Private Lands Conservation in the Bahamas

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Citation Information
Elizabeth McCormack, Private Lands Conservation In The Bahamas (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2004).
ELIZABETH MCCORMACK, PRIVATE LANDS CONSERVATION IN THE BAHAMAS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2004).

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PRIVATE LANDS CONSERVATION IN THE BAHAMAS

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

September 2004

Sponsored by The Nature Conservancy

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**BRIEF QUESTIONS**

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

   There is currently no Conservation Easement Act in the Bahamas, but the government does recognize easements for governmental purposes. The Bahamas also recognizes the power of the Bahamian government, delegated to The Bahamian National Trust, to purchase or acquire land for conservation purposes. Additionally, the Coast Protection Act allows purchase or lease by the government of private land for coastal protection purposes. And, the government may create private reserves through the Wild Animals Protection Act and the Wild Birds Protection Acts. Finally, the government may restrict private citizens from engaging in certain activities on their land for conservation purposes. For example, the Conservation of the Physical Landscape of the Bahamas Act restricts the harvesting of certain trees, even on privately owned land.

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

   The Law of Property and Conveyancing (Condominium Act) allows for negative easements to prevent the blockage of a neighbor’s natural light and to prevent the removal of support from a neighbor’s building. Such negative easements also can be portrayed as restrictive covenants between neighbors and could possibly be creatively expanded to conserve private lands. Leasing land is allowed as well and could be used for private lands conservation, but most long term-leases take place on Crown lands. Traditional devises such as commonages also are recognized in the Bahamas. Commonages make it more difficult to develop land because land is held in common and the unanimous consent of the landholders is required for a change of use. While there are currently only three or four commonages in the Bahamas, there is a possibility these could be used for conservation purposes.
3. **Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation?**

The enactment of a Conservation Easement Act would override British common law restrictions on the creation of negative easements in the Bahamas and would further the goal of private lands conservation there. The Bahamas could then create a Conservation Easement Program, since the government is allowed to purchase land for public purposes under the Acquisition of Land Act. The Bahamas National Trust would also be able to establish conservation easements.
INTRODUCTION

This report seeks to provide a basic description of the legal instruments, processes and institutions relevant to private lands conservation currently in place within the Bahamas. It also assesses the feasibility of introducing a number of legal tools, including the conservation easement, into the Bahamas legal system for the purpose of achieving private lands conservation. Section I of the report provides a contextual overview of the Bahamas by discussing its relevant history, culture, government, and legal framework. Section II contains a brief overview of private land ownership and use in the Bahamas. Section III describes the Bahamas’ institutional framework for the administration of private lands. Section IV discusses some of the difficulties that arise when working with land and the current land administration. Section V introduces conservation easements and discusses the possible use of conservation easements in the Bahamas. Section VI discusses other potential legal tools that have been or could be used for private lands conservation, while section VII describes legal conservation tools that are currently available in the country. Finally, section VIII includes comprehensive recommendations for increasing private lands conservation in the Bahamas.

I. RELEVANT BACKGROUND

The land tenure system of the Bahamas is a mixed system. European legal concepts were layered on top of an existing land system with indigenous and African roots. Ideas such as “common” and “generational” land developed from African traditions, while Europeans
introduced sharecropping, leaseholds, and freehold tenures—as well as the notion of individual entitlement rather than group holdings—as formal legal concepts.¹

A. History of Land Tenure

Land tenure in the Bahamas began with the Arawak people, an indigenous group, that recognized claims to land through use, such as the building of homes, farming the land, and the existence of burial grounds.² Spain claimed ownership of the Bahamas in 1494, but formal tenure did not begin until 1629 when the British entered the islands. A new era of formal land tenure began in 1846 when the quit rent system was abolished by the Commutation Act, and the modern era began in 1961 with the Quieting Titles Act.³

1. Spanish Era (1494-1629)

Spain claimed ownership of the Bahamas in 1494 with the Treaty of Tordesillas between Spain and Portugal. The Spanish did not settle the area extensively and made no attempt to enforce a legal system. Therefore, notions regarding land remained virtually unchanged during the Spanish era.⁴

2. Origins of Formal Tenures (1629-1780s)

The Bahamas became a British colony in 1629 when the King of England claimed the islands as Crown land. The king created a quasi-feudal system and elected eight Proprietors to be tenants-in-chief of the land. The Proprietors granted guaranteed and unencumbered land to settlers in exchange for an annual quit rent. In return for an investment of £100, settlers were given 300 acres in “main settlement,” 35 acres for each additional household member, and 2,000

⁴ Ferguson.
acres outside the main settlement. During this British colonial period, the main forms of land tenure remained the quit rents held by settlers and the lesser-known group land holdings of the native people of the Bahamas.\(^5\)

### 3. The American Loyalists (1780s-1846)

The arrival of American Loyalists changed the demographic and socio-economic system in the Bahamas. In 1787, the Crown welcomed the Loyalists and their slaves to the Bahamas. Loyalists received 40 acres per head of household and 20 acres for each dependent, including slaves. In 1802, the Quit Rent Act required the surrender and re-granting of all land. The Quit Rent Act also subjected those who had been granted land once again to the payment of annual quit rents. Finally, the Registration Act of 1805 called for the registration of titles. Certain basic land law principles were established in the Bahamas: that all unalienated land belonged to the Crown, that Crown grants did not easily convert to freeholds, and that land tenure was not secure unless the land was registered.\(^6\)

During the same period, however, slaves built a kinship land system, based on with traditional ties to the land. Land was held in common and land, along with lineage, defined political units.\(^7\)

### 4. The Commutation Act of 1846 and Informal and Formal Tenures After Emancipation (1846-1961)

The Commutation Act of 1846 formally abolished the quit rent system and made it possible to obtain absolute title in land. In addition, a Surveyor General was posted to bolster the administration of Crown Lands under the Colonial Governor, and greater attention was paid to registration and the surveying of land. There was a corresponding increase in land registration on

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\(^5\) Craton at 92.

\(^6\) Id.

\(^7\) Id. at 90.
the island of New Providence. The Acquisition of Lands Act was enacted in 1913 and allowed for the quieting of titles for the lands which the government wished to expropriate.

However, even though they formed a majority of the population, there was no formal scheme to settle the land claims of former slaves. This neglect allowed former slaves to build their own customary land tenure pattern, much of which had roots stemming in African tradition. A system of communal lands flourished on the Out Islands, and because there was a general availability of large tracts of land, there was no need for formal boundaries, thus reinforcing the African tradition of common land use.

During the time shortly after emancipation, generational land systems also flourished, as former slaves became squatters and gained a legal claim to land. These generational land systems allow the official title to reside in one family member, who holds the land in trust for the entire family. Land is passed according to a “bilateral with unrestricted land-holding descent” method, which means that land can be inherited by almost anyone in the generational line.

5. Modern Land Issues (1961-Present)

Competing land policies and land tenure systems remain in the Bahamas. One type of tenure arises from traditional systems of land and the rights of squatters, and the other arises from an imposed formal legal system. Surveying of land has proven to be incomplete or inaccurate, and there have been an array of documentary and customary claims to land. In addition, generational land is now inherited by all children, making it difficult to keep track of the different interests in the land. Because of the uncertainty of title, those who occupy or work the land often lose it to those with more power and resources.

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8 Ferguson.
9 Craton at 100.
The Quieting Titles Act\textsuperscript{11}, which requires a person to advertise the intention to quiet title to land, was initiated in 1959 but really took effect with its interpretation in the \textit{Bowe} case of 1961.\textsuperscript{12} In the \textit{Bowe} case, twenty-eight adverse claimants came forward to dispute the ownership of the petitioner’s land. The case is one in which generational passage of land was an issue. Even though evidence demonstrated that the land was held in common, the court held that the law required that title be quieted in the petitioner.\textsuperscript{13}

With the coming to power of the Progressive Liberal Party in 1967, after new squatters had emerged in the Out Islands, mainly Haitian immigrants, there was a movement to make land more accessible and to reserve land for Bahamians. In the 1980s a government committee surveyed the land in the Bahamas, and in the 1990’s a Geographic Information System study of the land was completed in an attempt to further understand and improve land issues in the Bahamas.

\textbf{B. Overview of Land, Demographics, and Related Issues}

\textit{1. Figures and Background}

The Commonwealth of the Bahamas, with a total surface area of 5,380 square miles, consists of 700 islands and more than 2,000 cays and rocks in the southwestern edge of the North Atlantic Ocean. Only about thirty of the islands are inhabited.\textsuperscript{14} Of these, the main islands are New Providence, Grand Baham a, Andros, Eleuthera and Abaco. The capital, Nassau, is the

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\textsuperscript{11} Bahamas Code, Chapter 170.
\textsuperscript{12} \textit{Petition of James Maxwell Mitchell Bowe}, Bahama Islands Supreme Court, Equity Division, No. 137 (1961). This case involved a 3,763 acre tract of land located in the center of Great Exuma. Bowe’s family as well as 200 ex-slaves, consisting of 37 different households, two churches and one school were located on the land. The ex-slaves referred to the land as generational property.
\textsuperscript{13} Craton at 105.
\textsuperscript{14} Singer at 5.
center of politics and economy in the Bahamas. The population on the islands was 252,000 in 1990.\footnote{Id.}

The main industry in the Bahamas is tourism. Because of this dependence on tourism, Bahamians often have a positive outlook on tourism, as well as development in general. Agriculture, on the other hand, is a low-profile, low-status economy, and is practiced more extensively in the Out Islands.\footnote{Id.} Like many of the small islands of the Caribbean, the Bahamas relies heavily on U.S. markets and industry, and is greatly affected by the United States economy and policy.

