Natural Areas Journal

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A publication of the Natural Areas Association - www.naturalarea.org

Golf Course Conservation Easements with Natural Habitats: a Need for Clarity

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Natural Areas Journal 30:392–999

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ABSTRACT: Golf course conservation easements represent a controversial type of protected area which may qualify for federal and some state tax reduction incentives under certain conditions defined by the Internal Revenue Service Tax Code and respective state departments of revenue. Tax benefits are often the primary motivation for a landowner to terminate certain rights on a property through deed restrictions under a permanent conservation easement. One easement category within the Internal Revenue Service Tax Code requires protection of one or more natural habitats; however, few golf courses offered for conservation by this criterion actually possess meaningful environmental or biodiversity values, nor serve a real public interest. A general evaluation methodology is presented for objective consideration of such golf course conservation easements to ensure that only qualified sites are accepted. Not only is there a basic responsibility to comply with the intent of the tax code, but natural habitat quality must be maintained.

Index terms: conservation easement, environmental assessment, golf course, natural habitat, protected area, tax benefit

INTRODUCTION

Conservation easements have become an important natural area and biodiversity protection technique that allows a private landowner to retain title by conveyance of one or more interests (e.g., development rights) to a non-profit land trust organization or government agency (Rissman et al. 2007). From a preservation standpoint, costly fee simple acquisition (i.e., purchase of absolute or unconditional title) can be avoided if the appropriate interest(s) is transferred; however, federal tax policy has been extended to encompass sites that most protected area professionals might not anticipate - golf courses (Small 2004; McLaughlin 2005; Lindstrom 2008).

Familiarity with this topic was derived from the authors' combined experience of contractual work on golf course easements, protected area assessment and stewardship for the North Carolina Department of Environmental and Natural Resources, and coordination of land trusts in the southeastern United States. Awareness of the issue and how golf course easements with natural habitats may be assessed are goals of this article.

BACKGROUND AND HISTORY

The Internal Revenue Service Tax Code (Public Law 96-541, 26 USC 170[h] [4] [A] [i-iv]) divides qualified conservation contributions into four purposes: (1) preservation of land for outdoor recreation/public education; (2) protection of natural habitat; (3) preservation of open space (including farmland and forest land); and (4) preservation of historic land or a certified historic structure. Items one through three are germane to golf courses. An obvious incentive for a golf course owner is that land maintenance for its intended purpose will yield a bonus of reduced taxes in exchange for unneeded potential development rights. Generally, most golf courses don't qualify under Internal Revenue Service Standards for the first purpose (i.e., public recreation/education) unless they are open to the public and charge a daily fee comparable to a municipal course. While the open space criterion of category three seems like a logical fit, Treasury Regulations have various factors that must be satisfied for the course to qualify as a public benefit. Finally, the second purpose provides a nexus to golf courses if they include "a relatively natural habitat of fish, wildlife, plants or similar ecosystem" (Ellis 2005; Arnold 2007; Cornell University Law School 2010), but how that requirement is met represents a challenging issue with a checkered past.

From 1990 to 2005, there was a nationwide proliferation of various conservation easements conveyed to non-profit land conservation organizations, commonly referred to as "land trusts." Conservation easements may be purchased, but these do not qualify the seller for income tax deductions or credits. More frequently, conservation easements are donated and, when permanent, these easements may qualify for tax reduction incentives. This technique became a primary tool of private land conservation which resulted in

over 2.5 million hectares being set aside (Lindstrom 2008). However, selected examples of perceived abuses sparked harsh criticism in the media (e.g., Washington Post) and other literature (e.g., law journals, websites) that eventually catalyzed inquiry by the United States Senate Finance Committee in 2005. During that hearing, Rand Wentworth, president of the Land Trust Alliance (an umbrella organization that provides support and guidance for land trusts as well as providing a political voice), argued that golf course conservation easements should receive particular scrutiny and Steven McCormick, president of The Nature Conservancy, suggested a complete prohibition. Examples of golf course easements with supposed natural habitats were cited in the literature that clearly did not meet the aforementioned criterion (e.g., carefully trimmed fairways, roughs, and greens composed of non-native species and surrounded by cleared or disturbed land). Other concerns were expressed concerning land trusts that accepted these easements and how fair market values were determined (Small 2004; McLaughlin 2005; The Nature Conservancy 2005; Arnold 2007).

