2009

Attorney General's Authority to Defend Conservation Easements

Brian Eisenhower
Sea Grant Law Fellow, Roger Williams University School of Law

MEMORANDUM

DATE: May 31, 2009
TO: Mr. Rupert Friday, Director, Rhode Island Land Trust Council
CC: Ms. Megan Higgins, Research Counsel, Marine Affairs Institute
FROM: Brian Eisenhower, Rhode Island Sea Grant Law Fellow
SUBJECT: Attorney General's Authority to Defend Conservation Easements

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Consistent with the role of the Sea Grant Legal Program, this memorandum does not advocate for any party or legal position and is not to be used in any legal proceeding. The discussion that follows is for informational purposes only.

Introduction

Per your request, I researched legal theories that might provide support for the proposition that the Rhode Island Attorney General has the authority to defend conservation easements. Specifically, you expressed interest in the public trust doctrine and the charitable trust doctrine. As I stated when I presented my research to you and Mr. Ted Clement, Esq., my overall conclusion is that legal theories do not provide adequate support for your proposition and therefore I recommend that you pursue legislation that expressly grants the Attorney General the authority to defend conservation easements. As you know, Connecticut passed similar legislation in 2005. Conn. Gen. Stat. § 47-42c (2009).

Legislation is needed for several reasons. First, Rhode Island statutory law does not expressly grant its Attorney General the authority to defend all conservation easements; as discussed below, the Attorney General only has standing in certain circumstances. Second, the public trust doctrine is inapposite. Third, the charitable trust doctrine is too controversial in this context to be relied upon to protect conservation easement lands.

Rhode Island Statutory Law

In Rhode Island, conservation easements fall within the class of statutorily-defined

"conservation restrictions," which are designed to "provide the public the benefit of the unique features of the land ... predominantly in its natural, scenic, or open condition, or in agricultural, farming, open space, wildlife, or forest use, or in other use or condition consistent with the protection of environmental quality." R.I. Gen. Laws § 34-39-2 (2008). Your goal of developing a backup defense mechanism for conservation easements is consistent with the stated purpose of Chapter 34-39, which is "to grant a special legal status to conservation restrictions ... so that landowners wishing to protect and preserve real property may do so without uncertainty as to the legal effect and enforceability of those restrictions." See id. § 34-39-1.

As you know from personal involvement in advancing some of this legislation, Rhode Island law currently provides a number of express protections for conservation easements. Under R.I. Gen. Laws § 34-39-3 (2008), "no conservation restriction ... shall be unenforceable against any owner of the restricted land" for lack of contract, or lack of benefit to particular land, or on account of "any other doctrine of property law which might cause the termination of the restriction." Under R.I. Gen. Laws § 34-7-9, enacted in 2008, land held for the purposes of conservation or open space is not subject to adverse possession or prescription, which are legal doctrines that might otherwise result in another party acquiring title to the conservation lands. Collectively, these provisions are a strong statement of the legislature's intent to protect conservation easements. It follows that the legislature would be willing to enact a statute granting the Attorney General express authority to defend conservation easements, so as to protect the conservation lands and the taxpayers' investment in these lands by way of open space bonds and grants of conservation restrictions on their property.

Attorney General's Authority to Defend Conservation Easements is Currently Limited

New legislation is needed because existing legislation grants the Attorney General

authority to defend conservation easements only when certain conditions are met. The Attorney General is permitted, "whenever necessary," to "institute and prosecute ... all suits and proceedings which [a department] may be authorized to commence." R.I. Gen. Laws § 42-9-6 (2008). Additionally, although the statute is somewhat ambiguous, it appears that the Attorney General may only take action when the department requests. See id.; State v State Labor Relations Bd., 1983 WL 486868, at *7 (R.I. Super. Ct. 1983). Therefore, the statute authorizes the Attorney General to take action, whenever requested by DEM and deemed necessary, in conservation easement cases in which the DEM is authorized to commence suits or proceedings. R.I. Gen. Laws § 42-9-6.

