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In Defense of Conservation Easements: A Response to the End of Perpetuity

Nancy A. McLaughlin

W. William Weeks

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IN DEFENSE OF CONSERVATION EASEMENTS: A RESPONSE TO *THE END OF PERPETUITY*

*Nancy A. McLaughlin and W. William Weeks**

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* Nancy A. McLaughlin (J.D. University of Virginia) is the Robert W. Swenson Professor of Law at the University of Utah SJ Quinney College of Law. Professor McLaughlin is a member of the American Law Institute and a fellow of The American College of Trust and Estate Counsel. She was consulted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) regarding amendments to the comments to the Uniform Conservation Easement Act and serves as an Observer to NCCUSL’s Drafting Committee for its Regulation of Charities project. She served as a member of the Land Trust Alliance’s Conservation Easement Amendment Policy Group, which assisted with the drafting of the Alliance’s recently published report on conservation easement amendments, and she is a member of the Alliance’s Conservation Defense Advisory Council. She also serves on the advisory boards of Utah Open Lands and Vital Ground, and as a member of the Habitat Protection Advisory Committee of the Wildlife Land Trust.

W. William Weeks (J.D. Indiana University School of Law-Bloomington) is President of the Conservation Law Center; Director of Indiana University School of Law’s Conservation Law Clinic; former Vice President, Chief Operating Officer, and Executive Vice President of The Nature Conservancy; and author of *BEYOND THE ARK* (Island Press, 1996). He is also a member of the Board of Directors of the Sycamore Land Trust and counsel to The Nature Conservancy as prospective amicus curiae in *Salzburg v. Dowd*.

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I. INTRODUCTION

A. *Introduction to the Issue and the Law*

Charitable gifts made to government entities and charitable organizations can be either restricted or unrestricted. An unrestricted charitable gift is a contribution of money or property that the donor makes without attaching any conditions on its use by the recipient entity or organization. An entity or organization in receipt of an unrestricted charitable gift is free to use that gift as it sees fit in accomplishing its general public or charitable mission.¹ A restricted charitable

¹ The typical unrestricted charitable gift is the \$50 check written to a favorite charity at the end of the calendar year or the \$20 bill dropped in the church collection plate on Sunday, both of which the donor intends will be used by the recipient organization as it sees fit in accomplishing its general charitable mission.

gift, in contrast, is a contribution of money or property that the donor makes to a government entity or charitable organization to be used for a specific charitable purpose and often according to carefully negotiated terms. As explained in more detail below, under state law a restricted charitable gift creates a charitable trust or its functional equivalent, and the recipient entity is obligated to administer the gift in accordance with the terms and purpose specified by the donor (such terms and purpose are typically set forth in the donative instrument).²

Many conservation easements are conveyed to government entities or charitable conservation organizations (referred to as “land trusts”) in whole or in part as charitable gifts, and the primary issue addressed in this article is whether such easements constitute restricted or unrestricted charitable gifts for state law purposes. In *Hicks v. Dowd*:³ *The End of Perpetuity?* (hereinafter, *The End of*

² See, e.g., Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT. L. REV. 689, 701–02 (2005) (“[T]he law imposes more restrictions on a charitable corporation’s use of restricted gifts (i.e., gifts that expressly limit their use to specific purposes) than unrestricted gifts (i.e., outright gifts with no express restrictions on their use). A restricted gift creates a charitable trust or its functional equivalent, and the donee is obliged to honor these restrictions. . . . By contrast, an unrestricted gift does not create a formal ‘trust’ within the meaning of trust law, and the donee can use it for any charitable purpose set forth in its articles of incorporation.”); John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 698, 708–09 (2007) (explaining that restricted charitable gifts give rise to trust or trust-like duties, in particular the duty to abide by the terms of the gift, and that “[c]ontemporary donor-charity dealings at the negotiation/documentation stage of a contribution . . . more and more frequently result in ‘some really hairy gift agreements’ . . . specify[ing] in detail the terms upon which the donor’s gift is to be employed by the recipient organization”).

³ *Hicks v. Dowd*, 157 P.3d 914, 2007 WY 74 (2007). *Hicks* involved Johnson County, Wyoming’s attempted termination of a perpetual conservation easement encumbering an approximately 1,043 acre ranch located in the County. The Lowham Limited Partnership had donated the conservation easement as a charitable gift to the Board of County Commissioners of Johnson County (“the Board of Commissioners”) in 1993 for the purpose of preserving and protecting the conservation values of the ranch in perpetuity. *Id.* at 916. The easement, which prohibits subdivision and other inconsistent uses of the ranch, was estimated to have reduced the ranch’s value by more than a million dollars, and the Lowhams claimed a federal charitable income tax deduction based on that amount. See Conservation Easements, www.shifting-ground.com/conservation_easements.html (last visited Nov. 20, 2008). In 2002, at the request of the new owners of the ranch (“the Dowds”), who had purchased the ranch subject to the perpetual easement, the Board of Commissioners executed a deed transferring the easement to the Dowds, intending to thereby terminate the easement. *Hicks*, 157 P.3d at 916–17. The Board of Commissioners did not obtain court approval of the transfer and apparently did not request or receive compensation in exchange for the transfer. *Id.* at 917. A resident of Johnson County (“Hicks”) filed suit alleging, *inter alia*, that the conservation easement was held in trust for the benefit of the public, the Board of Commissioners could not terminate the easement without receiving court approval in a *cy pres* proceeding, and the purpose of the easement had not become impossible or impracticable as required under the *cy pres* doctrine to terminate the easement. See, e.g., Mem. in Opp’n to Defs’ Mot. for Summ. J. and in Supp. of Pls’ Mot. for Summ. J. at 5–14, *Hicks v. Dowd*, No. 2003-0057 (Wyo. Dist. Ct. Oct. 27, 2003). On May 9, 2007, the Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing to sue to enforce a charitable trust, but the Court invited the Wyoming

Perpetuity), C. Timothy Lindstrom asserts that government entities and land trusts have the right to modify and terminate the perpetual conservation easements they hold “on their own” and as they “see fit,” subject only to the agreement of the owner of the encumbered land and the general constraints imposed by federal tax law on the operations of charitable organizations.⁴ In other words, *The End of Perpetuity* asserts that perpetual conservation easements donated to government entities or land trusts are unrestricted charitable gifts, and, thus, that the holders of such easements are not obligated under state law to administer the easements in accordance with their stated terms or purposes.⁵

The End of Perpetuity defines “improper” terminations or modifications of conservation easements as “those terminations or modifications that confer a net financial benefit on a private person or entity and/or fail to meaningfully advance land conservation on the protected property or some other property in

Attorney General, as supervisor of charitable trusts in the state of Wyoming, “to reassess his position” with regard to the case. *Hicks*, 157 P.3d at 921. In July of 2008, the Wyoming Attorney General filed a complaint in District Court requesting that the deed transferring the conservation easement to the Dowds be cancelled and declared null and void. See *Salzburg v. Dowd*, Compl. for Declaratory J. Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions 13 (July 8, 2008). In the complaint, the Attorney General alleges, *inter alia*, that the Board of Commissioners (i) violated its fiduciary duty to assure the Ranch’s protection and preservation, (ii) had a contractual and mandatory obligation to have a judicial determination made of the impossibility of the continuation of the easement before terminating the easement, and (iii) violated its fiduciary duty and Wyoming’s constitution by transferring the easement to the Dowds for less than market value. *Id.* at 7–13.

⁴ C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25, 62 (2008) [hereinafter *The End of Perpetuity*] (asserting that holders have the right to terminate or modify conservation easements “on their own”); *id.* at 67 (asserting that holders have the authority to modify or terminate conservation easements as they “see fit,” taking into account the constraints on such decisions imposed by the common law of real property and federal tax law). Under the common law of real property, the owner of an easement can unilaterally release the easement, in whole or in part, and can agree with the owner of the burdened land to modify or terminate the easement. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 7.1, 7.3 (2000) [hereinafter RESTATEMENT OF PROPERTY]. Accordingly, such law does not place any meaningful constraint on a holder’s decision to modify or terminate a conservation easement. See also *infra* Part II.H (explaining that federal tax law does not ensure that government entities and charitable organizations comply with their fiduciary obligations under state law to administer charitable gifts in accordance with their stated terms and purposes, and that state attorneys general and state courts, rather than the Internal Revenue Service (“IRS”), are the proper enforcers of such state law fiduciary obligations).

⁵ Although *The End of Perpetuity* draws no distinction, the analysis in this article focuses on conservation easements conveyed in whole or in part as charitable gifts to land trusts or state or local government entities, as was the case with the conservation easement at issue in *Hicks*. The rules governing the administration of conservation easements conveyed to agencies of the federal government are beyond the scope of this article, as are the rules governing the administration of conservation easements purchased for their full value with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation. *Cf.* Part II.J. (explaining that the fact that some conservation easements are not conveyed as charitable gifts is not a justification for permitting government or land trust holders to avoid their fiduciary obligations with regard to those that are).

the vicinity of the protected property.”⁶ Pursuant to this definition, the holder of a conservation easement could properly agree with the owner of the encumbered land to extinguish the easement, or amend it to permit the subdivision and development of the land, provided the holder received appropriate compensation (and therefore did not confer a net financial benefit on a private person or entity), and used that compensation to “meaningfully advance land conservation on . . . some other property in the vicinity.” In other words, the quoted definition would permit governmental and nonprofit holders to liquidate conservation easements in whole or in part to fund, for example, the purchase of different easements encumbering other property in the vicinity, the purchase of fee title to other property in the vicinity, or even increases in a holder’s operating budget or stewardship endowment, all of which would arguably “meaningfully advance land conservation . . . in the vicinity.” Moreover, if the only restrictions on the administration of donated conservation easements were those alleged in *The End of Perpetuity*, governmental and nonprofit holders of easements would actually have far greater discretion. As with any unrestricted charitable gift, the holder of a conservation easement could agree to sell, trade, release, extinguish, or otherwise dispose of the easement, in whole or in part, and use the compensation received in any manner consistent with its general public or charitable mission.⁷ In other words, despite their detailed terms and purposes, conservation easements would be fungible or liquid assets in the hands of their government and land trust holders.

The *End of Perpetuity*’s implicit assertion that donated conservation easements are unrestricted charitable gifts is not supportable. Conservation easements are not donated to government entities and land trusts to be sold, traded, released, extinguished, or otherwise used or disposed of, in whole or in part, by such entities as they may see fit from time to time in the accomplishment of their general public or charitable missions. Rather, conservation easements are donated to government entities and land trusts to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance, generally in perpetuity. The conservation easement at issue in *Hicks v. Dowd* is a case in point, having been donated to Johnson County, Wyoming, for the express purpose of preserving and protecting the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Meadowood Ranch in perpetuity.⁸

⁶ *The End of Perpetuity*, *supra* note 4, at 25, n. 1.

⁷ See *supra* notes 4 and 5 accompanying text. See also *supra* note 2.

