication when developing their policies on record storage and maintenance. Generally, Rule 901 of the Federal Rules of Evidence states that authentication or identification is a condition precedent to admissibility. A document is authenticated if there is sufficient evidence to support a finding that the document in question is what its proponent claims. Authentication is an aspect of relevancy; it is only logical that if a document is not what it purports to be, it is not relevant.

A document may be authenticated by the following methods, chosen by the author for their applicability to CE litigation and not intended to represent a complete list: 1) testimony of a witness with knowledge; 2) public records or reports are regularly authenticated simply by proof of custody; 3) evidence that a document is at least 20 years old, is in such condition as to create no suspicion concerning its authenticity, and is in a place where it would likely be if authentic. (See Rule 901(b) of the Federal Rules of Evidence.)

Testimony from a witness with personal knowledge of the matter at issue is probably the most common way to authenticate a document. The witness's testimony may be based upon either knowledge acquired years before trial or knowledge specifically acquired to testify. This acceptance of being in anticipation of litigation is rare in the rules of evidence.

Using a monitoring report as an example, the land trust stewardship staff person who prepared the report would certainly be a credible witness for authentication. What if the preparer of the report was not available to testify? Would the current stewardship staff member who regularly prepares monitoring reports for the land trust be able to authenticate an old monitoring report? Probably, but it would be helpful if there were some indication that this was the holder's report, such as letterhead, signature of an employee, and proper storage in the holder's files.

The public records and ancient documents examples of authentication are self-explanatory. Note that both the public records and ancient documents examples extend the principle to include data stored in computers and by similar methods. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Photographs are often used in litigation as an aid to the jury to help them understand the issue at trial. To authenticate a photograph, a holder would need to establish that the photograph depicts an accurate representation of the property. Again, having the landowner and the preparer of the baseline and monitoring report sign and date the photographs will go a long way to establishing the photograph's authenticity years from now. Authentication will also require a showing that the chain of custody was not broken and the photograph was not tampered with. Some holders use a photograph affidavit for proof of when the photograph was taken and the chain of custody of the photograph from creation to the time of trial. [For more information, see "The Legal Efficacy of New Technologies in the Enforcement and Defense of Conservation Easements, Exchange, Summer 2004.]

III. Conclusion

Drafters of conservation easements, preparers of baseline and monitoring reports, and those who are responsible for maintenance and storage of these documents should take heed of the rules of evidence in their state governing admissibility of these documents into evidence. They should also adopt organizational standards for document preparation, maintenance and storage, and abide by these standards. Finally, everything should be done with an eye toward litigation far into the future because perpetuity is a long time in coming.

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