

University of Colorado Law School

Colorado Law Scholarly Commons

Books, Reports, and Studies

Getches-Wilkinson Center for Natural
Resources, Energy, and the Environment

2004

Private Lands Conservation in the U.S. Virgin Islands

Sonja Klopf

University of Colorado Boulder. Natural Resources Law Center

Follow this and additional works at: https://scholar.law.colorado.edu/books_reports_studies



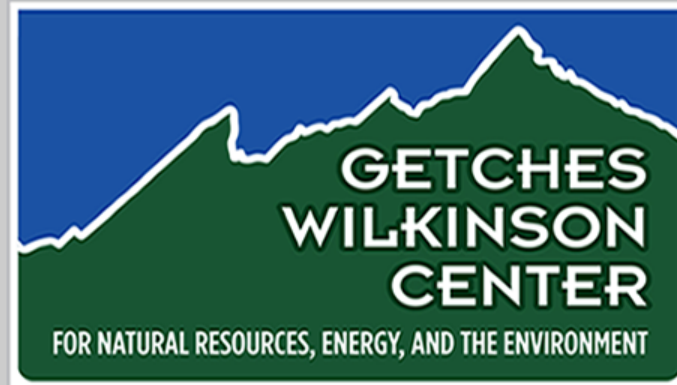
Part of the [Environmental Law Commons](#), [Environmental Policy Commons](#), [Estates and Trusts Commons](#), [Land Use Law Commons](#), [Legislation Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [Tax Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Sonja Klopf, Private Lands Conservation in the U.S. Virgin Islands (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2004).



William A. Wise Law Library
COLORADO **LAW**
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

SONJA KLOPF, PRIVATE LANDS CONSERVATION IN THE U.S.
VIRGIN ISLANDS (Natural Res. Law Ctr., Univ. of Colo.
Sch. of Law 2004).

Reproduced with permission of the Getches-Wilkinson
Center for Natural Resources, Energy, and the
Environment (formerly the Natural Resources Law
Center) at the University of Colorado Law School.

PRIVATE LANDS CONSERVATION IN THE U.S. VIRGIN ISLANDS

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

September 2004

Sponsored by The Nature Conservancy

Primary Author: Sonja Klopf, NRLC Research Assistant
nrlc@colorado.edu

KGZ
46
.K56
2004

Private Lands Conservation in the U.S. Virgin Islands

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

September 2004

Primary Author: Sonja Klopf, NRLC Research Assistant
E-mail: nrlc@colorado.edu

TABLE OF CONTENTS

BRIEF QUESTIONS.....	1
INTRODUCTION.....	4
I. RELEVANT BACKGROUND.....	5
A. Overview of U.S. Virgin Islands.....	5
B. Government/Legal Authority.....	7
1. Brief Political History	7
2. Legal Context.....	9
II. OVERVIEW OF LAND ISSUES AND LAND ADMINISTRATION IN THE VIRGIN ISLANDS	15
A. Restrictions on Ownership and Use of Real Property.....	15
B. Conveying Property in the U.S. Virgin Islands	17
C. Obtaining Clear Title in the U.S. Virgin Islands.....	18
D. Land Use Patterns in the Virgin Islands	19
III. CONSERVATION EASEMENTS FOR PRIVATE LANDS CONSERVATION IN USVI.....	20
A. Introduction to Conservation Easements	20
1. What is a Conservation Easement?	20
2. Appurtenant Conservation Easements.....	22
3. Conservation Easements in Gross	25
B. Conservation Easements in the U.S. Virgin Islands	26
1. Virgin Islands Property Law Regarding Conservation Easements	26
2. Restatements/Common Law and Conservation Easements	28
C. Facilitating Conservation Easements.....	31
1. Creating Conservation Easements with Dominant and Servient Parcels	31
2. Possible Tax Incentives for Conservation Easements in the U.S. Virgin Islands	31
IV. OTHER POTENTIAL LEGAL TOOLS.....	36
A. Deed Restrictions.....	36
B. Zoning.....	36
C. Real Covenants	37
D. Leases, “Leaseback” Agreements, and Reserved Life Interests	39
E. Equitable Servitudes	40
F. Profits à Prendre.....	42
G. Purchased Development Rights	44
V. GOVERNMENT CONSERVATION PROGRAMS CURRENTLY AVAILABLE IN THE USVI.....	45
A. Federal Programs that Include Conservation Easements.....	45
1. The Forest Legacy Program (FLP).....	45
2. Wetlands Reserve Program	47
3. Farmland Protection Program (FPP) & Farm and Ranch Lands Protection Program (FRPP)	48
B. Local Conservation Programs and Regulations.....	49
C. Local Implementation of CWA, CAA, ESA & Wildlife Restoration Projects.....	50
VI. RECOMMENDATIONS	51
A. Conservation Easement Legislation.....	51
B. Use Restatements as Authority for Conservation Easements	53
C. Forest Legacy Program	55
CONCLUSION	56

BRIEF QUESTIONS

1. What legal tools are in place for the purpose of achieving private lands conservation?

The Virgin Islands Legislature has not yet passed a Conservation Easement Act, although one was introduced on January 29, 2002.¹ Despite the absence of a Conservation Easement Act, the Nature Conservancy has succeeded in achieving private lands conservation through deed restrictions, appurtenant conservation easements on government land, as well as working cooperatively with the legislature.² In addition, Virgin Islands local ordinances allow the Commissioner of Planning and Natural Resources to declare *any* area in the Virgin Islands a game preserve and restrict hunting.³ The Commissioner also has the power to “designate and establish wildlife or marine sanctuaries in addition to those [already] designated.”⁴ Finally, there are a number of federal programs that encourage conservation easements on private lands. The most useful of these programs is the Forest Legacy Program, which not only authorizes the use of conservation easements despite state law, but will also fund up to seventy-five percent of the cost of the easement. The Virgin Islands is already participating in the Forest Legacy Program.⁵

¹ The PDF version of this proposed legislation can be found at www.senate.gov.vi/BillTracking/Bills/24-0217.pdf or in the Appendix. The Bill that was introduced was number 24-0217.

² Please see section IV and V(B) for more information. In addition, with legislative approval and help from the Nature Conservancy, the first territorial park in the Virgin Islands was created, THE NATURE CONSERVANCY, *East End Marine Park, St. Croix*, <http://nature.org/wherewework/caribbean/usvirginislands/work/art8687.html>. Also, the St. Croix Environmental Association’s Southgate Pond project was made possible through local donations of land and money. ST. CROIX ENVIRONMENTAL ASSOCIATION, *SEA Conservation Programs*, <http://stxenvironmental.org/stcroixenvironmentalssociation/id9.html>. Please look in the Appendix to find copies of these documents.

³ Please see section V(B) for more information.

⁴ Establishment of Wildlife or Marine Sanctuaries, 12 V.I. CODE ANN. § 97 (1987) (Amended 2003).

⁵ Please see section V(A)(1) for more information.

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

There are a number of common law legal tools that could be useful in conserving private lands in the Virgin Islands. Although statutory conservation easements would be preferred because they are easier to create and have more certainty of enforcement, appurtenant conservation easements are recognized in USVI. It is important that a deed conveying an appurtenant easement is clearly written to show that it was intended to run with the land and the dominant land parcel is receiving a benefit from the conservation easement. In addition, long-term leasing is another possibility to restrict development in the Virgin Islands. Leasing is a recognized conveyance of property in the Virgin Islands and there are no restrictions on leasing land for conservation purposes.⁶

3. Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation?

The legal tool that would currently be most helpful in the Virgin Islands for private lands conservation is a Conservation Easement Act. However, if a Conservation Easement Act proves too difficult to obtain, it might be possible to achieve authorization of conservation easements through the American Law Institute Restatements. The Restatement Third of Property clearly authorizes and outlines the use of conservation easements; and if there is no contrary local law, the Restatements are authoritative law in the Virgin Islands. There is a question of whether there actually is contrary local law in USVI, and thus whether the Restatements will actually apply; but it would be helpful to

⁶ Please see section IV(D) for more information.

do a test case in the Virgin Islands to see if Conservation Easements as recognized in the Restatement Third would be validated by the court system.⁷

⁷ Please see section III(B)(2) for more information.

INTRODUCTION

Most of the sixty-eight islands that make up the United States Virgin Islands (USVI or Virgin Islands) contain hilly, rugged landscape with little arable land. Numerous occupying nations have fragmented the once abundant and diverse forests in order to grow crops, but the hard terrain and lack of fresh water always proved too difficult to profitably overcome. In the 1960s, however, tourism in the USVI increased dramatically, and currently over 70 percent of the economy and workforce is based on tourism. With an area about the same size as Washington, D.C., and a population of approximately 125,000, the islands host over two million visitors per year.⁸ This dependence on tourism creates considerable pressure to developing the land as new resorts, hotels, and homes located near pristine beaches have the ability to earn a significant profits. Increased development, however, threatens the various native plants and animals on the islands, including the endangered St. Croix lizard, which depend on open space for their livelihood. Private lands conservation is one possible way to try and restrict development in some crucial areas and protect the islands' diverse plants and animals.

This report discusses the legal instruments, processes, and institutions within the USVI that are relevant to private lands conservation. In addition, this report analyzes the feasibility of using conservation easements as a practical tool for land conservation as well as the availability of other options in the Virgin Islands. Section I of the report provides relevant background information on the history, culture, economy, and governmental structure of the Virgin Islands. Section II of the report supplies an

⁸ CENTRAL INTELLIGENCE AGENCY, *The World Factbook: The U.S. Virgin Islands* (Dec. 18, 2003), <http://www.cia.gov/cia/publications/factbook/geos/vq.html> (hereinafter *The World Factbook*).

overview of land issues and land administration in the Virgin Islands. Section III discusses conservation easements and the possibility of creating conservation easements for private lands conservation in the Virgin Islands. Section IV describes other potential legal tools that could be used for private lands conservation. Section V details the government conservation programs that are currently available in USVI. Finally, section VI provides recommendations regarding private lands conservation in the Virgin Islands.

I. RELEVANT BACKGROUND

A. Overview of U.S. Virgin Islands

The Virgin Islands consist of sixty-eight separate islands located about 1000 miles southeast of Miami, Florida and about 40 miles east of Puerto Rico.⁹ The three largest islands are Saint Croix, Saint John, and Saint Thomas with the territory's capital, Charlotte Amalie, located on the island of St. Thomas. The islands are mainly hilly to rugged and mountainous terrain with little level land for farming. St. John is exceptional because it only has about 2,000 residents and two-thirds of its area is dedicated to a national park. There are no minerals, oil, or natural gas resources on the island for mining, and there are no freshwater sources on the island besides rainfall. However, a dependence on tourism puts a lot of pressure on developing land because new resorts, hotels, and homes have the ability to earn a considerable profit. Increased development, however, threatens the various native plants and animals on the islands, including the endangered St. Croix lizard.¹⁰ Currently, one of the most pressing natural resources

⁹ Forest Legacy for the U.S. Virgin Islands An Assessment of Need, Prepared by The Nature Conservancy for the Virgin Islands Department of Agriculture 27, Jan. 2003.

¹⁰ Please see the Introduction to this report.

issues for residents and visitors to the islands is the lack of fresh water.¹¹ However, desalination facilities are being expanded and modernized to meet the increasing demand for potable water.¹²

The territorial economy is almost exclusively dependent on tourism and federal aid.¹³ Tourism is the primary economic activity and accounts for more than 70 percent of gross domestic product (GDP), 70 percent of employment, and about two million visitors per year.¹⁴ The manufacturing sector consists of petroleum refining, textiles, electronics, pharmaceuticals and watch assembly. Because of the limited tillable land, the agricultural sector is small and most food is imported. The international business and financial services are a small but growing part of the economy. The cost of land in the Virgin Islands is very high. Subsequently, the outsiders who can afford to buy land are often major industries and big businesses who are slowly taking control of the economy away from the natives.¹⁵

The Virgin Islands grew rapidly in population starting in the 1960s and is now about 125,000. The per capita GDP in 2001 was \$19,000. The U.S. Territories have a per capita income more than 1/3 less than the poorest state in the United States. The United States per capita GDP in 2002 was \$37,600.¹⁶ The demographics of the Virgin Islands is 80 percent Black, 15 percent white, and 5 percent mixed race or other races.¹⁷ In island-wide elections the majorities usually go to candidates who advocate a

¹¹ *The World Factbook*.

¹² 1 MODERN LEGAL SYSTEMS CYCLOPEDIA Ch. 4, 8 (Kenneth R. Redden & Linda L. Schlueter, eds., William S. Hein & Co. 2000) (hereinafter MODERN LEGAL SYSTEMS CYCLOPEDIA).