⁸ Deed of Conservation Easement between the Lowham Limited Partnership, Grantor, and the Board of County Commissioners of Johnson County, Wyoming, Grantee 2 (Dec. 29, 1993) [hereinafter Lowham Easement]. The Board of Commissioners apparently later transferred the Lowham Easement to the Scenic Preserve Trust, a charitable organization created by the Board of Commissioners for the purpose of preserving and enhancing the scenic resources of Johnson County. See *Hicks*, 157 P.3d at 915–18. The Scenic Preserve Trust is governed by a Board of Trustees, the members of which are the same as the members of the Board of Commissioners. *Id.* at 916.

Because conservation easements are donated to government entities and land trusts to be used for a specific charitable purpose, their donation should create a charitable trust or its functional equivalent under state law, even though the deeds of conveyance typically do not contain the words “trust” or “trustee,”⁹ and even though many easement donors may not know that the intended relationship is called a trust.¹⁰ As explained in the Restatement (Third) of Trusts:

An outright devise or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee¹¹

In some jurisdictions courts refer to gifts made to government entities or charitable organizations to be used for specific charitable purposes, not as charitable trusts, but as implied trusts, quasi-trusts, restricted charitable gifts, or public trusts. Regardless of how such gifts are characterized, however, the substantive rules governing the administration of charitable trusts generally apply.¹² Accordingly, as

⁹ See *infra* note 66 and accompanying text (explaining that no magical incantation is necessary to create a charitable trust).

¹⁰ See *infra* notes 67–76 and accompanying text (explaining that all that is required to create a trust is an intention to create a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another, and that it is immaterial whether or not the settlor knows that the intended relationship is called a trust). See also *infra* note 98 and accompanying text (explaining that the status of a conservation easement as a partial interest in real property does not prevent it from being held in trust).

¹¹ RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a. (2003) [hereinafter RESTATEMENT (THIRD) OF TRUSTS]. These principles also generally apply to charitable gifts made to state and local government entities. See, e.g., *In re Estate of Heil v. Nevada*, 259 Cal. Rptr. 28 (Cal. Ct. App. 1989) (devise of residue of decedent’s estate to the state of Nevada to be used for the preservation of wild horses created a charitable trust); *Tinkham v. Town of Mattapoisett*, 22 Mass. L. Rep. 635 (2007) (gift of land to a town to be used for conservation purposes created a charitable trust); *State v. Rand*, 366 A.2d. 183 (Me. 1976) (gift of land to a city to be forever held and maintained as a public park created a charitable trust); *Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) (“It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of trust.”).

¹² See RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959) [hereinafter RESTATEMENT (SECOND) OF TRUSTS] (“Property may be devoted to charitable purposes not only by transferring it to individual trustees to hold it for such purposes, but also by transferring it to a charitable corporation. . . . Where property is given to a charitable corporation, particularly where restrictions are imposed by the donor, it is sometimes said by the courts that a charitable trust is created and that the corporation is a trustee. It is sometimes said, however, that a charitable trust is not created. This is a mere matter of terminology. . . . Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations”); *id.* Reporter’s Notes cmt. f (“Where restricted

with other gifts conveyed to government entities or charitable organizations to be used for a specific charitable purpose, the holder of a conservation easement should not be permitted to use the easement for a purpose other than that for which it was granted without receiving judicial approval in a *cy pres* proceeding. Thus, the holder of a conservation easement should not be permitted to release, extinguish, or otherwise terminate the easement (which would clearly be contrary to its stated purpose), or amend the easement in manners contrary to its stated purpose (such as to permit the subdivision and development of the land), without receiving judicial approval in a *cy pres* proceeding. The holder could, however, agree to amendments that are consistent with the purpose of the easement pursuant to the holder's express or implied power to agree to such amendments or, in the absence of such powers, with judicial approval obtained in a more flexible administrative (or equitable) deviation proceeding.¹³

A variety of authoritative sources support the application of charitable trust principles to conservation easements, including the Uniform Conservation

gifts are made to charitable corporations, the restrictions are enforceable at the suit of the Attorney General.”); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS*, § 348.1 (4th ed. 1989) (“Certainly many of the principles applicable to charitable trusts are applicable to charitable corporations. In both cases the Attorney General can maintain a suit to prevent a diversion of the property to purposes other than those for which it was given; and in both cases the doctrine of *cy pres* is applicable.”). *See also, e.g.*, Blumenthal v. White, 683 A.2d 410, 412–13 (Conn. 1996) (applying charitable trust principles to a gift of land to a city with instructions that the land be used as a public park and explaining that, while the conveyance did not create a trust “in strict sense, it may be so regarded,” and the city held the land as a “quasi-trustee”); Carl J. Herzog Found. v. University of Bridgeport, 699 A.2d 995, 998 n. 2 (Conn. App. Ct. 1997) (explaining that the law governing the enforcement of charitable gifts is derived from the law of charitable trusts and “The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced” (citing Lefkowitz v. Lebensfeld, 417 N.Y.S.2d 715, 720 (N.Y. App. Div. 1979))); *Tinkham*, 22 Mass. L. Rep. at 635 (applying charitable trust principles to a gift of land to a town to be used for conservation purposes and describing the gift as having created both a public trust and a charitable trust); *Town of Cody v. Buffalo Bill Memorial Ass’n*, 196 P.2d 369, 377 (Wyo. 1948) (applying charitable trust principles to a gift of land to a charitable association to be used to memorialize the memory of William F. “Buffalo Bill” Cody and explaining, “Grants made to a charitable corporation may, of course, be of various kinds. They may be absolute or, on the other hand, proper terms, conditions and directions may be annexed thereto. In the latter case, the terms, conditions and directions annexed must be carried out”). For law review commentators, see, for example, Katz, *supra* note 2; Eason, *supra* note 2. A few of the procedural rules applicable to trusts do not apply in the case of charitable gifts made for specific purposes. *See, e.g.*, SCOTT & FRATCHER, *supra*, § 348.1 (“The circumstances under which and the proceedings by which creditors can reach the property are different”); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1209 (2007) (“[A] restricted gift . . . does not impose on the corporate charity the trust law procedural requirements for providing information to beneficiaries (although the charity would have to respond to a request for information from the attorney general) and for judicial accounting.”).

¹³ *See infra* Part II.D. (explaining the legal principles governing the administration of charitable trusts and how those principles should apply to conservation easements).

Easement Act (adopted by Wyoming in 2005),¹⁴ the Uniform Trust Code (adopted by Wyoming in 2003),¹⁵ the Restatement (Third) of Property: Servitudes,¹⁶ and federal tax law,¹⁷ all of which are discussed in more detail below.¹⁸ In addition, state attorneys general in a growing number of states are recognizing both their right and their obligation, as supervisors of charitable trusts, to protect the public interest and investment in conservation easements.¹⁹

¹⁴ Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Conservation Easement Act § 3 cmt. (2007), *available at* http://www.law.upenn.edu/blil/ulc/ucea/2007_final.htm (last visited Nov. 20, 2008) [hereinafter UCEA] (“[B]ecause conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose . . . the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.”). Wyoming’s version of the UCEA can be found at WYO. STAT. ANN. §§ 34-1-201 to -207 (2008).

¹⁵ Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Trust Code § 414 cmt. (2005), *available at* <http://www.law.upenn.edu/blil/ulc/uta/2005final.htm> (last visited Nov. 20, 2008) [hereinafter UTC] (explaining that the creation of a conservation easement will frequently create a charitable trust and the organization to which the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement). Wyoming’s version of the UTC can be found at WYO. STAT. ANN. §§ 4-10-101 to -1103.

¹⁶ RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11 (providing that the substantial modification or termination of conservation easements held by government entities and charitable organizations is governed, not by the real property law doctrine of changed conditions, but by a special set of rules modeled on the charitable trust doctrine of *cy pres*).

¹⁷ *See infra* notes 302–306 and accompanying text (explaining that tax-deductible conservation easements must be, *inter alia*, transferable by their holders only to other government entities or charitable organizations that agree to continue to enforce the easements, and extinguishable by their holders only in what essentially is a *cy pres* proceeding).

¹⁸ *See also* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L. Q.* 673 (2007) [hereinafter *Perpetuity and Beyond*] (discussing the support for applying charitable trust principles to conservation easements, including case activity on the issue to date).

¹⁹ *See, e.g., supra* note 3 (discussing the complaint filed by the Wyoming Attorney General seeking to enforce the conservation easement at issue in *Hicks* on behalf of the public); *infra* notes 131–143 and accompanying text (describing a case in which the Maryland Attorney General sought to enforce a perpetual conservation easement on behalf of the public on the ground that the gift of the easement had created a charitable trust); *Windham Land Trust v. Jeffords*, Order on State’s Motion to Intervene (Cumberland Sup. Ct. Jan. 2, 2008) (granting the Maine Attorney General’s motion to intervene in a case involving the enforcement of a conservation easement, which motion was requested in part based on the attorney general’s right to enforce gifts made to charities); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 *U. RICH. L. REV.* 1031, 1069–70 [hereinafter *Amending Perpetual Conservation Easements*] (noting that state attorneys general in a number of states, including Maryland, California, Pennsylvania, Maine, Connecticut, and Massachusetts are beginning to recognize that they have the right and the obligation to enforce conservation easements on behalf of the public, and quoting, for example, Belinda J. Johns, Senior Assistant Attorney General in the California Attorney General’s Office, as stating “It is our position that conservation easements are donor-restricted charitable assets and that modification would be governed by the *cy pres* doctrine,” and Larry Barth, Senior Deputy Attorney General for the State of Pennsylvania, as stating that “we regard [conservation easements] as we would any other charitable trust . . . under Common Law and those of our statutes that give the AG authority over charities and charitable trusts”). The New Hampshire Attorney General has

B. *Land Trust Practices*

The End of Perpetuity's assertion that government entities and land trusts are free to amend or terminate the conservation easements they hold “on their own” and as they may “see fit” is also inconsistent with (i) the representations the Land Trust Alliance and individual land trusts make to easement grantors, funders, and the general public regarding the perpetual nature of conservation easements, (ii) the guidelines promulgated by the Land Trust Alliance for the responsible operation of land trusts, and (iii) the manner in which land trusts generally account for the easements they acquire on their financial books. The Land Trust Alliance is a nonprofit umbrella organization that provides training and education to, and develops policies and standards for, the over 1,700 local, state, and regional land trusts operating in the United States.²⁰

1. *Representations Made*

The promise of permanent protection of the specific land encumbered by a conservation easement has always been, and continues to be, a key selling point for land trusts soliciting conservation easement donations. The Land Trust Alliance, in conjunction with the Trust for Public Land, first published the Conservation Easement Handbook in 1988 (“the 1988 Handbook”).²¹ One purpose of the 1988 Handbook was to provide land trust and public agency personnel with detailed guidance for operating successful conservation easement acquisition programs.²² The 1988 Handbook lists the ability to promise permanent protection of the encumbered land as one of the “Four Key Selling Points” of a conservation easement

likewise taken the position that conservation easements are charitable trusts enforceable by the Attorney General. Personal Communication between Terry Knowles, past President of the National Association of State Charity Officials and Assistant Director of the Charitable Trusts Unit of the New Hampshire Attorney General's Office, and Nancy A. McLaughlin on September 5, 2008. The New Hampshire Attorney General is working with land trusts in New Hampshire to develop guidelines regarding Attorney General and court oversight of conservation easement modifications and terminations. *Id.* The New Hampshire Attorney General has also participated in two minor cases involving *cy pres* petitions filed with the court to correct problems in conservation easement deeds, and both cases were resolved “quickly and efficiently.” *Id.*

²⁰ See Land Trust Alliance, www.lta.org/about-us (last visited Nov. 20, 2008). The charitable mission of the Alliance is “[t]o save the places people love by strengthening land conservation across America.” Land Trust Alliance, Who We Are, www.lta.org/about-us/who-we-are (last visited Nov. 20, 2008).