\section*{2. Public and Private Lands}

Seventy percent of land in the Bahamas is Crown land,\footnote{Crown land refers to public or government owned land that may be granted to public institutions or private individuals.} which is administered by the Land and Surveys Department. Crown land cannot be registered until it becomes private land; however, it is not mandatory for citizens to register their land. The distribution of Crown land for purposes such as agricultural development has been a controversial issue, partly because of the inability of the administration to manage the land and ensure that it is used for agricultural purposes.\footnote{Singer at 3.} A proposal has been proffered to distribute land only to Bahamians, but to allow them to enter into joint ventures with foreign investors. However, such changes in the distribution of land could not succeed without a well-equipped land administration in place.\footnote{Id. at 4.}

The disposal of Crown land is currently accomplished through conditional purchase leases, long-term leases, and annual tenancy. A conditional purchase lease requires the fulfillment of specific conditions outlined in the lease, such as the development of a particular
piece of land.\textsuperscript{20} Long-term leases may be for residential, recreation, or commercial purposes. Lands required for agricultural use are usually granted under leasehold for a term of five years. Finally, annual tenancy is used by small farmers for subsistence farming and rural homesteading on a non-permanent basis. In this type of tenancy, neither structures nor permanent crops are permitted.\textsuperscript{21}

In addition, the Bahamian government is authorized to acquire land through the Acquisition of Land Act.\textsuperscript{22} This land may be acquired by private agreement for purchase or by compulsory purchase for public purposes. The Minister is required to give notice in the Bahamas Gazette whenever land is needed.\textsuperscript{23} If the promoters (owners) of the land and the persons interested in the land cannot agree on a purchase price, an application must be submitted to the Governor General to appoint an assessor for the land.\textsuperscript{24} Under the Act, the Minister or a surveyor is authorized to enter the land in order to survey and set the boundaries of the property. The owner of the property is entitled to compensation for any damage done to his land during the surveying process.\textsuperscript{25}

If the parties are still unable to agree on a purchase price, the issue should be brought before the local district magistrate by written request of the owners. The request must include the nature of all interests in the land, and notice should be given to everyone who has an interest in or occupies the land.\textsuperscript{26} The judge may act with any powers of the Supreme Court, but the Supreme Court is also available on appeal.\textsuperscript{27} Everyone with an interest in the land is entitled to

\begin{itemize}
\item Conditional purchase leases have been utilized on the larger of the Family Islands.
\item Singer at 17.
\item Bahamas Code, Chapter 233.
\item \textit{Id.} at § 6.
\item \textit{Id.} at §§ 8-11.
\item \textit{Id.} at § 4.
\item \textit{Id.} at § 12.
\item \textit{Id.} at § 38.
\end{itemize}
compensation for that interest.28 The magistrate’s judgment must be in writing, include a description of the land and the costs of the proceedings, and be signed by the magistrate, judge, and assessors.29 When the land is in New Providence, the award is registered in the Register of Records. When the land is located in the Out Islands, it must be recorded with the local magistrate’s office.30

The Bahamas National Trust is also able to hold public land in trust and is responsible for the development of wildlife sanctuaries and the protection of wetlands and wildlife species.31 In addition, acts such as the Wild Animals Protection Act and the Wild Birds Protection Act allow for reserves to be created upon Crown land.32

C. Government

The Bahamas is an independent member of the Commonwealth of Nations, which is an association of nations consisting of the United Kingdom and its dependencies, as well as many former British colonies that are now sovereign states but owe allegiance to the British Crown. The government of the Bahamas is classified as a constitutional parliamentary democracy.

1. Executive Branch

The Executive Branch of the Bahamas consists of the British monarch, the Governor General, Prime Minister, and the Cabinet. The British monarch is the nominal head of state and appoints a Governor General to represent the monarchy in the Bahamas. The Prime Minister is the material head of state33 and is usually the leader of the majority party following the

28 Id. at § 30.
29 Id. at § 31.
30 Id. at §§ 35, 36.
32 Bahamas Code, Chapter 229; Bahamas Code, Chapter 230 at § 5.
33 LEX BAHAMAS, Bahamian Online Legal Resource Centre (March 23, 2003), http://www.lexbahamas.com (hereinafter LEX BAHAMAS).
The Cabinet is appointed by the Governor General and must be approved by the Prime Minister.

2. **Legislative Branch**

The Legislative Branch consists of a bicameral legislature, which includes a House of Assembly and Senate. The legislature is authorized to enact laws and has regular elections. The House of Assembly has 43 members who are elected from individual constituencies for five year terms. The Senate consists of sixteen members, nine appointed on the advice of the Prime Minister, four on the advice of the Leader of the Opposition, and three on the advice of the Prime Minister after consulting with the Leader of the Opposition. As under the Westminster system, the government may dissolve Parliament and call elections at any time.35

3. **Judicial Branch**

The judicial system in the Bahamas consists of a hierarchical system of courts including the Out Island Commissioners’ Court, the Stipendiary and Circuit Magistrates’ Court, the Supreme Court, the British Court of Appeal, and the Privy Council of the United Kingdom.36

The Supreme Court obtains its judicial power from the Constitution of the Bahamas.37 It has unlimited original jurisdiction for all civil and criminal cases, supervisory jurisdiction over all inferior courts, and appellate jurisdiction.38 The Supreme Court is also the sole guardian of the Constitution. The justices are appointed by the Governor General with the advice of the judicial commission, and the Chief Justice is chosen by the Governor General.

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34 The World Factbook.  
35 Id.  
36 There are seventeen Magistrate Courts, fourteen in New Providence, two in Freeport, Grand Bahama, and one in Eight Mile Rock, Grand Bahama. The Magistrate Court hears summary offenses and civil cases where the amount does not exceed $5,000.00. There is also a separate court for industrial cases. The Industrial Tribunal can hear and determine trade disputes, register industrial agreements, and hear and determine matters relating to the registration of such agreements. LEX BAHAMAS.  
38 Id.
Because the Supreme Court has unlimited original jurisdiction, land cases can be decided by the Supreme Court. In fact, the authority for land issues is ultimately the Supreme Court. According to the Quieting Titles Act, the Supreme Court is vested with the ability to quiet title to land and may issue a Certificate of Title that is good against those claiming title. However, cases may first be tried to the Out Island Commissioners’ Court, the lowest court in the Bahamas, which has authority to hear land cases.

The Court of Appeal, which consists of three judges, is the immediate appellate court for the Supreme Court of the Bahamas.³⁹ The Privy Council of the United Kingdom serves as the highest appellate court.⁴⁰ Decisions of the Privy Council are binding in the Bahamas unless it is a decision stemming from another country where the Privy Council has appellate jurisdiction.⁴¹

D. Legal Framework

The legal framework of the Bahamas is similar to that of the United Kingdom and consists of the Bahamas Constitution, Acts of the British Parliament, Bahamas legislation, and English common law. The Bahamas Constitution was adopted in 1973 and is the Supreme Law of the Bahamas.⁴² The Constitution declares that if any law is inconsistent with the Constitution that law should be void.⁴³ This includes both Acts of the British Parliament as well as Acts of the Bahamas legislators.

The British Parliament has the authority to make laws subject to the provisions of the Bahamian Constitution for the order and good governance of the Bahamas.⁴⁴ In addition, the legislative branch of the Bahamas may also make laws affecting the country as long as they do

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³⁹ The Court of Appeal consists of a President, the Chief Justice, who is invited by the President, and two to four Justices of Appeal (to qualify one must have held judicial office in the past). The Court of Appeal hears decisions of the Supreme Court. LEX BAHAMAS.
⁴⁰ Id.
⁴¹ Knowles at Ch. 2.
⁴² The Constitution follows the Westminster model. Id. at Ch. 1.
⁴³ Bahamas Constitution, Art. 2.
⁴⁴ Id. at Art. 52(1).
not contradict the Constitution. Finally, where the legislation of the Bahamas does not conflict, British common law is considered legal precedent.45

II. FRAMEWORK OF LAND OWNERSHIP IN THE BAHAMAS

A. Interests in Land Recognized in the Bahamas

There are a number of different interests in land that are recognized in the Bahamas including the fee simple,46 life estate,47 lease, trust, and mortgage. Rights of commonage and generational title, described below, also exist in the Bahamas. Finally, easements and restricted covenants are mentioned in several Bahamian Acts,48 and so although an authorization for them appears to be absent from the Bahamas Code, it is most likely that their authorization stems from British common law.49

Commonages also are recognized by the Bahamas Code, which restricts owners of commonages from selling their property because ownership of the land is so uncertain.50 There are only three or four actual commonages in the Bahamas, but these make up a fairly large portion of land. Commonages were first formed after a recession in 1833 when individuals consolidated their individual titles to land in order to form joint ventures that could assist in paying the back rents on the land. This form of joint ownership recognized each person’s rights