¹³ 4 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1759 (Herbert M. Kritzer, ed., ABC CLIO 2002) (hereinafter LEGAL SYSTEMS OF THE WORLD).

¹⁴ *The World Factbook*.

¹⁵ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 10, 11.

¹⁶ CENTRAL INTELLIGENCE AGENCY, *The World Factbook: United States* (May 11, 2004), <http://www.cia.gov/cia/publications/factbook/geos/us.html>.

¹⁷ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 10.

progressive capitalism, continued affiliation with the United States, and cooperation between races and classes.¹⁸

B. Government/Legal Authority

1. Brief Political History

The political history of the Virgin Islands consists of numerous conquerors and occupiers. At various times, Holland, France, England, Spain, Denmark and the Knights of Malta all wanted to possess the Virgin Islands, mostly for agricultural purposes, but the lack of water and arable land frustrated their endeavors.¹⁹ Finally in 1917, the United States bought the Virgin Islands from Denmark for 25 million dollars because of its strategic military importance during World War I. The Virgin Islands had been in economic decline under Denmark's rule since the abolition of slavery in 1848.²⁰ Prior to the sale, Denmark held a vote and found that the majority of residents at the time favored U.S. acquisition.²¹

Since the United States purchased the Virgin Islands, the territory has consistently become more prosperous as well as more independent vis-à-vis their relationship to the United States. After the acquisition, the United States was preoccupied with World War I and not concerned with the governing of the territory, which left the inhabitants of the Virgin Islands waiting for Congress to make some kind of determination as to their status and citizenship.²² The Act of March 3, 1917 put the islands under the supervision of the

¹⁸ STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 68 (Lawyers Cooperative Publishing 1995) (hereinafter LAUGHLIN).

¹⁹ UNITED STATES VIRGIN ISLANDS, *A Brief History of the Virgin Islands*, <http://www.virginisles.com/history.html>

²⁰ *The World Factbook*.

²¹ LEGAL SYSTEMS OF THE WORLD at 1759.

²² ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 249 (Boston, Martinus Nijhoff 1989) (hereinafter LEIBOWITZ).

Naval Department, and in 1927 Virgin Islands residents were finally granted U.S. citizenship.²³ In 1931 President Hoover transferred jurisdiction of the islands from the Navy over to the Department of the Interior and appointed a civil governor.²⁴ However, no permanent government was established for the Virgin Islands until 1936.²⁵

In 1936, Congress passed the Organic Act, instituted universal suffrage, extended the Bill of Rights to the Virgin Islands, and permanently transferred the supervision of the islands to the Department of the Interior.²⁶ The Organic Act of 1936 also set up two separate legislatures for local governance.²⁷ In 1954, the revised Organic Act gave the Virgin Islanders a greater degree of autonomy and created a centralized legislature with one house to replace the two created in 1936.²⁸ It also clearly defined the Virgin Islands as an “unincorporated territory” of the United States.²⁹ The Virgin Islands continued to increase in independence after the Revised Organic Act. The Elective Governor Act of 1968 finally provided for popular election of the Virgin Islands Governor beginning in November 1970.³⁰ Also, in 1972, Congress provided that the Virgin Islands would have a non-voting delegate in the U.S. Congress.³¹ Presently, it appears that the majority of Virgin Islands residents are satisfied with the status quo and content for USVI to remain an unincorporated territory of the United States.³²

²³ INTERNATIONAL BUSINESS ORGANIZATION, *US Virgin Islands Country Profile*, http://www.worldinformation.com/World/camerica/American_Virgin_Islands/profile.asp?country=340 (hereinafter INTERNATIONAL BUSINESS ORGANIZATION).

²⁴ ABOUT ST. THOMAS AND THE U.S. VIRGIN ISLANDS, http://www.e-vacationrentals.com/st_thomas/about_stthomas.htm.

²⁵ LEIBOWITZ at 254.

²⁶ *Id.* at 257, 258.

²⁷ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 19.

²⁸ *Id.* at Ch. 4, 18, 19.

²⁹ LEIBOWITZ at 263.

³⁰ *Id.* at 272, 273.

³¹ LAUGHLIN at 380.

³² *Id.* at 68.

2. *Legal Context*

The United States Virgin Islands is an organized, unincorporated territory of the United States with policy relations between the Virgin Islands and the United States under the jurisdiction of the Office of Insular Affairs, U.S. Department of the Interior.³³ There are numerous sources of law governing the Virgin Islands including the Organic Act of 1954, which is considered the Constitution for the Virgin Islands; applicable provisions of the United States Constitution; federal laws operating in the Virgin Islands; local law; and United States common law as adopted by the American Law Institute Restatements.³⁴ There is no long-standing or deeply ingrained indigenous, traditional law.³⁵

The Organic Act of 1954 is the constitution of the Virgin Islands. The Organic Act includes a revised version of the “Bill of Rights” and charters the government of the territory establishing separate executive, legislative and judicial branches as part of a central government.³⁶ In 1976, Congress authorized the Virgin Islands to adopt its own constitution, although Congress retained the authority to approve the constitution before it went into effect.³⁷ At this time, the USVI has written a number of Constitutions, but none have passed a country-wide vote.³⁸

The United States Constitution has been incorporated to a degree into the Revised Organic Act of 1954. However, Virgin Islands residents, even though they are United

³³ *The World Factbook*.

³⁴ LAUGHLIN at 380.

³⁵ The Virgin Islands were not densely populated when they were first colonized and many native inhabitants died or were killed soon after European occupation. Slaves that were brought to the island were too subjugated to create any kind of customary law. LAUGHLIN at 395.

³⁶ MODERN LEGAL SYSTEMS CYCLOPEDIA at 1759.

³⁷ *An Act to Provide for the Establishment of Constitutions for the Virgin Islands and Guam*, Pub. L. No. 94-584, 1976 H.R. 9460 (1976); LAUGHLIN at 380.

³⁸ *Approving a Constitution for the U.S. Virgin Islands*, H.R. REP. NO. 97-25 (1981), reprinted in C.I.S. 81 H443-4.

States citizens, do not receive the full protection of the U.S. Constitution. The doctrine of territorial incorporation states that “natural rights” such as the right not to be deprived of property without just compensation are protected, but “artificial rights,” such as the right to a grand jury, must be provided for by Congress.³⁹

In addition to the U.S. Constitution, other federal laws operating in USVI have the power to preempt local regulations which conflict with these federal laws.⁴⁰ Generally the laws of general application to the several states are also applicable to the territories, but it is often not quite so straightforward. The most clearly applicable laws are those in which Congress specifically mentions applicability to the Virgin Islands or the United States territories generally. Some federal environmental laws that apply in USVI include the Endangered Species Act, Clean Water Act, Clean Air Act, and National Environmental Policy Act (NEPA). The Federal Land Policy and Management Act (FLPMA) does not apply because there is no applicable federal land in the USVI and the Wilderness Act does not apply because the islands are not large enough to support a Wilderness Area under the Act.⁴¹

Congress has the power to pass laws affecting USVI, or even change their constitution, but Virgin Islands public opinion discourages this. The islanders elect a nonvoting representative to the U.S. Congress, but they cannot vote in presidential

³⁹ “The doctrine of territorial incorporation was first adopted in *Downes v. Bidwell*, 182 U.S. 244 (1901). It was later applied to the Virgin Islands in a series of cases, including *Government of the Virgin Islands v. Rijos*, 285 F.Supp. 126 (D.V.I. 1968); *Rivera v. Government of the Virgin Islands*, 375 F.2d 988 (3d Cir. 1967); and *Soto v. United States*, 273 F. 628 (3d Cir. 1921).” Joycelyn Hewlett, *The Virgin Islands: Grand Jury Denied*, 35 How. L.J. 263, 263 (1992).

⁴⁰ For instance, because the Sherman Anti-Trust Act was applicable to the Virgin Islands, a local law was invalidated because it violated the Sherman Anti-Trust Act. LAUGHLIN at 390.

⁴¹ Ruth G. VanCleve, *The Application of Federal Laws in American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands* (Dep’t of the Interior, Office of the Solicitor 1993).

elections.⁴² USVI does not have much influence on United States politics and generally does not appreciate it when Congress makes laws affecting the USVI without its input.⁴³

The USVI legislature has primary legal authority over regulations locally affecting the Virgin Islands as well as the power to raise local taxes.⁴⁴ However, local regulations cannot conflict with the Revised Organic Act, other federal laws that are applicable to USVI, or impede an existing treaty of the United States.⁴⁵ Finally, common law, as expressed in the American Law Institute Restatements, is considered authoritative. The USVI courts must follow the Restatements absent local law to the contrary.⁴⁶

a. Executive Branch

The executive power of the USVI is vested in an elected governor and lieutenant governor, an attorney general, and other officials appointed by the governor. The governor is responsible for the faithful execution of the laws of the Virgin Islands and United States, and must make an annual report of the transactions of the USVI government to the Secretary of the Interior. The governor has the power to issue executive orders and regulations as long as they are not in conflict with any applicable

⁴² TERRY DUNNAHOO, U.S. TERRITORIES AND FREELY ASSOCIATED STATES 45 (F. Watts 1988) (hereinafter DUNNAHOO).

⁴³ This attitude is well-portrayed by a comment made by the President of the Virgin Islands Senate, “Political Convention and custom mandates that amendments to the Organic Act demand public input by at least the legislature, and that any issue that remotely implies serious economic and development changes be brought to the Virgin Islands people first and then to Congress.” *U.S. Territories and Freely Associated States: Hearing Before the Committee on Energy and Natural Resources To Amend the Organic Act of Guam, the Revised Organic Act of the Virgin Islands, and the Compact of Free Association Act, and for Other Purposes*, 105th Cong. 1st Sess. (1997) (statement of President of Virgin Islands Senate).

⁴⁴ LEIBOWITZ at 37.

⁴⁵ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 19.

⁴⁶ LAUGHLIN at 398; Application of Common Law; Restatements, 1 V.I. CODE ANN. § 4 (1921); Ducrot v. Marshall & Sterling, Inc., 861 F. Supp. 363, 365 (V.I. 1994) (Absent local law to the contrary, the District Court must follow the restatements of law). Also, In re Tutu Water Wells Contamination Litig., 42 V.I. 278, 78 F.Supp.2d 456 (1999); Chase v. Virgin Islands Port Auth., 38 V.I. 417, 3 F.Supp.2d 641 (1998); Andrews v. Nathaniel, 2000 WL 221937 (Terr.V.I. 2000); Land Holdings (St. Thomas) Ltd. v. Mega Holdings, Inc., 1999 WL 1044836 (D.V.I. 1999).

federal law. The governor also recommends bills to the legislature and has veto power over Virgin Islands legislation.⁴⁷ The governor is elected for a four-year term by popular vote. In 2002 Democrat Governor Charles W. Turnbull was re-elected with 50.5 percent of the vote. The next gubernatorial elections will be held in November 2006.⁴⁸

b. Legislative Branch

The legislature of the Virgin Islands is a unicameral body that is elected for two-year terms and is composed of 15 senators, five from St. Croix, five from St. Thomas, one from St. John, and four from the islands at large.⁴⁹ Virgin Islands politics often centers around the struggle between the two larger islands of St. Thomas and St. Croix to maintain their own sense of identity and role as a political force within the state, thus it is very important for the two larger islands to elect as many senators at-large from their own respective islands as possible.⁵⁰ The legislature meets in regular sessions each year that are open to the public, and the governor may call a special session if necessary.⁵¹ The structure and operations of the legislature are virtually identical to the United States Congress. Legislation must be passed by a majority of the Senators present and voting, and is then sent to the Governor. The Governor has the power to veto the bill, which the Senators can override with a two-thirds vote of the fifteen member body.⁵² At present, a

⁴⁷ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 21.

⁴⁸ INTERNATIONAL BUSINESS ORGANIZATION.

⁴⁹ ABOUT ST. THOMAS AND THE U.S. VIRGIN ISLANDS, http://www.e-vacationrentals.com/st_thomas/about_stthomas.htm.

⁵⁰ LEIBOWITZ at 276.

⁵¹ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 20.