²¹ CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION EASEMENT HANDBOOK]. The Trust for Public Land is a national nonprofit land conservation organization that “conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come.” The Trust For Public Land, www.tpl.org/tier2_sa.cfm?folder_id=170 (last visited Nov. 20, 2008).

²² 1988 CONSERVATION EASEMENT HANDBOOK *supra* note 21, at xi.

program.²³ The 1988 Handbook also cautions that program administrators not get so involved in describing the technicalities of conservation easements that they “forget to emphasize the main reason why people grant them: to protect *their* property *forever*.”²⁴

In answer to the question “*How Long Does an Easement Last?*” the 1988 Handbook explains “[a]n easement can be written so that it lasts forever. This is known as a perpetual easement,” and “[a]n easement runs with the land—that is, the original owner and all subsequent owners are bound by the [easement’s] restrictions”²⁵ And in discussing an easement holder’s responsibilities, the 1988 Handbook provides “[t]he grantee organization or agency is responsible for enforcing the restrictions that the easement document spells out.”²⁶ These representations were carried forward in only slightly modified form to the most recent edition of the Conservation Easement Handbook, published in 2005 (“the 2005 Handbook”), which explains, in part, “[w]hen the easement holder accepts an easement, it accepts responsibility for enforcing the restrictions set forth in the easement document, typically in perpetuity.”²⁷ The 2005 Handbook also opens with the following statement by Rand Wentworth, President of the Land Trust Alliance, “For many people who love their land, [a conservation easement] is the best way to ensure that it will be preserved for all time.”²⁸

In a recently published brochure detailing its philosophy, the Land Trust Alliance similarly defines a conservation easement as

a legal agreement between a landowner and a land trust (or other eligible entity) that restricts future activities on the land to protect its conservation values. When people donate a conservation easement to a land trust, they give up some of the rights associated with the land. For example, they might give up

²³ *Id.* at 37.

²⁴ *Id.* (emphasis added).

²⁵ *Id.* at 7 (emphasis in original).

²⁶ *Id.* More than 15,000 copies of the 1988 Handbook were sold and it served “as a critical source of information that led to the drafting of thousands of conservation easements, protecting millions of acres.” ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK ix (2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK].

²⁷ 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 22. In answer to the question “*How Long Does an Easement Last?*” the 2005 Handbook similarly explains “[c]onservation easements are usually intended to last forever—these are known as perpetual easements” and “[a] perpetual easement runs with the land—that is, the original owner and all subsequent owners are bound by its restrictions.” *Id.* at 21 (emphasis in original).

²⁸ *Id.* at 7. The 2005 Handbook goes on to describe an easement donor who “expressed sentiments about his land that are similar to those of other landowners across the country: ‘I placed an easement on [my farm] because 52 years ago I found it to be a beautiful piece of property and wanted it to remain so forever.’” *Id.*

the right to build additional structures, while retaining the right to live on the land and grow crops. *Future owners of the property will be bound by the easement's terms. The land trust is responsible for making sure the easement's terms are followed in perpetuity.*²⁹

And in its 2007 Annual Report, under the heading “*Ensuring the Permanence of Conservation*,” the Land Trust Alliance noted that its recently launched conservation defense program will help land trusts “make sure that conserved land stays protected forever.”³⁰ The Report explains that this new program “will give land trust staff, volunteers and board members the legal backup they need to assure the public that we do have the resources, knowledge and capability to defend conserved land forever.”³¹

Similar representations regarding the nature of a perpetual conservation easement can be found in the solicitation materials of virtually every land trust operating in this country. To provide just a few examples, in describing conservation easements on its website, The Nature Conservancy³² explains:

Most easements “run with the land,” remaining with the property even if it is sold or passed on to heirs, thus binding in perpetuity the original owner and all subsequent owners to the easement’s restrictions. The organization or agency that holds the conservation easement is responsible for making sure the easement’s terms are followed into the future. . . . Often landowners have no intention of subdividing their properties for development. But a conservation easement is still attractive to them because it reaches beyond their own lifetimes to ensure the conservation purposes are met forever. An easement binds heirs and other future landowners to comply with the easement’s terms. . . . It can give peace-of-mind to current landowners worried about the future of a beloved property, whether forest or ranch, stretch of river or family farm.³³

²⁹ PHILOSOPHY OF THE LAND TRUST ALLIANCE 4 (Land Trust Alliance), *available at* www.lta.org/about-us/who-we-are/alliance-philosophy.pdf/view (last visited Nov. 20, 2008) (emphasis added).

³⁰ LAND TRUST ALLIANCE 2007 ANNUAL REPORT 20, *available at* www.lta.org/about-us/who-we-are/annual-report-2007.pdf (last visited Nov. 20, 2008)

³¹ *Id.*

³² The Nature Conservancy is a land trust that operates on a national and international level and its charitable mission is “to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.” The Nature Conservancy, How We Work, www.nature.org/aboutus/howwework/?src=t2 (last visited Nov. 20, 2008).

³³ The Nature Conservancy, How We Work, Conservation Easements—All About Conservation Easements, <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html> (last visited Nov. 20, 2008).

In explaining “Easement Basics” to prospective easement grantors, funders, and other members of the public on its website, the Jackson Hole Land Trust³⁴ (which has employed the author of *The End of Perpetuity* as its Director of Protection and Staff Attorney since 2000³⁵), provides:

A conservation easement is a voluntary contract between a landowner and a land trust, government agency, or another qualified organization in which the owner places permanent restrictions on the future uses of some or all of their [sic] property to protect scenic, wildlife, or agricultural resources. . . . *The easement is donated by the landowner to the land trust, which then has the authority and obligation to enforce the terms of the easement in perpetuity.* The landowner still owns the property and can use it, sell it, or leave it to heirs, but *the restrictions of the easement stay with the land forever.*³⁶

And in defining conservation easements on its website, the Teton Regional Land Trust³⁷ similarly provides:

A conservation easement is a voluntary agreement a willing landowner makes to permanently restrict the type and amount of development that may take place on his or her property in the future. . . . The landowner continues to own the property; he or she may sell it, live on it, use it, or leave it to heirs, but *the agreed-upon restrictions remain with the land forever.* The Land

³⁴ The Jackson Hole Land Trust is a local land trust and its charitable mission is “to preserve open space and the scenic, ranching and wildlife values of Jackson Hole by assisting landowners who wish to protect *their* land *in perpetuity*.” Jackson Hole Land Trust, www.jhlandtrust.org (last visited Nov. 20, 2008) (emphasis added).

³⁵ See Jackson Hole Land Trust, Our Board & Staff, <http://jhlandtrust.org/about/timothyindstrom.htm> (last visited Nov. 20, 2008).

³⁶ Jackson Hole Land Trust, Easement Basics, <http://jhlandtrust.org/protection/easement.htm> (last visited Nov. 20, 2008) (emphasis added). Jean Hocker, past President of the Land Trust Alliance and a founder of the Jackson Hole Land Trust, similarly describes perpetual conservation easements as follows:

Questions often arise regarding the concept of “perpetual.” The terms of an easement, of course, stay in place even when the land is sold, no matter how many times it is sold. An easement is attached to the deed, and the property’s subsequent buyers are well aware of an easement’s terms and limitations.

Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV’T 244, 245 (2001).

³⁷ The Teton Regional Land Trust is a regional land trust and its charitable mission is “to conserve agricultural and natural lands and to encourage land stewardship in the Upper Snake River Watershed for the benefit of today’s communities and as a legacy for future generations.” Teton Regional Land Trust, Mission & Values, www.tetonlandtrust.org/about_mission.htm (last visited Nov. 20, 2008).

Trust accepts the responsibility for the regulation of the easement agreement. . . . While the tax benefits are helpful, *many people have found the greatest satisfaction in working with Land Trusts is the assurance that the land they cherish will always be protected.*³⁸

These representations regarding the perpetual nature of conservation easements are also often memorialized in the deeds of conveyance. For example, the easement at issue in *Hicks v. Dowd* provides

The Grantee . . . intends, by acceptance of the grant made hereby, forever to honor the intentions of the Grantor stated herein to preserve and protect in perpetuity the natural elements

³⁸ Teton Regional Land Trust, Easements Defined, www.tetonlandtrust.org/easement_defined.htm (last visited Nov. 20, 2008) (emphasis added). Additional examples abound. For example, the Montana Land Reliance (“MLR”), a well-respected state-wide land trust, explains on its website

A conservation easement is the legal glue that binds a property owner’s good intentions to the land in perpetuity. . . . A conservation easement runs with the title to the property regardless of changes in future ownership

MLR only takes conservation easements in perpetuity, which gives the donor the comfort of knowing that their property will remain as they describe in the conservation easement document.

Montana Land Reliance, An Introduction to Conservation Easements, www.mtlandreliance.org/easement.htm (last visited Nov. 20, 2008); Montana Land Reliance, FAQs, www.mtlandreliance.org/faq.htm (last visited Nov. 20, 2008).

And in its “Landowner Information Series,” the Vermont Land Trust (“VLT”), another well-respected state-wide land trust, explains

A donation of a conservation easement protects your land from development for all future generations. The land continues to be privately owned but it carries with it protective restrictions that limit some future uses. These protections are forever upheld by the Vermont Land Trust through its stewardship staff

Conservation easements offer several advantages to landowners. . . . Easements are permanent. Conservation easements remain in force even after the land changes hands. Unlike deed restrictions, a conservation easement is forever upheld by VLT as an interested party whose goal is to protect the easement

[U]nanticipated future uses that are inconsistent with the original owner’s conservation goals are prohibited. This ensures that VLT has the ability to carry out the original landowner’s intent in perpetuity.

