

TAX ANALYSTS EXCLUSIVE

Conversations: William T. Hutton

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William T. Hutton, a partner in the San Francisco office of Coblenz, Patch, Duffy & Bass LLP and a professor of law emeritus at the University of California, Hastings College of the Law, is best known as an expert in conservation easements. For its inaugural Lawyer of the Year awards, *Best Lawyers* named Hutton the 2010

San Francisco Lawyer of the Year in Tax Law.

Hutton earned his JD from the University of Michigan School of Law and his LLM in taxation from New York University. Tax Analysts' Sam Young recently asked him about being recognized by *Best Lawyers*, finding a niche in tax law, and problems with legislation on conservation easements.

Tax Analysts: You were just selected as a Lawyer of the Year by *Best Lawyers*. Can you tell me what that recognition means to you?

William T. Hutton: I never quite know what to make of the bests and the supers and so forth. At one level, without being too cynical, I think it means you've hung around a long time and you've gotten to know a lot of people, and that's probably in significant measure responsible for the award.

I don't think they've had this designation before. I really have no idea whatsoever what the process is that results in this sort of thing. Somebody has to win a lottery, and that may be me this year.

TA: What qualities do you hope would be recognized?

Hutton: Well, I have come at this practice rather obliquely. Until a year and a half ago, I was a full-time law professor, and had been for 40 years. I'm still teaching on a half-time basis. But since moving to San Francisco from New York almost 30 years ago, I've always practiced, in some years fairly substantially and in other years, particularly the last few years, not as much.

I was kind of a general-purpose tax lawyer in the 1980s, with a significant emphasis on nonprofit matters. As the years go by, from my perspective —

sensibly, I think — I have narrowed my focus so that what I'm doing right now is about 90 percent conservation transactions — land protection transactions, essentially — in the last 10 years mostly through the use of what's called a conservation easement.

It's a very national practice and a very satisfying practice, but I've gotten well away from the kind of work that most people would associate with the practice of tax law. Tax law has a lot to do with it, but it's by no means the only specialty that comes to bear.

TA: You pursued an LLM immediately after your JD, so you must have wanted to practice tax law.

Hutton: I did, but I had a lot to learn about what tax practice was like and what venue I would occupy within that specialty. I was with a big Wall Street firm for three years, and then I had the opportunity to teach in the NYU law program, which I did for the next roughly 12 years, practicing very little.

I quite serendipitously developed this affinity for nonprofit work because Congress, in the first of the great tax reform acts, the Tax Reform Act of 1969, rewrote the rules on charitable giving and foundation matters. I followed that legislation on behalf of the university, which had a lot of direct interests involved. From that grew a law school course, which I think was the first in the country on the tax treatment of nonprofits, and from that grew some consulting work.

In about 1973 I was fortunate enough to consult with a little firm in New York that was working with the Nature Conservancy on a very major conservation transaction. That's how the whole thing started, and I've nurtured that interest ever since.

I no longer work much with the Nature Conservancy, but I've worked with several dozen other organizations and a lot of private land owners.

My specialty had been pretty well established before 1973. I taught that course for the first time in the spring of 1971 — Tax-Exempt Organizations, it was called — and I was getting some calls and getting some recognition for knowing something about this area, and that led to the affiliation with the firm.

TA: How did you end up working with conservation easements?

Hutton: In the '70s, the time of a maximum income tax rate of 70 percent — which seems to be unthinkable today — it was possible to give property away and come out ahead, financially speaking, as opposed to a sale at full fair market value. It was simply a tax-rate play, whereby a sale at full fair market value, after federal, local, and state

income taxes, could leave you with 65 or 70 cents on the dollar, and a donation could leave you with at least 70 percent.

The practice was remarkably simple. As years went by, of course, tax rates changed, and it no longer became possible to demonstrate that result. So we turned to a considerably more sophisticated approach, relying quite heavily on conservation easements.

There are now 1,700 or 1,800 organizations in the United States, mostly small, that use the conservation easement as their principal conservation vehicle. It protects an awful lot of land all over the country.

TA: This is an area that you've grown into professionally, but is it still a passion?

Hutton: Absolutely. The practice, as I said, is national. Two weeks ago we concluded the largest private land conservation transaction ever done in the state of Hawaii. I'm working on things in Montana and New Hampshire, and of course California.

So yeah, I have a lot of fun with it.

TA: Do any particularly memorable transactions come to mind?

Hutton: There are a lot.