⁵² 25th LEGISLATURE OF THE U.S. VIRGIN ISLANDS, *The Legislature's History*, <http://www.senate.gov.vi/25thLegislature/historyinfo/History.htm>.

majority of the Senators are affiliated with the Democratic Party, and the next parliamentary elections will be held in November 2006.⁵³

c. Judicial Branch

Judicial power is vested in both the Territorial Court, which was established by the laws of the Virgin Islands, and in the U.S. District Court of the Virgin Islands.⁵⁴ The Territorial Court is authorized by the Virgin Islands legislature and has general jurisdiction. Judges are appointed by the Governor with approval of the legislature for terms of six years. There are eight judges total; four are selected from the St. John/St. Thomas district and four from St. Croix.⁵⁵ The legislature has given the Territorial Court exclusive jurisdiction over civil actions for less than \$500; criminal cases for fines not more than \$100 or imprisonment not more than six months; and all violations of police and executive regulations unless otherwise provided. In most other matters, as long as they are not reserved exclusively for the District Court, the Territorial Court serves as a concurrent, locally-appointed court where cases of a local nature may be brought for trial.⁵⁶

The Territorial Court has expanded to include criminal, civil, traffic, family, small claims, probate and probation divisions.⁵⁷ All civil actions must be initiated in the judicial division where the defendant resides or where the cause of action arose or where

⁵³ 25th LEGISLATURE OF THE U.S. VIRGIN ISLANDS, *Senators*, <http://www.senate.gov.vi>; INTERNATIONAL BUSINESS ORGANIZATION.

⁵⁴ LEIBOWITZ at 276. “The judicial power of the Virgin Islands shall be vested in a court of record designated the ‘District Court of the Virgin Islands’ established by Congress, and in such appellate court and lower courts as may have been or may hereafter be established by local law.” District Court of Virgin Islands; Local Courts, 48 U.S.C.A. § 1611(a) (1921) (amended 1984).

⁵⁵ LEGAL SYSTEMS OF THE WORLD at 1760.

⁵⁶ LAUGHLIN at 384-386.

⁵⁷ LEGAL SYSTEMS OF THE WORLD at 1760.

the defendant may be served with process.⁵⁸ There is also a conciliation division of the Territorial Court. One party of a civil suit may summon the other party to appear before the judge in an informal hearing in an effort to encourage an amicable settlement of the controversy other than litigation.⁵⁹ Appeals from the Territorial Court go to the Virgin Islands District Court.⁶⁰

The Virgin Islands District Court was created under Article IV of the U.S. Constitution and its jurisdiction is more far-reaching than the district courts in the states.⁶¹ The district court consists of two judges that are appointed by the President for ten years.⁶² The court is divided into two divisions: Division of St. Croix and the Division of St. Thomas/St. John.⁶³ Each division must hold sessions at least once every three months.⁶⁴ The district court is a court of general jurisdiction, and jurisdiction is usually presumed unless there is a statutory exception. The Organic Act gives the court federal question jurisdiction as well as jurisdiction in diversity and bankruptcy cases regardless of the amount in controversy.⁶⁵ The district court's original jurisdiction is for the most part concurrent with that of the Territorial Court, but is exclusive regarding criminal and civil proceedings involving any cases arising under the laws of the United States.⁶⁶ At its option and in the interest of justice, the District Court may, upon a motion

⁵⁸ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 24.

⁵⁹ *Id.* at Ch. 4, 25.

⁶⁰ LAUGHLIN at 382, 383.

⁶¹ *Id.* at 381.

⁶² *Id.* at 381, 382.

⁶³ In addition, the division of St. Croix is subdivided into the Christiansted jurisdiction and the Fredericksted jurisdiction. MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 21.

⁶⁴ LAUGHLIN at 382.

⁶⁵ *Id.*

⁶⁶ LEGAL SYSTEMS OF THE WORLD at 1760; MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 25.

by any party, transfer to the District Court any action or proceeding brought before the Territorial Court.⁶⁷

The District Court is also the sole appellate tribunal in the Virgin Islands and has wide-ranging review powers including the judgments and orders of the Territorial Court in all civil cases, all juvenile or domestic relations cases, and in all criminal cases where the defendant has been convicted.⁶⁸ The Third Circuit takes appeals from the District Court of the Virgin Islands.⁶⁹

Land disputes and land claims can be brought before either the Territorial Court or the District Court because the two Court systems have concurrent jurisdiction over civil matters. There is no court in USVI that deals specifically with land issues.

II. OVERVIEW OF LAND ISSUES AND LAND ADMINISTRATION IN THE VIRGIN ISLANDS

Real property law in the USVI is outlined in Title 28 of the Virgin Islands Code. The common law, as expressed in the American Law Institute Restatements, deals with many legal issues that are not specifically addressed in the Virgin Islands Code or local common law.⁷⁰

A. Restrictions on Ownership and Use of Real Property

There are very few significant restrictions on the ownership of real property in the Virgin Islands. First, there is a twenty-year statute of limitations for filing a claim for ownership of real property. After twenty years, a landowner loses her ability to file an

⁶⁷ MODERN LEGAL SYSTEMS CYCLOPEDIA at Ch. 4, 22.

⁶⁸ LAUGHLIN at 382, 383.

⁶⁹ LEIBOWITZ at 276.

⁷⁰ “The rules of common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.” Application of Common Law; Restatements, 1 V.I. CODE ANN. § 4 (1921).

action in court regarding ownership of land.⁷¹ In addition, USVI recognizes adverse possession, where there is a conclusive presumption that title has changed hands after *fifteen* years of uninterrupted, exclusive, actual, physical adverse, continuous, notorious possession of real property under claim or color of title.⁷² Second, the Virgin Islands reserves the right to exercise eminent domain for all public uses authorized by Congress or the Legislature of the Virgin Islands.⁷³ The Virgin Islands has the right to take land in fee simple, to take an easement, or to enter and occupy land as long as the owner is given just compensation.⁷⁴

Limitations on land use include regulations created mainly for the health of the island. First, an “Earth Change Permit” is required before any real property is cleared, graded or filled, including the erection of any building.⁷⁵ However, this permit is not required for household gardening or farming.⁷⁶ Second, landowners may not cut or injure any tree or vegetation within thirty feet of the center of any natural watercourse or within twenty-five feet of the edge of the watercourse without written permission from the Commissioner. This limitation includes streams which flow regularly after rainfalls as well as those with a permanent flow.⁷⁷ Third, any owner wanting to newly develop certain areas of the coastal zone must obtain a coastal zone permit, which will be approved if the development would not have undesirable and adverse effects on the

⁷¹ Time for Commencement of Various Actions, 5 V.I. CODE ANN. § 31 (1921) (Amended 1977); *See* *Kruger & Birch, Inc. v. Du Boyce*, 3 V.I. 599, 241 F.2d 849 (3d. Cir. 1957).

⁷² Adverse Possession, 28 V.I. CODE ANN. §11 (1921) (Amended 1977).

⁷³ Public Uses, 28 V.I. CODE ANN. § 411 (1921) (Amended 1978).

⁷⁴ Estates and Rights Subject to be Taken, 28 V.I. CODE ANN. § 412 (1921); Just Compensation; Appointment of Commission; Powers, Proceedings; Court Action, 28 V.I. CODE ANN. § 418 (1921).

⁷⁵ This requirement is to prevent harmful erosion on the islands. Earth Change Plans, 12 V.I. CODE ANN. § 533 (1971) (Amended 1987).

⁷⁶ Exemptions, 12 V.I. CODE ANN. § 535 (1971) (Amended 1987).

⁷⁷ Cutting or Injuring Certain Trees, 12 V.I. CODE ANN. § 123 (1948); Obtaining Permission to Cut or Injure Certain Trees, 12 V.I. CODE ANN. § 124 (1948).

environment or the development plan includes mitigation measures to lessen or eliminate any adverse effects.⁷⁸ Finally, the Virgin Islands legislature has declared that the public has the right to use and enjoy the shorelines.⁷⁹ Therefore, no entity or person can legally create or maintain a barrier or any kind of restraint “upon, across or within the shorelines of the United States Virgin Islands.”⁸⁰ These conservation measures consist of minor limitations on ownership of property in order to counteract or forestall some of the island’s most difficult environmental problems including development on the shoreline and erosion.

B. Conveying Property in the U.S. Virgin Islands

A conveyance of lands, or of any estate or interest, is made by deed and signed by the person conveying the land.⁸¹ The deeds must be executed in the presence of two witnesses and recorded in the Office of the Recorder of Deeds.⁸² USVI acknowledges and finds legitimate all deeds to real property that were executed before the Virgin Islands Code was developed as long as the deeds were executed in accordance with the laws in force at the time.⁸³ The Virgin Islands also has a Statute of Frauds and any interest in real property may not be “created, granted, assigned, transferred, surrendered, or declared” without a writing signed by the person being charged.⁸⁴ Finally, “any person

⁷⁸ Findings and Goals, 12 V.I. CODE ANN. § 903 (1978); Coastal Zone Permit, 12 V.I. CODE ANN. § 910 (1978) (amended 1987).

⁷⁹ Declaration of Policy, 12 V.I. Code Ann. § 401 (1971).

⁸⁰ Obstruction of Shorelines Prohibited, 12 V.I. Code Ann. § 403 (1971).

⁸¹ Manner of Executing Conveyance, 28 V.I. CODE ANN. § 41 (1921).

⁸² Proof by Subscribing Witness of Execution of Conveyance, 28 V.I. CODE ANN. § 43 (1921); Place of Recording, 28 V.I. CODE ANN. § 121 (1921) (Amended 1999).

⁸³ Conveyances Under Prior Laws, 28 V.I. CODE ANN. § 131 (1921).

⁸⁴ The Statute of Frauds does not apply to leases that do not exceed a term of one year. Creation or Transfer of Interest in Real Property, 28 V.I. CODE ANN. § 241 (1921).

who has a legal estate in real property, and a present right to the possession,” has standing in court to bring an action to recover that possession and receive damages.⁸⁵

In order to buy, sell, or transfer any kind of property, the original deed must be recorded at the Recorder of Deeds Office. First, it is necessary to have the original deed, which has been signed, dated, and notarized with two witnesses. Second, it is necessary to have proof in writing that all property taxes concerning the property being conveyed have been paid. This proof must be obtained through the Department of Finance, Office of the Tax Assessor.⁸⁶ Thirdly, stamp taxes, which consist of two percent of the value of the purchase price or consideration as well as fees must be paid. However, there is an exemption from the stamp tax and fees if the land is being transferred to a non-profit organization and the property is not being used for commercial purposes. In order to obtain this benefit the non-profit must submit an affidavit along with the deed describing in detail the legal basis for the tax exemption.⁸⁷

C. Obtaining Clear Title in the U.S. Virgin Islands

In order to obtain clear title it is necessary to record the deed in the Office of Recorders. If a conveyance of property is not recorded, then it is void as to subsequent good-faith purchasers.⁸⁸ Also, obtaining a warranty deed for a conveyance of property guarantees clear title of that land. “Thus, through obtaining a warranty deed from a

⁸⁵ Action to Recover Possession; Parties, 28 V.I. CODE ANN. § 281 (1921).

⁸⁶ U.S. VIRGIN ISLANDS OFFICE OF THE TAX ASSESSOR,
<http://www.ltg.gov.vi/departments/taxdetail.html>.

⁸⁷ U.S. VIRGIN ISLANDS OFFICE OF THE RECORDER OF DEEDS,
<http://www.ltg.gov.vi/departments/recorder.html>; E-mail from Althea Pedro, District Recorder of Deeds, St. Croix (June 17, 2004). The Recorder of Deeds Office “is responsible for recording all property deeds, mortgages, personal liens, tax liens, and other miscellaneous documents against individuals and property owners.” The Lieutenant Governor exercises oversight responsibility of various divisions of government including the Recorder of Deeds, U.S. VIRGIN ISLANDS OFFICE OF THE LIEUTENANT GOVERNOR,
<http://www.ltg.gov.vi>.

⁸⁸ Unrecorded Conveyance Void as to Subsequent Innocent Purchaser, 28 V.I. CODE ANN. § 124 (1976).

grantor, a purchaser of real property may rely on grantor's assurances that the purchaser possesses valid title."⁸⁹ It is also possible to obtain clear title to land through a foreclosure sale,⁹⁰ adverse possession,⁹¹ or a quiet title action in either the District Court or the Territorial Court.