Vermont Land Trust, VLT Landowner Information Series, Conservation Easement Donations, available at www.vlt.org/Conservation_Easement_Donations.pdf (last visited Nov. 20, 2008). See also 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 143 (in which Darby Bradley, then President of the Vermont Land Trust, explains “[a]fter the deal is done, the ribbon cut, and the celebration is over, the marathon begins. *We’ve promised to look after the land forever, and that promise outlives us*”) (emphasis added). The perpetual nature of conservation easements is similarly described in the popular press. See, e.g., Christopher West Davis, *Pushing the Sprawl Back: Landowners Turn to Trusts*, N.Y. TIMES, Oct. 23, 2003, at 14WC, p.1 (“[C]onservation easements allow landowners to keep their raw land but donate its development rights to a neutral land trust that will keep it locked up forever.”); C. Woodrow Irvin, *Land Trust Touts Success in Preserving Virginia Properties*, WASH. POST, Jan. 23, 2005, at T11 (“Conservation easements are agreements between landowners and governments to limit development on the land in perpetuity, no matter who the owner is.”).

and ecological and aesthetic values of the Ranch, and further intends to enforce the terms of this instrument³⁹

. . . .

This Easement shall be a burden upon and shall run with the Ranch in perpetuity and shall bind the Grantor [and] its successors and assigns forever⁴⁰

There is no mention in any of these representations of the donee's reserved right to later agree to amend or terminate the perpetual conservation easements it holds "on its own" and as it may "see fit." Rather, the representations are directly to the contrary. Accordingly, as with any other property donated to a government entity or charitable organization to be used for a specific charitable purpose, a landowner who donates a conservation easement quite reasonably expects that the donee entity or organization will enforce the easement in accordance with its stated purpose and carefully negotiated terms.

An excerpt from a posting on the Land Trust listserv eloquently illustrates the perspective of many easement grantors:

I know donors (and am myself such a donor) whose purpose in the donation is the ultimate protection of beloved land. If I were to see a casual attitude toward amendments, I would be inclined not to donate to the land trust in question or, perhaps, to any land trust because the [conservation easement] or fee donation would not achieve my purpose. For example, one restriction I have used in my donations is that no living standing redwoods may be cut. A future board could conclude that it could safely log and sell every fifth redwood tree because the board decides the harm to my preserve would be relatively small and the dollar value of the cut trees would be enormous and could be used to preserve other land or to do other good work. I can see how someone who was not passionate about my land could think cutting "just a few" trees would be ok given the "greater good" to be achieved.

I don't care. I am the one making the donation and giving up the more comfortable life the sale price could bring me, and I

³⁹ Lowham Easement, *supra* note 8, at 2.

⁴⁰ *Id.* at 9.

get to decide. If the land trust can amend away the protections I placed on my land, then I might as well sell the land and have a more comfortable life.⁴¹

These same sentiments are reflected in surveys of easement donors, which indicate that many landowners are willing to donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved.⁴² In an interview with a New York Times reporter, Stephen J. Small, a Boston-based attorney who specializes in conservation easement transactions and was a principal drafter of the Treasury Regulations interpreting § 170(h) of the Internal Revenue Code (which authorizes a charitable income tax deduction for the donation of a conservation easement), “summed it up: ‘Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land.’”⁴³

Many in the land trust community are cognizant of the fiduciary duties land trusts owe to easement donors. For example, in its recently published research report on amendments to conservation easements (“the Amendment Report”), the Land Trust Alliance cautions land trusts about the dangers of fraudulent

⁴¹ E-mail to Land Trust Listserv from Ann Taylor Schwing, Land Trust Accreditation Commissioner, Past President of The Land Trust of Napa County, Trustee of the American Inns of Court Foundation, and a principal drafter of the Land Trust Alliance’s recently published report on conservation easement amendments (Nov. 13, 2006, 1:13pm MST) (on file with authors). For similar sentiments expressed by the daughter of a deceased easement donor, see *infra* note 134 and accompanying text.

⁴² See, e.g., Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 45 (2004) [hereinafter *Tax Incentives*] (“[T]he surveys indicate that for most easement donors, a strong personal attachment to and concern about the long-term stewardship of their land is the primary factor motivating their donations, while tax incentives generally play a subsidiary or supplemental role.”); Darby Bradley, President, Vermont Land Trust, *Land Conservation: The Case for Perpetual Easements* (Jan. 2003) (noting, with regard to easements granted to the Vermont Land Trust, “[a]lthough the tax and financial benefits were usually important considerations, the owner’s primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends”), available at www.vlt.org/perpetual_easements.html (last visited Nov. 20, 2008). See also *Tax Incentives, supra*, at 45 (noting that the survey results “are not surprising given that the federal tax incentives compensate the typical easement donor for only a modest percentage of the reduction in the value of his or her land resulting from an easement donation. Any charitable donation that requires a significant financial sacrifice must be motivated by factors other than, or in addition to, the anticipated tax savings”).

⁴³ Christopher West Davis, *Pushing the Sprawl Back: Landowners Turn to Trusts*, N.Y. TIMES, Oct. 23, 2003, 14WC, p. 1. See also, e.g., Lorna Thackery, *Landowners seek security: Agreements usually ban surface mining, subdivisions*, THE BILLINGS GAZETTE, Feb. 26, 2006 (“Preservation of much-loved landscapes ranks high among the motivating factors for increasingly popular conservation easements.”).

solicitation,⁴⁴ and explains that land trusts are both legally and ethically bound by the representations they make to donors.⁴⁵ All land trusts would do well to heed these warnings. In a 2003 case, *Madigan v. Telemarketing Associates*, the United States Supreme Court sided with the Attorney General of Illinois in holding “States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used.”⁴⁶ Although *Madigan* involved solicitations for donations of money, the same principles should apply to land trusts that make false or misleading representations that deceive landowners about how their conservation easement donations will be used (e.g., representing that “the restrictions of the easement stay with the land forever” and the land trust has the “obligation to enforce the terms of the easement in perpetuity,” when the land trust intends or believes it is free to amend or terminate the easement on its own and as it may see fit from time to time).⁴⁷

2. *Legal and Ethical Guidelines*

The End of Perpetuity’s assertion that government entities and land trusts are free to amend or terminate the conservation easements they hold “on their own” and as they may “see fit” is also inconsistent with the Land Trust Alliance’s legal and ethical guidelines for the responsible operation of land trusts (“the Standards and Practices”),⁴⁸ the Conservation Easement Handbook, and the Alliance’s Amendment Report. The Standards and Practices, which must be adopted by all of the Alliance’s member land trusts, provide, in relevant part, that “amendments [to

⁴⁴ See *Amending Conservation Easements, Evolving Practices and Legal Principles*, RESEARCH REPT. (Land Trust Alliance, Wash. D.C.), Aug. 2007, at 30 [hereinafter, *LTA Amendment Report*] (noting that “a land trust that publicly describes its conservation easements as perpetual while occasionally granting amendments that diminish easement protections of conservation values risks running afoul of fraudulent solicitation or other provisions”).

⁴⁵ *Id.* at 33. (“Whether a donor gives money or an interest in land, representations by the land trust upon soliciting funds and accepting gifts are binding, both legally and ethically.”).

⁴⁶ *Madigan v. Telemarketing Associates*, 538 U.S. 600, 624 (2003). See also *Principles for Good Governance and Ethical Practice, A Guide for Charities and Foundations, Reference Edition* (Panel on the Nonprofit Sector), October 2007, at 28, available at http://www.nonprofitpanel.org/report/principles/Principles_Reference.pdf (last visited Nov. 22, 2008) (“An organization’s communications while it is soliciting contributions may also create a legally binding restriction that can be enforced under state and federal fraudulent solicitation prohibitions.”).

⁴⁷ See *supra* note 36 and accompanying text (quoting the representations made by the Jackson Hole Land Trust to prospective easement grantors, funders, and the general public).

⁴⁸ *Land Trust Standards and Practices* (Land Trust Alliance, Wash. D.C.), revised 2004, available at www.lta.org/learning/sp/lt-standards-practices07.pdf (last visited Nov. 20, 2008) [hereinafter *LTA Standards and Practices*]. See also Land Trust Alliance, *Land Trust Standards and Practices*, www.lta.org/learning/sp (last visited Nov. 20, 2008) (describing the Standards and Practices as “guidelines for the responsible operation of a land trust, which is run legally, ethically and in the public interest and conducts a sound program of land transactions and stewardship”).

conservation easements] are not routine, but can serve to strengthen an easement or improve its enforceability” and “all amendments [must] result in either a positive or not less than neutral conservation outcome”⁴⁹ In commentary explaining this practice, the Alliance warns that “[a] land trust that accepts and holds conservation easements commits itself to their annual stewardship in perpetuity, [and to] enforcement of their terms,”⁵⁰ and “[s]tate laws governing conservation easements, charitable trust law, contract law, nonprofit corporation law and public trust law, and federal and state tax laws all might have something to say about if and how amendments are permitted.”⁵¹

The Conservation Easement Handbook similarly recommends a conservative approach to amendments. Both the 1988 and 2005 editions of the Handbook provide that a conservation easement amendment should change the easement for the better (i.e., strengthen the protective terms of the easement document), or at least be neutral, and that an amendment must never result in net degradation of the conservation values of the land the easement is designed to protect.⁵² The 2005 Handbook also warns that “[a]ll applicable state laws, charitable trust law, contract laws, nonprofit corporation laws, public trust laws, and federal tax laws must be followed when amendments are made.”⁵³

In addition, the Land Trust Alliance’s recently published Amendment Report provides, as two of its “seven definitive principles that should guide all easement amendment decisions,”⁵⁴ that any amendment should be “consistent with the conservation purpose(s) and intent of the easement,”⁵⁵ and “consistent with

⁴⁹ *LTA Standards and Practices*, *supra* note 48, at 14 (Practice 11I. Amendments). See also Land Trust Alliance, Adoption Requirements, www.lta.org/learning/sp/adoption-requirements/?searchterm=None (last visited Nov. 20, 2008) (“The Land Trust Alliance requires that all member land trusts adopt *Land Trust Standards and Practices* as the guiding principles for their operations.”).

⁵⁰ *Background to the 2004 revisions of Land Trust Standards and Practices* (Land Trust Alliance, Wash. D.C.), 2004, at 21.

⁵¹ *Commentary on Land Trust Alliance Standards and Practices 2004, Standard 11: Conservation Easement Stewardship, Practice 11I: Amendments* (Land Trust Alliance, Wash. D.C.), available from the Land Trust Alliance and on file with authors [hereinafter *Commentary on Practice 11I*].

⁵² 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 122; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 184.

⁵³ 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 188.

⁵⁴ *LTA Amendment Report*, *supra* note 44, at 7. The Amendment Report further provides, “[n]o amendment policy should be more permissive than these Principles allow, but some land trusts may choose to adopt more conservative amendment guidelines.” *Id.* at 17.