The first deal that I mentioned, in '73-'74, was a 25,000-acre hunt club in South Carolina called the Santee Club [now the Santee Coastal Reserve]. It went back to 1880, and the 22 members were very disparately situated. Some had an enormous appetite for tax benefits, and some had none. One was a Vermont schoolteacher; many were descendants of the original members.

The two members who led the effort to preserve this property were Forrest Mars, of Mars bars, and Jack Dorrance, who was a Campbell's Soup scion. They said they wanted to "do it for the ducks," but of course they also wanted to do it for the tax benefits.

That was the first one. It was fascinating and took about a year to do.

A couple of years later, working with the Nature Conservancy, we structured the acquisition of Santa Cruz Island off of Santa Barbara, the biggest of the Channel Islands at about 55,000 acres. We struck a deal to buy that property for about \$3 million, if you can imagine.

That took about a year, also, to put together. It involved a family corporation and a dispute — these are often the opportunities that allow you to get your foot in the door — and a 30-year retained interest on behalf of the guy who'd lived there pretty much his whole life — Carey Stanton, his name was.

[Stanton] lived 11 years, and the property fell into a conservancy, mainly University of California

ownership, for \$3 million. You can't even buy an acre on the coast for that today.

There are an awful lot of transactions. We did the Hearst Ranch about four years ago, 82,000 acres and 17 miles of coastline.

TA: How long have you been working with conservation easements?

Hutton: Easements really started to take off in the late '70s. The statute that's the foundation of this work was enacted in 1980.

In the easement area, there haven't been that many tax law changes. There's been a little tinkering with the statute, but in nearly 30 years there have been just little tweaks here and there, essentially.

There have been over the last four years some enhanced incentives for land conservation as a species of charitable contribution. Until December 31 [2009], land conservation easements were more equal than other charitable contributions (in the Orwellian term) in that you get a larger write-off and a longer carryforward of deductions.

TA: Are they facing the same valuation scrutiny as other charitable contributions?

Hutton: I think they are. They always have.

The IRS, as is typical in all areas of tax, has been a bit behind the curve all along. In the early '80s, after what I call the modern statute was enacted, they quite frequently — in fact more often than not — asserted that easements had no value. That was based mostly on suspicion and ignorance.

They got a little better, but there was a series of articles in *The Washington Post* in early 2003 that first focused on some major Nature Conservancy transactions that the *Post* found questionable, if not objectionable. Then the scrutiny broadened to land trusts in general.

No question about it, there has been some abuse. About three or four years ago, the Service focused on Colorado. They audited over 200 taxpayers and asserted a lot of deficiencies. It was a major audit effort. Many of those cases are still in the pipeline.

So it's fair to say that the conservation easement was not really in the IRS's gunsights until that happened. And since then everyone has been considerably more scared and careful.

TA: You mentioned that the law hasn't changed much. Even though donors and their advisers may prefer stability, is more guidance needed?

Hutton: Yes, some. In the world of corporations or partnerships, statutes get a great deal of technical attention. In this area, enactment is quite often precipitous and often happens without proper attention to the consequences. That has happened in particular with regard to some of these enhanced incentives [for conservation easements].

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Some examples give ludicrous pro-taxpayer results and should be tended to by way of wholesale revision or technical amendment. And I don't think that's apt to happen any time soon.

TA: So your complaint in that regard is with Congress and not the IRS?

Hutton: Yes. The regulations can't anticipate everything. Regulations are often more carefully crafted than the statute, which might be enacted with no more than a couple weeks of legislative consideration.

TA: How is the economy shaping these transactions?

Hutton: It's had an impact. It's hard to quantify, because on the one hand you have everybody's retrenchment, and there's definitely a lot of the wait-and-see attitude about major preservation transactions, but on the other hand you have those incentives. It's hard to see how they balance out.

There's still a lot of activity, but there's not as much as I would have expected without the unfortunate financial events of the last couple years. I would have expected more easement activity. I'm not as busy at year-end as I normally would be.

TA: What advice do you have for young attorneys and law students?

Hutton: The key is having something to sell. Find a niche that you really enjoy and that has salutary socioeconomic consequences, and start on that path early on.

It doesn't have to be as exotic as what I do, and I wouldn't advise anyone without the passion to do what I do, because it takes an awful lot of time to get around the various specialties that are involved. It's not just tax. It's tax, it's estate planning, it's nonprofit law, it's real estate, and corporate and partnership tax both come into play.

But you really can't start too early in trying to define what it is you want to do. ■