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## Private Lands Conservation in Puerto Rico

Elizabeth McCormack

University of Colorado Boulder. Natural Resources Law Center



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# **PRIVATE LANDS CONSERVATION IN PUERTO RICO**

**A Country Report by the Natural Resources Law Center,  
University of Colorado School of Law**

September 2004

*Sponsored by The Nature Conservancy*

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## **BRIEF QUESTIONS**

### **1. What tools are in place for the purpose of private land conservation?**

Puerto Rico passed a Conservation Easement Act in 2001. This Act encourages conservation easements through tax exemptions and provides for a uniform procedure of creating such easements. In addition, the Puerto Rico Forest Act provides for conservation easements aimed specifically at protecting forest lands.

Puerto Rico also has several domestic programs which concern private land conservation. These programs include the Natural Patrimony Program, where NGOs hold conservation easements on land purchased from private landowners by the Commonwealth; the Unification of State Forests Program, which allows the Commonwealth to acquire forest land to act as a buffer zone to protected forests; the Reforestation and Management of Living Resources Program, which is intended to promote the protection of watersheds, forests, wildlife sanctuaries and private forest land; and also the Adopt-a-Beach Program and Adopt-an-Acre programs.

Two U.S. federal programs, the Farm and Ranch Protection Program and the Farm Debt Cancellation Program, are also employed in Puerto Rico. Both programs aim to achieve the preservation of agriculturally significant lands.

### **2. What legal tools are recognized by the legal system and capable of being employed for private lands conservation?**

Puerto Rico's Civil Code was altered slightly by the Conservation Easement Act in order to make the Act possible. Before the Act, the Puerto Rico Supreme Court was disregarding certain servitude restrictions in order to allow for conservation easements; but the passage of the Act solidified the trend.

Today, the Puerto Rico legal system recognizes negative easements appurtenant and in gross, real covenants, equitable servitudes, restrictive agreements, and leases. Each of these tools can be used under certain circumstances to achieve the conservation of private land.

**3. What is the legal significance of the relationship between the U.S. and the Commonwealth of Puerto Rico?**

This relationship is analogous, but different in key ways, to the split powers between the states and federal government. Puerto Rico has nominal authority over its internal affairs, but the U.S. government retains control of many, if not most, areas of government. Notably, the U.S. retains control over all agricultural matters. In addition, the U.S. Congress may pass laws specific to Puerto Rico, and the Federal District Court of Puerto Rico usually assumes that generally applicable federal laws apply to the Commonwealth also unless Congressional intent demonstrates otherwise.

## **INTRODUCTION**

This report attempts to provide a basic understanding of Puerto Rico's legal system and, in particular, to explain how conservation easements currently operate within that system. In addition, this report examines the domestic- and U.S.-funded conservation programs that are available on the island. The first section contains relevant background information on Puerto Rico; including descriptions of its legal history, the conflict between economic and conservation interests, its governmental structure, and the interplay between U.S. federal law and Commonwealth law. The second section of the report describes current rights and restrictions governing private lands in Puerto Rico. This section will also discuss the institutional framework for administering land in Puerto Rico, including the procedures for land registration, transfer, and dispute settlement. The third section describes the legal tools available in the Commonwealth for private lands conservation, including the easement, equitable servitude, and real covenant. This section also explains the Conservation Easement Act, as well as other programs and statutes relevant to the conservation of private land. The final section of the report provides a brief outlook on what may, and hopefully will, occur in the future as a result of Puerto Rico's progressive environmental actions.

### **I. RELEVANT BACKGROUND**

#### **A. Overview of the Land**

Puerto Rico is located in the Caribbean Sea off the coast of Florida. It consists of the island of Puerto Rico, as well as the islands of Culebra, Vieques,<sup>1</sup> and Mona. The ecosystem is mountainous and tropical. Puerto Rico is comprised of 3,515 square miles of land, which is

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<sup>1</sup> 31 L.P.R.A §748 (This governs the land transfer of Vieques).

home to 3,897,960 English and Spanish speaking people.<sup>2</sup> Over the past forty years the population has tended to migrate from the agricultural and outlying areas to the urban areas, such as the capital city of San Juan. This migration has placed a great amount of pressure on the Puerto Rican Land Administration to regulate land and to engage in proper town planning.

## **B. Legal History**

In 1898 during the Spanish-American War, Spain lost control of Puerto Rico to the United States. The U.S. takeover ended an over four hundred year period in which Spain controlled Puerto Rico with a passive hand. Soon after the U.S. took control, however, Puerto Rico became a non-governing commonwealth of the United States.<sup>3</sup>

A gradual transition to self-government occurred from 1900 to 1940, and during this process Puerto Rico adopted legal and governmental structures that were based largely on U.S. models. Illustrating this fact, Puerto Rico revised its extant legal code to remove conflicts with federal law, the Puerto Rico Supreme Court altered its structure by adopting much of the reasoning and practices of U.S. supreme courts, and in 1948 Puerto Rico ratified a U.S.-approved constitution to administer its local affairs.<sup>4</sup> In spite of the focus on U.S. common law and government, traces of the Spanish Civil Code do still exist.

Puerto Ricans have twice voted on whether to remain a commonwealth. In 1967, sixty percent of citizens voted to remain a commonwealth. But since that time a gradual shift in attitude has occurred, illustrated by a 1993 vote in which only 48.6 percent of Puerto Ricans

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<sup>2</sup> Information obtained from [www.infoplease.com](http://www.infoplease.com).

<sup>3</sup> CIA World Factbook, at [www.odci.gov/cia/publications/factbook/geos/rq.html](http://www.odci.gov/cia/publications/factbook/geos/rq.html).

<sup>4</sup> Max K. Lowdermilk, *Agrarian Structural and Land Use Problems in Puerto Rico*, p. 25 (Pennsylvania State University, 1969) (hereinafter Lowdermilk).

wished to remain a commonwealth. In that same vote, 46.3 percent wished for statehood, and only 4.4 percent desired outright independence.<sup>5</sup>

### C. Economic Development to Conservation

After becoming a U.S. commonwealth, Puerto Rico grew into a hub for Caribbean commerce and saw a tremendous growth in economic development.<sup>6</sup> Several factors created such a result. First, American investment contributed to the local economy.<sup>7</sup> Second, programs designed to promote development were implemented.<sup>8</sup> Third, a rapid increase in urban populations<sup>9</sup> put stress on the island's limited farmland and open spaces.<sup>10</sup> Fourth, and perhaps most importantly, the Puerto Rican courts preferred urban expansion over environmental protection.

The policy of the courts to facilitate economic growth was reflected in most decisions between 1900 and 1940. These decisions promoted the efficient exploitation of land while protecting private property rights.<sup>11</sup> In *Municipal Council of Carolina v. Saldana*, for example, easements over private land were recognized to facilitate an aqueduct system.<sup>12</sup> Sometimes, however, the protection of private property rights could result in an environmental benefit.<sup>13</sup> Where the construction of roads was denied over private property, for example, roadless areas were maintained.<sup>14</sup>

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<sup>5</sup> Information obtained from [www.infoplease.com](http://www.infoplease.com).

<sup>6</sup> *Id.*; CIA World Factbook.

<sup>7</sup> Lowdermilk, at 34.

<sup>8</sup> *Id.*

<sup>9</sup> 67 Rev. Jur. U.P.R. 201, 202.

<sup>10</sup> Lowdermilk, at 34.

<sup>11</sup> 67 Rev. Jur. U.P.R. 201, 214.

<sup>12</sup> 17 P.R.R. 487 (expropriations and easements over private land allowed because the interest of the area in water extraction was of great importance to the community); see also *Torres v. Sucesion Serralles*, 57 P.R.R. 532 (1940) (defendant not allowed to expand an aqueduct system).

<sup>13</sup> *Estate of Bianchi v. Municipality of Anasco*, 6 P.R.R. 299 (1904) (easement not created over private property, thus protecting private property rights even when faced with an economic choice).

<sup>14</sup> 67 Rev. Jur. U.P.R. 201, 214.

In the 1970s, due to a limited amount of open land and a rapidly growing population, Puerto Rico government began to recognize a need for conservation. The country was one of the first to implement a program of family planning, but even so the population is expected to double in the next fifty years.<sup>15</sup> Puerto Rico is so densely populated that a shortage of land has long been recognized as a problem.

Starting in the 1970s the Puerto Rican government began to recognize a need for increased regulation and legislation.<sup>16</sup> Lands that possessed significant environmental value, such as the San Juan and El Yunque regions, were set aside by the government as protected areas.<sup>17</sup> The Puerto Rican courts began to decide cases with an eye toward conservation. For example, the Puerto Rico Supreme Court liberally interpreted the Constitution of Puerto Rico to give the legislature the greatest amount of leeway to develop laws promoting conservation. With supportive courts, the Puerto Rico legislature was able to create several important environmental land management organizations. Over time the role of these groups— such as the Environmental Quality Board, the Department of Natural Resources and Land Administration, and the Natural Patrimony Program—has become greater.