⁵⁵ *Id.* at 32. This principle requires that a land trust “ensure that an amendment will not erode the overarching purposes and intent of the original easement.” *Id.* at 33.

the documented intent of the donor . . . and any direct funding source.”⁵⁶ The Amendment Report lists a litany of potential legal constraints on amendments, including federal tax law, state and federal laws governing the administration of restricted gifts and charitable trusts, and state laws on fraudulent solicitation and misrepresentation to donors.⁵⁷ And, although the purpose of the Amendment Report is to provide guidance on easement amendments, and not easement terminations, the report instructs that tax-deductible conservation easements can be extinguished by the holder only through a judicial proceeding and upon a finding that continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and to the extent an amendment amounts to an extinguishment, the land trust must satisfy these requirements.⁵⁸ Accordingly, the aggressive approach to the amendment and termination of conservation easements advocated in *The End of Perpetuity* is inconsistent not only with the law governing restricted charitable gifts, but also with the land trust community’s longstanding position with regard to amendments and terminations.

3. Accounting Practices

The End of Perpetuity’s assertion that government entities and land trusts are free to amend or terminate the conservation easements they hold “on their own” and as they may “see fit” is also inconsistent with the manner in which many land trusts account for the easements they acquire. Many land trusts record the easements they acquire on their books as having a “zero value” because they recognize that they are not free to sell, trade, release, extinguish, or otherwise dispose of such easements in whole or in part (except for transfers made to a government entity or land trust that agrees to continue to enforce the easement).⁵⁹ Indeed, most land trusts view the conservation easements they acquire as net liabilities due to the costs associated with monitoring and enforcing the easements in perpetuity. As one commentator notes

the typical conservation easement . . . furnish[es] little or no measurable benefit to the donee. . . . [I]ndeed, most nonprofit easement managers are all too aware that monitoring and

⁵⁶ *Id.* at 32. This principle “protects the land trust against claims of fraudulent solicitation and violation of the terms of the donation of the easement or funds to acquire the easement.” *Id.* at 33. The Amendment Report warns “[l]and trusts become bound by obligations to easement donors, grantors, and funders as part of the donation process.” *Id.* at 43.

⁵⁷ *Id.* at 23.

⁵⁸ *Id.* at 24 and n. 7 (explaining that “[s]ignificant amendments may be viewed as partial extinguishments”). See also *infra* notes 302–306 and accompanying text (explaining the requirements that must be met to qualify for a federal charitable income deduction upon the donation of a conservation easement).

⁵⁹ See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 67 (“Since a typical conservation easement . . . has no measurable value to the holder, many nonprofits use the ‘zero-value’ approach when recording the easement on their books.”).

enforcement of easement obligations create net balance sheet liabilities. . . . From the donee's perspective, then, the donated silk purse is transformed, at the moment of conveyance, into a sow's ear destined for perpetual care.⁶⁰

This zero value phenomenon is, of course, not particular to conservation easements. Any property donated to a government entity or charitable organization to be used be used for a specific public or charitable purpose (i.e., as a restricted charitable gift) has a reduced or perhaps even zero value from the holder's perspective because it cannot be freely sold or exchanged.⁶¹

The End of Perpetuity ultimately acknowledges that "there is likely to be sufficient legal basis" for applying charitable trust principles to conservation easements conveyed as charitable gifts.⁶² The article nonetheless suggests that courts create a special judicial exemption from the application of charitable trust principles for this particular form of restricted charitable gift. The arguments offered in support of this suggestion are, however, unconvincing and based on an incorrect analysis of both the relevant facts and the relevant law. To set the record straight, and to help ensure that the development of the law and policy in this area is not influenced by an incorrect analysis of the facts or the law, Part II explains the flaws in each of *The End of Perpetuity's* arguments. Part II also examines the policies underlying the well-settled role of state attorneys general and the courts in supervising the administration of restricted charitable gifts and charitable trusts, and explains how such supervision can and should operate to protect the public interest and investment in conservation easements. Part III takes a short detour to discuss the problems with proposals to change state law to permit politically-appointed state boards to authorize the substantial modification or termination of conservation easements. Part IV then provides a brief summary and conclusion.

⁶⁰ William T. Hutton, *Easements as Public Support: The "Zero-Value" Approach*, in 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 135–36.

⁶¹ For example, land donated to a government entity or charitable organization to be used as a public park or nature preserve has a reduced value from the holder's perspective because it cannot be freely sold or exchanged and it must be maintained. This phenomenon is discussed in Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS. L. REV. 1897, 1939–42 (2008) [hereinafter *Condemning Conservation Easements*]. The article explains that, when such land is condemned so that it can be put to a different public use, the entity or organization holding the land on behalf of the public is generally entitled to compensation based on the value of the land as if it were not subject to the use restriction (i.e., based on its unrestricted value), but that such value lies dormant and inaccessible by the entity or organization until the restriction is lifted in the context of a condemnation or *cy pres* proceeding. The article also explains that the entity or organization must generally use the compensation to accomplish similar charitable purposes in some other manner or location.

⁶² *The End of Perpetuity*, *supra* note 4, at 62. See also *infra* note 312 and accompanying text.

II. ADDRESSING THE ARGUMENTS IN *THE END OF PERPETUITY*

A. *Intention to Create a Charitable Trust*

The End of Perpetuity asserts that a “hurdle to finding that the conveyance of a conservation easement creates a charitable trust is the requirement that for a trust to exist there must be a clear intention on the part of the putative settlor to create a trust.”⁶³ The article cites to the Uniform Trust Code (sometimes referred to hereinafter as the UTC), which provides that a trust is created only if “[t]he settlor indicates an intention to create the trust.”⁶⁴ The article then concludes “[t]he notion that the conservation easement that they have negotiated with a specific land trust constitutes a trust the beneficiaries of which are the general public would be startling to many easement donors.”⁶⁵ As discussed below, *The End of Perpetuity’s* analysis of this issue is inconsistent with the law governing the creation of charitable trusts, the facts surrounding the creation of conservation easements, and the specific language of conservation easement deeds. Landowners who convey conservation easements to government entities and land trusts as charitable gifts clearly manifest the intent needed to create a charitable trust or its functional equivalent.

It is well-settled that no magical incantation, such as use of the word “trust” or “trustee,” is required to create a trust.⁶⁶ Indeed, the settlor need not even understand precisely what a trust is. All that is required to create a trust is an

⁶³ *Id.* at 60. Another “hurdle” to which *The End of Perpetuity* refers is the requirement that the court determine that the donor had a general charitable intent. *Id.* at 59–60. Characterizing the requirement of general charitable intent as a hurdle to the creation of a charitable trust is improper. A charitable trust can be created whether the donor has a specific or a general charitable intent. *See, e.g.,* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 478–80 (2005) [hereinafter *Rethinking the Perpetual Nature of Conservation Easements*] (explaining that the donor of a restricted charitable gift or charitable trust can have either a specific or a general charitable intent, and that such intent is relevant only when applying the doctrine of *cy pres* and only in some jurisdictions). *See also infra* Part II.D.1.c.(2) (discussing the doctrine of *cy pres*).

⁶⁴ *The End of Perpetuity*, *supra* note 4, at 61 (citing UTC § 402(a)(2) and WYO. STAT. ANN. § 4-10-403(a)(2) (2007)). The UTC was approved by NCCUSL in 2000 and has since been adopted in twenty-one states, including Wyoming. *See* Nat’l Conf. of Comm’rs on Uniform State Laws, Uniform Trust Code, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp (last visited Nov. 20, 2008) (listing the following as having adopted the UTC: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Wyoming, and the District of Columbia).

⁶⁵ *The End of Perpetuity*, *supra* note 4, at 61.

⁶⁶ *Tinkham v. Town of Mattapoisett*, 22 Mass. L. Rep. 635 (2007). *See also* SCOTT & FRATCHER, *supra* note 12, § 351 (“The settlor need not . . . use any particular language in showing his intention to create a charitable trust; he need not use the word ‘trust’ or ‘trustee.’”); JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 498 (7th ed. 2005) (“No particular form of words is necessary to create a trust. The words *trust* or *trustee* need not be used.”) (emphasis in original).

intention to create a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.⁶⁷ As explained in a leading treatise on trust law

an express trust may arise even though the parties in their own minds did not intend to create a trust. . . . An express trust may be created even though the parties do not call it a trust, and even though they do not understand precisely what a trust is; it is sufficient if what they appear to have in mind is in its essentials what the courts mean when they speak of a trust.⁶⁸

. . . .

. . . The question in each case is whether the settlor manifested an intention to create the kind of relationship that to lawyers is known as a trust, that is to say, whether the settlor manifested an intention to impose upon himself or upon a transferee of the property equitable duties to deal with the property for the benefit of another person.⁶⁹

In explaining § 402(a)(2) of the Uniform Trust Code, which provides that a trust is created only if “the settlor indicates an intention to create the trust,” the drafters of the UTC refer to § 23 of the Restatement (Second) of Trusts (1959) and § 13 of the Restatement (Third) of Trusts (Tentative Draft No. 1, approved 1996), both of which incorporate the foregoing well-settled understanding of the intent needed to create a trust.⁷⁰

Section 23 of the Restatement (Second) of Trusts provides “[a] trust is created only if the settlor properly manifests an intention to create a trust,”⁷¹ and the

⁶⁷ GEORGE G. BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 1 (West 2007); *see also* *Scotti’s Drive In Restaurants, Inc. v. Mile High-Dart In Corp.*, 526 P.2d 1193, 1196 (Wyo. 1974).

⁶⁸ SCOTT & FRATCHER, *supra* note 12, § 2.8.

⁶⁹ *Id.* § 24. *See also, e.g.*, *King v. Richardson*, 136 F.2d 849, 857 (4th Cir. 1943) (“We attach no importance to the fact that technical language creating a trust was not used. . . . Technical language is not required. A trust arises when property is given to one with the direction that it be used and applied for the benefit of another.”); *Chattowah Open Land Trust v. Jones*, 636 S.E.2d 523, 524–26 (Ga. 2006) (holding that the devise of decedent’s home and surrounding acreage to a land trust for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) “unambiguously created a charitable trust” and the decedent’s failure to use the terms “trust” and “trustee” did not alter the outcome because the strict use of those terms is not required to establish a trust); *Lux v. Lux*, 288 A.2d 701, 704 (R.I. 1972) (“It is an elementary proposition of law that a trust is created when legal title to property is held by one person for the benefit of another.”).

⁷⁰ *See* UTC, *supra* note 15, § 402 cmt.