D. Land Use Patterns in the Virgin Islands

Only fifteen percent of the land in the Virgins Island is arable and only six percent of the land has permanent crops. The other seventy-nine percent of the islands are either beaches or rough, rugged terrain that is unsuitable for crops.⁹² St. Croix has over 28,000 acres of herbaceous and shrubland/scrub forest, which amounts to approximately 53 percent of the island; St. Thomas has 2,700 acres or 15 percent, and St. John has another 3,400 acres accounting for 27 percent of the island.⁹³ In 1976, private ownership represented approximately 95 percent of all timberland on St. Croix, 87 percent on St. Thomas and 57 percent on St. John if the National Parks Service is not included.⁹⁴ The largest forested areas under public ownership are administered by the U.S. Forest Service, the Virgin Islands government, and the National Parks Service.⁹⁵ The privately owned forests in the Virgin Islands are usually owned in small, less than ten acre, parcels. However, there are still a number of large parcels of forest that are still privately owned.⁹⁶

⁸⁹ Newfound Mgmt. Corp., General Partnership of Newfound Ltd. Partnership v. Sewer, 885 F.Supp. 727 (D.V.I. 1995).

⁹⁰ Saastopankkien Keskus-Osake Pankki v. Allen-Williams Corp., 7 F.Supp.2d 601, 607 (D.V.I. 1998).

⁹¹ Adverse Possession, 28 V.I. CODE ANN. § 11.

⁹² *The World Factbook*.

⁹³ USVI Assessment of Need at 8.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.*

⁹⁶ *Id.* at 10.

III. CONSERVATION EASEMENTS FOR PRIVATE LANDS CONSERVATION IN THE VIRGIN ISLANDS

A. Introduction to Conservation Easements

Conservation easements are a very useful tool for private lands conservation. This section introduces different types of conservation easements in order to provide background knowledge for the reader. Part B of this section examines conservation easements in the context of the Virgin Islands.

1. What is a Conservation Easement?

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.⁹⁷ Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a *conservation easement*.⁹⁸ 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

⁹⁷ Black’s Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).

⁹⁸ 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.

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 extinguished.⁹⁹ 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.¹⁰⁰

⁹⁹ 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 Section IV(F).

¹⁰⁰ 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).

2. *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 affected 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 automatically transferred with the dominant estate—meaning that it “runs with the land.”¹⁰¹ 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.¹⁰² There are some jurisdictions, however, that require the estates affected by an appurtenant

¹⁰¹ 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.

¹⁰² *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).

easement to be adjacent.¹⁰³ 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. The following list is a brief sample of such methods:

a. Purchase by NGOs of Land That can Serve as Adjacent Estates¹⁰⁴

One method for meeting an adjacent lands requirement is for an NGO to acquire—by purchase or donation—land adjacent to the property to be subject to the easement. This allows the NGO’s property to be the dominant estate, and the NGO to hold the easement over adjoining lands.

b. Creative “Nexus” Arguments for Non-adjacent Lands

Another potential method for creating a valid appurtenant easement between non-adjacent properties is to establish (e.g., by successfully arguing its existence in a court of law) an adequate nexus between the properties in question. In Costa Rica, the Center for Environmental Law and Natural Resources (CEDARENA) created an appurtenant easement between a parcel of private land and a nearby state reserve that shared the same birds.

c. Reciprocal Easements

Reciprocal easements enable adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.¹⁰⁵ Working with private landowners, conservation groups in Latin America

¹⁰³ ENVIRONMENTAL LAW INSTITUTE, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23 (2003).

¹⁰⁴ The information in Part I § A.2 (a) – (e) is taken primarily from Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23–24 (2003).

¹⁰⁵ In order to take advantage of federal and state tax incentives, U.S. landowners must grant the conservation easement to either a governmental entity or an authorized NGO. Thus, while the use of reciprocal easements between private landowners is potentially an effective method for achieving private

have used reciprocal easements that grant a third-party NGO the right to enforce the easement—with express authority to enter the property, monitor compliance, and seek judicial enforcement of the rights and obligations derived from the easement. Thus, the use of reciprocal easements can potentially provide a conservation NGO with enforceable rights over land, without the need for the NGO to own adjacent land.

d. Use of Public Lands as the Dominant Estate to Hold an Easement

In several Latin American countries, easements over private land have been created using adjacent or nearby public lands as the dominant estate. In some instances, the easements have also provided a third-party NGO with the right to enforce its terms.

e. Legal Limitations and Uncertainties to Third-Party Enforcement

The common law—or civil code—of some jurisdictions only recognizes the right of an easement’s holder to enforce its terms. Thus, depending on the jurisdiction in question, the practice of granting a third-party NGO the right to enforce the easement may or may not survive legal scrutiny. Additionally, the relevant legal authority is often unclear as to whether the grant to an NGO of the right to monitor and enforce an easement is a real property right that runs with the land, or a personal right enforceable only against the original maker of the easement.

Under the common law adhered to in the U.S., third party enforcement of a conservation easement would be invalidated in court due to a basic principle of contract law which mandates only the parties to the contract may enforce its terms. However,

lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.

many U.S. states have laws authorizing the assignment of this specific power to non-profit organizations—provided the assignment is written into the conservation easement.

3. *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.¹⁰⁶ At common law an easement in gross could not be transferred. Today, however, there are many jurisdictions where legislation and more modern trends in the relevant common law have authorized the transferability of easements in gross.¹⁰⁷

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.¹⁰⁸

¹⁰⁶ 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.

¹⁰⁷ 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.

¹⁰⁸ 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

B. Conservation Easements in the U.S. Virgin Islands

Conservation Easements have not yet been recognized in the Virgin Islands, although a Conservation Easement Act was recently introduced in the Virgin Islands Legislature.¹⁰⁹ It is possible to create appurtenant conservation easements in the Virgin Islands, but it is necessary to have a dominant and servient parcel of land for them to be enforceable. It might also be possible to achieve authorization of conservation easements through the American Law Institute Restatements. The Restatements clearly authorize and outline the use of conservation easements, and if there is no contrary local law, the Restatements are authoritative law in the Virgin Islands.¹¹⁰

1. Virgin Islands Property Law Regarding Conservation Easements

There are no conservation easement statutes that have been enacted in the U.S. Virgin Islands and there have been no cases in either the Territorial Court or the District Court that recognize or even discuss conservation easements. However, both positive and negative easements have been recognized in the Virgin Islands, and restrictive covenants have been recognized and litigated in both the Territorial Court and the District Court of the Virgin Islands.

Territorial Court cases have consistently expressed the rules for the validity and enforceability of restrictive covenants.

The essential elements of a covenant affecting real property are well-established. It must appear that: (1) the grantor and the grantee intended the covenant to run with the land; (2) the covenant is one that “touches” or “concerns” the land with which it runs; and (3) there is privity of estate

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.

¹⁰⁹ The PDF version of this proposed legislation can be found at www.senate.gov.vi/BillTracking/Bills/24-0217.pdf or in the Appendix. The Bill that was introduced was number 24-0217.

¹¹⁰ Please see section III(B)(2) for more information.

between the party claiming the benefit of the covenant and the right to enforce it, and the party who rests under its burden.¹¹¹

Territorial Court cases have explicitly upheld restrictive covenants. In Harris v. Lombardi, the court described a restrictive covenant as “essentially a contractual promise which is said to run with the land and the liability to perform the duties enumerated in the covenant.”¹¹² The judge continued to describe restrictive covenants as enforceable for “prohibiting a particular use or activity [and] even prevails over a zoning ordinance which would permit such use or activity.”¹¹³ Finally, the court held that a tax sale can extinguish a lien, mortgage, or other monetary encumbrances, but a tax sale cannot extinguish restrictive covenants.¹¹⁴

The Virgin Islands District Court cases are very similar to those of the Territorial Court. The District Court also recognizes restrictive covenants and the right to enforce them. “The general theory behind the right to enforce restrictive covenants is that the covenants must have been made with or for the benefit of the one seeking to enforce them.”¹¹⁵ However, the court in Neal v. Grapetree Bay Hotels, Inc. decided that privity is not always required with restrictive covenants. “The violation of a restrictive covenant creating a negative easement may be restrained at the suit of one for whose benefit the restriction was established irrespective of whether there is privity of estate or contract between the parties, or whether an action at law is maintainable.”¹¹⁶ A case decided in 2000 from the District Court, Roach v. West Indies Inv. Co., quotes the Neal case and agreed with their decision, holding that if “equitable restrictive covenants” provide a

¹¹¹ Owners’ Ass’n v. Emigrant Industrial Savings Bank, 278 N.Y. 248 (1938), *quoted in* Carlton Home & Property Owners Ass. v. Daas, 16 V.I. 500 (1979).

¹¹² Harris v. Lombardi, 1990 V.I. Lexis 5, 7.

¹¹³ *Id.* at 11.

¹¹⁴ *Id.* at 10.

¹¹⁵ Neal v. Grapetree Bay Hotels, Inc., 8 V.I. 267, 11 (1971).

¹¹⁶ *Id.* at 11, 12.

tangible benefit that touches and concerns the property, they can be enforced by third parties.¹¹⁷

All of the cases in both the District Court and the Territorial Court have discussed restrictive covenants and negative easements only in the context of subdivided, neighborhood covenants. There has been no litigation concerning conservation easements in the Virgin Islands, so it cannot be said with certainty whether the courts would enforce them without a specific act.

2. *Restatements/Common Law and Conservation Easements*

Although there is no conservation easement statute in USVI, it might be possible to use the American Law Institute Restatements (Restatements) as authority for creating conservation easements. The Virgin Islands Legislature has adopted U.S. common law as expressed in the Restatements for any area of law that local Virgin Islands law does not cover. This statute states in full:

The rules of common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.¹¹⁸

Given that there is no statutory law in the Virgin Islands on conservation easements, it might be possible that valid conservation easements could be established if done so in accordance with the Restatements. However, the application of the Restatements is not certain because it is not clear whether “local law” in the above code means merely local statutes or means local case law *and* local statutes. In addition, the local common law only discusses easements and restrictive covenants in terms of neighbors or neighborhood

¹¹⁷ Roach v. West Indies Inv. Co., 42 V.I. 238, 94 F.Supp.2d 634 (D.C.V.I. 2000).

¹¹⁸ Application of Common Law; Restatements, 1 V.I. CODE ANN. § 4 (1921).

developments. It is not clear whether the Virgin Islands common law on easements would be considered contrary local law, or whether conservation easements could be considered a topic of law that is not covered by local common law, thus allowing the Restatements to apply.¹¹⁹

While no Virgin Islands case law specifically interprets the Restatements on conservation easements (“servitudes” section), case law has reinforced the concept of using other Restatements to fill in the gaps in Virgin Islands Law. In Harland v. Gore, the court stated, “According to the Restatement (Second) of Torts §158 (1965) Pursuant to 1 V.I.C. §4, the rules of common law as set forth in the restatements are to be applied in the courts of the Virgin Islands if there are no contrary local laws.”¹²⁰ Harris v. Lombardi also relies heavily on the Restatements in order to determine the rules of law. The court relies on the Restatement of Property in deciding that a tax sale does not extinguish restrictive covenants.¹²¹ In determining the remedies for fraud, the court also states, “In the absence of a specific Virgin Islands fraud statute, we are bound to follow the Restatement of Torts.”¹²² It is important to look at the Restatement of Property Law as it could possibly control decisions in cases in the Virgin Islands.

The Third Restatement of Property clearly defines a Conservation Servitude and a Conservation Organization. The comments to this section also say that, “With the elimination of restrictions on creation and transferability of benefits in gross in this Restatement, there is no longer any impediment to the creation of servitudes for

¹¹⁹ Please see section V(B) for a more in-depth analysis of applying the Restatements in USVI.

¹²⁰ Harland v. Gore, 41 V.I. 12, 20 (1999)

¹²¹ Harris v. Lombardi, 1990 V.I. Lexis 5, 10.

¹²² *Id.* at 15.

conservation or preservation purposes.¹²³ Section 2.6 of the Restatement goes on to eliminate the previous common law problem of third party beneficiaries enforcing conservation easements. The Restatement states that, “The benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.”¹²⁴ The comments explain that the third-party-beneficiary doctrine from contracts provides the basis for allowing servitudes that benefit persons who are not parties to the contract.¹²⁵

Other sections of the Restatement detail the specifics of transferring, modifying, and enforcing conservation easements. For the most part, a conservation servitude held by a governmental body or conservation organization is transferable only to another governmental body or conservation organization.¹²⁶ Conservation easements can only be modified if the use for which they were created has become impracticable, and they can only be terminated if the servitude can no longer accomplish any conservation purpose for which it was intended.¹²⁷ Finally, a conservation organization or government can enforce conservation easements through coercive remedies and other relief, but not a judgment for damages.¹²⁸

The Restatement clearly authorizes conservation easements and clearly outlines their specific provisions. If the legislature is reluctant to pass a Conservation Easement Act, it might be useful to create a conservation easement as a test case, relying on the Restatements, in order to see whether the courts in the Virgin Islands will hold that they

¹²³ Restatement (Third) of Property (Servitudes) § 1.6 (2000); Restatement (Third) of Property (Servitudes) § 1.6, Comment a (2000).