These changes were also facilitated through U.S. federal funding and the involvement of U.S. agencies.<sup>18</sup> U.S. programs that encouraged the placement of conservation easements on

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<sup>15</sup> Etienne Dusart, *An Ecomanagement Model for Puerto Rico: The Planner's View* (1975).

<sup>16</sup> 67 Rev. Jur. U.P.R. 25, 201, 202.

<sup>17</sup> J. Costonis, *The Puerto Rico Plan: Environmental Protection Through Development Rights Transfer*, p. 5 (Washington, D.C.: The Urban Land Institute, 1975) (hereinafter Costonis).

<sup>18</sup> These programs include the Agricultural Conservation Program with the incentive of up to 75% of total activity cost or a maximum of \$3,500 per person per year; the Emergency Conservation Program with the incentive of up to 64% of cost or a maximum of \$200,000 per person per disaster; the Forestry Incentives Program with the incentive of up to 65% of total activity cost or maximum of \$10,000 per person per year; the Small Watershed Program with the incentive of up to 50% of construction cost or a maximum of \$100,000 per person over life of program; the Stewardship Incentive Program with the incentive of up to 75% of total activity cost or maximum of \$10,000 per person per year; the Water Quality Incentives Projects with the incentive of payment of up to \$25 per acre plus cost sharing up to \$1,500 per person per contract; the Conservation Reserve Program (which includes the renting of private land to retire from production and to establish 10 year conservation cover) with the incentive of up to 50% of cost erosion control measures plus annual rents of up to \$50,000 per person; the Farm Debt Cancellation-

private lands—such as the Farm Debt Cancellation-Conservation Easement Program and the Farm and Ranch Lands Protection Program—were implemented in Puerto Rico. Under these programs, areas that contain unique soils and important archaeological resources<sup>19</sup> are protected. With the positive conservation easement precedent set by these programs, the Puerto Rico legislature enacted the Conservation Easement Act. This act simplified and unified the conservation easement process in Puerto Rico.

#### **D. The 2001 Puerto Rico Conservation Easement Act**

At the turn of the century the Puerto Rico Conservation Trust lobbied the legislature intensely to acknowledge that a unified law to govern conservation easements would promote the use of conservation easements. The Trust's efforts succeeded, and in 2001 the legislature enacted the Puerto Rico Conservation Easement Act. Significantly, rather than relying on the Spanish Civil Code the Puerto Rican legislature relied on the common law of the United States.<sup>20</sup> The act brought the federally authorized conservation easements<sup>21</sup> and Puerto Rico's recent judicial developments under one roof, and it now governs all conservation easement transactions in Puerto Rico.

#### **E. Government**

The current government of Puerto Rico is modeled after that of the United States and is structured in three branches: the executive, legislative, and judicial branches.<sup>22</sup>

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Conservation Easement Program with the incentive of full or partial debt cancellation or maximum of 33% of principal for current borrowers; the Integrated Farm Management Program Option with the incentive of annual price support for acres planted to conserving uses; and the Farmland Protection Program with the incentive of a conservation easement.

<sup>19</sup> Legislative Assembly, Puerto Rico Senate, October 15, 2001.

<sup>20</sup> 32 Rev. Jur. U.I.P.R. 291, 291.

<sup>21</sup> SG040 ALI-ABA 1085.

<sup>22</sup> Information obtained from [www.infoplease.com](http://www.infoplease.com).

### **1. *Executive Branch***

Although the president of the United States is the head of the Puerto Rican executive, island residents do not vote in the presidential election. The governor of Puerto Rico, however, is elected by popular vote to terms of four years.

### **2. *Legislative Branch***

The legislative branch consists of a twenty-eight member Senate and a fifty-one member House of Representatives. From the pool of legislators, a nonvoting “commissioner” who sits at the U.S. House of Representatives is elected by popular vote. Both Senate and House members are elected for four year terms. In addition, the U.S. Congress maintains similar powers over Puerto Rico as it does over the states in the union.

### **3. *Judicial Branch***

Puerto Rico has both a system of commonwealth courts and a Federal District Court of Puerto Rico.<sup>23</sup> Like the division between state and federal courts, the federal court only hears cases in which it has subject matter or personal jurisdiction so land disputes are not heard in the federal court unless a federal statute is involved. When a federal court does hear a case that involves a Puerto Rico statute, the federal court will defer greatly to previous interpretations by the Puerto Rican Supreme Court.<sup>24</sup> The trial court for issues of federal law is the Court of First Instance, with appeals heard by the federal district court. Appeals from the federal district court are heard by the United States Supreme Court. The U.S. Supreme Court is the ultimate appellate court for both the federal and Commonwealth courts.

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<sup>23</sup> 67 Rev. Jur. U.P.R. 201, 204.

<sup>24</sup> Stanley K. Laughlin, *The Law of United States Territories and Affiliated Jurisdictions* (hereinafter Laughlin).

The commonwealth trial courts are called Municipal Courts, and appeals are heard by the Puerto Rico Supreme Court. Judges to both these courts are appointed by the Governor.<sup>25</sup> While the civil laws of Puerto Rico are heavily influenced by the Spanish Civil Code, local courts often rely on common law jurisprudence to interpret these laws.<sup>26</sup> The Puerto Rico Supreme Court draws heavily on American case law in making decisions,<sup>27</sup> especially in the area of equitable servitudes.<sup>28</sup>

Few courts on the U.S. mainland rival the receptivity of the Puerto Rico Supreme Court in matters of conservation and land management, however. As the public has realized the need for both, the courts have followed.<sup>29</sup> In *Puerto Rico v. Rosso*,<sup>30</sup> the court stated that both private and public land must be considered in land management.<sup>31</sup> The court also states that private land rights must be balanced against the needs of society as a whole, an idea similar to a public trust. As mentioned earlier, the court has interpreted the Constitution of Puerto Rico to allow for the greatest amount of conservation.<sup>32</sup>

#### **F. Framework of Local and Federal Law**

Puerto Rico operates under a dual system of laws—federal and local. The supreme law of the land is the U.S. Constitution and U.S. federal laws are presumed valid. In the area of private lands conservation in Puerto Rico, however, commonwealth laws are most applicable. The current political arrangements in Puerto Rico are the result of a treaty signed in 1952. Puerto Rico, as a commonwealth, belongs to the United States but is neither a state nor an independent nation. In comparison to other U.S. territories, Puerto Rico is given significant

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<sup>25</sup> Information obtained from [www.infoplease.com](http://www.infoplease.com).

<sup>26</sup> 32 Rev. Jur. U.I.P.R 291.

<sup>27</sup> 67 Rev. Jur. U.P.R. 201, 204.

<sup>28</sup> 32 Rev. Jur. U.I.P.R 291.

<sup>29</sup> Costonis, at 3.

<sup>30</sup> 955 P.R.R. 488 (1967) (holding that the Land Administration Act is constitutional).

<sup>31</sup> *Id.*

<sup>32</sup> *Commonwealth v. Rosso*, 95 P.R.R. 488 (1967).

control over its local affairs. For example, Puerto Rico’s governor and legislature control all internal affairs, including taxes.<sup>33</sup>

### ***1. U.S. Constitution***

The supremacy clause of the U.S. Constitution is equally applicable to Puerto Rico.<sup>34</sup> Accordingly, Puerto Rico’s Civil Code may not conflict with the U.S. Constitution.<sup>35</sup> If such a conflict was asserted, however, the issue would be decided by the federal district court and would potentially be ruled upon by the U.S. Supreme Court.

### ***2. Puerto Rico Federal Relations Act***

The Puerto Rico Federal Relations Act<sup>36</sup> recognized government by consent for the people of Puerto Rico. Although this is not the same as a sovereign to sovereign compact, it allowed Puerto Rico to organize a government and adopt a constitution of their own. In addition, the statutory relationship between Puerto Rico and the U.S. is prescribed by the act, which applies federal laws unless the law is “locally inapplicable” and creates a presumption that federal laws are applicable to Puerto Rico.<sup>37</sup> Questions of applicability are decided by the Federal District Court of Puerto Rico,<sup>38</sup> and often turn on whether Congress expressed a sufficient intent to do make them applicable.<sup>39</sup>

As a result of the Federal Relations Act, Puerto Rico is required to participate in federally mandated environmental legislation such as the Clean Water Act and Clean Air Act. In addition,

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<sup>33</sup> Puerto Ricans are exempt from the Internal Revenue Code, at [www.wordig.com/definition/Puerto\\_Rico](http://www.wordig.com/definition/Puerto_Rico).

<sup>34</sup> United States Constitution, Article VI.

<sup>35</sup> *Puerto Rico Herald*, No. 00-2088.

<sup>36</sup> 48 U.S.C. 731b.

<sup>37</sup> *Id.*

<sup>38</sup> *Puerto Rico Herald*, No. 00-2088, citing *United States v. Quinones*, 758 F.2d 40, 43 (1<sup>st</sup> Cir. 1985).