This pervasive controversy caused complete bans in some state revenue departments. The South Carolina state legislature amended its state income tax credits for donated conservation easements to deny eligibility for easements associated with any golf course (Miller 2006). After three golf course easements were accepted for conservation tax credits from 1997 to 2004, the North Carolina Department of Environment and Natural Resources (2010) subsequently banned donation of land used specifically for golf (i.e., "tees, fairways, traps, greens, areas for in-bounds play, cart paths, and any other areas modified for golf course use") (Scott Pohlman, North Carolina Natural Heritage Program, pers. comm., 2010; North Carolina Department of Environment and Natural Resources 2010).

While the easement debate captured both public and government attention, the outcome of a Michigan court case (*Glass vs. Commissioner of Internal Revenue*) provided some degree of definition relative to golf courses with natural habitats. A married couple challenged the Internal Revenue Service concerning its denial of 1992 and 1993 deductions for conservation easements donated to a local land trust. Their conveyances protected undeveloped Lake Michigan shoreline that provided habitats for two listed species: Pitcher's thistle (*Cirsium pitcheri*) - federal and state threatened status; and Lake Huron tansy (*Tanacetum huronense*) - state threatened status. A final ruling by the United States Tax Court in 2005 supported their deductions by recognition of habitats for rare, endangered, or threatened plants or animals as significant, regardless of size. Relative to golf courses, habitats for listed species qualify as valid conservation easements with the added allowance that golf and surrounding land uses are allowed as long as these activities protect and sustain natural habitats (Arnold 2007; Levin 2007).

Given this somewhat confusing background, what exactly is a legitimate golf course conservation easement relative to habitat protection? Perhaps the best known example is the Merit Club in Libertyville, Illinois, which has an easement that encompasses most of the 129-hectare golf course, except parking lot and clubhouse, and includes 67 hectares occupied by a combination of restored tall grass prairie, wetlands, and oak-hickory savanna (Ellis 2003; Arnold 2007). These habitats are part of the 1295-hectare Liberty Prairie Reserve, a local network of public and private protected lands located in northern Chicago suburbs that includes 14 listed species and three areas in the Illinois Nature Preserve System, overseen by the non-profit Liberty Prairie Conservancy (Liberty Prairie Conservancy 2010; Prairie Crossing 2010). This site demonstrates that a golf course easement can exist as a legitimate natural or protected area (sensu, Dudley 2008), but proper documentation and evaluation are necessary to achieve this goal. Also, a land trust organization that receives such an easement has the responsibility of, at minimum, annual monitoring to ensure ongoing protection of natural integrity (Brewer 2003).

METHODS

When a conservation easement on a golf course is claimed as a tax deduction, a supporting environmental inventory or assessment for the landowner is prepared, typically by a contractor. A federal or state revenue agency may challenge the donation by an audit that includes another contracted report as part of their review. Environmental documentation submitted by both parties is evaluated by the government as part of a confidential legal process until a mutually agreed outcome (i.e., easement acceptance or denial) is reached. If not, a final remedy is determined through the court system (Internal Revenue Service 2010). Detailed documentation of site significance is, thus, crucial for a golf course that has to meet the "relatively natural habitat" criterion.

Environmental assessment of a proposed or existing golf course conservation easement requires particular attention to natural communities and constituent species per the tax code regulation and Glass ruling. Ellis (2003) concluded that: "Ecological factors such as habitats for birds, animals, etc. can be challenged under various conservation authorities compared to truly undeveloped land. Every situation is different but substantial due diligence must be made to determine and document the "exclusively for conservation purposes" requirement."

Overall format of the report should include at a minimum: (1) introduction with easement description, purpose, and boundaries; (2) field and office methods (e.g., site visits, sampling, data analysis); (3) physical and biological characterizations of the site; (4) discussion and conclusion that feature findings regarding the subject easement; (5) references -- especially any previous easement assessment or inventory; and (6) appendices (e.g., photos, soil mapping, listed species documentation, curriculum vitae of the author). Finally, a concise letter of transmittal to serve as an executive summary should be placed at the beginning of the document.