¹²⁴ *Id.* at § 2.6.

¹²⁵ *Id.* at § 2.6, Comment a.

¹²⁶ *Id.* at § 4.6.

¹²⁷ *Id.* at § 7.11.

¹²⁸ *Id.* at § 8.5.

are enforceable. Please see the Recommendations in section V(B) for more analysis regarding this suggestion.

C. Facilitating Conservation Easements

1. Creating Conservation Easements with Dominant and Servient Parcels

The Nature Conservancy has been successful in creating appurtenant conservation easements in the Virgin Islands using dominant and servient parcels. These easements have been done only on government or quasi-governmental owned conservation lands with the Nature Conservancy holding the easements.¹²⁹ These easements have been successful, but they have only been done on government conservation land and still must be appurtenant, containing dominant and servient parcels to be effective. It is likely, under Virgin Islands property law, that appurtenant conservation easements could also be created on non-governmental land as long as the easement benefits the dominant parcel of land. Although this might be more difficult and more expensive because of the necessity of having control over two contiguous parcels of land, it is another possible way to create conservation easements.¹³⁰

2. Possible Tax Incentives for Conservation Easements in the U.S. Virgin Islands

What incentive does a private landowner have to convey valuable development rights to either a public or private trustee? In the U.S., along with the desire of landowners to preserve undeveloped land, the answer is often money—received in the form of tax benefits (e.g., income, property, gift and estate taxes) or cash payments. For instance, U.S. landowners who donate conservation easements that satisfy requirements

¹²⁹ E-mail from Robert Weary, Caribbean Conservation Finance and Policy Advisor, The Nature Conservancy (June 8, 2004).

¹³⁰ Please see section III(B)(1) of this report.

of the Internal Revenue (IRS) Code can take advantage of federal income and estate tax benefits. If conservation easements are created in the Virgin Islands, there are a number of possible tax incentives for Virgin Islands landowners wishing to conserve their lands, including reductions in income, property, estate, or gift taxes.

a. Income Taxes

The USVI follows the mirror code, which requires that all Virgin Islands tax provisions mirror the United States income tax provisions.¹³¹ Virgin Islands residents can satisfy their Virgin Islands income tax by paying their federal income tax to the Virgin Islands treasury.¹³² In addition, the Legislature of the Virgin Islands is authorized to levy a surtax on taxpayers up to ten percent of residents' annual income tax obligation.¹³³ Currently, only corporations are charged the ten percent surtax on their income taxes.¹³⁴

It is possible to reduce income taxes through the contribution of a conservation easement to a charitable organization. To satisfy the relevant section of the Internal Revenue Code, a conservation easement must be granted—

- a. to a governmental entity or charitable organization that meets certain public support tests; and
- b. exclusively for conservation purposes, which include (1) the preservation of open space for scenic enjoyment pursuant to a clearly delineated governmental conservation policy; (2) the preservation of land for outdoor recreation; (3) the protection of the natural habitat of wildlife or plants; and (4) the preservation of historically important land or a certified historic structure.¹³⁵

¹³¹ Mary Kay Dunning, *Equality Principle for Virgin Islands Tax Clarified by the Third Circuit: Chase Manhattan Bank v. Government of the Virgin Islands*, 56 Tax Law. 665, 665 (2003).

¹³² LEIBOWITZ at 288.

¹³³ Income Tax Laws of the United States in Force; Payment of Proceeds; Levy of Surtax on all Taxpayers, 48 U.S.C.S. § 1397.

¹³⁴ Income Tax Surcharge on Corporations, 33 V.I. CODE ANN. §581 (1986).

¹³⁵ IRS Code, 26 U.S.C.A. § 170(h).

If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in the property's value before the easement was granted compared to the property's value after the granting of the conservation easement. This is often referred to as the "before and after" test.¹³⁶ The prospect of reduced income taxes can persuade some people to donate conservation easements.

b. Property Taxes

One of the biggest tax incentives for donating conservation easements is the possibility of reduced property taxes. Donating easements can reduce property taxes because after the easement is donated, the property is worth less, thus lowering the total property taxes. A non-profit organization holding land is exempt from property taxes as long as the land is held for the purpose of preserving open spaces, greenbelt areas, or buffer zones or nature preserves.¹³⁷

The Virgin Islands Code provides for taxes on property, but has a Farmland Exemption, which allows a deduction of 95 percent of the real property taxes on the total area of land including structures and improvements.¹³⁸ For this exemption to apply, the land must be used actively and solely for agricultural or horticultural purposes and located within an area that has been zoned for agricultural or horticultural uses.¹³⁹ While this exemption creates incentives for the continued use of farmland and may make it

¹³⁶ For federal income tax purposes, this difference in value is a charitable deduction which can be used for a period of up to 5 years to reduce the income tax of the grantor of the easement. The maximum deduction in any year is 30 percent of the grantor's adjusted gross income. For federal estate tax purposes, the grant of the easement results in a lower valuation of the property—and thus, a lower valuation of the estate to which the federal estate tax will be applied. Under the Farm and Ranch Protection Act (1997), IRS Code § 2031.c, landowners can receive an exclusion from federal estate taxes for up to 40 percent of the value of their land under a conservation easement. Only easements granted in perpetuity are eligible for federal tax benefits.

¹³⁷ Exemptions to Non-Profit Organizations, 33 V.I.C. § 2355a (1969).

¹³⁸ Farmland Exemption, 33 V.I. CODE ANN. § 2342 (1968) (Amended 1974).

¹³⁹ Requirements for Land, 33 V.I. CODE ANN. § 2344 (1968).

possible for low-income farmers to keep their land, the Farmland Exemption allows deductions for almost all of a farmer's property tax. Consequently, there is little property tax incentive to donate or sell a conservation easement on farm land, thus there is no incentive to permanently protect the land. A farmer could continue farming his land, paying very little in property taxes, and then sell the farmland to a developer, making a large profit. However, the Farmland Exemption might have limited effect on conservation in the Virgin Islands because only six percent of the land in the Virgin Islands contains permanent crops.¹⁴⁰

Property tax incentives also do not always work because tax assessors are sometimes reluctant to decrease land values when they are responsible for bringing in a certain amount of property taxes every year. In addition, if the land has not been assessed in a long time (and is not likely to be assessed if there is no request for an easement), the more recently assessed land with the conservation easement may actually be worth more than the land assessed years ago without the conservation easement. It was not possible to determine how often property is assessed in USVI or whether tax assessors in USVI are generally responsible about lowering the value of property when necessary. However, because of federal income tax reductions and declines in federal grants, the Virgin Islands is facing a shortage of funds and might be reluctant to grant property tax reductions.¹⁴¹ Consequently, the potential for a property tax reduction depends on the competency of the tax assessors office in the Virgin Islands.

¹⁴⁰ Please see section II(B) of this report.

¹⁴¹ LEIBOWITZ at 302.

c. Estate Taxes

In some places, estate taxes are also reduced by limiting development and lowering the value of the land. Consequently, there can be an incentive to donate conservation easements in order to decrease the estate taxes, ensuring that the property will not have to be divided and sold to pay the taxes. However, in the Virgin Islands, an inheritance is exempt from the payment of inheritance taxes if the decedent, when living, would have been considered a “nonresident not a citizen of the United States” or was “a resident of the Virgin Islands or owned property situated in the Virgin Islands, at the time of his death.”¹⁴² Because any landowner in the Virgin Islands can pass land on without paying estate taxes, this incentive does not apply in the Virgin Islands.

d. Gift Taxes

Gift taxes apply in the Virgin Islands and range from 2.5 percent to 7.5 percent depending on who the gift recipient is. In computing net gifts for the calendar year, it is possible to deduct the amount of all gifts made to a corporation, trust, or foundation operated exclusively for religious charitable, scientific, literary, or educational purposes.¹⁴³ The statute does not mention conservation easements and it is not clear whether a conservation easement could be defined as a gift for charitable, scientific, or educational purpose. However, the gift tax has very limited applicability in the Virgin Islands because like estate taxes, a person is exempt from paying gift taxes if he is a “nonresident not a citizen of the United States” or if he was a resident of the Virgin Islands at the time the gift was made.¹⁴⁴

¹⁴² Exemptions, 33 V.I. CODE ANN. § 5 (1984) (Amended 1985).

¹⁴³ Deductions, 33 V.I. CODE ANN. § 25 (1973).

¹⁴⁴ Exemptions, 33 V.I. CODE ANN. § 31 (1984) (Amended 1985).

IV. OTHER POTENTIAL LEGAL TOOLS

This section discusses other potential legal tools for conserving private land in the Virgin Islands. Some of these tools are already in use in the Virgin Islands, while others are common law tools that could possibly be used in USVI for conservation purposes.

A. Deed Restrictions

Deed restrictions, clauses contained in the deed restricting the future uses of the property, have been used in the Virgin Islands for restricting development.¹⁴⁵ The problem with deed restrictions, though, is that they are only effective if the grantor or a third party beneficiary is willing to enforce them. For example, there is a deed restriction near Great Pond on the island of St. Croix, which prohibits development on the land. The original owners who placed the restrictions on the land cannot be found and the Senate granted rezoning to the property. Building permits have been approved even though they are in clear violation of the deed restriction and covenants.¹⁴⁶

B. Zoning

Zoning is a legal mechanism for local governments to control land use and promote orderly development by regulating the use of privately owned land. Using zoning is another possible option for conservation, but it may not be a very effective way to protect land in the Virgin Islands. The Virgin Islands Senate decides rezoning requests. With only fifteen senators, only eight senators are needed to get the land rezoned. The Nature Conservancy is contemplating proposing A Land and Water Use Plan to the Legislature that could be used to lock in zoning and take that power away from the

¹⁴⁵ Please see Appendix for an example of a Warranty Deed containing Deed Restrictions that was used in the Virgin Islands.

¹⁴⁶ Robert Weary, E-mail (June 8, 2004).

Senate. Unfortunately, it is the Senate that must pass the Land and Water Use Plan, and it is unlikely that they would voluntarily take power away from themselves.¹⁴⁷

C. 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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ 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

¹⁴⁷ *Id.*

¹⁴⁸ Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

¹⁴⁹ 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.

¹⁵⁰ 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.

covenant must “touch and concern” land;¹⁵¹ (4) horizontal privity must exist;¹⁵² (5) vertical privity must exist;¹⁵³ and (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.¹⁵⁴

¹⁵¹ 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.

¹⁵² 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.

¹⁵³ 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.

¹⁵⁴ 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.

There is case law in the Virgin Islands that discusses covenants. Roach v. West Indies Inv. Co. allowed neighbors in a subdivision to enforce a restrictive covenant.¹⁵⁵

This tool might also be used for conservation purposes, although the only USVI case law discussing restrictive covenants involves subdivision covenants. However, it was not possible to find any information regarding the specific use of covenants for conservation purposes in the Virgin Islands.

D. Leases, “Leaseback” Agreements, and Reserved Life Interests

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.¹⁵⁶

A “leaseback” agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

¹⁵⁵ This case is also discussed in the Conservation Easement section of this report. Please see section III(B)(1) for more information on this case.

¹⁵⁶ Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the landowner (or his or her heirs) to terminate the lease. This arrangement would provide the landowner with ongoing control over land use while providing some security of tenure to the conservation NGO.

A landowner could also transfer fee simple title to the land to a conservation NGO (by donation or sale), but reserve a life interest in the land. This method would enable the landowner to remain undisturbed on the land for life. The landowner also has the assurance that without further legal action the conservation NGO will assume control of the land upon the his or her death.

Leasing is a valid and recognized conveyance of property in the Virgin Islands. Leases over one year are subject to the Statute of Frauds and must be in writing. Although it was not possible to find any specific information on the use of leasing to conserve private lands in the Virgin Islands, there are not any restrictions on leasing outlined in the Virgin Islands Code. Leasing may be a valid tool for the conservation of private lands in the Virgin Islands.

E. Equitable Servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.¹⁵⁷ 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 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,¹⁵⁸ for the *burden* of an equitable servitude to bind the original promisor's successors four elements must be met: (1) the promise must

¹⁵⁷ 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).

¹⁵⁸ Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

be in a writing that satisfies the Statute of Frauds or implied from a common plan;¹⁵⁹ (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:¹⁶⁰ (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;¹⁶¹ (4) a servitude is valid

¹⁵⁹ 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.