<sup>39</sup> *Puerto Rico Herald*, No. 00-2088.

the Commonwealth may, and does, voluntarily participate in federally created conservation programs—such as the Farm and Ranch Lands Protection Program.<sup>40</sup>

### **3. *Puerto Rico Constitution***

The Constitution of Puerto Rico governs all of the courts in the commonwealth<sup>41</sup> and requires the local governments to conserve natural resources and the environment for the benefit of the community as a whole.<sup>42</sup> The Puerto Rico Constitution, like the U.S. Constitution, contains a takings clause which requires the government to compensate private landowners when their land is taken for a governmental purpose.<sup>43</sup>

### **4. *Commonwealth Policy***

The public policy of Puerto Rico is to “conserve, develop, and use its natural resources in the most effective manner possible for the general welfare of the community; [and] to conserve and maintain buildings and places declared by the Legislative Assembly to be of historic or artistic value....”<sup>44</sup>

## **II. RIGHTS AND RESTRICTIONS PERTAINING TO PRIVATE LANDS**

After enactment by the legislature of Puerto Rico, the statutory rights and restrictions pertaining to private land are placed in the Civil Code of Puerto Rico.

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<sup>40</sup> See US Farm Bills, and EPA Region 2, at [www.epa.gov](http://www.epa.gov); see also 12 LPRA § 1131(16)(B); 12 LPRA § 1135; 33 U.S.C.A. § 1251; and 42 U.S.C.A. § 7410.

<sup>41</sup> *Puerto Rico Herald*. No. 00-2088 citing *United States v. Quinones*, 758 F.2d 40,43 (1st Cir. 1985).

<sup>42</sup> Constitution of the Free State Association of Puerto Rico, Section 19, Article 6 (hereinafter Puerto Rico Constitution).

<sup>43</sup> *Commonwealth v. Perez*, 98 D.P.R. 781 (1970); *Waymouth Corp. v. Planning Board*, 80 P.R.R. 599 (1958).

<sup>44</sup> Puerto Rico Constitution, Section 19, Article 6.

## A. Ownership of Private Property

### 1. *The Rights of Ownership*

The ownership of property in Puerto Rico, and the associated rights of owners, is a heavily codified area of law.<sup>45</sup> As a result, land ownership is relatively stable and is a well-defined area of law in the Commonwealth.

The statutory definition of property “ownership” is defined as the right to exclude all others;<sup>46</sup> this right confers the ability to enjoy and dispose of the property without limitations, except those established by law.<sup>47</sup>

### 2. *Restrictions on Land Alienation and Use*

Land in Puerto Rico may be freely sold unless there is a general restriction on the land. Such restrictions established by law include easements or servitudes,<sup>48</sup> profits,<sup>49</sup> or the rights of other tenants in common or co-owners of property.<sup>50</sup> The Code also recognizes rights of way and use rights. In general, the restrictions are defined similarly to U.S. common law definitions. Servitudes are codified particularly heavy.

A servitude is defined as any “charge imposed upon an immovable for the benefit of another tenement belonging to a different owner.”<sup>51</sup> Legal servitudes include those relating to water, rights of way, light and view, and works for certain constructions and plantings.<sup>52</sup> Servitudes for pasturage and use of woodland products are also defined by statute.<sup>53</sup> Positive and negative servitudes are allowed, and servitudes may be continuous, discontinuous, apparent, or

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<sup>45</sup> See Puerto Rico Civil Code, Title 31.

<sup>46</sup> 31 L.P.R.A. § 1111.

<sup>47</sup> *Id.*

<sup>48</sup> 31 L.P.R.A. § 1112.

<sup>49</sup> 31 L.P.R.A. § 1113-11145.

<sup>50</sup> *Id.* at Sections 1271-1291.

<sup>51</sup> Ch. 181 of Code.

<sup>52</sup> 31 L.P.R.A. § 1701-§ 1805.

<sup>53</sup> 31 L.P.R.A. § 1827 - § 1831.

not apparent.<sup>54</sup> Servitudes are indivisible and may be either legal (created at law) or voluntary (created at the will of the owner).<sup>55</sup> Servitudes may be acquired by title or by prescription; but continuous and not apparent servitudes and discontinuous and either apparent or not apparent servitudes may only be acquired by title.<sup>56</sup>

Other rights and duties of dominant and servient owners are controlled by statute.<sup>57</sup> For example, the dominant estate must not alter the servient estate so as to impair the servient estate.<sup>58</sup> Servitudes may also be extinguished, which occurs through either a merger of the dominant and servient tenements with one owner, nonuse for twenty years, a change in the servient tenement so that it may no longer be used or enjoyed, the fulfillment of conditions on a temporary or conditional servitude, or by redemption agreed upon between the dominant and servient owners.<sup>59</sup>

### **3. *Establishing Title***

The processes of establishing title and the succession of title are also contained in the code.<sup>60</sup> In general, land may be acquired through occupancy, gift, testate or intestate succession, or in consequence of certain traditional contracts.<sup>61</sup> In addition, land may be donated or put into trust.<sup>62</sup> An inter vivos gift of land may be made gratuitously only where there is no attached condition, onerously where the donee is burdened with a charge upon the value of the land, or

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<sup>54</sup> 31 L.P.R.A. § 1634, § 1635.

<sup>55</sup> 31 L.P.R.A. § 1637, § 1638.

<sup>56</sup> 31 L.P.R.A. § 1651, § 1653.

<sup>57</sup> 31 L.P.R.A. § 1671-1673.

<sup>58</sup> 31 L.P.R.A. § 1671, § 1673.

<sup>59</sup> 31 L.P.R.A. § 1681.

<sup>60</sup> Title 31, Sections 1113-1145, 1146, 1147-1176

<sup>61</sup> 31 L.P.R.A. § 1931.

<sup>62</sup> *Davila v. Agrait*, 116 D.P.R. 549 (1985).

remuneratively where the donor gives for services or merits of the donee.<sup>63</sup> All gifts of real property must be made in a public instrument.<sup>64</sup>

## **B. Private Land Administration**

### ***1. Institutional Framework***

Land administration in Puerto Rico is not as fragmented as it is in many other countries.<sup>65</sup> Private land in Puerto Rico, in fact, is administered by several agencies, each with individually defined roles in the overall regulatory scheme. The Environmental Quality Board, which operates in conjunction with the U.S. Environmental Protection Agency (EPA), is charged with enforcing federal environmental legislation on Commonwealth land and administers the Puerto Rico Conservation Trust.<sup>66</sup> Other agencies include the Planning Board—responsible for zoning and all other regulation over land use, the Land Administration—part of the Department of Economic and Commercial Development,<sup>67</sup> and the Department of Natural and Environmental Resources—overseer of the implementation and administration of all federal environmental programs.<sup>68</sup>

### ***2. Commonwealth Regulatory Agencies***

#### **a. Environmental Quality Board**

The three-member Environmental Quality Board (Board) was created in 1970 and holds a broad mandate to implement and enforce environmental standards. The Board is instrumental in both local environmental protection efforts and as a liaison between the Commonwealth and the EPA.

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<sup>63</sup> 31 L.P.R.A. § 1983.

<sup>64</sup> 31 L.P.R.A. § 2010.

<sup>65</sup> Costonis, 3.

<sup>66</sup> 12 L.P.R.A. § 1124.

<sup>67</sup> 2 Anderson's Am. Zoning § 10:11(4<sup>th</sup> ed.); Lowdermilk.

<sup>68</sup> Costonis, 3.

On a local level, the Board develops and recommends conservation policy to the Governor.<sup>69</sup> Once policy is fixed, the Board may, after an administrative hearing,<sup>70</sup> fine and/or file civil actions against any violators.<sup>71</sup> The fines and judgments collected are used to mitigate environmental damage caused by the violation itself. The Board also keeps a register of environmental data<sup>72</sup> and issues permits or licenses as needed to regulate air quality and pollution.<sup>73</sup>

As the Commonwealth's liaison to the Federal government, the Board acts somewhat as the Commonwealth arm of the EPA. The Clean Air Act, Clean Water Act, and the Solid Waste Disposal act are examples of federal laws that the Board is charged with implementing and enforcing at home.<sup>74</sup> To accomplish this, the EPA provides federal matching funds under Title IV of the Clean Water Act, which is also distributed to local programs.<sup>75</sup>

Operating as a branch of the Board, the Puerto Rico Conservation Trust (Trust) was created by statute for the purpose of exchanging information on legal developments and experiences concerning environmental protection issues with Latin American and Caribbean governments.<sup>76</sup> The Trust also tries to secure international agreements with the governments of Central and South America and various international entities.<sup>77</sup>

The Board acts as trustee for funds raised from private sources and funds generated by the Environmental Quality Board for this purpose. Interest and investment returns on these

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<sup>69</sup> 12 L.P.R.A. § 1131.