Because natural habitats are a primary focus of easement justification, an evaluator

must gain a thorough perspective on past land use and, if possible, which natural communities were present prior to initial development. Historic accounts of the easement area may exist in local literature or through personal communications with nearby residents. Changes in topography and other features may be ascertained from past and present United States Geological Survey quadrangle maps. Although these maps are updated sporadically (e.g., every 20 or more years), significant alterations in contours and general vegetation cover can be detected. Aerial photography at 1:1000 scale or smaller from such sources as the state department of transportation can serve as an additional visual reference over available timeframes. Soil series derived from United States Department of Agriculture county survey maps may be correlated with expected plant communities and then compared to extant community structure and composition. Descriptions of regional natural communities may be obtained from a given state Natural Heritage Program and relevant publications (e.g., Cowardin et al. 1979; Schafale and Weakley 1990).

If natural communities are present within the easement area, the quality of each may be determined by sampling pertinent parameters (e.g., strata dominants, mean tree dbh by species, species richness per unit area). Community-specific characteristics such as old growth canopy dominants, presence of endemic species, and lack of invasive species will assist in valuation of the habitat(s) in question. Comparison of these data to those sampled from local or regional reference community types may be possible (e.g., The Carolina Vegetation Survey 2010).

According to the *Glass* ruling, federal- or state-listed species and associated habitats are a priority consideration; thus, an assessment must include a thorough inventory of rare species presence within the easement and, if possible, an estimated size of each population. Although additional listed species may occur in the vicinity (e.g., according to Natural Heritage Program records), the primary importance of this information is to inform the investigator of which species might occur within the easement proper. Use of the subject golf course as foraging habitat by a rare animal species with a documented nest site outside the easement should be reviewed on a case by case basis relative to life history and autecology. For example, an easement boundary located 5 km from the nearest red-cockaded woodpecker (*Picoides borealis*) colony would not be part of the foraging habitat because this species typically ranges less than a 1.5 km from its cavity tree (Franzreb 2006; U.S. Fish and Wildlife Service 2010).

Findings, both in the conclusion section and letter of transmittal, are best presented in a non-technical manner that is understood easily by the general public and government agency personnel. Since few tax departments are staffed by scientists, final determination of easement validity likely will be made by a non-scientist(s); plus, the report may be used in a court proceeding.

DISCUSSION AND CONCLUSIONS

Conservation easements on golf courses have been characterized in the media as abusive tax shelters for wealthy landowners. A chain of problems (i.e., inconsistent tax law enforcement, irresponsible land trusts, and questionable valuations) have resulted in unqualified donations. An additional weak link involves easements on courses where proof of habitat quality and/or presence of listed species are required. Qualified easements in this category are rare because demands and realities of course construction, operation, and maintenance normally require dominance by non-native grasses and other plant species that grow quickly, look aesthetically pleasing, and tolerate constant use. At the same time, there are definite public relations and tax incentive benefits to golf course owners and managers who are willing to either restore or maintain truly natural habitats within a given course.

It is the responsibility of biologists and natural area professionals tasked with an easement assessment to render a thorough and objective opinion that utilizes best available information for the site in question. A protocol that includes a comprehensive physical and biological characterization of the proposed easement relative to documented local natural communities is essential. Aside from on-site inventory, information from local natural heritage program records and other pertinent sources is invaluable for assessment of rare species and other natural features within the subject golf course.

Finally, evaluators have the larger mission of natural area quality control. Golf course easements with one or more poor examples of a natural community type will erode the concept of natural significance. An unworthy easement that receives negative attention by local media and the public could create problems for valid preservation projects–for example, a draconian response by state or county decision-makers to reduce or eliminate public funding for protected area acquisition and management. Conversely, if an easement is accepted without question, a false sense of natural area protection also may curtail subsequent allocations of needed money and personnel for one or more deserving sites.

ACKNOWLEDGMENT

The authors wish to thank employees of the North Carolina Natural Heritage Program for various modes of information.

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