¹⁶⁰ As noted above, under the “integrated approach” adopted by the Restatement (Third), easements, real covenants, profits and equitable servitudes are all categorized as servitudes

¹⁶¹ 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, 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

if it is not otherwise illegal or against public 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;¹⁶² (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.

Although the Virgin Islands follow U.S. common law and equitable servitudes are most likely generally valid, there was very little case law discussing equitable servitudes. It was also difficult to find any information of equitable servitudes being used in the Virgin Islands for conservation purposes.

F. Profits à Prendre

A profit à prendre is a common law interest in land that gives a right to enter and take part of the land or something from the land.¹⁶³ Although it is not commonly used for conservation purposes, a profits à prendre have the potential to facilitate the conservation of private lands. For instance, a landowner that wishes to protect the timber on his or her property could grant a profit à prendre to a conservation group with respect to that

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).

¹⁶² Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.

¹⁶³ See 28A C.J.S. Easements § 9 (noting that a “right to profits à prendre is a right to take a part of the soil or product of the land of another. It is distinguishable from a pure easement.” Historically, there were five types of profits à prendre depending on the subject matter of the profit: (1) rights of pasture—where the taking is done by the mouths of the grazing animals; (2) rights of piscary—to harvest the fish; (3) rights of turbary—to cut turf or peat as fuel; (4) rights of estover—to take wood necessary for furniture for a house; and (5) a miscellaneous group referring to the taking and using of sand, gravel, stone, etc. A profit à prendre cannot generally be used to take minerals.

timber.¹⁶⁴ The conservation organization would have the exclusive right to decide whether and what trees to cut. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. Under the common law, a landowner can grant a profit à prendre to anyone because there is no requirement that the holder of a profit à prendre own adjacent property.¹⁶⁵

A landowner creates a profit à prendre by granting it in writing to the profit à prendre holder. The landowner specifies precisely what the holder is allowed to enter the land to take. Once the landowner has granted a profit à prendre, he or she must respect its terms. The profit à prendre holder can sue if the owner deals with the land in a way that detracts from the rights of the profit à prendre holder. The holder of a profit à prendre can also sue anyone else who interferes with the profit à prendre.¹⁶⁶

A profit à prendre document is designed to outlive the landowner and perhaps even the profit à prendre holder. In creating a profit à prendre, it is thus essential to consider potential conflicts between a landowner and a profit à prendre holder and describe exactly what the parties intend in the document itself. To protect the profit à prendre holder if the land is subsequently sold, the profit à prendre should be registered in the appropriate land title office. The profit holder can lease, sell, give away or bequeath the profit à prendre to someone else. The holder can also terminate a profit à prendre by

¹⁶⁴ To help ensure its legal validity, a profit à prendre designed to facilitate conservation should be used only where the protected interest is something that can be taken from the land—e.g., timber, fish, pasture, or something similar. Otherwise, it is possible a court would construe the document as an easement and thus apply the far much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit à prendre to protect things that are not included in these categories of removable items. For instance, a landowner could protect spotted owls by granting a profit à prendre to a conservation organization for the harvest of timber.

¹⁶⁵ Profits à prendre of this kind are called *profits en gross*.

¹⁶⁶ Conversely, the profit à prendre holder must respect the rights of the landowner. The landowner can sue the profit à prendre holder if the holder interferes with the landowner's rights.

giving a written release to the landowner, which would then be registered in the land title office.

Although profits are a common law interest that is most likely recognized in the Virgin Islands, there is no information regarding the use of profits in the Virgin Islands. Additionally, there is no case law on profits in the District Court of the Virgin Islands or the Territorial Court.

G. Purchased Development Rights

In the U.S., purchased development rights (PDR) are voluntary legal agreements that allow owners of land meeting certain criteria to sell the right to develop their property to local governmental agencies, a state government, or to a nonprofit organization. A conservation easement is then placed on the land. This agreement is recorded on the title to permanently limit the future use of the land. A PDR is thus an interest in real property that is nonpossessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.¹⁶⁷

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The buyer essentially purchases the right to develop the land and retires that right permanently, thereby assuring that development will not occur on that particular property. Used strategically, a PDR program can be an effective tool to help maximize a community's conservation efforts. Financial support for PDR programs can be raised

¹⁶⁷ At common law PDRs closely resemble negative easements in gross. With the exception of commercial easements in gross, easements in gross were not transferable and expired with the holder. These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the UCEA. In addition to providing protection against being extinguishment, for PDRs drafted as conservation easements under its provisions, the UCEA provides the basis for claiming both federal and state income and estate tax benefits. See Maureen Rudolph and Adrian M. Gosch, Comment, A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143, 146 (2000).

through a variety of mechanisms—including bond initiatives, private grants and various taxation options.

There is no information on Purchased Development Rights being used in the Virgin Islands. There is also no case law concerning Purchased Development Rights in the Virgin Islands.

V. GOVERNMENT CONSERVATION PROGRAMS CURRENTLY AVAILABLE IN THE U.S. VIRGIN ISLANDS

A number of conservation programs are currently available or have been put into practice in USVI including the restrictions on property that are outlined in section II(A)(1) above, U.S. environmental laws, and various local and federal programs geared towards protecting habitat and the environment.

A. Federal Programs that Include Conservation Easements

There are some federal conservation programs including the Forest Legacy Program, the Wetlands Reserve Program, the Farm and Ranchland Protection Program, and the Farmland Protection Program, which explicitly authorize the acquisition of conservation easements. The Virgin Islands is eligible to participate in each of these programs.

1. The Forest Legacy Program (FLP)

The Forest Legacy Program is a U.S. Department of Agriculture administered program established for achieving the goal of “ascertaining and protecting environmentally important forest areas that are threatened by conversion to nonforest uses.”¹⁶⁸ The program focuses on the acquisition of partial interests, such as conservation easements, in privately owned forest lands that have significant environmental values or

¹⁶⁸ Forest Legacy Program, 16 U.S.C.A. § 2103c (1990) (Amended 2003).

shall be threatened by present or future conversion to nonforest uses.¹⁶⁹ The FLP is available to all of the states, which by statutory definition includes USVI.¹⁷⁰

To achieve the program's goal, the Secretary of Agriculture may purchase and hold conservation easements against willing landowners,¹⁷¹ which may not be "limited in duration or scope" by "any provision of state law."¹⁷² In addition, the conservation easement may not be defeated because it is held in gross, is transferred to a non-federal entity, or if the FLP is ever disestablished.¹⁷³ The U.S. Federal share of costs must not exceed, to the extent possible, 75 percent of the total costs; but the acquisition costs may be shared with regional organizations, other governmental units, landowners, corporations, or private organizations.¹⁷⁴ To participate in the program, a state must conduct an Assessment of Need (AON) that identifies the land areas it wishes to include in the program.¹⁷⁵ Upon approval by the Secretary of Agriculture, a FLP is implemented in the state and lands and interests in lands (i.e., conservation easements) are acquired on a willing seller/willing buyer basis.¹⁷⁶

This program is a useful tool for private lands conservation in USVI for a number of reasons. First, the Virgin Islands are already active in this program. The Assessment of Need has been prepared and was approved on June 20, 2003. Although no conservation easements under the Forest Legacy Program have yet been created in the Virgin Islands, the Annaly Bay/Hermitage Valley Tracts have been submitted to the

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at § 2109(d)(1).

¹⁷¹ *Id.* at § 2103c(c).

¹⁷² *Id.* at § 2103c(k)(2).

¹⁷³ *Id.* at § 2103c(k)(2)(A)-(D).

¹⁷⁴ *Id.* at § 2103c(j)(2).

¹⁷⁵ U.S. Dept. of Agriculture Forest Service, *Forest Legacy Program Implementation Guidelines*, pp. 8-12 (June 30, 2003).

¹⁷⁶ *Id.*

USDA for approval for fiscal year 2005. The President has already authorized \$1 million for the project and it is waiting for approval from Congress.¹⁷⁷ Secondly, the FLP is useful because under the terms of the program the U.S. holds the conservation easement without any interference from conflicting state laws. Because federal laws operating in USVI have the power to preempt local regulations which conflict with the federal laws, the uncertainty of relying on Virgin Islands servitude law is absent when working through this program.¹⁷⁸ Finally, the U.S. shoulders up to 75 percent of the conservation easement acquisition costs (in partnership with other entities). This enables USVI to conserve its private lands at little or no cost to itself.

2. *Wetlands Reserve Program*¹⁷⁹

The Wetlands Reserve Program (WRP) is also well-suited to the Virgin Islands for a number of reasons (although it is not known how much wetlands are currently in private hands). The U.S. government is the holder of the conservation easement; the U.S. government will fund up to 100 percent of the acquisition costs if the easement is permanent;¹⁸⁰ the program is voluntary; and permanent easements are preferred. Unlike the FLP, one important aspect of the WRP is that it appears that private landowners may become eligible for it on their own, without any preliminary action being required from the USVI government.

The most significant drawback of the Wetlands Reserve Program, however, is that easements “shall be for 30 years, permanent, or the maximum duration allowed under

¹⁷⁷ E-mail from David Howlett, Stewardship/Legacy Coordinator for the U.S.V.I., USDA Forest Service (June 7, 2004).

¹⁷⁸ Please see section I(B)(2) of this report.

¹⁷⁹ Wetlands Reserve Program, 16 U.S.C. §3837 (1985) (Amended 2002).

¹⁸⁰ Duties of the Secretary, 16 U.S.C. §3837c (b). The secretary is also authorized to pay up to 75 percent of the costs for thirty-year easements.

applicable State laws.”¹⁸¹ Instead of clearly identifying the terms and conditions of the conservation easements as Congress did in the FLP, the WRP instead relies on state laws to determine the type and length of an easement. In the Virgin Islands, where conservation easements are not even clearly recognized, this creates significant uncertainty. However, the fact that the United States is the entity holding the easement as well as the fact that the United States will pay a considerable portion of the costs, still makes the WRP a feasible option for private lands conservation.

Initially, the extent of private wetlands in the USVI should be determined. When this is completed, landowners should be contacted and educated about the WRP so that they might become participants.

3. *Farmland Protection Program (FPP) & Farm and Ranch Lands Protection Program (FRPP)*¹⁸²

The Farmland Protection Program and the Farm and Ranch Lands Protection Program are two very similar federal programs that are perhaps the least constructive of the federal programs available in the Virgin Islands that include conservation easements. The FPP and FRPP authorize the United States to purchase conservation easements or other interests in eligible land for the purpose of protecting topsoil by limiting the nonagricultural uses of the land.¹⁸³ However, the United States will only pay up to fifty percent of the costs of a conservation easement under the FPP and FRPP, with the eligible entity providing the other half.¹⁸⁴ Less U.S. Federal contribution means more money must be found elsewhere. Also, under these programs the conservation easement is not held by the U.S. Federal Government, but rather by a NGO or other “eligible

¹⁸¹ Easements and Agreements, 16 U.S.C. §3837a (e).

¹⁸² Farmland Protection, 16 U.S.C. § 3838i (1985) (Amended 2002).

¹⁸³ *Id.* at § 3838i (a).

¹⁸⁴ *Id.* at § 3838i (c)(1)(A).

entity.”¹⁸⁵ The question arises of whether there will be more or less enforcement of the easement when it is not held by the U.S. Government. Finally, only fifteen percent of the land in the Virgin Islands is arable, with only six percent of the land containing permanent crops. These programs may be of limited use because of the small land area that is applicable for the program.

B. Local Conservation Programs and Regulations

The Virgin Islands have also created wildlife sanctuaries and preserves that encourage conservation. Some of these programs include the ability to affect conservation on private lands as well as the creation of public conservation areas. The Commissioner of Planning and Natural Resources has the power to declare *any* area in the Virgin Islands a game preserve, and may prohibit hunting of all types for one season at a time.¹⁸⁶ The Commissioner also has the power to “designate and establish wildlife or marine sanctuaries in addition to those [already] designated.”¹⁸⁷ The Christainsted Deer Preserve has already been declared a preserve for the propagation and restoration of wild deer and includes the entire area of St. Croix lying east of the town of Christiansted.¹⁸⁸ In addition, there is also the St. Croix East End Marine Park that was established to promote the sustainability of marine ecosystems. The East End Marine Park is the first territorial park in the U.S. Virgin Islands and protects the largest island barrier reef system in the

¹⁸⁵ *Id.* at § 3838j (a).

¹⁸⁶ Establishment of Game Preserves, 12 V.I. CODE ANN. § 91 (1951).

¹⁸⁷ Establishment of Wildlife or Marine Sanctuaries, 12 V.I. CODE ANN. § 97 (1987) (Amended 2003).