45 Declaratory Act (1799).
46 A fee simple is defined as the greatest possible interest a person can have in real estate, the totality of ownership rights recognized by the law. In addition, the Bahamas recognizes four types of co-tenancies, which are joint tenancy, tenancy in common, coparcenery, and tenancy by entirety.
47 A life estate is the right to use and enjoy land and/or structures on land for the life of the life tenant. The estate reverts back to the grantor (or to some other person), at the death of the person to whom it is given.
48 See Bahamas Code, Chapter 124.
49 Email from Jason Hepburn, Legal Assistant for Brian Simms, Attorney, Bahamas (July 13, 2003).
50 Bahamas Code, Chapter 142.
to the land according to how much he paid, but did not recognize specific boundaries. This led to confusion of ownership rights and has hindered meaningful use of the land.\textsuperscript{51}

Generational Title, on the other hand, is not a legal estate in land, but exists when families have not probated their estates for generations.\textsuperscript{52} Generational title stemmed from the practice of customary land tenure and the “squatting” on land that took place after the emancipation of the slaves.\textsuperscript{53} High percentages of generational title are found on islands where land had historically little value and low levels of commerce. These islands include Eleuthera, Cat, Long, Crooked and Rum Cay.\textsuperscript{54}

Finally, adverse possession also is recognized in the Bahamas. In order to gain title by adverse possession a person must prove that his possession of the property has been continuous for at least thirty years.\textsuperscript{55} Evidence of adverse possession may be brought under the Quieting Titles Act to the Supreme Court of the Bahamas.\textsuperscript{56}

\textbf{B. Conveying Property in the Bahamas}

The conveyancing of property in the Bahamas is governed by the Conveyancing and Law of Property Act, which was adopted in order to simplify and improve the process of transferring property. A transfer of land can be enacted through a simple deed and normally includes everything upon the land including houses, buildings, hedges, and fixtures. Deeds in the Bahamas are referred to by the term “This Indenture,” and come into effect upon delivery.\textsuperscript{57} A typical provision in a deed, the words “the vendor, as the beneficial owner, hereby conveys to the purchaser,” shows a covenant to convey good title, quiet enjoyment, and freedom from

\begin{itemize}
\item Singer at 12.
\item Craton.
\item Rabley at 20.
\item Bahamas Code, Chapter 127 at § 14.
\item See generally Bahamas Code, Chapter 127.
\item The Schedule of the Conveyancing and the Law of Property Act, Bahamas Code, Chapter 123.
\end{itemize}
encumbrances. However, the seller makes a covenant to sell property even if only general words are used. In addition, a description of the land as well as any easement or right of way should be placed in the schedule. A contract for sale of property is generally not reversible if a deed is correctly executed.

A seller of property is obligated to produce his documents for the purpose of inspection and comparison with abstracts of purchase, but the purchaser bears all the expenses of producing and verifying all property records that are not in the possession of the seller. The purchaser also cannot require that the conveyance be executed in his presence. Finally, a land purchaser cannot require a title search for more than thirty years, the period extending back to a grant or lease by the Crown, or a title granted by the court according to the Quieting Titles Act.

If there are encumbrances on a property that is being transferred, the court can require that payment be made to the court in order to compensate those who hold them. Upon payment, the court is authorized to declare the land free from encumbrances. After the sale, notice is given to those who had interests in the land, and the money held by the court for those interests is divided among them.

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58 Id. at §§ 5-7.
59 Descriptions of land in deeds may be accomplished with a survey of the land or a simple legal description, which is often more difficult to decipher.
60 Bahamas Code, Chapter 123 at § 3. The seller is also obliged to produce documents in any court or commission in the Bahamas. Anyone interested in requiring a seller to produce documents may apply to the court for the production of the documents, and the cost of these obligations is born by the person requesting the documents. Bahamas Code, Chapter 123 at § 9.
61 Id. at § 7.
62 Crown land may be granted, leased, or used for governmental purposes. Crown land is also commonly leased by private individuals for either short-term leases or for long-term leases. The comprehensive policy toward Crown land is to utilize the land for large-scale development. The sale of Crown lands to private individuals is only done in exceptional circumstances.
63 See Quieting Titles Act, Bahamas Code, Chapter 127.
64 Bahamas Code, Chapter 123 at § 4.
65 Id.
C. Registration of Property in the Bahamas

Bahamian citizens and foreign investors are required to follow separate procedures when registering an interest in land. First, as long as the transfer is between a competent seller and a willing buyer, Bahamian citizens are not required to record documents conveying property. However, citizens are encouraged to use the registration system because interests first lodged in the Registry have preference over any other interests, and there is no fee for the registration or issue of any deed or document.

Deeds are recorded in the general register under the Registration of Records Act. The Registrar is required to accept documents of title as long as they are regular on their face, and the Registrar should endorse every deed or writing accepted. This system of registering property has problems, though, because it has not prevented the same parcels of land from being registered several times.

Non-citizens are required to register their property interests, but they must first submit an application for a permit to the Foreign Investments Board along with a $5.00 fee payable to the Treasurer. The Board may ask for additional information, admit, or deny the application. If the application is accepted, a fee of $20.00 is due and payable to the Treasurer. In addition, the non-citizen who is applying for registration of land may ask that a permit be altered. The non-citizen is required to present to the Registrar General the document evidencing ownership or interest in the property, a description of the property, the permit issued by the Board, a concise statement including the name and address of the applicant, and a plan of the property as approved under the

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66 Ferguson.
67 Bahamas Code, Chapter 175 at § 10.
68 Id. at § 19.
69 Id.
70 Singer at 6.
71 Bahamas Code, Chapter 125 at § 2.
Land Surveyors Act. If the Registrar General is satisfied with the paperwork submitted, he is authorized to alter an existing permit.

D. Establishing Clear Title and Settling Disputes

The best way to secure clear title in the Bahamas is to follow the procedures of the Quieting Titles Act. The Quieting Titles Act was passed in 1959 and authorizes any person who has an estate or interest in land to petition the court to have his title investigated and declared in a certificate of title. The Act requires notice of the petition to be posted in local newspapers. Any parties with an adverse claim to the property have a prescribed amount of time to bring their claim in court.

The effect of a Certificate of Title under the Act is far reaching. It provides conclusive evidence as to its contents, and is binding upon all persons as well as the Crown. The Certificate of Title is subject to any reservations contained in the original grant from the Crown as well as any valid, recorded encumbrances such as easements. Once a Certificate Title is issued it is permanent, and courts may set it aside only if it was obtained by fraud.

Since 1959, when the Act was adopted, there have been over 800 petitions presented to quiet title, the vast majority on the island of New Providence. People have used the Act to cure defects in their title as well as to quiet title to property gained by adverse possession. Despite the fact that clear title to land is most needed in the Out Islands, the area has seen few petitions. And, it is important to note that because the Certificate of Title is difficult to set aside, there have been instances of abuse, especially by those in power.

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72 Please see section III(A) for more information on the Land Surveyors Act.
73 Bahamas Code, Chapter 125 at § 8.
74 Quieting Titles Act, Bahamas Code, Chapter 127 at § 3 (1959).
75 Id. at § 27.
76 Knowles at Ch. 6.
77 Id.
78 Singer at 13.
Despite the Quieting Titles Act, issues with lack of registration, generational land, commonages, and squatting still hinder people’s ability to acquire clear title to land. First, because it is not mandatory to record transfers of land, it is nearly impossible to obtain documentary evidence of good title.\(^\text{79}\) Second, both generational land and the commonage often have multiple parties claiming legal title to a single parcel of land. In addition, throughout the Out Islands there is an extensive but undetermined amount of squatting. Squatting often results from inequities in land distribution, and many farmers who are unable to obtain their own land, end up squatting on others’ lands or Crown lands. The government has no effective monitoring system for squatters even though this is an extensive practice. Finally, there continues to be a high incidence of land disputes because of multiple claimants to land, multiple registrations of land, lack of surveys, and lack of known boundaries.\(^\text{80}\) Essentially, the government still does not know how much land in the Bahamas is claimed by the populace or where that land is located.\(^\text{81}\) Therefore it is somewhat difficult to establish clear title in the Bahamas.

Land disputes in the Bahamas are adjudicated in the court system. The typical remedy is damages, which could make the enforcement of an equitable servitude or conservation easement more difficult. Equitable remedies such as specific performance are discretionary,\(^\text{82}\) but specific performance has been granted in contract cases where the sale of land is in question.\(^\text{83}\) In appropriate cases injunctions also may be ordered.

\(^{79}\) Id. at 12.
\(^{80}\) Rabley at 3.
\(^{81}\) Id.
\(^{82}\) Knowles at Ch. 2.
\(^{83}\) Id.
III. LAND ADMINISTRATION AGENCIES

Land in the Bahamas is managed by several government agencies that generally look at their own objectives rather than the bigger picture and often do not work in conjunction with one another.\(^8^4\) There is no general, ultimate policy to direct the government agencies as to land administration in the Bahamas.\(^8^5\) The government agencies dealing with land include: The Land and Surveys Department of the Ministry of Works and Land, the Registrar General’s Department, the Physical Planning Department of the Ministry of Works and Land, the Land Administration Section of the Ministry of Agriculture, Trade and Industry, the Valuation Section of the Ministry of Finance (Real Property Tax Department), and the Treasury Department.