⁷¹ RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 23.

comments to that section explain “[i]t is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not he knows the precise characteristics of the relationship which is called a trust.”⁷² With regard to the intention needed to create a charitable trust in particular, § 351 of the Restatement (Second) of Trusts provides that the rule is the same as that applicable to private trusts in § 23⁷³ and adds “No particular form of words or conduct is necessary for the manifestation of intention to create a charitable trust. . . . A charitable trust may be created although the settlor does not use the word ‘trust’ or ‘trustee.’”⁷⁴

Section 13 of the Restatement (Third) of Trusts (Tentative Draft No. 1, approved 1996) similarly provides “[a] trust is created only if the settlor properly manifests an intention to create a trust relationship,”⁷⁵ and the comments to that section explain “[i]t is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise characteristics of a trust relationship.”⁷⁶ Moreover, the comments to § 28 of the Restatement (Third) of Trusts (2003) provide specific guidance on the type of conveyance that creates a charitable trust. As noted in the Introduction, the Restatement explains that, while an outright devise or donation to a charitable institution to be used for its general purposes is charitable but does not create a trust, a disposition to such an institution for a specific charitable purpose, such as to support medical research on a particular disease or establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee.⁷⁷

Moreover, the drafters of the Uniform Trust Code specifically contemplated that the conveyance of a conservation easement “will frequently create a charitable trust.” The UTC and Wyoming’s version of the UTC both provide that the section of the UTC that allows for the modification or termination of certain uneconomic trusts “does not apply to an easement for conservation or preservation”—thereby implying that other UTC sections do apply to such easements in appropriate circumstances.⁷⁸ In their commentary, the UTC drafters confirm this interpretation, explaining:

⁷² *Id.* § 23 cmt. a.

⁷³ *Id.* § 351 cmt. a.

⁷⁴ *Id.* § 351 cmt. b.

⁷⁵ RESTATEMENT (THIRD) OF TRUSTS § 13 (Tentative Draft No. 1, April 5, 1996). This same language is included in the final version of the Restatement (Third) of Trusts. RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 13.

⁷⁶ RESTATEMENT (THIRD) OF TRUSTS § 13 cmt. a (Tentative Draft No. 1 1996). This same language is included in the final version of the Restatement (Third) of Trusts. RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 13 cmt. a.

⁷⁷ RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 28 cmt. a.

⁷⁸ *See* UTC, *supra* note 15, § 414(d); WYO. STAT. ANN. § 4-10-415(c) (2008).

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust.⁷⁹

As with the comments to any Uniform Act, these comments to the UTC should be relied upon as a guide in interpreting the act so as to achieve uniformity among the states that enact it.⁸⁰

Accordingly, the question of whether the conveyance of a conservation easement creates a charitable trust does not turn on the presence or absence of the word “trust” or “trustee” in the deed of conveyance (most conservation easement deeds do not contain those words). Also irrelevant is the fact that the easement donor may not have known that the intended relationship is called a trust. All that is required is what is present in any charitable donation of a perpetual conservation easement: the donation of property (the easement) to a government entity or charitable organization to be used, not for that entity’s or organization’s general

⁷⁹ UTC, *supra* note 15, § 414 cmt. By providing that the conveyance of a conservation easement will “frequently” create a charitable trust, the drafters of the UTC were leaving open the question of whether perpetual conservation easements not acquired as charitable gifts (i.e., those purchased with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation) should be governed by similar equitable principles. E-mail to Nancy A. McLaughlin from K. King Burnett, member and past president of NCCUSL (Aug. 17, 2008, 10:51am MST) (on file with authors). For a brief discussion of conservation easements acquired in such nondonative contexts, see *infra* Part II.J.

⁸⁰ See UTC, *supra* note 15, § 1101 (“In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.”). As explained by the Connecticut Supreme Court:

Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. . . . Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.

Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993). See also UTC, *supra* note 15, § 106 cmt. (explaining that the statutory text of the UTC is supplemented by the Comments thereto, “which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation”). Wyoming’s version of the UTC is similarly intended to be applied and construed so as to make the law uniform among that states that adopt it. See WYO. STAT. ANN. § 4-10-1101 (2007) (“In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”); see also WYO. STAT. ANN. § 8-1-103(a) (vii) (2008) (“Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it.”).

purposes, but for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance in perpetuity. As explained in the Restatement (Third) of Trusts, the Uniform Trust Code, and the Uniform Conservation Easement Act (discussed in Part II.B below), this type of conveyance creates a charitable trust of which the holder of the easement should be deemed to be acting as trustee. And even in those jurisdictions where such gifts are not technically referred to as charitable trusts, the substantive principles governing the administration of charitable trusts, including the doctrine of *cy pres*, should nonetheless apply.⁸¹

The End of Perpetuity's assertion that conservation easement donors would be “startled” to learn that their easements are effectively held in trust for the benefit of the public is also unsupported. First, it can be assumed that landowners donating conservation easements to government entities or land trusts in exchange for sizable federal and state charitable income tax deductions understand that they are making charitable gifts intended to benefit the public. Most conservation easement deeds expressly state that the conveyance of the easement is intended to benefit the public,⁸² and it can be assumed that easement donors understand that the generous tax benefits they receive are in exchange for the benefits their easements are intended to provide to the public. In fact, in a later section of the article, *The End of Perpetuity* acknowledges “Clearly, the grantor of [a conservation easement] intends that the [easement] be used . . . for the benefit of the public (if any intent to gain tax benefits is part of the donor’s motivation).”⁸³

⁸¹ See *supra* note 12 and accompanying text (explaining that, regardless of how gifts made to government entities or charitable organizations to be used for specific charitable purposes are characterized—as charitable trusts, implied trusts, quasi-trusts, restricted charitable gifts, or public trusts—the substantive rules governing the administration of charitable trusts generally apply). The analysis in this section is not limited to, or dependent upon, a conservation easement being granted in perpetuity. A landowner who makes a charitable gift of a conservation easement to a government entity or land trust for the purpose of protecting the particular land encumbered by the easement for a specified term, such as thirty years, should also be viewed as having created a charitable trust or the functional equivalent thereof. In such case, there similarly would be a donation of property (the term easement) to a government entity or charitable organization to be used, not for that entity’s or organization’s general purposes, but for a specific charitable purpose. Accordingly, in such case the holder should be deemed to be acting as trustee of the easement for the specified term, and should be required to administer and enforce the easement in accordance with its stated terms and purpose for the duration of the term.

⁸² For example, the conservation easement involved in *Hicks* provides:

The Ranch contains substantial ranching, agricultural, natural, wildlife, wildlife habitat, ecological, scenic, aesthetics, and recreational values . . . of great importance to the residents, guests, ranch guests, and visitors of Johnson County, and the people of Wyoming, and its protection will yield a significant public benefit.

Lowham Easement, *supra* note 8, at 1.

⁸³ *The End of Perpetuity*, *supra* note 4, at 73–74. Even absent the receipt of tax benefits it can be assumed that a landowner who donates a conservation easement to a charitable organization or government entity understands that the easement will be held and enforced for the benefit of the

It can also be assumed that a landowner who donates a conservation easement for the express purpose of protecting a particular parcel of land from development and other environmentally harmful uses believes that the donee will administer the easement in accordance with its stated purpose and other carefully negotiated terms.⁸⁴ This belief is reinforced by the representations made to easement grantors regarding the nature of a perpetual conservation easement (e.g., “the restrictions of the easement stay with the land forever,” “the land trust has the obligation to enforce the terms of the easement in perpetuity,” and a conservation easement assures that cherished land “will always be protected”).⁸⁵ Even *The End of Perpetuity* acknowledges “Clearly, the grantor of [a conservation easement] intends that the [easement] be used in a certain way (i.e., according to the typically elaborate provisions of the easement document)”⁸⁶ Accordingly, what would be startling to conservation easement donors is not that the donee government entity or land trust effectively holds the easements it acquires in trust for the benefit of the public and, thus, may agree to terminate such easements only with court approval obtained in a *cy pres* proceeding—as is contemplated by federal tax law⁸⁷ and set forth in many conservation easement deeds in any event.⁸⁸ Rather, what would be

public. *See, e.g.*, *Town of Cody v. Buffalo Bill Memorial Ass’n*, 196 P.2d 369, 377 (Wyo. 1948) (noting that “the very nature of a charitable corporation indicates that its property is intended to be administered for the benefit of others than the corporation itself. It is of its essence to do so for the benefit of the public or a part thereof”). The same can be said of government entities, which exist to serve the public. It can also be assumed that a landowner who sells a conservation easement to a government entity or charitable organization understands that the easement is being purchased with public or charitable funds by such entity or organization because the easement is intended to provide benefits to the public.

⁸⁴ Karin F. Marchetti, co-author of the 2005 edition of the *Conservation Easement Handbook* and General Counsel of the Maine Coast Heritage Trust, explains

it is unlikely that a conservation easement was granted with the expectation that the land trust might at its pleasure dispose of the easement and apply the proceeds to its general conservation purposes, as with trade lands. It is implicit in a *perpetual* easement that the purposes of the gift, *the preservation of that particular parcel of land*, will be honored barring unforeseeable or extremely improbable circumstances.

Karin F. Marchetti, *Planning and Managing Conservation Easements: The Legal Perspective* 37 (Oct. 20, 2000) (on file with authors) (second emphasis added).

⁸⁵ *See supra* notes 36 & 38 and accompanying text. *See also generally supra* Part I.B.1 (discussing the representations made to easement grantors regarding the nature of perpetual conservation easements).

⁸⁶ *The End of Perpetuity*, *supra* note 4, at 73–74.

⁸⁷ *See infra* note 304 and accompanying text.

⁸⁸ *See, e.g.*, *Lowham Easement*, *supra* note 8, at 9 (providing “[t]he Grantor wishes to express again its intent that this Easement be maintained in perpetuity for the purposes expressed herein. However, if . . . a final binding non-appealable judicial determination is made that continuation of this Easement is impossible . . . then Grantor and Grantee, with the approval of the Court, may agree to transfer their respective interests in the Ranch”); 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 160 (providing, in its Model Conservation Easement, “[i]f circumstances arise in the future such as render the purpose of this Easement impossible to accomplish, this Easement can

startling is that the donee might later take the position that it is free to agree with subsequent owners of the land to liquidate such easements, in whole or in part, as it may see fit to fund other land protection activities or add to its operating budget or stewardship endowment. In other words, what would be startling to easement donors is that a government entity or land trust might take the position that the perpetual conservation easements it holds are fungible or liquid assets.

Whether a conservation easement is interpreted using the rules of construction applicable to charitable trusts, to deeds, to contracts, or (as would be appropriate) a combination thereof, the universal rule is that the parties' intent must generally be ascertained from the language of the instrument itself⁸⁹—and virtually all conservation easement deeds manifest a clear intent to protect the particular land encumbered by the easement for the conservation purposes specified in the deed, generally in perpetuity. The stated purpose of a conservation easement,⁹⁰ as well as

only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction . . ."); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 375 (providing, in its sample conservation easement provisions, "should [this Conservation Easement] be extinguished, which may be accomplished only by judicial proceedings . . .").