<sup>70</sup> Environmental Practice Group of Fiddler, Gonzalez & Rodriguez, Puerto Rico Environmental Law Handbook, 3<sup>rd</sup> ed. (2003).

<sup>71</sup> 12 L.P.R.A. § 1141(10)(A).

<sup>72</sup> 12 L.P.R.A. § 1131 (37)(B).

<sup>73</sup> 12 L.P.R.A. § 1131(23).

<sup>74</sup> 12 L.P.R.A. § 1131(16)(B), § 1135.

<sup>75</sup> 12 L.P.R.7A. § 1135(a).

<sup>76</sup> 12 L.P.R.A. § 1142.

<sup>77</sup> 12 L.P.R.A. § 1142(b).

funds are used to operate the Trust. To facilitate, the Trust may obtain tax-exempt loans from private businesses<sup>78</sup> and issue obligations that are eligible for tax exemption.<sup>79</sup>

**b. Planning Board**

The Planning Board implements zoning and land regulations on private land.<sup>80</sup> The three members of the Board are nominated by the governor and subject to approval from the Commonwealth Senate.<sup>81</sup> The Board submits for consideration by the legislature any proposed deviations from the general development model, including regulations promulgated to control the use and development of land with special qualities.<sup>82</sup>

**c. Land Administration**

The Land Administration (Administration) is allowed to acquire property in any lawful manner, including by purchase or eminent domain.<sup>83</sup> “Land banking,” or the Administration practice of purchasing, retaining, or disposing of land for a number of purposes and without many restrictions, is allowed because it is believed to encourage the wise use of land, promote public works, enable housing and industrial development programs, and prevent inflation.<sup>84</sup> It is also seen as a possible way to preserve natural resources and water, control flooding, and develop public parks and green areas.<sup>85</sup> The Administration also works with other government agencies to provide services to the community.<sup>86</sup>

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<sup>78</sup> 13 L.P.R.A. § 10025.

<sup>79</sup> 13 L.P.R.A. § 10013.

<sup>80</sup> Special Consulting Group for Land Use Policies and Controls Project, San Juan, Puerto Rico. Puerto Rico Land Use Regulation (April 1969).

<sup>81</sup> Regimen de la Propiedad Privada en el Estado Libre Asociado de Puerto Rico, 102.

<sup>82</sup> Environmental Practice Group of Fiddler, Gonzalez & Rodriguez, Puerto Rico Environmental Law Handbook, 3<sup>rd</sup> ed. (2003).

<sup>83</sup> 24 L.P.R.A. § 311f(j).

<sup>84</sup> 2 Anderson’s Am. Zoning § 10:11(4th ed.)

<sup>85</sup> 2 Anderson’s Am. Zoning § 10:11(4th ed.); 24 L.P.R.A. § 311(f)(x) and § 311(s)

<sup>86</sup> Department of Economic and Commercial Development; [www.ddecpr.com](http://www.ddecpr.com)

#### **d. Department of Natural and Environmental Resources**

The Department of Natural and Environmental Resources (DNER), in conjunction with the Board, creates and implements conservation programs.<sup>87</sup> The DNER maintains a police force—the Natural Resources Rangers Corps—to enforce environmental regulations. The secretary of the Department can issue injunctions on activities that violate Commonwealth environmental regulations, and can issue fines for continued violations.<sup>88</sup>

#### **3. *Municipal Governments***

The Autonomous Municipalities Act<sup>89</sup> provides a basis for municipal governments to exercise greater control over land regulation and use. Municipalities may request the delegation of power to develop land use and zoning regulations. The municipalities may then design mechanisms to grant land segregation permits, construction permits, and others.<sup>90</sup>

#### **4. *Other Entities Involved in Conservation***

The Puerto Rico Industrial Development Company, Department of Public Works, Department of Health, Department of Agriculture, and the Institute of Puerto Rican Culture may also at times be delegated with certain duties to implement specific conservation goals required by individual acts.<sup>91</sup>

### **C. Land Registration, Transfer, and Dispute Settlement**

The recording system in Puerto Rico is effective at registering titles, but some delays occur between the application and actual registration. As security, however, many parties apply

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<sup>87</sup> See 12 L.P.R.A. § 1129

<sup>88</sup> 12 L.P.R.A. § 1201; Environmental Practice Group of Fiddler, Gonzalez & Rodriguez, Puerto Rico Environmental Law Handbook, Third Edition. 2003.

<sup>89</sup> 21 L.P.R.A. § 4001.

<sup>90</sup> Environmental Practice Group of Fiddler, Gonzalez & Rodriguez, Puerto Rico Environmental Law Handbook, 3rd ed. (2003).

<sup>91</sup> *Id.*

for title insurance to cover risks incurred during this period of time.<sup>92</sup> In general land in Puerto Rico is properly registered with the Office of the Registrar,<sup>93</sup> where it is public information.<sup>94</sup>

In order for a transfer of land in Puerto Rico to be valid, the land and any attached servitudes must be recorded.<sup>95</sup> Unrecorded titles are not prejudicial to third parties, however.<sup>96</sup>

Land disputes are handled by municipalities, which are separate and independent of the Puerto Rico government.<sup>97</sup> Each municipality is granted certain powers through legislation.<sup>98</sup>

### **III. LEGAL TOOLS FOR PRIVATE LANDS CONSERVATION IN PUERTO RICO**

#### **A. General Introduction to Legal Tools**

In addition to statutorily authorized interests in land, the common law recognizes a number of interests in land that have the potential to facilitate the goal of private lands conservation. Among these interests are real covenants, equitable servitudes, easements and profits. It is important to note, however, that while the common law recognizes these interests, it has traditionally imposed requirements that—in many instances—render their use problematic for conservation purposes. The Restatement (Third) of Property has simplified the law governing real covenants, equitable servitudes, easements and profits by combining the rules governing these interests into a single doctrine—that of the Servitude. This modernized law of servitudes has also largely eliminated the common law impediments to the use of these interests for conservation purposes.

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<sup>92</sup> 407 PLI/ Real 209.

<sup>93</sup> See Land Administration section.

<sup>94</sup> 31 L.P.R.A. § 1871- § 1875.

<sup>95</sup> 31 L.P.R.A. § 1653.

<sup>96</sup> 31 L.P.R.A. § 1872.

<sup>97</sup> 12 L.P.R.A. § 4003 Annotation, listing the Creation of New Municipalities and the Special Commission to decide issues of property rights, Act June 30, 1969 No. 149 p. 553, Section 4, creating the municipality of Canoanitas; the municipality of Florida, and the municipality of Barceloneta. See 21 L.P.R.A. § 4005

<sup>98</sup> 21 L.P.R.A. § 4005

## 1. *Real Covenants*

A real covenant is a promise concerning the use of land that (1) benefits and burdens both the original parties to the promise and their successors and (2) is enforceable in an action for damages.<sup>99</sup> A real covenant gives rise to personal liability only. It is also enforceable only by an award of money damages, which is collectible out of the general assets of the defendant.<sup>100</sup> If the promisee sues the promisor for breach of the covenant, the law of contracts is applicable. If, however, a person who buys the promisee's land is suing, or a person who buys the promisor's land is being sued, then the law of property is applicable.<sup>101</sup> The rules of property law thus determine when a successor owner can sue or be sued on an agreement to which he or she was not a party. Two points are essential to understanding the function of these rules. First, property law distinguishes between the original parties to the covenant and their successors. Second, each real covenant has two "sides"—the burden (the promisor's duty to perform the promise) and the benefit (the promisee's right to enforce the promise).

In order for the successor to the original promisor to be obligated to perform the promise—that is, for the *burden* to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must "touch and concern" land;<sup>102</sup> (4) horizontal privity must exist;<sup>103</sup> (5) vertical privity must exist;<sup>104</sup> and

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<sup>99</sup> Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

<sup>100</sup> This historic remedy for breach of a real covenant is damages, measured by the difference between the fair market value of the benefited property before and after the defendant's breach.

<sup>101</sup> English courts never extended the concept of real covenants outside the landlord-tenant context. American courts, however, extended it to promises between fee simple owners or neighbors.

<sup>102</sup> For the covenant to "touch and concern land," it must relate to the direct use or enjoyment of the land. A covenant that restricts the development on a parcel meets this requirement.

<sup>103</sup> The common law traditionally requires that the original parties have a special relationship in order for the burden to run, called horizontal privity. In some U.S. states, horizontal privity exists between the promisor and the promisee who have mutual, simultaneous interests in the same land (e.g., landlord and tenant). Other U.S. states also extend horizontal privity to the grantor-grantee relationship.

(6) the successor must have notice of the covenant. In contrast, the common law traditionally required only four elements for the *benefit* of a real covenant to run to successors: (1) the covenant must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to benefit their successors; (3) the benefit of the covenant must touch and concern land; and (4) vertical privity must exist.