A. Land and Surveys Department

The Director of Lands and Surveys reports to the Office of the Prime Minister and is responsible for the management of Crown Lands, which occupy 70 percent of the land in the Bahamas.\(^8^6\) The management of the Crown lands includes managing grants, sales, leases, and licenses on Crown land as well as the management of forests, the valuation of lands, surveying Crown land boundaries, and the subdivision of Crown lands. In general there is a lack of adequate funding and organization for the work required.\(^8^7\)

The Land Surveyors Act of 1975 and the Land Surveyors Regulations of 1975 set out the responsibilities of the Surveyors General and define the standards for surveys. The Land Surveyors Act establishes the Office of the Surveyor General, the Land Surveyors Board, and the

\(^8^4\) Singer at 19.
\(^8^5\) *Id.*
\(^8^6\) The Department of Lands and Surveys is split into four sections: Estate Management, Forestry, Research, and Survey and Mapping. Other duties of the Land and Surveys Department include mapping activities, data acquisition, production of charts, documents storage, retrieval and facilitation of land, and geographical information needs of the government. The Act also requires the preservation of those surveys done in accordance with the Quieting Titles Act, which have been registered in the Supreme Court.\(^8^6\)
\(^8^7\) Rabley at 15.
Bahamas Association of Land Surveyors.\textsuperscript{88} The Board consists of the Surveyor General, two surveyors appointed by the Minister, and two surveyor members of the Bahamas Association of Land Surveyors who are also appointed by the Minister. The Association is given the power to hold, acquire, and dispose of real and personal property. The Association is also expected to promote and encourage proper conduct among surveyors, provide opportunities for the acquisition of land and diffusion of knowledge of land surveying, and to suggest and consider amendments to the law relating to land surveying.\textsuperscript{89}

In addition, the Act lays out disciplinary measures for registered surveyors who certify the accuracy of a survey without doing the actual work or make any false report or memorandum.\textsuperscript{90} A disciplinary committee of three members of the Board has the authorization to penalize the surveyor as long as there is adequate notice of the proceedings. Discipline can include removal of the name from the Register, suspension of registration for a period of not more than one year, and the possible contribution to the costs of any court proceedings.\textsuperscript{91} The Act also provides for a penalty of a fine up to 600 dollars and/or up to twelve months in prison\textsuperscript{92} for those who pretend to be a member of the Association of Land Surveyors, willfully make an entry into the Register knowing it to be false, or damage a survey station.

The Land Surveyors Act also requires that before a survey is done, notice be given in the Bahamas Gazette and two local newspapers that includes the description, locality, and position of all survey marks to be put down.\textsuperscript{93} The surveyor has authority to enter upon any land whether

\textsuperscript{88} Bahamas Code, Chapter 232 at § 8.
\textsuperscript{89} Id. at § 9.
\textsuperscript{90} Id. at § 15. Surveyors may also be disciplined if they complete a survey without marking or pegging the land, if they know the survey to be defective, or if they make an entry in the field book without that observation being derived from actual observation.
\textsuperscript{91} Id. at § 18. See also id. at §§ 19-22.
\textsuperscript{92} See id. at §§ 23-25.
\textsuperscript{93} Id. at § 26.
public or private for the purpose of surveying.\textsuperscript{94} The owner of the land is entitled to compensation by the Surveyor General for any damage done to his property during a survey for public purposes,\textsuperscript{95} and an aggrieved landowner may appeal the matter to the Supreme Court.\textsuperscript{96}

**B. Registrar General’s Department**

The Registrar General’s Department is part of the Attorney General’s Chambers and is responsible for registering property. The registers include records of land grants, land transfers, mortgages, leases, servitudes, cessions, and miscellaneous agreements. However, these records are not complete\textsuperscript{97} and are not very useful for a number of reasons. First, the registering of deeds is not mandatory and there is no obligation to review the accuracy of the data that is presented in or with the deed. In addition, there is no Title Registry, and surveys of land are only required for Crown lands. Therefore, it is common for parcels to be registered more than once, and the information within the registry is not guaranteed.\textsuperscript{98} Second, the register system does not provide for a simple way to search the registers. Searching the deed registers must be done by searching for the name of each party through each subsequent transaction because the deeds are stored in alphabetical order and there are no duplicates.\textsuperscript{99}

**C. Physical Planning Department**

The Physical Planning Department is part of the Ministry of Works and Land and is responsible for town planning activities on the island of New Providence. Its Director of Physical Planning and Town Planning Committee, which consists of seven members, manage urban issues and zoning. The committee was established by the Town Planning Act of 1961, and members are...

\textsuperscript{94} Id. at § 29.
\textsuperscript{95} Id. at § 30.
\textsuperscript{96} Id. at §§ 31, 32.
\textsuperscript{97} Rabley at 23.
\textsuperscript{98} Singer at 6.
\textsuperscript{99} Rabley at 23.
appointed by the Governor General.\textsuperscript{100} Although some claim that there is coordination between the Town Planning Department and other Departments, there is little evidence on the ground to support this assertion.\textsuperscript{101}

According to the Town Planning Act, it is not lawful to erect, establish, or pull down a building without first obtaining the sanction of the Committee. If a building is altered without proper sanction, the Committee has the authority to destroy, alter, or restore the building.\textsuperscript{102} In addition, anyone who wants to build a private road or subdivision must also apply to the Committee of Town Planning. The Committee may make changes to the plan submitted by the landowner.\textsuperscript{103}

The Minister has the authority to enter any land in order to carry out necessary town planning measures. The landowner is liable to the Minister for all expenses made in carrying out the terms of an order, including seven percent interest starting from the date of service.\textsuperscript{104} It is possible to appeal a decision of the Town Planning Committee to the Supreme Court. The Supreme Court, after receiving a copy of the decision, may affirm, reverse, or modify the decision of the Committee.\textsuperscript{105}

Chapter 238 applies the law of Private Roads and Subdivisions to the Out Islands. No one may create a new road or subdivision without the approval of the Minister of Private Roads and Subdivisions.\textsuperscript{106} Also, the Minister of Private Roads and Sub-divisions must approve any conveyance, agreement to sell, or demise by the owner of the property.\textsuperscript{107}

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\textsuperscript{100} Bahamas Code, Chapter 236 at § 16. Expenses associated with carrying out the decision or provisions of the Act are to be paid for by the Consolidated Fund.
\textsuperscript{101} Singer at 20.
\textsuperscript{102} Bahamas Code, Chapter 236 at §§ 7-9.
\textsuperscript{103} Bahamas Code, Chapter 237 at § 3.
\textsuperscript{104} Bahamas Code, Chapter 236 at §§ 11, 12, 16.
\textsuperscript{105} Id. at § 13.
\textsuperscript{106} Bahamas Code, Chapter 238 at § 4.
\textsuperscript{107} Id. at § 5.
\end{flushright}
D. Ministry of Agriculture and the Bahamas Agricultural and Industrial Corporation

This section of the government is responsible for the development of agriculture. The Ministry of Agriculture participates in the allocation of land, but there is no land administration function formally in place. On the ground, the Ministry of Agriculture and the Lands and Surveys Department appear to work against each other.\textsuperscript{108}

E. Real Property Tax Department

The Real Property Tax Department suffers from problems of being understaffed and under-funded, so regular assessments of land value are difficult; equipment is outdated; processes predate independence and are designed for manual work; there is a lack of coordination and integration with other departments; and the staff can barely keep up with the ad hoc requests that come in from the government and the public.\textsuperscript{109} In addition, property values are not monitored by either the Real Property Tax Department or the Department of Land and Surveys. Therefore, property taxes are often mismatched and inadequate.\textsuperscript{110} In order for a property to be taxed, it must first be assessed. However, many properties have never been assessed, so they remain untaxed. Because of this, many Bahamians enjoy substantial exemptions, and some are not taxed at all.

F. Bahamas, Environment, Science and Technology Commission (BEST)

The BEST Commission was formed in 1994 and is charged with the coordination of a National Conservation and Sustainable Development Strategy. A National Land Use Committee was established under BEST to address issues of land use conflict and development, but it has since disbanded because of lack of funds and lack of accessible information. However, the BEST commission has proposed legislation.

\textsuperscript{108} Singer at 22.
\textsuperscript{109} Bahamas Code, Chapter 339.
\textsuperscript{110} Rabley at 27.
In 2000 the BEST Commission proposed an Act to Establish the Bahamas Ministry of Environmental Planning and Protection and to Provide for Environmental Planning and Protection. A Minister of Environmental Planning and Protection would be charged with protecting the environment and ensuring sustainable development of natural resources. The Minister’s duties would include educating the public on conservation and disseminating information on conservation throughout the Bahamas. The Minister would develop a plan for land use, coastal zoning, surface water management, and natural resources management, as well as develop proposals for the protection of natural resources on both public and private lands. The Act also creates an Environmental Advisory Board to assist the Minister as well as a Department of Environmental Planning and a Department of Environmental Protection within the Ministry. This Act could potentially affect private land conservation and further conservation efforts.

