CEQA Mitigation On Conservation Easement Lands: How a Plea to Legislators Killed a Threat to Farmers' Property Rights (For Now)

By Arthur F. Coon on October 7th, 2011

Shortly before the close of the last legislative session, I found myself writing a strongly-worded letter (on behalf of myself and interested clients of Miller Starr Regalia) to Governor Brown, the authors of proposed SB 436 (Kehoe) and AB 484 (Alejo) and certain Senate and Assembly Committee Chairs to urge an amendment of – or alternatively a "no" vote on or veto of – those bills.

I specifically requested removal of proposed Government Code § 65968(b), which would have provided: "A property that has been previously protected for conservation purposes, including the placement of a conservation easement on the property, may not be used for mitigation purposes." My letter pointed out that the provision would: (1) constitute an unconstitutional taking of the property rights of farmers and landowners who have granted conservation easements on their properties; (2) violate constitutional prohibitions against contract impairment and public policy favoring freedom of contract; and (3) conflict with the existing statutory law and legislatively-established public policies governing voluntary conservation easements embodied in Civil Code §§ 815, et seq. In short, it was an illegal "property rights grab." And it was buried in an otherwise innocuous bill whose only purpose, as disclosed by every available legislative analysis, was to clarify and expressly authorize a non-controversial existing administrative practice regarding transferring endowment funds from governmental agencies to non-profits that acquire their conservation easements.

That the proposed law would have unlawfully taken property and contract rights was clear, as underscored by the statutorily-defined characteristics of "conservation easements":

- Conservation easements are broadly defined to include "any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominately in its natural, scenic, historical, agricultural, forested, or open space condition." (Civ. Code , § 815.1.)
- A conservation easement is a voluntarily-created and freely transferable perpetual easement in real property (Civ. Code, § 815.2(a)), and its "particular characteristics" are "those granted or specified in the instrument creating or transferring the easement." (Civ. Code, § 815.2(d).)
- "All interests not transferred and conveyed shall remain in the grantor of the easement, including the right to engage in all uses of the land not affected by the easement nor prohibited by the easement or by law." (Civ. Code, § 815.4.)

Conservation easements are not "cookie cutter" or "one-size-fits-all" property restrictions, but may be drafted to serve a variety of purposes and preserve a variety of distinct natural resource preservation values and conditions of lands. A farmer who voluntarily agrees and sells a conservation easement to restrict his commercial uses of the land to commercial agricultural uses does not necessarily give

up his potentially valuable property right to perform “mitigation” activities on his own property by restoring or enhancing natural resource values as well.

For example, if a planned upgrade from cattle grazing to vineyards, orchards or row crops would threaten endangered shrimp, frogs or salamanders, a farmer may wish to perform mitigation required by CEQA and/or federal laws by establishing and managing a species preserve on his own property rather than buying expensive credits in a mitigation bank elsewhere. Such activities fall naturally within farmers’ and ranchers’ traditional role as stewards of the land; cows, frogs and salamanders can co-exist! Whether the farmer has retained his property right to perform such mitigation, or make any other use of his property, is determined by reference to the specific terms of the voluntarily-negotiated conservation easement itself; all property rights not conveyed away are retained by the landowner. A statute purporting to wipe out such property rights across the board would be wrong, and illegal.

Without elaborating or speculating on how such a provision came to be buried – without legal, fiscal or policy analysis or disclosure – in the proposed bills, I observe with American poet John Godfrey Saxe that: “Laws, like sausages, cease to inspire respect in proportion as we know how they are made.” To their credit, two days after my letter was sent, representatives of Senator Kehoe’s office and SB 436’s sponsor called me and agreed to remove the offending provision; I thereafter withdrew my opposition, and the amended SB 436 passed (AB 484 was held and did not move forward).

Because this issue is likely to resurface, farmers and landowners who have conveyed or are contemplating conveying conservation easements should carefully consider the terms of any agreement with an eye toward protecting their important property rights, and should remain vigilant regarding any attempted uncompensated takings of their mitigation rights.