The Restatement (Third) of Property (Servitudes) has eliminated a number of these traditional common law requirements. The horizontal privity requirement and the prohibition on third party beneficiaries have been entirely eliminated. Also, the prohibition on covenant benefits in gross, the touch and concern requirement, and the vertical privity doctrine have been replaced with doctrines designed to more effectively accomplish their respective purposes. Pursuant to the Restatement's approach, a covenant is a servitude if either the benefit or the burden runs with the land. The *benefit or burden* of a real covenant runs with the land where (1) the parties so intend; (2) the covenant complies with the Statute of Frauds; and (3) the covenant is not otherwise illegal or violative of public policy.<sup>105</sup>

## 2. *Equitable Servitudes*

The primary modern tool for enforcing private land use restrictions is the equitable servitude.<sup>106</sup> An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by

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<sup>104</sup> Vertical privity concerns the relationship between an original party and his or her successors. Vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.

<sup>105</sup> Restatement (Third) of Property (Servitudes) §§ 1.3, 1.4 (2000). Under the Restatement, a covenant burden or benefit that does not run with land is held "in gross." A covenant burden held in gross is simply a contractual obligation that is a servitude because the benefit passes automatically to successors to the benefited property. A covenant benefit held in gross is a servitude if the burden passes automatically to successors to the land burdened by the covenant obligation.

<sup>106</sup> There is some doctrinal confusion regarding the difference—if any—between an equitable servitude and a conservation easement. However, under the approach adopted by the Restatement (Third) of Property, easements, profits, covenants—including equitable servitudes, are governed by a single body of law. See Susan F. French, *Highlights of the new Restatement (Third) of Property: Servitudes*, Real Property, Probate and Trust Journal 226, 227 (2000).

injunction. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,<sup>107</sup> for the *burden* of an equitable servitude to bind the original promissor's successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;<sup>108</sup> (2) the original parties must intend to burden successors; (3) the promise must "touch and concern" land; and (4) the successor must have notice of the promise. In contrast, the traditional common law only required three elements to be met for the *benefit* to run to successors: (1) the promise must be in writing or implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must "touch and concern" land.

Under the law of servitudes set forth by the Restatement (Third) of Property (Servitudes), there are eight basic rules that govern expressly created servitudes:<sup>109</sup> (1) a servitude is created by a contract or conveyance intended to create rights or obligations that run with the land if the servitude complies with the Statute of Frauds; (2) the beneficiaries of a servitude are those intended by the parties; (3) servitude benefits held in gross are assignable unless contrary to the intent of the parties;<sup>110</sup> (4) a servitude is valid if it is not otherwise illegal or against public

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<sup>107</sup> Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

<sup>108</sup> If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, the majority of U.S. courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his or her retained lots.

<sup>109</sup> As noted above, under the "integrated approach" adopted by the Restatement (Third), easements, real covenants, profits and equitable servitudes are all categorized as servitudes.

<sup>110</sup> Restatement (Third) of Property (Servitudes) § 2.6 (1)–(2) (2000). Early law prohibited the creation of servitude benefits in gross and the creation of servitude benefits in persons who were not immediate parties to the transaction. However, under the Restatement (Third) of Property (Servitudes), the benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property. Also, the benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

Homeowner associations are entitled to enforce covenants despite owning the fact that they do not own land. See, e.g., *Streams Sports Club, Ltd. v. Richmond*, 109 Ill.App.3d 689, 440 N.E.2d 1264 (1982), *aff'd*, 99 Ill.2d 182,

policy; (5) a servitude is interpreted to carry out the intent or legitimate expectations of the parties, without any presumption in favor of free use of land; (6) servitude benefits and burdens run to all subsequent possessors of the burdened or benefited property;<sup>111</sup> (7) servitudes may be enforced by any servitude beneficiary who has a legitimate interest in enforcement, whether or not the beneficiary owns land that would benefit from enforcement; and (8) servitudes that have not been terminated may be enforced by any appropriate legal and equitable remedies.

**a. Equitable Servitudes in Puerto Rico**

The Supreme Court of Puerto Rico first adopted the principle of the equitable servitude in *Gines v. Matta*. Under the Civil Code, an appurtenant easement is not created if both the dominant and servient estate have the same owner. The Court was able to recognize this unity of ownership by adopting Common Law precedent from U.S. courts, rather than utilizing extent Civil Law precedent. After *Gines*, the owner of the servitude has the right to equitable injunctive relief.

The Common Law principals of *Gines* were confirmed in *Colon v. San Patricio*. The Puerto Rico Supreme Court held that equitable servitudes would be governed under U.S. common law unless in conflict with the laws of Puerto Rico. Since *Colon*, the Court has never found a conflict, and the conservation easement has been built on this foundation of precedent.

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457 N.E.2d 1226 (1983); *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill.App.2d 186, 136 N.E.2d 556 (1956); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

Courts have also held that developers are entitled to enforce covenants after selling all their lots if intended to have the power to do so. See, e.g., *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N.E. 216 (1911); *Christiansen v. Casey*, 613 S.W.2d 906 (Mo.Ct.App.1981).

Even where a conservation easement is not authorized by statute, courts have recognized the benefit in gross as a valid and enforceable interest. See e.g., *Bennett v. Commissioner of Food and Agriculture*, 576 N.E.2d 1365 (Mass.1991) (where beneficiary of a restriction is the public and restriction reinforces a legislatively stated public purpose, old common law rules barring creation and enforcement of easements in gross have no continuing force; question is whether bargain contravened public policy when made and whether enforcement is consistent with public policy and reasonable).

<sup>111</sup> Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.

### 3. *Conservation Easements*

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right, granted by an owner of real property, to use all or part of his or her property for specific purposes.<sup>112</sup> Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a *conservation easement*.<sup>113</sup> A conservation easement is thus a voluntary, legally enforceable agreement in which a landowner agrees (usually with a governmental entity or NGO) to limit the type and amount of development that may occur on his or her property in order to achieve the goal of conservation. They are legally recorded deed restrictions that “run with the land” and can be obtained voluntarily through donation or purchase from the landowner.

Traditionally, an easement was “affirmative” (carrying rights to specified actions) and “appurtenant” (attached to a neighboring parcel of land). For example, one landowner might hold an easement in the land of a neighbor, allowing him or her to cross the neighbor’s property or draw water from the neighbor’s well. In contrast to conventional easements, conservation easements are generally “negative” (prohibiting specified actions) and “in gross” (that is, they may be held by someone other than the owner of a neighboring property). While a conventional easement involves the conveyance of certain affirmative rights to the easement holder, an easement for conservation purposes involves the relinquishment of some of these rights and a conferral of power in the new holder of the rights to enforce the restrictions on the use of the property. This is a critical distinction—the landowner relinquishes the right to develop the land, but that right is not conveyed to the easement holder. That particular right (to develop the land) is

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<sup>112</sup> Black’s Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).

<sup>113</sup> Depending on the type of resource they protect, easements are frequently referred to by different names—e.g., historic preservation easements, agricultural preservation easements, scenic easements, and so on.

extinguished.<sup>114</sup> What the easement holder does acquire is the right to enforce the land-use restrictions.

To understand the concept of an easement, it is helpful to think of owning land as holding a bundle of rights—a bundle that includes the right to occupy, lease, sell, develop, construct buildings, farm, restrict access or harvest timber, and so forth. A landowner may give away or sell the entire bundle, or just one or two of those rights. For instance, a landowner may give up the right to construct additional buildings while retaining the right to grow crops. In ceding a right, the landowner “eases” it to another entity, such as a land trust. However, in granting an easement over the land, a landowner does not give away the entire bundle of ownership rights—but rather forgoes only those rights that are specified in the easement document.<sup>115</sup>

#### **a. Appurtenant Conservation Easements**

In legal terms, conservation easements generally fall into one of two categories: (1) *appurtenant easements*; and (2) *easements in gross*. An appurtenant easement is an easement created to benefit a particular parcel of land; the rights effected by the easement are thus *appurtenant* or *incidental* to the benefited land. Put differently, if an easement is held incident to ownership of some land, it is an appurtenant easement. The land subject to the appurtenant easement is called the *servient estate*, while the land benefited is called the *dominant estate*. Unless the grant of an appurtenant easement provides otherwise, the benefit of the easement is

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<sup>114</sup> Conservation easements generally extinguish development rights. However, with certain types of agreements—such as those involving *purchased development rights* (PDRs)—the development rights are not necessarily extinguished, but instead become the property of the easement holder. PDRs are generally classified as easements in gross. For a more extensive discussion of PDRs, please refer to Part I § A.6.

<sup>115</sup> The grantor of a conservation easement remains the title holder, the nominal owner of the land. The landowner conveys only a part of his or her total interest in the land—specifically, the right to develop the land. However, the landowner retains the right to possess, the right to use (in ways consistent with the easement), and the right to exclude others. Daniel Cole, *Pollution and Property* 17 (2002).

automatically transferred with the dominant estate—meaning that it “runs with the land.”<sup>116</sup> Under the majority U.S. common law authorities, an appurtenant easement does not require the dominant and servient estates to be adjacent to one another—an easement may be appurtenant to noncontiguous property if both estates are clearly defined and if it was the parties’ intent that the easement be appurtenant.<sup>117</sup> There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.<sup>118</sup> In such jurisdictions, there are a number of ways to meet—or potentially relax—the adjacency requirement while furthering the goal of private lands conservation.