⁸⁹ Many conservation easement deeds contain an "integration clause," providing that the deed sets forth the entire agreement of the parties and supersedes all prior discussions, negotiations, understandings or agreements relating to the easement. *See, e.g.*, 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 162 (including an integration clause in its Model Conservation Easement); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 379 (including an integration clause in its sample conservation easement provisions); *see also, e.g.*, *Rock Springs & Timber, Inc., v. Lore*, 75 P.3d 614, 619–20 (Wyo. 2003) ("The rules of construction of a trust agreement are simple. A trust agreement is governed by the plain meaning contained in the four corners of the document.' . . . The courts strive to ascertain and effect the intent of the settlor, but parole evidence may not be considered 'where there is no ambiguity and the language of a declaration of trust is clear and plainly susceptible to only one construction'"); *Kerper v. Kerper*, 780 P.2d 923, 934 (Wyo. 1989) (explaining that, pursuant to "[e]stablished contract law of Wyoming . . . [t]he intent of the parties to a clear and unambiguous written agreement will be derived from the entire writing and determined as a matter of law. . . . Extrinsic evidence will not be used to contradict the plain meaning of a clear and unambiguous written agreement"); *First Nat'l Bank & Trust Co. v. Brimmer*, 504 P.2d 1367, 1369 (Wyo. 1973) ("In construing a trust agreement the intention of the settlor must govern and if possible be ascertained from the trust instrument. Every word is to be given effect if it does not defeat the general purpose.").

⁹⁰ *See, e.g.*, *Lowham Easement*, *supra* note 8, at 2 ("It is the purpose of this Easement to preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch."); 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 157 (providing, in its Model Conservation Easement, "[i]t is the purpose of this Easement to assure that the Property will be retained forever [predominantly] in its [*e.g., natural, scenic, historic, agricultural, forested, and/or open space*] condition and to prevent any use of the Property that will significantly impair or interfere with the conservation values of the Property.") (second and third alterations and emphasis in original); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 318–19 (providing, as the Purpose Statement to be included in conservation easement deeds, "[t]he purpose of this Conservation Easement is to forever conserve the Protected Property for the following conservation purposes: . . . [and] Grantor and Holder intend that this Conservation Easement will confine the use of the Protected Property to activities that are consistent

the detailed provisions specifying the conservation values of the encumbered land and the activities permitted and prohibited on that land,⁹¹ provide compelling evidence of the parties' intent to protect *that* land, and not to provide the holder with a fungible or liquid asset. When such intent is clearly expressed in a document, evidence purporting to show a contrary intent should not be admissible. Thus, a donee, years after the donor has died or sold the encumbered land, should not be heard to say that the donor did not actually intend to protect the land as specified in the easement deed, and instead intended to grant the donee a fungible or liquid asset.⁹²

Government entities and land trusts could, of course, negotiate for freely terminable conservation easements, which would grant them the discretion to agree to modify or terminate the easements, in whole or in part, as they may see fit from time to time in the accomplishment of their general public or charitable missions.⁹³ The donation of such an easement would not create a charitable trust because it would constitute an "outright . . . donation to a . . . charitable institution . . . to be used for its general purposes . . ."⁹⁴ Whether Congress would be willing to grant tax incentives for the donation of such freely terminable easements,⁹⁵

with the Purposes of this Conservation Easement and will prohibit and prevent any use of the Protected Property that will materially impair or interfere with the Protected Conservation Values of the Protected Property").

⁹¹ For examples of the detailed provisions included in conservation easement deeds, see, e.g., Lowham Easement *supra* note 8, at 1–10; 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 156–63; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 317–84.

⁹² The Land Trust Alliance's Amendment Report provides the following guidance to land trusts "[w]ith a well-drafted easement, there is no need to look beyond the easement itself and the clear import of its words. At the time the easement is signed, the intent of all parties *including the land trust* should be expressed fully and clearly in the written easement." *LTA Amendment Report*, *supra* note 44, at 43 (emphasis added).

⁹³ Such terminable easements would be valid and enforceable property interests under most easement-enabling statutes because most such statutes do not require that conservation easements be perpetual. See, e.g., UCEA *supra* note 14, § 2(c) ("[A] conservation easement is unlimited in duration unless the instrument creating it otherwise provides."); WYO. STAT. ANN. § 34-1-202(c) (2008) (same). See also *Perpetuity and Beyond*, *supra* note 18, at 707–12 (discussing terminable conservation easements). Even in the few jurisdictions where the easement-enabling statute validates only perpetual conservation easements, terminable conservation easements could be created if they were held appurtenant to a small anchor parcel or recognized under the common law. See *id.* at 707 n.117.

⁹⁴ See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 28 cmt. a. Cf. *Perpetuity and Beyond*, *supra* note 18, at 711–12 (explaining that, similar to the deaccessioning of unrestricted gifts of artwork from a museum's collection, the substantial modification or termination of a terminable conservation easement that is providing significant benefits to the public could be controversial).

⁹⁵ See *infra* notes 347 and 348 and accompanying text (explaining that Congress intended to subsidize the acquisition of conservation easements only if such easements protect unique or otherwise significant land areas or structures in perpetuity, and Congress anticipated that the need to substantially modify or terminate such easements would be rare).

and whether landowners would be willing to donate such easements, are open questions. Congress's decision to limit federal tax incentives to the donation of expressly perpetual conservation easements was not irrational, however, given that a system that would allow government and nonprofit holders to substantially modify or terminate tax-deductible easements as they might see fit from time to time would be vulnerable to manipulation, error, and abuse.⁹⁶ It is also doubtful that conservation easement donors would be willing to grant government or land trust holders such broad modification and termination discretion.⁹⁷

In sum, the notion that land trusts or government entities are free to substantially modify or terminate the perpetual conservation easements they hold “on their own” and as they may “see fit” is contrary to state law governing the administration of charitable gifts conveyed for specific charitable purposes. All entities and organizations that solicit and accept such gifts are required to administer them in accordance with their stated terms and purposes pursuant to charitable trust or similar equitable principles, and there is nothing about the particular character or condition of conservation easements or land trusts that suggests that either should be exempted from these principles. The status of a conservation easement as a partial interest in real property does not prevent it from being held in trust for the benefit of the public.⁹⁸ Moreover, any charitable

⁹⁶ *Hicks v. Dowd* illustrates the manipulation, error, and abuse that could occur if government and nonprofit holders of tax-deductible conservation easements were permitted to simply agree with the owners of the encumbered land to substantially modify or terminate those easements (i.e., without oversight by those charged with protecting the public interest and investment in charitable assets). See *supra* note 3. For other examples see *infra* notes 131–143 and accompanying text (describing the Myrtle Grove controversy) and *infra* note 237 (describing the Wal-Mart controversy). See also *infra* note 310, in which one of the principal authors of the Treasury Regulations interpreting Internal Revenue Code § 170(h) explains “the decision to terminate [a conservation easement] should not be made solely by interested parties. With the decision-making process pushed into a court of law, the legal tension created by such judicial review will generally tend to create a fair result.”

⁹⁷ See *supra* Part I.B.1 (explaining that many landowners donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved). Even in the purchase context it is not clear that landowners would be willing to grant holders such broad modification or termination discretion. See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 15–17 (“A landowner survey conducted in three northern California counties—where many easements are purchased—found that landowners participating in easement programs appreciated not only the cash infusion, but also that their land would be preserved for continuing farming and open space use.”).

⁹⁸ See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 40 (“[A] trustee may hold in trust *any* interest in *any* type of property.”) (emphasis added); *id.* § 40 cmt. b. (“Subject to requirements of lawful purpose and administration . . . , no policy of the trust law restricts the types of property interests a trustee may hold in that fiduciary capacity.”). Interests in real property for life or for a term of years, reversionary interests, executory interests, remainders (whether contingent, vested, or vested subject to being divested), interests held in co-ownership, and even a right to enforce a restrictive covenant can be the subject matter of a trust. See *id.*; GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 112 (West 2008). The status of a conservation easement as a partial

organization could make the same complaints about the application of charitable trust principles as are made on behalf of land trusts in *The End of Perpetuity*—that the doctrines of administrative deviation and *cy pres*, as well as attorney general and court oversight, are inconvenient, costly, and time consuming.⁹⁹ Indeed, many museums, universities, and social welfare, religious, or other charitable organizations might prefer to be able to solicit large donations by promising to abide by the stated terms and purposes of the gifts in perpetuity, but then have the freedom to later alter the terms and purposes of the gifts as they see fit, and without regard to the intent of the donor or the inconvenience of state attorney general or court oversight. Such is not the law, however, nor should it be, as it would likely result in a significant decline in charitable giving to the detriment of the public. As explained by the forty-five states that filed an *amici* brief in *Madigan*, the fraudulent solicitation case:¹⁰⁰

Charitable contributions represent a significant public resource. They promote a wide range of important initiatives in areas such as medical and scientific research, social services, public health, education, the environment, civil rights, and legal aid. Yet these initiatives cannot succeed without popular support, and such support will come only where the public trusts that its donations will be used for purposes that donors intend to sponsor and are led to believe their donations will in fact sponsor.¹⁰¹

interest in real property does mean that the owner of the encumbered land would be a necessary party to any administrative deviation or *cy pres* action. However, while this complicates, it should not negate the application of charitable trust principles to donated easements since all manner of partial interests in property can be held in trust despite the possibility of similar complications.

⁹⁹ See *The End of Perpetuity*, *supra* note 4, at 66 (complaining that application of the doctrine of *cy pres* to conservation easements “will complicate the enforcement of easements because enforcement may involve multiple parties and the attendant increase in the time and cost of litigation”); *id.* at 81 (complaining that litigation is “costly and time consuming”). As explained in Part II.D, *infra*, due to a misunderstanding of the law, *The End of Perpetuity* significantly overstates the extent to which holders of conservation easements would be required to seek court approval to amend easements in manners consistent with their stated purposes.

¹⁰⁰ See *supra* note 46 and accompanying text (discussing *Madigan*).

¹⁰¹ Amici Brief of Fla. Attorney Gen. et al., *Madigan v. Telemarketing Assocs.*, 2001 U.S. Briefs 1806, 2002 U.S. S. Ct. Briefs LEXIS 734, at 2 (Dec. 24, 2002). According to a recent nationwide survey by Zogby International, (i) 97 percent of the respondents said they consider it a “very” or “somewhat” serious matter if charities are spending money donated to them on unauthorized projects, while 78.7 percent said they would “definitely” or “probably” stop giving to any nonprofit organization that accepts contributions for one purpose and uses the money for another, (ii) 72.4 percent said that, when a nonprofit organization uses money “for a purpose other than the one for which it was given,” the managers of the recipient organization “should be held legally or criminally liable for acting in a fraudulent manner,” and (iii) 97.4 percent said that respecting a donor’s wishes was “very” or “somewhat” important to the “ethical governance” of a nonprofit. *Public will Punish Nonprofits that Misuse Designated Grants, New Zogby Survey Finds* 1 (Dec. 15, 2005) (on file with authors) (explaining the results of the survey commissioned by the plaintiffs in

B. Charitable Trust Law, Property Law, and the Myth of the Two-Party Contract

In support of its suggestion that charitable gifts of conservation easements be exempted from the rules that apply to all other charitable gifts made for specific purposes, *The End of Perpetuity* asserts “the doctrine of *cy pres* applies to the law governing charitable trusts, which makes the doctrine part of the law of trusts. Conservation easements are governed by the law pertaining to easements, which is property law.”¹⁰² This assertion is not grounded on a careful analysis of the law. First, as previously discussed, charitable trust principles (including the doctrine of *cy pres*) apply to gifts made to government entities and charitable organizations to be used for specific charitable purposes as well as to formally designated charitable trusts.¹⁰³ Second, fee title to land, being the quintessential form of property and, thus, obviously governed by property law, is not thereby removed from the overlapping law governing charitable trusts. Rather, gifts of fee title to land to a government entity or charitable organization to be used for a specific charitable purpose (such as the site of a hospital, library, public park, or memorial) are subject to both property law *and* charitable trust law, and the case law applying charitable trust principles to the administration of such gifts is voluminous.¹⁰⁴ In one recent example, the Georgia Supreme Court held that

the Robertson v. Princeton University case). See also John Hechinger, *Big-Money Donors Move to Curb Colleges' Discretion to Spend Gifts*, WALL ST. J., Sept. 18, 2007, at B1 (explaining that, upset by the apparent disregard for donor intent on the part of many colleges and universities, several philanthropists—including the billionaire founder of Home Depot Inc.—are launching a nonprofit that will advise donors on how to attach legally enforceable restrictions to their gifts).