¹⁸⁸ Christiansted Deer Preserve, 12 V.I. CODE ANN. § 93 (1952).

Caribbean.¹⁸⁹ The Marine Park also includes a No-take Area, Turtle Wildlife Area, Recreation Area and Open Area.¹⁹⁰

C. Local Implementation of CWA, CAA, ESA & Wildlife Restoration Projects

The Virgin Islands play a role in implementing various federal laws that protect the environment including the Clean Water Act, Clean Air Act, and Endangered Species Act. Although these statutes originated with the U.S. Congress, the Virgin Islands has implemented them locally in the Virgin Islands Code.¹⁹¹ Because these are federal laws that are applicable to the Virgin Islands, any contradictory local law would be preempted.¹⁹²

There are also numerous federal programs that are in use in the Virgin Islands. The Wildlife Restoration Project is a cooperative program between the federal and state governments, which has existed since 1937 and provides federal grants “to state agencies for conservation through land and water management for wild birds and mammals.”¹⁹³ Under the Wildlife Restoration Project, the Virgin Islands Commissioner has the power and duty to secure the benefits from the federal government available under the Wildlife Restoration Projects Act. These projects could include, “the acquisition by purchase, condemnation, lease or gift of areas” suitable for wildlife restoration as well as “research

¹⁸⁹ THE NATURE CONSERVANCY, EAST END MARINE PARK, ST. CROIX, <http://nature.org/wherewework/caribbean/usvirginislands/work/art8687.html>.

¹⁹⁰ St. Croix East End Marine Park Established; Establishment of Territorial System of Marine Parks Authorized, 12 V.I. CODE ANN. § 98 (2003).

¹⁹¹ Wildlife Restoration Projects, 12 V.I. CODE ANN. § 81 (1946); Protection of Indigenous, Endangered and Threatened Fish, Wildlife and Plants, 12 V.I. CODE ANN. §§101-107 (1990); Water Pollution Control, 12 V.I. CODE ANN. §§181-198 (1976); Air Pollution Control, 12 V.I. CODE ANN. §§201-221 (amended 1994). Please see Conservation Programs section of the Appendix for more information.

¹⁹² Please see section I(B)(2) of this report.

¹⁹³ Louis Alan Talley, *Wildlife Restoration Projects Fund*, CRS REPORT FOR CONGRESS 97-506, available at <http://www.ncseonline.org/nle/crsreports/biodiversity/biodv-30.cfm?&CFID=14286564&CFTOKEN=59351249> (hereinafter Talley).

into problems of wildlife management.”¹⁹⁴ In 1997, the Virgin Islands received a total of \$276,318, with \$228,250 of that going towards wildlife restoration.¹⁹⁵ It was difficult to discover, though, whether this money was used to acquire land for conservation purposes or was used for research purposes.

Other programs include the National Wildlife Refuge Fund, the North American Wetlands Conservation Fund, the Neotropical Migratory Bird Conservation Program, and the Landowner Incentive Program.¹⁹⁶ These programs all provide federal funding to further the goal of conservation.¹⁹⁷

VI. RECOMMENDATIONS

A. Conservation Easement Legislation

The most effective way to make conservation easements easier to create and more certain in their enforceability is to get a Conservation Easement Act passed in the Virgin Islands. All the legal doubts could be cleared up in the legislation—there would be no question about whether a conservation easement is legal, who is legally allowed to enforce the easement, if the easement runs with the land, or whether the easement has to be appurtenant or in gross. A Conservation Easement Act was introduced in the Senate in January of 2002, but never made it out of committee.¹⁹⁸ Apparently there was little

¹⁹⁴ Wildlife Restoration Projects, 12 V.I.C. § 81 (1951); authorized by 16 U.S.C. § 669 et seq.

¹⁹⁵ Talley. A list of wildlife restoration projects from the years 1946-1993 is available at http://caribbean-ecoteam.fws.gov/sport_fish_USVI.htm.

¹⁹⁶ *Norton Briefs President Bush on Interior Department’s Cooperative Conservation Programs; Announces \$25.8 Million in Grants to Assist Conservation Efforts for Imperiled Species on Private Lands*, U.S. FISH & WILDLIFE SERVICE, available at <http://southeast.fws.gov/news/2004/n04-004.html>.

¹⁹⁷ H.R. REP. NO. 107-103 (2002), available at http://www.congress.gov/cgi-bin/cpquery/?&dbname=cp107&&r_n=hr103.107&sel=TOC_100326&. For more information regarding conservation programs please see the Appendix.

¹⁹⁸ BILL TRACKING, 24th LEGISLATIVE SESSION, <http://www.senate.gov.vi>.

understanding of and interest in the Conservation Easement Act.¹⁹⁹ The proposed act was taken directly from the Uniform Conservation Easement Act and is almost identical to it.²⁰⁰

The U.S. Congress could also pass an act or amend the Revised Organic Act in order to create a Conservation Easement Act for the U.S. Virgin Islands, although this course of action could be problematic. First, it would probably be even harder to garner support for a Conservation Easement Act affecting the Virgin Islands in the U.S. Congress because there are more lawmakers and they are less connected to the territory. In addition, the people of the Virgin Islands send only one non-voting delegate to the U.S. Congress and do not vote for the President. They have almost no influence over politics in the United States and would likely resent the U.S. Congress taking steps to control the territory without their input. Consequently, the most practical way to create a

¹⁹⁹ Robert Weary, E-mail (June 9, 2004).

²⁰⁰ *Chapter 15 Uniform Conservation Easements*, (Proposed Legislation to Amend Title 12 of the Virgin Islands Code, Jan. 29, 2002). 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 governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments." (UCEA, Prefatory Note, 12 U.L.A. 166 (1996), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm>).

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. (UCEA, § 1(1)—Definitions).

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. (UCEA, § 4, 12 U.L.A. 179).

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.

conservation easement act for the Virgin Islands is to develop local support for the act in the Virgin Islands and try to influence the fifteen senators in the Virgin Islands Legislature.

B. Use Restatements as Authority for Conservation Easements

If the legislature cannot be persuaded to pass a Conservation Easement Act quickly, it might be worth trying a test case for conservation easements by relying on the Restatements. As discussed in section III(B), there is no statutory authority in the Virgin Islands authorizing the use of conservation easements. However, the Virgin Islands Code states that if there is no contrary local law, then the Restatements will be authoritative, and the Restatements clearly authorize and outline the use of conservation easements. The question that arises is whether there is any contrary local law. There is nothing in the Virgin Islands Code that discusses the enforcement or requirements of easements. However, there is some Virgin Islands case law requiring privity or appurtenant parcels of land for easements or restrictive covenants.²⁰¹

There are a number of ways to argue that the Restatements should apply when enforcing conservation easements notwithstanding Virgin Islands common law. First, it is possible to argue that “local law” as stated in the code describes only the Virgin Islands Code and not Virgin Islands common law. Some of the evidence for this line of reasoning is the history of the code itself. This provision of the Virgin Islands Code was based on a similar code of the islands from 1921 and states, “The common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance [code].”²⁰² This history shows that the intent of the

²⁰¹ Please see section III(B) of this report.

²⁰² 1 V.I. CODE ANN. § 4, History.

original legislators was for the United States case law to be modified only by local statutes and not local case law. In addition, a Territorial Case, Harris v. Lombardi, decided in 1990, states, “[i]n the absence of a specific Virgin Islands fraud statute, we are bound to follow the Restatement of Torts.”²⁰³

However, there is also ample evidence that “local law” in the Virgin Islands Code does include local case law as well as statutory law. Numerous cases have stated that local law means both statutes and precedent.²⁰⁴ One way to respond to this evidence is to show that the law on easements in the Virgin Islands has always directly followed U.S. common law. Therefore any case law regarding easements in the Virgin Islands is simply the reiteration of U.S. common law and not locally created Virgin Islands common law.

Finally, another way to argue that the Restatements and not case law should apply in enforcing conservation easements is to show that although there is some case law regarding positive easements and restrictive covenants in developed neighborhoods, there is absolutely no case law specifically discussing conservation easements. This lack of law stems primarily from the fact that conservation easements are relatively new and simply had not been considered as a possibility. Therefore, although there is local case law on easements, there is no *contrary* law on conservation easements. For instance, there is no local statute or case that pronounces that conservation easements will not be enforced in the Virgin Islands. In fact, in validating conservation easements, a judge

²⁰³ Harris v. Lombardi, 1990 V.I. LEXIS 5, 15.

²⁰⁴ Moore v. A.H. Riise Gift Shops, D.C.V.I. 1987, 23 V.I. 227, 659 F.Supp. 1417 (“Local law” is not limited to Virgin Islands statutes, but also includes Virgin Islands case law); Board of Drs. of Shibui Condominium Ass’n v. Consolidated Int’l, Inc., 28 V.I. 57 (1993) (In absence of written or case law to contrary, Restatements of the Law are rule of law in Virgin Islands); Machover v. Estate of Machover, 28 V.I. 7 (1992) (Because no written or case law existed concerning in terrorem clauses in wills, Territorial Court in estate dispute was forced to follow common law rules as expressed in Restatements of Law).

would not have to overturn any of the case law concerning positive easements or restrictive covenants in neighborhoods.

It would be helpful to do more research on this subject to learn exactly how the courts determine what contrary local law is, and what most courts require before they follow the Restatements. However, in bringing a test case, it would be most helpful to have very good facts. For instance, the contract has to clearly and unambiguously state that the conservation easement is meant to be an easement in gross and is meant to run with the land. Also, the land the conservation easement is protecting should be land that the court can easily recognize as having important conservation potential. It would also be best if the court would issue a declaratory judgment. If that is not possible, it would be good if the plaintiff, or the person contesting the easement, does not stand to lose big financially by the court's decision because it might make the court less likely to enforce the conservation easement. Depending on the facts of the case, a judge who is sympathetic to conservation could legitimately follow the Restatements and enforce conservation easements in the Virgin Islands.

C. Forest Legacy Program

The Forest Legacy Program appears to be one of the most useful federal programs currently being used for conservation in the Virgin Islands. Not only does it provide funding for attaining conservation easements, but the language of the statute clearly authorizes the federal government to own conservation easements even if they are contrary to state law. If it proves difficult to get a conservation easement act passed, or if the courts are unwilling to recognize the Restatements, then working through the Federal

Legacy Program in order to create legally enforceable conservation easements is another possibility.

CONCLUSION

From the research conducted for this paper, it appears likely that the Virgin Islands' legal system is suited for and adaptable to the concept of conservation easements. Although conservation easements are not expressly recognized in the Virgin Islands, easements and land use restrictions in general are enforceable. In addition, a Virgin Islands court looking to the Restatement of Property for guidance will find that conservation easements are strongly recognized and even encouraged. With an increased demand for development stemming from the growing population and the tourism industry, there is a growing need for the Virgin Islands government to find a way to conserve its vanishing natural resources. Under these pressures, with appropriate education measures taken, and with the appeal of conservation easement as an efficient, effective, and fair way to conserve private lands, it seems likely that Virgin Islands legal authority will eventually accept some form of conservation easement.

BIBLIOGRAPHY

* All materials starred are available for review in the Appendix to this report.