A bill to regulate the activities of non-governmental organizations (NGOs) has also been proposed. This bill would require NGOs working in the Bahamas to have minimum standards and register with the government.

G. Department of Environmental Health

The Department of Environmental Health was created in 1987 and is charged with the responsibility of promoting and protecting public health as well as ensuring conservation and environmental protection. The Department’s duties include: the prevention and control of pollution of any waters in the Bahamas; monitoring the safety of water; the regulation and

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111 Environmental Planning and Protection Act, proposed legislation by BEST (2000).
112 Id. at § 4(2)(e).
113 Id. at §§ 8-9.
114 Non-Governmental Organizations Act, proposed legislation by BEST (2000).
control of the environmental health aspects of seaports, harbors, marinas, and airports; the prevention and control of contamination of land; and control of deposits of contaminants.\textsuperscript{115}

\textbf{H. Other Organizations}

Other relevant government organizations include the Water and Sewage Corporation, the Department of Fisheries, and the Department of Agriculture.\textsuperscript{116} There is also a Commissioner of the Family Islands\textsuperscript{117} who is responsible for the collection of rents for Crown Lands on the Family Islands.\textsuperscript{118}

\textbf{IV. PROBLEMS WITH CURRENT LAND ADMINISTRATION}

\textbf{A. The Bureaucracy and Policy of Land Administration}

About 48 percent of Bahamians own land, and it is estimated that 25 percent of the land is in dispute because of lack of clear documentation.\textsuperscript{119} The main problems in the bureaucracy of land management that cause these disputes are conflicting policies and a lack of resources. The existing institutions in the Bahamas are not well adapted to balancing the competing land policies in the Bahamas, which include the marketization of land, the protection of the environment, and providing access to land for the disadvantaged.\textsuperscript{120} Land conservation can be unpopular when it is seen as impinging upon the ability of private land owners to generate economic benefits from the land they own. The conflicting policies and provisions of the

\textsuperscript{115} Rabley at 29.
\textsuperscript{116} Id.
\textsuperscript{117} Family Islands refers to the Bahama Islands.
\textsuperscript{118} Singer at 24.
\textsuperscript{119} Rabley at 3.
\textsuperscript{120} David J. Stanfield, Kevin Barthel & Allan Williams, \textit{A Framework for Discussion of Land Policy, Administration and Management in the Caribbean} (March 3, 2003) (hereinafter Stanfield).
different government agencies, as well as the lack of a clear national policy, are large problems in the Bahamas.\textsuperscript{121}

Another difficulty with the land administration system is the lack of resources in the land departments. Poor salaries, lack of training, lack of funds, outdated equipment, and bureaucratic rigidity create low motivation for staff. In addition, it is the responsibility of the legislature to update legislation in accordance with new information regarding land protection and conservation, but this does not always happen.

B. Squatting and Generational Land

Generational land is currently a problem because there are multiple claims to land, which makes obtaining clear title prohibitively hard. The legislature needs to deal with this issue. Because generational land is a part of Bahamian society, it can be accommodated, although not in the same informal system that exists now.

Squatting is also a problem that needs to be addressed, especially if the value of land increases. Squatters can take over land that is designated for conservation, and ignore the protective easements, environmental regulations, and zoning that accompanies the land.\textsuperscript{122} Squatting can be addressed with large changes in the equities of land administration, or by the less idealistic system of stricter enforcement of land boundaries. For this as well as other problems with land in the Bahamas, the land administration system needs to be stronger.

C. Land Valuation

Because there is not a regular or accurate valuation of land, the land is not taxed correctly or equitably. There needs to be regular taxation of property, with tax breaks for legitimate policy purposes. This will allow for a sound fiscal base to meet social and community needs as well as

\textsuperscript{121} Id. at 4.
\textsuperscript{122} Rabley at 12.
help finance the land administration departments. Also, regular taxation of property could encourage more people to create conservation easements on their land for the purpose of reducing their property taxes. Finally, the high transfer tax, the Stamp Tax, that is required when registering property is a deterrent to property registration.

D. Deed Registration and Deed Searching

Finally, title searches are very difficult in the Bahamas because currently registration is not mandatory, and there is only one copy of each deed, filed by name, which makes them very difficult to sort through. Although title searches are very important, as the system stands they are very expensive and inconvenient. Also, the deeds are highly susceptible to natural disasters, fires, and becoming lost. In addition to making deed registration mandatory, there should be a simple way to search the deeds such as on a computer database in digital form. There also needs to be a true system of title registration, which guarantees that the ownership and encumbrances information is contained in the certificate of title for a specific parcel of real property.

V. CONSERVATION EASEMENTS IN THE BAHAMAS

A. Introduction to Conservation Easements

Conservation easements are generally a very useful tool for private lands conservation. Part A of this section introduces different types of conservation easements in order to provide background knowledge for the reader. Parts B and C of this section examine conservation easements specifically in the context of the Bahamas.

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123 Id. at 19.
124 See Stamp Act, Bahamas Code, Chapter 334 (1925). Crown grants and leases are exempt from the Stamp Tax; Rabley at 26.
125 Rabley at 26.
126 Id. at 31.
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.\(^{127}\) Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a *conservation easement*.\(^{128}\) A conservation easement is thus a voluntary, legally enforceable agreement in which a landowner agrees (usually with a governmental entity or NGO) to limit the type and amount of development that may occur on his or her property in order to achieve the goal of conservation. They are legally recorded deed restrictions that “run with the land” and can be obtained voluntarily through donation or purchase from the landowner.

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

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\(^{128}\) Depending on the type of resource they protect, easements are frequently referred to by different names—e.g., historic preservation easements, agricultural preservation easements, scenic easements, and so on.
extinguished. 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.

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...

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129 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.

130 The grantor of a conservation easement remains the title holder, the nominal owner of the land. The landowner conveys only a part of his or her total interest in the land—specifically, the right to develop the land. However, the landowner retains the right to possess, the right to use (in ways consistent with the easement), and the right to exclude others. Daniel Cole, Pollution and Property 17 (2002).
automatically transferred with the dominant estate—meaning that it “runs with the land.”\textsuperscript{131}

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.\textsuperscript{132} There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.\textsuperscript{133} 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:

\textbf{a. Purchase by NGOs of Land that can Serve as Adjacent Estates}\textsuperscript{134}

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.

\textsuperscript{131} 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—but, provided certain requirements are met, the burden can run with the land.

\textsuperscript{132} 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).

\textsuperscript{133} Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 23 (2003).

\textsuperscript{134} 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).
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 served as habitat to the same species of 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. Working with private landowners, conservation groups in Latin America 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 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.

135 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 lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.
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, 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. At common law easements in gross could not be transferred and therefore are essentially not recognized. Today there are many jurisdictions where legislation and more modern trends in the relevant common law have authorized the transferability of easements in gross.

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

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136 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.

137 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.
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.  

### 4. The Uniform Conservation Easement Act

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA). The Act’s primary objective is to enable “private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments.”

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

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

resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property.\textsuperscript{140}

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.\textsuperscript{141}

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.

\section*{B. Conservation Easements in the Bahamas}

There is no Conservation Easement Act in the Bahamas, and only a few Bahamas statutes address easements in general.\textsuperscript{142} The Law of Property and Conveyancing (Condominium Act) discusses easements, but simply reinforces British common law, which is discussed below.

\begin{thebibliography}{9}
\item UCEA, §1(1)—Definitions.
\item § 4, 12 U.L.A. 179.
\item The Law of Property and Conveyancing (Condominium Act) allows for the possibility of multiple types of easements. The Act includes an easement in favor of the owner for the subjacent and lateral support of the building. There are also easements for the passage of water, sewage, and heat for and against the owners of any units of a condominium. The Act allows for a body corporate to operate the property and lays out the liability of unit owners for acts and omissions of duty. The unit owners can by unanimous resolution execute on their behalf a grant of easement or restriction burdening the property and to accept on their behalf a grant of easement or restriction benefiting the property. Bahamas Code, Chapter 124.
\end{thebibliography}
Furthermore, easements are uncommon in the Bahamas, because generally in conveyances of land on the islands, the seller promises against encumbrances on the property.\textsuperscript{143}

However, there are a few instances when an easement runs with the land and is transferred upon sale to the purchaser. These are mainly government easements that allow city functions such as rights of way or easements for sewage lines. In addition there is a provision in the Bahamas Code that allows the interest of an easement to continue after transfer of the property. However, the easement is limited to the holder and those persons deriving title under him.\textsuperscript{144} Thus, easements in gross are not authorized by this particular provision.

Because there are no controlling laws in the Bahamas concerning conservation easements or negative easements in gross, it is necessary to look at the common law of England, where there are significant impediments to creating valid conservation easements. English courts only recognize four types of negative easements, including authorizing a property owner to prevent his neighbor from 1) blocking his window 2) interfering with the flow of air to his land in a defined channel 3) removing the support from his building and 4) interfering with the flow of water in an artificial stream.\textsuperscript{145} In addition, English courts stopped the progress of the creation of new negative easements in the nineteenth century.