### **b. Conservation Easements in Gross**

Unlike an appurtenant easement, an easement in gross is not created for the benefit of any land owned by the owner of the easement, but instead attaches personally to the easement owner—regardless of whether the owner of the easement owns any land.<sup>119</sup> At common law an easement in gross could not be transferred. Today, however, there are many jurisdictions where

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<sup>116</sup> Roger Bernhardt and Ann Burkhart, *Real Property in a Nutshell* 191, 214 (4th ed. 2000). An interest “runs with the land” when a subsequent owner of the land has the burden or benefit of that interest. An appurtenant easement runs with the land since the servient estate remains subject to it after being transferred, and the dominant estate retains the benefit after being transferred. With an easement in gross, the benefit cannot run with the land as there is no dominant estate—however, provided certain requirements are met, the burden can run with the land.

<sup>117</sup> *Verzeano v. Carpenter*, 108 Or.App. 258, 815 P.2d 1275 (1991) (“[W]e agree with the majority view that an easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties’ intent that it be appurtenant.”) (citing 7 *Thompson on Real Property* § 60.02(f)(4)); see also *Day v. McEwen*, 385 A.2d 790, 791 (Me.1978) (enforcing reserved “right of an unobstructed view” over servient tenement where dominant tenement was on the other side of a public road); *Private Road’s Case*, 1 Ashm. 417 (Pa.1826) (holding that a circumstance in which a navigable river intervenes between a meadow and an island is no legal reason why a way across the former should not be appurtenant to the latter); *Saunders Point Assn., Inc. v. Cannon*, 177 Conn. 413, 415, 418 A.2d 70 (1979) (holding that while an easement appurtenant must be of benefit to the dominant estate, the servient estate need not be adjacent to the dominant estate); *Woodlawn Trustees, Inc. v. Michel*, 211 A.2d 454, 456 (1965) (holding that in cases of noncontiguous parcels, the easement over the land of the servient tenement is valid and enforceable if, by means of a right of way of some sort which traverses land of another, the servient tenement benefits the dominant tenement).

<sup>118</sup> Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23 (2003).

<sup>119</sup> Examples of typical easements in gross include the right of a non-owner to harvest timber, mine minerals, extract water or other items from the owner’s land.

legislation and more modern trends in the relevant common law have authorized the transferability of easements in gross.<sup>120</sup>

As noted above, both an appurtenant conservation easement and a conservation easement in gross meet the legal criteria for what is known as a negative easement—an easement that prohibits the owner of the servient-estate from doing something. Conservation easements are negative in character because they prevent the owner of the burdened estate from developing the land, typically in any way that would alter its existing natural, open, scenic, or ecological condition. However, while the common law has generally recognized and enforced certain limited types of negative easements, it has generally refused to enforce negative easements in gross. Due to doubts over the validity and transferability of negative easements in gross at common law, statutes have been enacted in most U.S. states authorizing conservation easements—both in gross and appurtenant.<sup>121</sup>

#### **4. *Uniform Conservation Easement Act***

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA). The Act’s primary objective is to enable “private parties to enter into consensual arrangements with charitable organizations or

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<sup>120</sup> Restatement (Third) of Property, Servitudes, §4.6 (T.D. No. 4, 1994), provides that all easements in gross are assignable unless contrary to the intent of the parties. It eliminates the restriction of the first Restatement that only commercial easements in gross are assignable.

<sup>121</sup> Jesse Dukeminier and James E. Krier, Property 856 (4th ed. 1998). Traditionally, courts have disfavored interests conveyed “in gross” and negative easements because they can cloud title and may raise recordation problems—the difficulty being notice to future landholders. However, in the U.S. legislation with proper recordation requirements and limitations upon those who may hold these kinds of interests have largely overcome these objections.

governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments.”<sup>122</sup>

The UCEA defines “conservation easement” as “[a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include: (1) retaining or protecting natural, scenic, or open-space values of real property; (2) assuring its availability for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property.”<sup>123</sup>

The UCEA has made conservation easements more certain devices by eliminating several common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.<sup>124</sup>

A unique feature of the Act is the “third-party enforcement right.” Under the Act, an easement may empower an entity other than an immediate holder to enforce its terms. The third-party must be a charitable organization or governmental body eligible to be a holder. Additionally, one organization may own the easement, but delegate enforcement to another, provided the terms of the easement allow it.

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<sup>122</sup> UCEA, Prefatory Note, 12 U.L.A. 166 (1996). An online copy of the UCEA is available at the following address: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm>.

<sup>123</sup> UCEA, §1(1)—Definitions.

<sup>124</sup> § 4, 12 U.L.A. 179.

## **B. Conservation Easements in Puerto Rico Prior to the Conservation Easement Act**

Before the Puerto Rico Conservation Easement Act, conservation easements could be created through programs such as the Natural Patrimony Program<sup>125</sup> and laws such as the Puerto Rico Forest Act.<sup>126</sup> Conservation easements that were created prior to the Conservation Easement Act remain in effect.

## **C. Puerto Rico Conservation Easement Act**

The passage in 2001 of the Puerto Rico Conservation Easement Act moved conservation easements out from under the restrictions of the Spanish Civil Code to the more lenient U.S. administrative law,<sup>127</sup> and importantly, allowed dominant and servient estates to be owned by the same entity.<sup>128</sup> The express purpose of the Act is to accomplish the preservation of open spaces, undeveloped land, forest, agricultural land, river basins, and historic buildings; but the Act has also been used for improving air and water quality.

### ***1. Creating Conservation Easements Under the Act***

In all cases, land must be certified as important for conservation before an easement will be awarded. For private landowners, property must be inventoried by the Natural Heritage Program of the Department of Natural and Environmental Resources. To be certified, property must be of substantial natural value, be highly productive agricultural land, or possess a great cultural or historical value.<sup>129</sup> In making conservation easement determinations, the Act requires that the ultimate goal of conservation and sustainable development be considered. Significantly,

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<sup>125</sup> 12 L.P.R.A. § 1225.

<sup>126</sup> 12 L.P.R.A. 196.

<sup>127</sup> Legislative Assembly, Puerto Rico Senate, October 15, 2001.

<sup>128</sup> *Id.*

<sup>129</sup> 12 L.P.R.A. § 785(m).

NGOs may apply for conservation easements on any property it considers important for environmental preservation.<sup>130</sup>

Conservation easements may be created as either a personal or real property servitude, with the latter normally limited to only lands appurtenant to the owner's property. Under the Act, conservation easements are subject to the Statute of Frauds and must be registered at the Registry of Property, but other limitations have been removed from the Act to make it available to a larger group of participants.<sup>131</sup>

For security and efficiency purposes, a public document should be utilized to create the conservation easement. Such documents may be obtained at the Registry of Property.

## **2. *Benefits to the Landowner***

Landowners who agree to place a conservation easement on their land receive income tax and property tax exemptions,<sup>132</sup> but the easement must be in perpetuity to receive these benefits. In addition, the income tax exemption cannot exceed fifteen percent of the adjusted gross income of the donor<sup>133</sup> and will be terminated if the easement is modified so that it is no longer consistent with the aims of the Act.

The property tax exemptions are administered by the Center of Municipal Tax Collection and are determined according to the lessened value of the burdened property.<sup>134</sup> The municipality is then compensated by the Commonwealth government in the amount of the lost tax revenue.<sup>135</sup>

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<sup>130</sup> 12 L.P.R.A. § 785(m).

<sup>131</sup> Legislative Assembly, Puerto Rico Senate, October 15, 2001.

<sup>132</sup> 12 L.P.R.A. § 785(h).

<sup>133</sup> Enviro News, Issue 1, 2002, [www.fgrlaw.com](http://www.fgrlaw.com): 12 L.P.R.A. § 785.

<sup>134</sup> 12 L.P.R.A. § 785(n).

<sup>135</sup> 12 L.P.R.A. § 785(n).

### **3. *Responsibilities of the Landowner and Enforcement of the Act***

The owner of the encumbered property has no right to lessen the conservation easement, but instead is required to perform affirmative supervisory duties related to the easement.<sup>136</sup> In addition, the owner of the conservation easement has an obligation to diligently enforce the rights and obligations listed in the creating instrument or public document.<sup>137</sup>

If the provisions of the easement are not followed, the Act provides that the state or any citizen of Puerto Rico may file a civil action against the violator of the conservation easement.<sup>138</sup> Relief may include an injunction, whereby the Commonwealth or private party may force the violator to restore the property to its original state. If restoration proves impossible, the violator of the easement may be responsible for up to three times the value of the easement and is liable for the costs of litigation.<sup>139</sup>

### **4. *Transfer or Termination of Conservation Easements Created Under the Act***

Under the Act, a private person or corporation may donate a conservation easement to an agency or any approved nonprofit organization. To be approved, however, nonprofit organizations must meet certain standards: the principal objective of the organization must be the protection or conservation of valuable natural or cultural areas, it must be a bona fide NGO, and it must have been in operation for at least five years.<sup>140</sup> The Act does allow for the transfer of the conservation easement to the State of Puerto Rico if a nonprofit organization to which a conservation easement was originally conferred has dissolved.<sup>141</sup>

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<sup>136</sup> 12 L.P.R.A. §785(f).