Background Information:

- ABOUT ST. THOMAS AND THE U.S. VIRGIN ISLANDS, http://www.e-vacationrentals.com/st_thomas/about_stthomas.htm.*
- CENTRAL INTELLIGENCE AGENCY, *The World Factbook: The U.S. Virgin Islands* (Dec. 18, 2003), <http://www.cia.gov/cia/publications/factbook/geos/vq.html>.*
- CENTRAL INTELLIGENCE AGENCY, *The World Factbook: United States* (May 11, 2004), <http://www.cia.gov/cia/publications/factbook/geos/us.html>.
- TERRY DUNNAHOO, U.S. TERRITORIES AND FREELY ASSOCIATED STATES 45 (F. Watts 1988).
- INTERNATIONAL BUSINESS ORGANIZATION, *US Virgin Islands Country Profile*, http://www.worldinformation.com/World/camerica/American_Virgin_Islands/profile.asp?country=340.*
- STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 68 (Lawyers Cooperative Publishing 1995).
- 4 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA (Herbert M. Kritzer, ed., ABC CLIO 2002) (hereinafter LEGAL SYSTEMS OF THE WORLD).
- ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (Boston, Martinus Nijhoff 1989).
- 1 MODERN LEGAL SYSTEMS CYCLOPEDIA Ch. 4 (Kenneth R. Redden & Linda L. Schlueter, eds., William S. Hein & Co. 2000).
- UNITED STATES VIRGIN ISLANDS, *A Brief History of the Virgin Islands*, <http://www.virginisles.com/history.html>.*

U.S. Virgin Islands Statutes:

- 1 V.I. CODE ANN. § 4 (1921), Application of Common Law; Restatements.*
- 5 V.I. CODE ANN. § 31 (1921) (Amended 1977), Time for Commencement of Various Actions.*
- 12 V.I. CODE ANN. § 81 (1946), Wildlife Restoration Projects.*
- 12 V.I. CODE ANN. § 91 (1951), Establishment of Game Preserves.*
- 12 V.I. CODE ANN. § 93 (1952), Christiansted Deer Preserve.*
- 12 V.I. CODE ANN. § 97 (1987) (Amended 2003), Establishment of Wildlife or Marine Sanctuaries.*
- 12 V.I. CODE ANN. § 98 (2003), St. Croix East End Marine Park established; establishment of territorial system of marine parks authorized.*
- 12 V.I. CODE ANN. §§101-107 (1990), Protection of Indigenous, Endangered and Threatened Fish, Wildlife and Plants* (*Only Selections of this law included in Appendix*).
- 12 V.I. CODE ANN. § 123 (1948), Cutting or Injuring Certain Trees.*

- 12 V.I. CODE ANN. § 124 (1948), Obtaining Permission to Cut or Injure Certain Trees.*
- 12 V.I. CODE ANN. §§181-198 (1976), Water Pollution Control* (*Only Selections of this law included in Appendix*).
- 12 V.I. CODE ANN. §§201-221 (amended 1994), Air Pollution Control* (*Only Selections of this law included in Appendix*).
- 12 V.I. Code Ann. § 401 (1971), Declaration of Policy.*
- 12 V.I. Code Ann. § 403 (1971), Obstruction of Shorelines Prohibited.*
- 12 V.I. CODE ANN. § 533 (1971) (Amended 1987), Earth Change Plans.*
- 12 V.I. CODE ANN. § 535 (1971) (Amended 1987), Exemptions.*
- 12 V.I. CODE ANN. § 903 (1978), Findings and Goals.*
- 12 V.I. CODE ANN. § 910 (1978) (amended 1987), Coastal Zone Permit.*
- 28 V.I. CODE ANN. §11, Adverse Possession.*
- 28 V.I. CODE ANN. § 41 (1921), Manner of Executing Conveyance.*
- 28 V.I. CODE ANN. § 43 (1921), Proof by Subscribing Witness of Execution of Conveyance.*
- 28 V.I. CODE ANN. § 121 (1921) (Amended 1999), Place of Recording.*
- 28 V.I. CODE ANN. § 124 (1976), Unrecorded Conveyance Void as to Subsequent Innocent Purchaser.*
- 28 V.I. CODE ANN. § 131 (1921), Conveyances Under Prior Laws.*
- 28 V.I. CODE ANN. § 241 (1921), Creation or Transfer of Interest in Real Property.*
- 28 V.I. CODE ANN. § 281 (1921), Action to Recover Possession; Parties.*
- 28 V.I. CODE ANN. § 411 (1921) (Amended 1978), Public Uses.*
- 28 V.I. CODE ANN. § 412 (1921), Estates and Rights Subject to be Taken.*
- 28 V.I. Code Ann. § 418 (1921), Just Compensation; Appointment of Commission; Powers, Proceedings; Court Action.*
- 33 V.I. CODE ANN. § 5 (1984) (Amended 1985), Exemptions.*
- 33 V.I. CODE ANN. § 25 (1973), Deductions.*
- 33 V.I. CODE ANN. § 31 (1984) (Amended 1985), Exemptions.*
- 33 V.I. CODE ANN. §581 (1986), Income Tax Surcharge on Corporations.*
- 33 V.I. CODE ANN. § 2342 (1968) (Amended 1974), Farmland Exemption.*
- 33 V.I. CODE ANN. § 2344 (1968), Requirements for Land.*
- 33 V.I.C. § 2355a (1969), Exemptions to Non-Profit Organizations.*

United States Statutes:

- 16 U.S.C. § 2103c (1990) (Amended 2003), Forest Legacy Program.*
- 16 U.S.C. §3837 (1985) (Amended 2002), Wetlands Reserve Program.*
- 16 U.S.C. §3837c, Duties of the Secretary.*
- 16 U.S.C. §3837a, Easements and Agreements.*
- 16 U.S.C. § 3838i (1985) (Amended 2002), Farmland Protection.*
- 26 U.S.C. § 170(h), Charitable, etc., Contributions and Gifts.*
- 48 U.S.C. § 1397, Income Tax Laws of the United States in Force; Payment of Proceeds; Levy of Surtax on all Taxpayers.*

- 48 U.S.C. § 1611 (1921) (amended 1984), District Court of Virgin Islands; Local Courts.*

Restatements of Law:

- Restatement (Third) of Property (Servitudes) § 1.3 (2000), Covenant Running With Land, Affirmative, Negative, And Restrictive Covenants Defined.*
- Restatement (Third) of Property (Servitudes) § 1.4 (2000), Terms "Real Covenant" And "Equitable Servitude" Dropped.*
- Restatement (Third) of Property (Servitudes) § 1.6 (2000), Conservation Servitude and Conservation Organization Defined.*
- Restatement (Third) of Property (Servitudes) § 2.6 (2000), Creation of Benefits In Gross and Third Party Beneficiaries.*
- Restatement (Third) of Property (Servitudes) § 4.6 (2000), Transferability of Servitude Benefits.*
- Restatement (Third) of Property (Servitudes) § 7.11 (2000), Modification and Termination of a Conservation Servitude Because of Changed Conditions.*
- Restatement (Third) of Property (Servitudes) § 8.5 (2000).*

Cases:

- Andrews v. Nathaniel, 2000 WL 221937 (Terr.V.I. 2000).*
- Board of Drs. of Shibui Condominium Ass'n v. Consolidated Int'l, Inc., 28 V.I. 57 (1993).
- Carlton Home & Property Owners Ass. v. Daas, 16 V.I. 500 (1979).*
- Chase v. Virgin Islands Port Auth., 38 V.I. 417, 3 F.Supp.2d 641 (1998).*
- Downes v. Bidwell, 182 U.S. 244 (1901).*
- Ducrot v. Marshall & Sterling, Inc., 861 F. Supp. 363 (V.I. 1994).*
- Government of the Virgin Islands v. Rijos, 285 F.Supp. 126 (D.V.I. 1968).*
- Harland v. Gore, 41 V.I. 12 (1999).*
- Harris v. Lombardi, 1990 V.I. Lexis 5.*
- Kruger & Birch, Inc. v. Du Boyce, 3 V.I. 599, 241 F.2d 849 (3d. Cir. 1957).*
- Land Holdings (St. Thomas) Ltd. v. Mega Holdings, Inc., 1999 WL 1044836 (D.V.I. 1999).*
- Machover v. Estate of Machover, 28 V.I. 7 (1992).*
- Moore v. A.H. Riise Gift Shops, 23 V.I. 227, 659 F.Supp. 1417 (D.V.I. 1987).*
- Neal v. Grapetree Bay Hotels, Inc., 8 V.I. 267 (1971).*
- Newfound Mgmt. Corp., General Partnership of Newfound Ltd. Partnership v. Sewer, 885 F.Supp. 727 (D.V.I. 1995).*
- Rivera v. Government of the Virgin Islands, 375 F.2d 988 (3d Cir. 1967).*
- Roach v. West Indies Inv. Co., 42 V.I. 238, 94 F.Supp.2d 634 (D.C.V.I. 2000).*
- Saastopankkien Keskus-Osake Pankki v. Allen-Williams Corp., 7 F.Supp.2d 601 (D.V.I. 1998).*
- Soto v. United States, 273 F. 628 (3d Cir. 1921).*
- In re Tutu Water Wells Contamination Litig., 42 V.I. 278, 78 F.Supp.2d 456 (1999).*

U.S. Virgin Islands Government Information:

- 24th LEGISLATIVE SESSION, *Bill Tracking*, <http://www.senate.gov.vi>.
- 25th LEGISLATURE OF THE U.S. VIRGIN ISLANDS, *The Legislature's History*, http://www.senate.gov.vi/25thLegislature/historyinfo/History.htm.*
- 25th LEGISLATURE OF THE U.S. VIRGIN ISLANDS, *Senators*, <http://www.senate.gov.vi>; INTERNATIONAL BUSINESS ORGANIZATION.
- U.S. VIRGIN ISLANDS OFFICE OF THE LIEUTENANT GOVERNOR, http://www.ltg.gov.vi.*
- U.S. VIRGIN ISLANDS OFFICE OF THE RECORDER OF DEEDS, http://www.ltg.gov.vi/departments/recorder.html.*
- U.S. VIRGIN ISLANDS OFFICE OF THE TAX ASSESSOR, http://www.ltg.gov.vi/departments/taxdetail.html.*

Conservation Areas/Programs:

- THE NATURE CONSERVANCY, *East End Marine Park, St. Croix*, http://nature.org/wherewework/caribbean/usvirginislands/work/art8687.html.*
- Norton Briefs President Bush on Interior Department's Cooperative Conservation Programs; Announces \$25.8 Million in Grants to Assist Conservation Efforts for Imperiled Species on Private Lands, U.S. FISH & WILDLIFE SERVICE, available at http://southeast.fws.gov/news/2004/n04-004.html.*
- ST. CROIX ENVIRONMENTAL ASSOCIATION, *SEA Conservation Programs*, http://stxenvironmental.org/stcroixenvironmentalssociation/id9.html.*

Reports:

- *An Act to Provide for the Establishment of Constitutions for the Virgin Islands and Guam*, Pub. L. No. 94-584, 1976 H.R. 9460 (1976).
- *Approving a Constitution for the U.S. Virgin Islands*, H.R. REP. NO. 97-25 (1981), reprinted in C.I.S. 81 H443-4.
- ENVIRONMENTAL LAW INSTITUTE, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* (2003).
- Forest Legacy for the U.S. Virgin Islands An Assessment of Need, Prepared by The Nature Conservancy for the Virgin Islands Department of Agriculture, Jan. 2003.* (*This document is located in the front pocket of the Appendix.*)
- H.R. REP. NO. 107-103 (2002), available at http://www.congress.gov/cgi-bin/cpquery/?&dbname=cp107&&r_n=hr103.107&sel=TOC_100326&.
- Louis Alan Talley, *Wildlife Restoration Projects Fund*, CRS REPORT FOR CONGRESS 97-506, available at <http://www.ncseonline.org/nle/crsreports/biodiversity/biodv-30.cfm?&CFID=14286564&CFTOKEN=59351249>.
- U.S. Dept. of Agriculture Forest Service, *Forest Legacy Program Implementation Guidelines*, 8-12 (June 30, 2003).

- *U.S. Territories and Freely Associated States: Hearing Before the Committee on Energy and Natural Resources To Amend the Organic Act of Guam, the Revised Organic Act of the Virgin Islands, and the Compact of Free Association Act, and for Other Purposes*, 105th Cong. 1st Sess. (1997) (statement of President of Virgin Islands Senate).
- Ruth G. VanCleve, *The Application of Federal Laws in American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands* (Dep't of the Interior, Office of the Solicitor 1993).

Law Review Articles:

- Mary Kay Dunning, *Equality Principle for Virgin Islands Tax Clarified by the Third Circuit: Chase Manhattan Bank v. Government of the Virgin Islands*, 56 TAX LAW. 665 (2003).
- Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes, Real Property*, PROBATE & TRUST J. 226 (2000).
- Joycelyn Hewlett, *The Virgin Islands: Grand Jury Denied*, 35 HOW. L.J. 263 (1992).*
- Maureen Rudolph and Adrian M. Gosch, *Comment, A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RESOURCES J. 143 (2000).

E-mail Contacts:

- David Howlett, Stewardship/Legacy Coordinator for the U.S.V.I., USDA Forest Service.
- Althea Pedro, District Recorder of Deeds, St. Croix.
- Robert Weary, Caribbean Conservation Finance and Policy Advisor, The Nature Conservancy.

Sample Documents:

- Conservation Easement Act, Proposed Legislation in the U.S. Virgin Islands (Jan. 29, 2002).*
- Conservation Easement, The Nature Conservancy – Magens Bay Authority (July 2002).*
- Warranty Deed and Deed Restrictions, The Nature Conservancy to MTHC II, LLP (Feb. 2003).*
- Warranty Deed, The Nature Conservancy to Magens Bay Authority (July 2002).*

* All materials starred are available for review in the Appendix to this report.