Thus, there is no legal tradition in the Bahamas authorizing conservation easements, and it would be unlikely that any easement in gross could be transferable.\textsuperscript{146} Therefore, in order to securely create conservation easements in the Bahamas, the property law regime must be changed. It would be most helpful to get a Conservation Easement Act passed, but a second, less secure, option is to get the legislature to eliminate the common law restrictions on negative easements.

\textsuperscript{143} Bahamas Code, Chapter 123 at § 7.
\textsuperscript{144} Bahamas Code, Chapter 123 at §§ 55, 56. \textit{But see} provision allowing payment to the court, and that payment is to be divided among those with interests in the land. Bahamas Code, Chapter 123 at § 7.
\textsuperscript{145} Dukeminier at 854.
\textsuperscript{146} English courts have been hostile to claims of perpetual rights divorced from land. 37 \textsc{Nat. Resources J.} 311.
easements. Until then, it is unlikely that the courts would validate conservation easements in the Bahamas.

C. Facilitating Conservation Easements

1. Tax Incentives for Conservation Easements

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 of the Internal Revenue (IRS) Code can take advantage of federal income and estate tax benefits. 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.\(^\text{147}\)

If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in 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.\(^\text{148}\) In addition to federal tax incentives, U.S. landowners can frequently take advantage of a variety of state tax incentives.

\(^{147}\) IRS Code, § 170(h).

\(^{148}\) 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
2. **Possible Tax Incentives in the Bahamas**

Because conservation easements are not valid in the Bahamas, there also are no corresponding income tax incentives for donating conservation easements. If property law were changed to validate conservation easements, there is a possibility that selling or donating a conservation easement could reduce property taxes because of the resultant decrease in the value of the property. However, the small percentage of people in the Bahamas paying significant property taxes, as well as the inadequate resources of the Real Property Tax Department, limit the possibility of using property tax deductions as an incentive for creating conservation easements.

There are a number of reasons why many Bahamians do not pay much, if any, tax on real property. First, real property taxes in the Bahamas are governed by the Real Property Tax Act, which includes many exemptions for property taxes. The most recent amendment in 2002 increased the tax exemption for owner occupied property. In addition, all property in the Family Islands as well as undeveloped land on New Providence is exempt from property taxes. Property owned by the government, foreign states, religious, educational, charitable, and educational organizations also is exempt. Finally, because the Real Property Tax Department has inadequate resources to assess and tax land, many Bahamians enjoy substantially reduced property taxes or are simply not taxed at all.

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149 Bahamas Code, Chapter 339, Act No. 28 (2002).
150 Rabley at 27.
VI. COMMON LAW LEGAL TOOLS

This section discusses other potential legal tools for conserving private land in the Bahamas. U.S. common law recognizes a number of interests in land that have the potential to facilitate the goal of private lands conservation. Among these interests are equitable servitudes, real covenants, purchased development rights, leases and profits. However, where Bahamas’ statutes are silent, British common law is followed. Although British common law recognizes these interests, it has traditionally imposed requirements that—in many instances—render their use problematic for conservation purposes.

A. Equitable Servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.\textsuperscript{151} Because equitable servitudes traditionally have been recognized under the common law, they are likely to be enforceable in the Bahamas. 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,\textsuperscript{152} for the burden of an equitable servitude to bind the original promisor’s successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;\textsuperscript{153} (2) the original

\textsuperscript{151} 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, \textit{Highlights of the new Restatement (Third) of Property: Servitudes, Real Property}, PROBATE AND TRUST JOURNAL 226, 227 (2000).

\textsuperscript{152} Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

\textsuperscript{153} 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
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.

Equitable servitudes are like easements in that they begin as a promise and are treated as an interest in the land.\textsuperscript{154} Courts enforcing the equitable servitude have made adaptations of equitable remedy doctrines. Unlike enforcement at law, where the remedy might be damages, a common equitable remedy is an injunction.\textsuperscript{155} Purchasers also must have notice and intent for the equitable servitude to become an interest that runs with the land.\textsuperscript{156}

English courts generally disregard negative easements at law, however English courts of equity still allow negative promises. Since the restrictive covenant, or equitable servitude, is more true to the common law tradition than other legal tools, it may be easier to apply in countries, such as the Bahamas, that follow the British common law. However, limitations still exist. First, the covenant needs to be appurtenant, which means a dominant and servient estate are essential. Appurtenance serves a notice function because the interest can be seen from surveying the neighborhood, whereas an interest in gross is far more difficult to discover.\textsuperscript{157}

\footnotesize{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.}


\textsuperscript{155} Id. at 1280.

\textsuperscript{156} Id. at 1284.

\textsuperscript{157} French at 1285. This notice function was particularly important in England when there was no adequate recording system. The same logic stands for the notice requirement in the Bahamas, since there is still not an adequate recording system in the Bahamas.
Second, the dominant estate needs to benefit from the covenant, and the covenant needs to “touch and concern” the land.\textsuperscript{158} “Touch and concern” has been used as a shorthand way of ascertaining intent as well as limiting the types of restrictions that can be put on property. The threshold is usually whether a reasonable purchaser would expect to incur such a restriction,\textsuperscript{159} and judges may be unwilling to hold that a reasonable buyer would expect a conservation easement on his property. However, an equitable servitude is possibly the most useful legal tool for conservation purposes in the Bahamas because it is the one most likely to be enforced by the courts.

B. Trusts

Trusts in Bahamian law stem from equitable law in England and could possibly be used on the islands for conservation purposes. The essential elements for the creation of an express trust are: 1) a person with capacity to convey, 2) an intent to create a trust relationship, 3) a writing, 4) a specific trust matter, 5) a sufficiently identifiable beneficiary, and 6) a proper purpose for the trust.\textsuperscript{160} There may be charitable trusts, which are made for the purpose of a charitable nature or public benefit.\textsuperscript{161} Gifts to a class where the class is the beneficiary are allowable. Except in cases of a charitable trust, there must be a definite beneficiary. Trusts may be created for any purpose that is not contrary to public policy.\textsuperscript{162} There may also be implied trusts, where evidence of the actual intention of the person is admissible. Constructive trusts are recognized and are interests in property when the titleholder obtained the property by fraud, but good conscience requires a trust to be imposed by the courts.

\begin{flushleft}
\textsuperscript{158} \textit{Id.} at 5. \\
\textsuperscript{159} French at 1290. \\
\textsuperscript{160} See The Trustee Act, Bahamas Code, Chapter 164 (1893). \\
\textsuperscript{161} Knowles, Chapter 3. \\
\textsuperscript{162} \textit{Id.}
\end{flushleft}
Duties of a trustee include taking possession in reasonable time, dealing fairly with the property, using it solely for the benefit of the beneficiary, keeping the beneficiary informed as to the management of the trust, and accounting.\textsuperscript{163}

C. \textbf{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.\textsuperscript{164} 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.\textsuperscript{165} 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.\textsuperscript{166} 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 promissor’s duty to perform the promise) and the benefit (the promissee’s right to enforce the promise).

In order for the successor to the original promissor to be obligated to perform the promise—that is, for the \textit{burden} to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must “touch

\begin{itemize}
\item[\textsuperscript{163}] See Verification of Trusts Act, Bahamas Code, Chapter 166.
\item[\textsuperscript{164}] Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.
\item[\textsuperscript{165}] 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.
\item[\textsuperscript{166}] 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. It is doubtful then that anything greater then the landlord-tenant context could exist.
\end{itemize}
and concern” land;\(^{167}\) (4) horizontal privity must exist;\(^{168}\) (5) vertical privity must exist;\(^{169}\) 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.

Because real covenants have been recognized under the British common law tradition,
they are likely to survive judicial scrutiny in the Bahamas.

D. Purchased Development Rights

In the United States, purchased development rights (PDRs) 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.\(^{170}\)

\(^{167}\) 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.
\(^{168}\) 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 promissor 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. In \textit{Tulk v. Moxhay}, the English court set aside
horizontal privity where it would be inequitable not to enforce a restriction. In this case a famous garden was sold
with a restriction to keep and maintain and not tear down and build upon the land. The court decided to allow the
restriction to stand even though there was not horizontal privity. \textit{Tulk v. Moxhay}, Court of Chancery, England, 1848.
2 Phillips 774, 41 Eng. Rep. 1143. The case allowed the a restriction to be enforced in equity where it could not be
enforced at law. It is questionable whether courts would impose the horizontal privity requirement or not in a case
where it seems inequitable not to impose the requirement.
\(^{169}\) 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.
\(^{170}\) 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
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 through a variety of mechanisms—including bond initiatives, private grants and various taxation options.

It is unclear from the relevant legal authorities whether PDRs would survive judicial scrutiny in the Bahamas.

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

Long-term lease agreements between a private landowner and a conservation NGO or government 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.\(^{171}\)

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 government agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to 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).

\(^{171}\) 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.
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.

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.

While long-term leases are recognized under Bahamian law, it is unclear whether the restrictions of leaseback agreements for conservation purposes would survive legal scrutiny.