DEM's authority to take legal action in defense of conservation easements is defined by statute and the terms of individual conservation easements. By statute, the DEM is responsible for maintaining an inventory of all lands held by land trusts. R.I. Gen. Laws § 42-17.1-2(28) (2008). The Director of DEM also has the responsibility to terminate an "inactive" land trust and transfer its assets to a successor organization, or to the DEM if none exists; however, the definition of "inactive" seems to be formal inactivity rather than a land trust's financial inability to institute legal proceedings. See id. § 42-17.1-2(28). Additionally, the director of DEM "may promulgate and enforce rules and regulations for the orderly and consistent protection, management, continuity of ownership and purpose, and centralized records-keeping for lands, water, and open spaces owned in fee or controlled in full or in part through other interests, rights, or devices such as conservation easements or restrictions, by private and public land trusts in Rhode Island." Id. § 42-17.1-2(28)(i). The only relevant regulations pertain to lands that are purchased with the assistance of open space grants, which require that the recipient of assistance execute a conservation easement running in favor of the State of Rhode Island providing that if

the recipient fails in its obligations then the State may enforce the conditions attached to the grant or financial assistance in equity or, at its discretion, may assume title, custody and control to protect its interest. See Rules and Regulations of the Natural Heritage Preservation Commission of the State of Rhode Island and Providence Plantations for Rhode Island Open Space Grants and the Revolving Loan Fund, Rules 12-13 (2001), available at http://www.dem.ri.gov/pubs/regs/regs/plandev/pdnhpc.pdf. It should be noted that DEM's statutory authority to promulgate rules and regulations may allow it to expand its authority to defend conservation easements. See R.I. Gen. Laws § 42-17.1-2(28)(i). Aside from the authority to defend conservation easements executed in accordance with DEM regulations to secure state financial assistance, DEM's current authority is limited to other conservation easements that expressly granted the DEM enforcement authority; it is presumed that many conservation easements that have been granted to land trusts did not do so.

Accordingly, existing legislation permits the Attorney General to defend some conservation easements but many others are left unprotected. First, the Attorney General's authority to institute suits is dependent on the DEM's authority to institute suits. Second, it should be noted that even if DEM has proper authority, the state is not required to defend conservation easements; inherent in the § 42-9-6 standard are separate grants of discretion to the DEM and the Attorney General to decide whether, respectively, to make a request for Attorney General assistance or determine that a legal proceeding is necessary.

Common Law Theories

Rhode Island's Public Trust Doctrine is Inapposite

Rhode Island's version of the public trust doctrine is not relevant to the protection of landlocked conservation easements. The public trust doctrine predates the United States and can

be traced back to England and Rome. See Greater Providence Chamber of Commerce v State, 657 A.2d 1038, 1042 (R.I. 1995) (internal citations omitted). However, there is not a uniform public trust doctrine in this country; instead, each state has its own policy, such that the scope and details vary. See Shively v. Bowlby, 152 U.S. 1, 26, 57-58 (1894). Under its public trust doctrine, Rhode Island holds in trust for its citizens the tidal lands below the high water mark. See Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council, 583 F. Supp. 2d 259, 269 (D.R.I. 2008); Greater Providence Chamber of Commerce, 657 A.2d at 1041; see also Bailey v. Burges, 11 R.I. 330, 331, 1876 WL 4788, at *2 (R.I. 1876). Rhode Island incorporated its common law public trust doctrine in its Constitution, which has always provided that: "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state." R.I. Const. art. I, § 17, cl. 1; see Palazzolo v. State, 2005 WL 1645974, at *7 (R.I. Super. Ct. 2005); Thomas R. Bender, Legislative Control over the Coastal Resources Management Council after Separation of Powers: Grasping at Thin Air (, Land, and Water), 12 Roger Williams U. L. Rev. 314, 320 (2007). It is clear from this language that Rhode Island's public trust doctrine does not extend to landlocked conservation easements. Although a few other states' public trust doctrines protect landlocked resources, see, e.g. Friends of the Parks v. Chicago Park District, 786 N.E.2d 161, 169 (Ill. 2003), it seems unlikely that Rhode Island's public trust doctrine will be expanded to include inshore lands. Further, it would not necessarily be good policy to expand the doctrine to include inshore resources. There are fundamental differences between the tidal lands protected by the public trust doctrine and the conservation easement lands at issue here. Whereas the tidal lands have never been privately owned because of their inherent public importance, the conservation easement lands have been privately owned

and their restrictions are in place only by choice, and may even be released through proper procedures, see R.I. Gen. Laws § 34-39-5 (2008).