<sup>137</sup> 12 L.P.R.A. § 785(g).

<sup>138</sup> In the most common case this would be the property owner, though it could be anyone.

<sup>139</sup> 12 L.P.R.A. § 785(j).

<sup>140</sup> 12 L.P.R.A. § 785(e).

<sup>141</sup> 12 L.P.R.A. § 785(c).

Conservation easements created under the Act may be terminated in a couple of ways. First, the easement may be created so as to automatically terminate after a term of years or upon the happening of a certain condition.<sup>142</sup> Remember, however, that these easements do not benefit from the tax breaks. Second, the easement may terminate when conditions are changed to such a degree so that it becomes impossible to return the property to its original condition and to enjoy the property in manner contemplated by the conservation easement.<sup>143</sup>

#### **D. Trusts and the Fideicomisum**

A trust is a transfer of property from the owner to a trustee with an obligation to manage the property for a third party.<sup>144</sup> By statute, the third party becomes the title holder, while the beneficiary is the legal owner of the property in equity.<sup>145</sup> The trust must also be recorded in a public deed.<sup>146</sup>

Trusts are extinguished in the Commonwealth under many circumstances: when the purpose for which it was created has been fulfilled, when the purpose becomes impossible to fulfill, when a condition necessary for its execution is absent or not performed, if the trust is renounced by the person receiving the benefit of the trust, when the beneficiary of the trust dies, if the sole constituent is confounded with the sole trustee, or by express agreement of all parties to the trust.<sup>147</sup>

In Puerto Rico, the trust, or fideicomisum, has been influenced by Spanish civil law.<sup>148</sup> For example, the original owner and beneficiary of the trust can be the same.<sup>149</sup> Trusts in the Commonwealth, however, are sometimes more restrictive than common law trusts. For example,

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<sup>142</sup> 12 L.P.R.A. § 785(i).

<sup>143</sup> 12 L.P.R.A. § 785(k).

<sup>144</sup> 32 Rev. Jur. U.I.P.R. 291, 297; 31 L.P.R.A. § 2557.

<sup>145</sup> 32 Rev. Jur. U.I.P.R. 291, 297.

<sup>146</sup> 31 L.P.R.A. § 2545.

<sup>147</sup> 31 L.P.R.A. § 2559.

<sup>148</sup> 32 Rev. Jur. U.I.P.R. 291, 299.

<sup>149</sup> 31 L.P.R.A. § 2563.

the trust must be created for a living person.<sup>150</sup> The restrictive nature of the fideicommissum has limited its use in Puerto Rico, but this form of trust is the legal basis on which the Puerto Rico Conservation Trust stands—discussed later as an important conservation organization in the Commonwealth.

## **E. Conservation Programs and Statutes Administered by the DNER**

The programs below, all organized through the DNER, authorize the creation of conservation easements as well. The subsequent Conservation Easement Act did not replace these programs, but rather served to increase conservation in Puerto Rico.

### ***1. Natural Patrimony Program***

Under this program the Commonwealth government may obtain private land—for the purpose of conservation—through donation, legacy, exchange, expropriation, or outright purchase. Also, the DNER may recommend to the Planning Board that certain areas be designated as natural reserves. If such reserves are approved, the government will exercise its power of eminent domain to obtain the land.

An advisory committee aids the DNER in managing the program’s funding efforts and land management responsibilities. The committee is composed of representatives of the Government Development Bank, the Planning Board, the Lands Administration, and the Department of the Treasury, and individuals with outstanding experience and interest in natural resource conservation.

The Natural Patrimony Program also attempts to provide cash-strapped NGOs seeking conservation easements on undeveloped lands with matching funds. When a conservation easement is acquired, title to the land is held by the Commonwealth, the NGO receives title to

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<sup>150</sup> 31 L.P.R.A. § 2552; See also § 2553, § 2554.

the conservation easement, and the land is exempted from all property taxes. The DNER may then manage the land itself or transfer management responsibilities to the NGO.

**a. *Tiburones Channel and Marsh***

The DNER designated Tiburones Channel an especially important and imperiled wetlands area under the Natural Patrimony Program, so the Planning Board subsequently approved the area as a natural preserve. This protection, authorized by the Puerto Rico Wetlands Act, is now a public policy of Puerto Rico.

**b. *Seven Seas Beach Estate***

The Seven Seas Beach Estate, another natural reserve created through the processes of the Natural Patrimony Program, protects the coastal lands of northeastern Puerto Rico.

**2. *The Puerto Rico Forest Act***

This multifaceted Act provides for particular forest management and conservation techniques. First, the Act requires the DNER to manage the publicly owned forests of the Commonwealth. Second, the DNER is authorized to raise funds for Forest Service educational and conservation programs. Third, the DNER is allowed to contract with public agencies or private parties to harvest timber. And fourth, the Act provides funds for tree planting and conservation efforts on both private and public lands.

In addition to authorizing the Secretary of DNER to work with private citizens to forward the cause of forests, the Secretary is allowed to acquire land from any person, agency, instrumentality, or municipality and to designate it as Commonwealth forest.<sup>151</sup> Once it is designated as forest, easements may be acquired on the land—by public or private entities—for

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<sup>151</sup> 12 LPRA § 193.

six percent of the value of the land comprised in the easement. When the easement is used by more than one leaseholder all users should divide equally the payment of the lease.<sup>152</sup>

**a. Karst Region Protection**

The Karst region in northern Puerto Rico is characterized by chalky sedimentary rocks, mainly limestone, which have been dissolved and eroded by the flow of surface and underground waters to form a special underground geography.<sup>153</sup> In conjunction with the Puerto Rico Forest Act, a conservation easement was purchased over the Karst Region in 1999. A tax break was awarded along with this conservation easement because the easement was registered in the Property Registry for at least fifty years or more, it guarantees the protection of that area, and it complies with the management plan approved by the Natural Patrimony Program. In this case, every five years the DNER is to notify the Municipal Revenues Collection Center of the owner's compliance with the management plan before the property tax exemption may be awarded.<sup>154</sup>

**3. Unification of State Forests Program**

The Unification of State Forests Program, run by the DNER, allows newly acquired forests to act as a buffer zone to already protected State Forests. The program allows for the acquisition, regulation, and rezoning of forested lands in Puerto Rico, including the Maricao, Susua, Guanica, Guilarte, Pueblo de Adjuntas, and Toro Negro regions. All regulations are developed by the DNER along with the Planning Board, Secretary of Agriculture, and an advisory committee.<sup>155</sup> Regulations may include prohibitions on urban development and

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<sup>152</sup> 12 L.P.R.A. § 196(c).

<sup>153</sup> 12 LPRA § 1151.

<sup>154</sup> 12 L.P.R.A. § 1158.

<sup>155</sup> The committee is made up of the Secretary of the Department of Agriculture, the Secretary for the Department of Transportation and Public Works, the Chairman of the Planning Board, the Director of the Land Administration, and mayors of affected communities.

construction, or incentives for private landowners to collaborate in the unification of state forests.

**4. *Reforestation and Management and Conservation of Living Resources Program***

This program is administered by the DNER and attempts to promote the conservation of watersheds, forests, natural reserves, wildlife sanctuaries, and private forested lands. In particular, the program offers incentives to private land owners in rural areas to initiate reforestation and tree management programs.

**5. *Watershed Protection Act***

The Watershed Protection Act was enacted for the purpose of acquiring and administering imperiled watershed lands in order that watershed protection and flood prevention might result. Land acquisitions are made through purchase, agreements, donations, or eminent domain.

**6. *Adopt-a-Beach Program***

The Adopt-a-Beach program encourages businesses, schools, and individuals to clean and beautify beaches. This is attempted through incentives offered by the DNER.

**7. *Adopt-an-Acre Program***

Like Adopt-a-Beach, this program is administered by the DNER. The program allows people to donate money in order to “adopt an acre,” or, to protect an acre that is of some natural value. Donations for the programs need not be exclusively in cash<sup>156</sup> and certain incentives are offered to those people or entities who participate in the program.<sup>157</sup> In conjunction with related agencies, the DNER may limit the use of the land through managing agreements.<sup>158</sup>

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<sup>156</sup> 12 LPRA § 1246.

<sup>157</sup> 12 LPRA § 1243.

<sup>158</sup> 12 LPRA § 1249.