F. Profits à Prendre

A profit à prendre (or profit) is a common law interest in land that gives a right to enter and take part of the land or something from the land.\textsuperscript{172} Although they are not commonly used for conservation purposes, 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 timber.\textsuperscript{173} 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

\begin{footnotesize}
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\item \textsuperscript{172} 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.
\item \textsuperscript{173} 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.
\end{itemize}
\end{footnotesize}
common law, a landowner can grant a profit à prendre to anyone—there is no requirement that
the holder of a profit à prendre own adjacent property.\textsuperscript{174}

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 who interferes
with the profit à prendre.\textsuperscript{175}

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

Although it was undetermined whether Bahamian law recognizes profits, profits are a
traditional British common law instrument, and thus likely could be employed in service of
conservation in the Bahamas.

G. Commonages

Commonages are traditional devices recognized in the Bahamas that might make it more
difficult to develop land because land is held in common and unanimous consent is required for a

\textsuperscript{174} Profits à prendre of this kind are called \textit{profits en gross}.

\textsuperscript{175} 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.
change of ownership or use. While there are only three or four actual commonages in the Bahamas, there is a possibility they could be used for conservation purposes.

VII. LEGISLATIVE TOOLS IN SUPPORT OF PRIVATE LANDS CONSERVATION

There are several other legal tools currently in place in the Bahamas that touch and concern conservation on private lands. These include the authorization of conservation in the Bahamas Constitution, the Bahamas National Trust, the Coast Protection Act, the Wild Animals Protection Act, the Wild Birds Protection Act, and the Conservation and Protection of the Physical Landscape of the Bahamas Act. There has also been an unsuccessful attempt to pass a Forest Protection Act.

A. The Bahamas Constitution

The Bahamas Constitution is unique in that it holds conservation as an aspiration for the nation. As the supreme law of the land, the Constitution lays a foundation for conservation, at times even putting it above individual property rights.

The Constitution of the Bahamas allows the government to acquire private property for the purposes of reclamation, drainage, soil conservation, and the conservation of natural resources. In addition, the Constitution authorizes the taking of property for agricultural development that the owner or occupier of the land has been required to do, but without reasonable excuse has refused to carry out.\textsuperscript{176} Finally, the Constitution provides for the protection of private property without compensation for conservation purposes.\textsuperscript{177}

\textsuperscript{176} Constitution of the Bahamas, Art. 27(j).
\textsuperscript{177} \textit{Id.} at Art. 15. The Bahamas Constitution also authorizes the deprivation of property when it is subject to a trust or a trust needs to be carried out. \textit{Id.} at Art. 27(j)(iv).
B. The Bahamas National Trust

The Bahamas National Trust (BNT) was created in 1959 to promote the preservation of natural or historically significant lands, tenements, and submarine areas.\textsuperscript{178} The BNT may acquire land by purchase or gift, possess any rights in land such as easements or profits, and manage or assist in the management of lands. In addition, the BNT is in charge of the development and management of the National Park System.\textsuperscript{179} Because the BNT is authorized to buy land for conservation purposes, and because it is perhaps the largest and most active recognized conservation institution in the Bahamas, it is the organization most likely to be able to create a valid conservation easement in the Bahamas.

The BNT is required to advise the government as to what areas of the country should become BNT property, as well as the policy to be pursued for the preservation of lands and the means of enforcing them.\textsuperscript{180} The Act allows some property to be inalienable at the discretion of BNT, and it authorizes the BNT to raise revenue through borrowing the rents, profits, or incomes derived from any of its properties.\textsuperscript{181} The BNT may also make arrangements with any local authority or any neighborhood residents concerning any of its property.\textsuperscript{182} For the purposes of conservation it is permissible for the BNT to prevent some recreational activities, the deposit of waste, the removal of desirable buildings, and any other activities that may be injurious to the land.\textsuperscript{183} Other interests in land or rights of way remain unaffected by the Act.\textsuperscript{184}

The BNT is governed by a Council that takes care of month-to-month implementation of policy as well as day-to-day operations. Park developments have permanent staff, and the BNT is

\begin{footnotesize}
\begin{enumerate}
\item[B.2.1] Bahamas Code, Chapter 18 at § 4.
\item[B.2.2] BAHAMAS NATIONAL TRUST.
\item[B.2.3] Bahamas Code, Chapter 18 at §4(4).
\item[B.2.4] Id. at § 15.
\item[B.2.5] Id. at § 23.
\item[B.2.6] Id. at § 24 (e).
\item[B.2.7] Id. at § 28.
\end{enumerate}
\end{footnotesize}
also supported by numerous volunteers.\textsuperscript{185} Regional and standing committee members are involved in the running of the organization as well. The BNT is divided into founding members, ordinary members, annual members, supporting members, life members, sponsor members, benefactor members, honorary members and local corresponding members.\textsuperscript{186} Organizations such as the Governor and Commander-in-Chief of the Bahamas Islands, the New York Zoological Society, the Rosenstiel School of Marine Science, the National Park Service, the Audubon Society, the American Museum of Natural History, the Smithsonian Institute, the Minister for Agriculture and Fisheries, and the Ministry for Tourism may appoint members to the BNT.\textsuperscript{187}

The Bahamas National Trust has succeeded in saving thousands of acres of valuable wetlands, forests, and marine environments. Several thousand children participate in the Discovery Club, the BNT educational program. In the 1980s, the Trust’s Historical Committee compiled a comprehensive database of historical buildings and sites in New Providence and the Family Islands\textsuperscript{188} that was subsequently made into a video series called “A Proud and Singular Heritage.”

The BNT is currently working on a number of different projects. A cooperative project that the BNT is working on with numerous organizations\textsuperscript{189} is the Abaco Fire Project, which will be used to protect Bahamian pine forests in Abaco. Another cooperative project is the Parks Partnership Project, which combines the efforts of The Nature Conservancy and the BMT. Goals of the Parks Partnership Project include increasing management and stewardship capacity in the

\begin{footnotesize}
\textsuperscript{185} Bahamas National Trust.
\textsuperscript{186} Bahamas Code, Chapter 18 at § 4(6).
\textsuperscript{187} Id. at § 10(2).
\textsuperscript{188} Bahamas National Trust.
\textsuperscript{189} These organizations include the Bahamas Department of Land and Surveys, the Bahamas Department of Agriculture, the Marsh Harbor Volunteer Fire Department, Abaco Friends of the Environment, The Nature Conservancy, the U.S. Forest Service, and the U.S. National Park Service.
\end{footnotesize}
Exuma Cays Land and Sea Park. Other projects include the Important Bird Areas Project, the Environmental Partnership, Kirtland’s Warbler Training and Research Project, and the People and Parrots Project.

C. The Coast Protection Act

The Coast Protection Act could be helpful for private lands conservation because it allows for the purchase and acquisition of private land if it is necessary for coastal protection. The Act allows the Minister to use departmental resources to acquire by purchase, lease, exchange, or otherwise any land necessary for coastal protection. If it is not possible for the Minister to reach agreement with the owner of the land, he may acquire the land compulsorily in accordance with the Acquisition of Land Act. If the value of the interest that the owner had has depreciated by the carrying out of coastal protection or maintenance, the Minister must pay the owner compensation equal to the amount of the depreciation or damage.

D. The Conservation and Protection of the Physical Landscape of the Bahamas Act

The Conservation and Protection of the Physical Landscape of the Bahamas Act contains important provisions relevant to private lands conservation. Part VI of the Act outlines the protection of trees in the Bahamas. The Minister can order the protection of any species of hardwood trees, rare trees, trees of remarkable growth, or historically significant trees. A permit is required for harvesting any protected trees, and the Director of Physical Planning may grant or refuse the permits. Any person who does not obtain a permit, even for private lands, is

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190 Bahamas National Trust.
191 Id.
192 Bahamas Code, Chapter 190 at § 3.
193 Id. at § 10.
194 Bahamas Code, Chapter 260 at § 20.
195 Id. at § 23.
guilty of an offense punishable by a ten thousand dollar fine and/or up to three months in prison.196

The Act also charges the Minister with the responsibility of regulating excavation, landfill operations, and mining for the purpose of providing for and ensuring the conservation and maintenance of the environment.197 Areas can be zoned according to the ability to mine in that area.198 Permits are also required in order to excavate or carry out a landfill operation, and they can be revoked if any provisions of the permit have been violated.199 If the Minister does any work for which the person running the excavation or landfill operation is liable under the Act, those expenses and a seven percent interest fee are due.200 The Act allows each Council of a district to administer the provisions of the Act, but the Councils are still subject to the directions of the Minister.201 Ultimately, the Director of Physical Planning advises the Minister and is responsible for the administration and enforcement of these provisions.202 In most parts of this Act, private and public lands are not distinguished.