However, the Rhode Island Constitution may provide support for new legislation granting the Attorney General express authority to defend conservation easements. In 1970, the following language was added:

> "... [the people] shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state."

R.I. Const. art. I, § 17, cl. 2-3. While clause two is somewhat amorphous, see Bender, supra, at 321-22, there is no indication in subsequent case law that this language expanded Rhode Island's common law public trust doctrine. However, clause three is properly interpreted as a constitutional environmental protection amendment. See Bender, supra, at 321-22. It could fairly be argued that the desired legislation, granting the Attorney General express authority to defend conservation easements, falls within the General Assembly's duty to provide for the conservation of land and the preservation of the natural environment.

The Charitable Trust Doctrine is Relevant but Controversial

Although the charitable trust doctrine is relevant, it is too controversial to be relied upon to support the proposition that the Attorney General has standing to defend conservation easements.

In Rhode Island, a charitable trust is defined as a fiduciary relationship that arises when there exists: a manifestation of an intention to create a charitable trust, trust property, and a

charitable purpose. See R.I. Gen. Laws § 18-9-4 (2008). Although conservation easements easily meet the charitable purpose requirement, given that the federal tax code considers qualified conservation contributions to be charitable contributions, see I.R.C. § 170(h) (West 2008), it is unclear whether a conservation easement is a trust. For example, the treasury regulations that illustrate the federal tax code discuss qualified conservation contributions that are not made in trust but are rather simple transfers of partial interests in property. See Treas. Reg. §§ 1.170A-7(a)(1), 1.170A-7(b)(5) (West 2009). In short, there is a difference between a trust and a gift that is made for a reason. Additionally, the "Standard Conservation Easement Form" that the DEM uses makes no mention of a trust. See Rhode Island Department of Environmental Management, "Conservation Easement" (2009), available at http://www.dem.ri.gov/programs/bpoladm/plandev/pdf/ceform.pdf. In Rhode Island, another factor weighing against the treatment of conservation easements as charitable trusts is that the DEM, rather than the Charitable Trusts Unit of the Attorney General's office, is responsible for maintaining the inventory of all lands held by land trusts. See R.I. Gen. Laws § 42-17.1-2(28) (2008).

The controversy as to whether a conservation easement is a charitable trust extends beyond Rhode Island. For example, the Supreme Court of Wyoming left undisturbed a trial court's finding that a scenic preserve trust was a charitable trust because the issue was not challenged on appeal, but the court seemed to signal that this could otherwise have been a litigable issue. Hicks v. Dowd, 157 P.3d 914, 919 (Wyo. 2007). Additionally, the "hot[ ] debate" during the drafting process for the Uniform Conservation Easement Act (UCEA), which many states other than Rhode Island have adopted, is further evidence that the charitable trust doctrine's application to conservation easements is highly controversial nationwide. See Mary

Ann King and Sally K. Fairfax, Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates, 46 Nat. Resources J. 65, 66, 97 (2006). "Initially, the [UCEA] included the AG specifically, but some commissioners believed that mentioning the AG in the Act might signal their acceptance of charitable trust law in [conservation easement] enforcement and modification, and the AG was removed and relegated to the notes." See id. at 97. The final result was that the UCEA includes "a person authorized by other law" among those parties with standing to bring judicial actions to enforce, modify, or terminate conservation easements. See Uniform Conservation Easement Act § 3 (1981). In order to avoid the issue of whether conservation easements are charitable trusts, the UCEA leaves to states the determination of whether the attorney general has standing to enforce conservation easements. Therefore, it seems most appropriate for Rhode Island to make a legislative decision as to the attorney general's standing to enforce conservation easements, as Connecticut did in 2005. See Conn. Gen. Stat. § 47-42c (2009).

Conclusion

New legislation is needed to achieve your goal of ensuring that the Rhode Island Attorney General will have standing to enforce conservation easements when land trusts are not able to do so. Existing statutes and legal theories are inadequate support for the proposition that the Rhode Island Attorney General currently has this authority. First, under Rhode Island statutory law, the Attorney General only has standing to enforce conservation easements in certain circumstances. Second, the public trust doctrine is inapposite. Third, the charitable trust doctrine is too controversial in this context to be relied upon to protect conservation easement lands.