## **F. Other Commonwealth Legislation Relevant to Private Lands Conservation**

### ***1. Public Policy Environmental Act***

Modeled after the U.S. National Environmental Policy Act, the Public Policy Environmental Act states that it is the public policy of Puerto Rico to use every means practical to encourage and promote the harmonious interaction of man and nature.<sup>159</sup> The Act created the Environmental Quality Board (Board) to implement this policy<sup>160</sup> and to manage the environmental standards. The Board functions to manage and enforce EPA programs as well.<sup>161</sup>

Under the Act, the Board may bring a civil action to recover damages for environmental or natural resource destruction.<sup>162</sup> This procedure survived a legal challenge in *SS Zoe Colocotroni*,<sup>163</sup> where the court upheld the right of the Commonwealth to sue over the loss of its publicly held natural resources. It is unclear, however, whether the Commonwealth may sue for the destruction of privately held resources.<sup>164</sup>

### ***2. Wildlife Act of 1999***

The Wildlife Act authorizes the creation of private game reserves. A game reserve is defined as an area where the owner, caretaker, or administrator raises animals in captivity, or through semi-natural methods, for a commercial hunting operation. A priority under the Act is to acquire certain properties adjacent to Commonwealth forests or other biological corridors that may serve as reserves for wildlife protection and game reserves. While the operation of game

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<sup>159</sup> 12 L.P.R.A. § 1121; Environmental Practice Group of Fiddler, Gonzalez & Rodriguez, Puerto Rico Environmental Law Handbook, Third Edition. 2003.

<sup>160</sup> See page 10.

<sup>161</sup> 456 F. Supp. 1327 (D.R.P. 1978).

<sup>162</sup> 12 L.P.R.A. § 1131.

<sup>163</sup> 456 F. Supp. 1327 (D.R.P. 1978), *The Commonwealth of Puerto Rico and the Environmental Quality Board brought an action to recover damages from harm done to the environment through defendant's spilled oil tanker. See also Puerto Rico v. SS Zoe Colocotroni*, 628 F. 2d 652 (1980) where the liability was affirmed but the damages award vacated.

<sup>164</sup> 456 F. Supp. 1327 (D.R.P. 1978); Environmental Practice Group of Fiddler, Gonzalez & Rodriguez, Puerto Rico Environmental Law Handbook, 3rd ed. (2003).

reserves is supported, the Act prohibits the modification of habitat crucial to rare or endangered species.

### **3. *The Urban Forests Act of 1999***

The Urban Forests Act provides funding for the maintenance of “urban forests.” A forest does not need to be within the boundary of a city or town to be classified as “urban” by the DNER. For example, forests within a transition area to urban development may also receive funding through the Act. Private, Commonwealth, and municipal forests all fall within the scope of the Act.

### **4. *Recent Developments***

The Commonwealth legislature continues to recognize the importance of environmental protection. In 2003, a statute protected the Region of Monte Santa Ana through a conservation easement. This easement is managed by the Land Administration and the Department of Recreation and Sports. In addition, the legislature recently passed more stringent penalties for violations of the Forest Act, the Law of Waters, the Sand Act, and the Caves Act. Violations of these statutes are now considered misdemeanors and are punishable by a maximum of three to six months in prison.

## **G. Federal Conservation Programs Adopted in Puerto Rico**

Puerto Rico has adopted several U.S. federal conservation programs. While the U.S. does not directly control private lands in the Commonwealth, Congress can offer financial incentives for the adoption of these programs.<sup>165</sup> The programs described below are administered by the U.S. Department of Agriculture. The Farm Debt Cancellation-Conservation Easement Program involves implementing conservation easements on private land, while the Farm Lands Protection Program and Conservation Reserve Program do not.

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<sup>165</sup> *South Dakota v. Dole*, 483 U.S. 203.

### **1. *Farm Debt Cancellation-Conservation Easement Program***

The Farm Debt Cancellation-Conservation Easement Program protects lands that are subject to federal farm loans, and works by offering partial debt relief to farmers who agree to place a conservation easement on their land.<sup>166</sup> Under this program, landowners can be relieved of up to thirty-three percent of their debt.<sup>167</sup> Easements created through this program, however, are subordinate to easements created through the Farm and Ranch Lands Protection Program, which is discussed below.

### **2. *Farm and Ranch Lands Protection Program***

The Farm and Ranch Lands Protection Program (FRPP) is administered by the Natural Resources Conservation Service of the U.S. Department of Agriculture (USDA).<sup>168</sup> The purpose of the FRPP is to protect—through the use of conservation easements—agricultural areas from conversion to non-agricultural uses. The easements typically prevent construction and development on the property<sup>169</sup> and may only be applied to lands that contain unique soil or historical and archaeological remains.

To enable the acquisition of easements, the FRPP provides matching funds (up to fifty percent of the conservation easement purchase price) to states, tribes, territories and NGOs.<sup>170</sup> The purchaser can also receive donations from the landowner of up to twenty-five percent of the purchaser's share. The landowner benefits by gaining eligibility for other USDA cost-sharing programs.<sup>171</sup>

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<sup>166</sup> 16 USC 3838.

<sup>167</sup> 16 USC 3838.

<sup>168</sup> Public Laws: 104-127 and 107-171.

<sup>169</sup> [www.cdfa.gov](http://www.cdfa.gov); 519.64.

<sup>170</sup> [www.cdfa.gov](http://www.cdfa.gov); 519.60.

<sup>171</sup> [www.cdfa.gov](http://www.cdfa.gov); 519.60(D).

Once an easement is purchased by an entity, the easement must be recorded according to Commonwealth law.<sup>172</sup> The entity then enrolls in the FRPP by submitting documentation which details how the property will be managed, the ability of the entity to enforce the easement, and the monitoring programs that will be implemented. When approved, the entity holds title to the easement and is responsible for managing the property under the easement.<sup>173</sup> Additional funds may be provided by the FRPP to cover management and enforcement expenses. To better manage the property, the holder of the easement may transfer management responsibilities to another entity with FRPP approval.<sup>174</sup>

The conservation easement is extinguished if the entity attempts to transfer, terminate, or divest the easement without consent of the USDA. After the easement is extinguished, title transfers to the Federal government.<sup>175</sup>

### ***3. Conservation Reserve Program***

The Conservation Reserve Program (CRP) also offers federal funding for private land conservation in Puerto Rico. Like the FRPP, the goal of the CRP is to protect the long-term viability of agricultural lands; but unlike the FRPP, the CRP does not utilize conservation easements. To achieve its goal the CRP provides landowners with financial and technical assistance for mitigating soil erosion and sedimentation, improving water quality, and creating wildlife habitat.

The program is available to individual farmers and ranchers, land partnerships, trusts, corporations, estates, and other agencies which have owned their land for at least one year. Landowners contract with the program for ten or fifteen years, agreeing to follow an approved

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<sup>172</sup> [www.cdfa.gov](http://www.cdfa.gov); 519.60(K).

<sup>173</sup> [www.cdfa.gov](http://www.cdfa.gov); 519.60.

<sup>174</sup> [www.cdfa.gov](http://www.cdfa.gov); 519.50(D).

<sup>175</sup> [www.cdfa.gov](http://www.cdfa.gov); CITE 519.50.

conservation plan in return for CRP funds. The conservation plans are created by local conservation districts.

#### **IV. RECOMMENDED ACTIONS**

In the past few years, Puerto Rico has moved to the forefront of conservation and environmental protection in its region. Public opinion has pushed environmental issues to the forefront, and this will hopefully lead to more positive developments in the area. The law, however, is still in a state of flux. Looking ahead, some possible outcomes and courses of action are described below.

First, Puerto Rico may become more involved with federal programs such as the FRPP and CRP. In the past, Puerto Rico benefited from the adoption of these programs because they led to locally-based conservation initiatives and they provide a source of much needed funding.

Second, the Puerto Rico Conservation Trust might become influenced more heavily by U.S. common law. Currently, the Fideicomisum is a blend of civil and common law, but a heavier lean toward U.S. common law would make the Fideicomisum more easily operative in a greater number of circumstances.

Third, an amendment of the Internal Revenue Code of 1994 to reflect new legislation on the Conservation Easement Act would be an important step toward conservation.

Finally, Puerto Rico may serve as an example to other governments in the region. The Commonwealth has made enormous strides in land conservation in the past five years, and their success will hopefully provide encouragement to other countries to implement similar measures.

## TABLE OF AUTHORITIES

*Supporting materials are contained in a companion Appendix to this report.*

2 Anderson's Am. Zoning § 10:11 (4th ed.)

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- 11) Puerto Rico Income Tax Form, 2003
- 12) Regimen de la Propiedad Privada en el Estado Libre Asociado de Puerto Rico
- 13) SG040 ALI- ABA 1085
- 14) Special Consulting Group for Land Use Policies and Controls Project, San Juan, Puerto Rico. Puerto Rico Land Use Regulation, April 1969.
- 15) [www.cdfa.gov](http://www.cdfa.gov)
- 16) [www.epa.gov](http://www.epa.gov)
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