The Conservation and Protection of the Physical Landscape of the Bahamas Regulations of 1997 contains comprehensive, helpful information regarding the required applications for permits.203 The regulations also lay out the details of licenses, including the methods for transferring licenses,204 the provisions for variations in licenses, and the procedure for appeals.205

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196 Id. at § 21(2).
197 Id. at § 4.
198 Id. at § 16.
199 Id. at § 10.
200 Id. at § 26.
201 Id. at § 34.
202 Id. at § 5.
The fees for offences and penalties for making false statements also are outlined in these regulations.\textsuperscript{206}

E. Wild Animals and Wild Birds Protection Acts

The Wild Animals and Wild Birds Protection Acts also could be helpful for private lands conservation because they allow the creation of a private reserve if certain animals are found on private land. The Wild Birds Protection Act authorizes the Minister to establish reserves for the protection of any wild bird. The Minister also may enlarge or reduce the size of the reservations if necessary. Private land and/or Crown land may be used in creating the reserves.\textsuperscript{207} In addition, anyone who enters upon a private reserve is guilty of an offense under the Act, which is punishable by a fine of five hundred dollars or a month’s imprisonment.\textsuperscript{208}

F. Forestry Act

A Forestry Act could be useful for private lands conservation because it could create private forest reserves. There have been attempts to pass a Forestry Act in the Bahamas, but they have been unsuccessful. A proposed Forestry Act would have authorized the creation of forest reserves and protected areas. It would also have greatly affected North Andros, Abaco, and Grand Bahama, which are largely forested areas. The Land and Surveys Department supported the passage of the proposed Forestry Act because the forest section of the Lands and Surveys Department has a difficult time implementing forest management plans. However, the Ministry of Agriculture opposed the act, and so the measure failed. Thus, at present there is no Forestry Act in the Bahamas.

\textsuperscript{206} Offences and Penalties, Conservation and Protection of the Physical Landscape of the Bahamas Regulations, Part VI (1997).
\textsuperscript{207} Bahamas Code, Chapter 230 at § 5.
\textsuperscript{208} \textit{Id}. at § 5.
VIII. RECOMMENDATIONS

A. Enact Conservation Easement Legislation in the Bahamas

The most effective way to encourage and secure conservation easements in the Bahamas would be for the Bahamian Legislature to enact a general Conservation Easement Act. The government could then regulate and control the enforcement of conservation easements. A Bahamian Conservation Easement Act could dictate eligibility requirements for holding conservation easements and it could determine how easements might be transferred. It could also outline possible tax incentives for those who choose to create conservation easements. The Uniform Conservation Easement Act would provide a useful model for a Bahamian Conservation Easement Act, and sections could be modified to cater to unique features of Bahamian law and custom.

B. Utilize Crown Lands for Conservation Purposes

Another way to address conservation is for non-profit agencies or private individuals to buy Crown lands for the purpose of creating reserves or conservation easements. Although it is unusual for Crown lands to be sold, such lands may be divested if there is a compelling governmental interest. If the government were encouraged to adopt a policy of selling Crown lands for conservation purposes, acquiring Crown land could become powerful method for conservationists, as 70 percent of land in the Bahamas is Crown land.

C. Utilize the Bahamas National Trust For Conservation Easements

As the leader of conservation in the Bahamas, the BNT could be used to purchase conservation easements. Since the BNT is already authorized to contract for the purchase of private land, it makes sense that they could contract for the purchase of a conservation easement. Legislation would most likely need to be passed authorizing the BNT to create easements. It also
might be necessary for the BNT to create a guiding policy and regulations that clarify BNT’s role in creating conservation easements.

D. Utilize the BEST Commission

The BEST Commission could be more actively involved in environmental conservation endeavors and perhaps become a leader in creating environmental policies for private lands. It would also be helpful if the related National Land Use Committee could be reinstated. The legislation proposed by BEST, particularly the Environmental Planning and Protection Act should be adopted.\(^{209}\) This legislation would allow for greater environmental planning and protection and would increase private lands conservation. The BEST Commission might be able to encourage legislation enabling conservation easements or even the adoption of a Conservation Easement Act.

E. Utilize GIS Land Information System and Center

The Land Information Center should be used to obtain and organize information on land and land ownership and to sort out the issues that make registration and obtaining clear title such a difficult process in the Bahamas. Because of the lack of information on land in the Bahamas, the Bahamas National GIS (BNGIS) project was instituted in 1998 and lasted three years.\(^{210}\) The project was administered through the Inter-American Development Bank and funded by a United Kingdom Trust Fund and a Japanese grant. The study brought together 13 different agencies and consisted of a comprehensive review of land in the Bahamas including an urban information study as well as an environmental study.

Staff members collected data from different departments and agencies for the modernization of land administration in the Bahamas. Deeds were gathered from the Registrar

\(^{209}\) See section entitled ‘BEST Commission’

\(^{210}\) Stanfield at 5.
General in order to scan them into a computer and associate them with the correct parcel of land. Information from the Water and Sewer Corporation was taken in order to integrate billing records with their respective land parcels. Data from the Department of Statistics was gathered to integrate census level data at block level. Information from the Real Property Tax Department was gathered to assign real property tax records to each land parcel. Finally, data from the Ministry of Public Works was taken to integrate building permits with each parcel of land, and clarify names and addresses of buildings.\textsuperscript{211}

The project was successful, but since its completion there have been no steps to carry this modernization forward and the BNGIS Center sits largely dormant. This is most likely because of the project’s lack of priority in the Bahamian Government and limited resources for training, data collection, and modernization of the land administration institutions. In order for the BNGIS Center to remain useful, it needs to be sustainable. The BNGIS Center needs to be firmly established in the government as a separate and independent entity with a full office located in the Office of the Prime Minister, and it needs to have an adequate budget and a skilled staff.\textsuperscript{212}

F. **Adopt a Forest Act**

The adoption of a Forest Act would be helpful for conservation because it could provide for forest reserves. It would also allow the forest section of the Land and Surveys Department to implement forest management plans. However, in order for a Forest Act to be adopted, the Ministry of Agriculture would need to agree that forest reserves are a good idea. Up to now, the Ministry of Agriculture has blocked adoption of Forest Act legislation.\textsuperscript{213}

\textsuperscript{211} Id. at 13.
\textsuperscript{212} Id. at 14.
\textsuperscript{213} Id. at 12.
CONCLUSION

It appears that the Bahamas could adopt a Conservation Easement Act. Public attitude towards conservation in the Bahamas is generally positive. Even though British Common Law does not provide for conservation easements, the Bahamas National Trust can purchase land for conservation, and this power might be extended to purchasing or obtaining conservation easements. Also, the BEST commission might be able to propose a Conservation Easement Act that would be accepted by the Bahamian legislators. Ratification of a Conservation Easement Act by the legislature would be an essential element to securing conservation easements against judicial scrutiny.

However, there are problems in the Bahamas, especially in the Out Islands, that would make the realization of conservation easements difficult. The major challenges are squatting and the difficulty of securing clear title of property.

Conservation, and thus the security that conservation easements afford, is very important in the Bahamas, in part because of the wealth of natural resources held in the hands of private landowners.²¹⁴ Although measures to enact legislation authorizing conservation easements would face challenges, the results would be greatly beneficial for the country in the long run.

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²¹⁴ Eco-Tourism in the Bahamas is an additional reason why conservation is so important to the country. Rochelle Newbold, Economic Development or Conservation? Local Government Choices in the Bahamas (Duke University, 2000).
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2. Bahamas National Trust Act, Chapter 18
3. Coast Protection Act, Chapter 190
4. Commonage Act, Chapter 142
5. Conservation and Protection of the Physical Landscape of the Bahamas Act, Chapter 260
6. Declaratory Act of 1799
7. Environmental Planning and Protection Act, 2000 (proposed legislation by BEST)
8. Immovable Property Acquisition by Foreign Persons, Chapter 125
9. Land Surveyors Act, Chapter 232
10. Law of Property and Conveyancing Act (Condominium Act), Chapter 124
11. Non-Governmental Organizations Act, 2000 (proposed legislation by BEST)
12. Private Roads and Subdivisions Act, Chapter 238
13. Plants Protection Act, Chapter 231
14. Public Trustee Act, Chapter 165
15. Real Property Tax Act, Chapter 339
16. Registration of Records Act, Chapter 175
17. Quieting Titles Act, Chapter 170
18. Town Planning Act, Chapter 236
19. Wild Animals Protection Act, Chapter 229
20. Wild Birds Protection Act, Chapter 230

Table of Authorities


9. Bahamas National Trust; www.bahamasnationaltrust.com

10. www.lexbahamas.com


12. Bahamas Constitution
APPENDIX CONTENTS

The following materials are contained in a companion Appendix to this report.

Bahamas Constitution

Organizational/ Government Websites
www.bahamasnationaltrust.com
Trust Formation in the Bahamas; www.geographia.com/bahamas/investment/trust

Structural Basics
www.infoplease.com
www.state.gov (US Dept of State)
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Miscellaneous

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www.lexbahamas.com
**Bahamas Acts**

- Act No. 4 of 1987, Act to promote the Conservation and Maintenance of the Environment
- Explosives Act 1968
- Act No. 8 of 1986, Act to Amend the Stamp Act
- Act No. 28 of 2002, Act to Amend the Real Property Tax Act

**Bahamas Statutes**

- Acquisition of Land Act, Chapter 233
- Bahamas National Trust Act, Chapter 18
- Coast Protection Act, Chapter 190
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- Registration of Records Act, Chapter 175
- Quieting Titles Act, Chapter 170
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- Wild Animals Protection Act, Chapter 229
- Wild Birds Protection Act, Chapter 230

**Bills**

- Bill for Non Governmental Organizations Act, 2000
- Bill for Environmental Planning and Protection