¹⁰² *The End of Perpetuity*, *supra* note 4, at 59.

¹⁰³ See *supra* notes 11 and 12 and accompanying text.

¹⁰⁴ See, e.g., Estate of Zahn, 93 Cal. Rptr. 810 (Cal. Ct. App. 1971) (applying the doctrine of *cy pres* to bequests of real property to be used for specific charitable purposes when neither of the parcels was suitable for carrying out the testatrix's declared intention at her death); Blumenthal v. White, 683 A.2d 410 (Conn. 1996) (applying charitable trust principles to a city's proposed transfer of land that had been donated to the city to be used as a public park); Village of Hinsdale v. Chicago City Missionary Soc'y, 30 N.E.2d 657 (Ill. 1940) (applying charitable trust principles to a village's sale of lots that had been donated to the village for the purpose of constructing a library); Cohen v. City of Lynn, 598 N.E.2d 682 (Mass. App. Ct. 1992) (applying charitable trust principles to declare null and void a city's conveyance to a developer of land that had been conveyed to the city to be used forever for park purposes); Tinkham v. Town of Mattapoisett, 22 Mass. L. Rptr. 635 (2007) (applying charitable trust principles to invalidate a town's attempt to convey property received as a gift to be used for conservation purposes to a developer in exchange for other property); State v. Rand, 366 A.2d 183 (Me. 1976) (applying charitable trust principles to a city's use of the proceeds from the condemnation of land that had been donated to the city to be used as public park); *In re Neher*, 18 N.E.2d 625 (N.Y. 1939) (applying charitable trust principles to a village's proposed use of a homestead that had been devised to the village to be used as a hospital and as a memorial to the testatrix's husband); Town of Cody v. Buffalo Bill Mem'l Ass'n, 196 P.2d 369 (Wyo. 1948) (applying charitable trust principles to void a charitable association's transfer of land that had been donated to the association to be used to memorialize the memory of Buffalo Bill).

a devise of a testator's residence and surrounding acreage to a land trust for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) "unambiguously created a charitable trust," and the land trust was therefore not entitled to receive the property outright as it "vociferously contended."¹⁰⁵

As Professor McLaughlin explained in a previous article:

Those who argue that donated perpetual conservation easements can be modified or terminated in the same manner as other easements—i.e., by agreement of the holder of the easement and the owner of the encumbered land . . . —are viewing such easements solely through a real property law prism, and ignoring the fact that such easements are also charitable gifts made for a specific charitable purpose. Whenever any interest in real property, whether it be fee title to land or a conservation easement, is donated to a municipality or charity for a specific charitable purpose, both state real property law and state charitable trust law should apply. State real property law prescribes the procedural mechanisms by which real property interests can be transferred and, in the case of easements, modified or terminated. State charitable trust law governs a donee's use and disposition of property conveyed to it for a specific charitable purpose. In other words, although state real property law may provide that a conservation easement can be modified or terminated by agreement of the holder of the easement and the owner of the encumbered land . . . , the holder of a perpetual conservation easement, in its capacity as trustee, may not agree to modify or terminate the easement in contravention of its stated purpose without first obtaining court approval in a *cy pres* proceeding.¹⁰⁶

The End of Perpetuity also asserts that "as easements, conservation easements have been seen primarily as two-party contracts," and cites to an article written by Mary Ann King and Sally K. Fairfax in support of this assertion.¹⁰⁷ *The End*

¹⁰⁵ *Chattowah Open Land Trust v. Jones*, 636 S.E.2d 523, 525–26 (Ga. 2006). See also *infra* note 302 and accompanying text (discussing Internal Revenue Code § 170(h)).

¹⁰⁶ *Perpetuity and Beyond*, *supra* note 18, at 683. As discussed in detail in Part II.D, *infra*, holders of conservation easements treated as charitable trusts (or the functional equivalent thereof) would not be required to obtain court approval in a *cy pres* proceeding for amendments that are consistent with the purpose of a conservation easement. Rather, a holder could agree to such amendments pursuant to its express or implied power to amend, or with court approval obtained in a more flexible administrative deviation proceeding.

¹⁰⁷ *The End of Perpetuity*, *supra* note 4, at 67 (citing Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65 (2006)).

of *Perpetuity's* reliance on the King and Fairfax article as support for its argument that land trusts should be deemed to have the right to modify and terminate the easements they hold on their own and as they may see fit is ironic given that the thrust of the King and Fairfax article is a call for greater accountability on the part of the land trusts. King and Fairfax specifically provide:

We argue that [conservation easements (“CEs”)] are much more public than either the [Uniform Conservation Easement Act (“UCEA”)] or land trusts often frame them and that the public nature of CEs warrants more explicit attention to public accountability than the private ordering system prescribed by the UCEA.¹⁰⁸

....

Clearly the public interest in CEs is sufficient to justify efforts to constrain easement and fee holders from modifying the terms of the agreement at will.¹⁰⁹

Moreover, although expressing concern about the manner in which charitable trust principles might apply to conservation easements,¹¹⁰ King and Fairfax note that commentators “present compelling arguments that application of the charitable

¹⁰⁸ Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 67 (2006).

¹⁰⁹ *Id.* at 109.

¹¹⁰ In their discussion of charitable trust law, Mary Ann King (a Ph.D. student in the Department of Environmental Science, Policy and Management at the University of California, Berkeley) and Sally K. Fairfax (Henry J. Vaux Distinguished Professor of Forest Policy in that department) make a number of assumptions about the application of charitable trust principles to conservation easements that are incorrect. They mistakenly assume that charitable trust principles would require holders of conservation easements to “disclose fully to the beneficiary [in this context, the public] about transactions.” *Id.* at 107. That is not the case. See Brody, *supra* note 12 (explaining that a restricted gift does not impose on a corporate charity the trust law procedural requirements for providing information to beneficiaries, although the charity would have to respond to a request for information from the attorney general). They also mistakenly assume that the doctrine of *cy pres* would apply to all amendments to conservation easements, including those that are consistent with the purpose of an easement. See King & Fairfax, *supra* note 108, at 108–09. That also is not the case. See *infra* Part II.D (discussing a holder’s express and implied powers and the more flexible doctrine of administrative deviation). In addition, King and Fairfax do not discuss the interests of conservation easement donors or the reasons underlying the deference accorded to donor intent under charitable trust law—namely, a deeply rooted tradition of respecting an individual’s right to control the use and disposition of his or her property and a concern that failing to honor the wishes of charitable donors would chill future charitable donations. See *supra* note 101 and accompanying text (discussing the consequences of disregarding donor intent). They also do not acknowledge that the Treasury Department has already determined that court oversight in what essentially is a *cy pres* proceeding is the appropriate oversight mechanism for the termination, presumably in whole or

trust doctrine may be the best and even perhaps the only available viable option for existing easements.”¹¹¹ They also quote one of the NCCUSL commissioners who participated in the drafting of the Uniform Conservation Easement Act (sometimes referred to hereinafter as the UCEA), who stated:

The intent . . . was to include principles involving trust and cy-pres . . . and because under Section 1 a charitable type of relationship is invoked . . . any court which is going to be confronted with a modification or termination problem has got to consider not only the law of easements with respect to modification and termination, but also trust implications, such as cy-pres.¹¹²

The UCEA was approved by NCCUSL in 1981 and has since been adopted in whole or in substantial part by twenty-four states, including Wyoming.¹¹³ Although the application of charitable trust principles to conservation easements was not directly addressed in the UCEA, the act has always contemplated that conservation easements are more than simply two-party contracts or property arrangements. While the UCEA provides that a conservation easement may be modified or terminated “in the same manner as other easements”¹¹⁴ (i.e., by agreement of the holder of the easement and the owner of the encumbered land), it also confirms that “[t]his Act does not affect the power of a court to modify

in part, of tax-deductible conservation easements. *See supra* notes 303 and 309 and accompanying text (discussing the federal tax law extinguishment requirement). King and Fairfax further note that “[a]n understaffed attorney general’s office cannot be counted on to provide the kind of oversight that land trusts and conservation easements require.” King & Fairfax, *supra* note 108, at 110. As discussed in Part II.F, *infra*, however, repeated law suits by state attorneys general may be unnecessary because a credible threat of enforcement alone may both discourage holders from agreeing to inappropriate modifications or terminations and reduce the incidence of landowner violations and requests to substantially modify or terminate easements in manners contrary to donor intent and the public interest. In the end, if correctly interpreted and applied in the conservation easement context, charitable trust principles will provide precisely the kind of accountability to the public on the part of land trusts that King and Fairfax desire.

¹¹¹ King & Fairfax, *supra* note 108, at 110 n.196.

¹¹² *Id.* at 108 (citing Proceedings in Comm. of the Whole, Uniform Conservation Easement Act of the NCCUSL, 32 (Aug. 4–5, 1981) (remarks of Bullivant)).

¹¹³ *See generally* UCEA, *supra* note 14; *see also* Nat’l Conf. of Comm’rs on Uniform State Laws, Uniform Conservation Easement Act, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Nov. 20, 2008) (listing the following as having adopted the UCEA: Alabama, Alaska, Arizona, Arkansas, Delaware, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia and the U.S. Virgin Islands). Georgia and Oklahoma have also effectively adopted the UCEA. *See* GA. CODE ANN. §§ 44-10-1 to 44-10-5 (West 2008); 60 OKL. STAT. ANN. tit. 60, §§ 49.1 to 49.7 (West 2008).

¹¹⁴ UCEA *supra* note 14, § 2(a); WYO. STAT. ANN. § 34-1-202(a) (2008).

or terminate a conservation easement in accordance with the principles of law and equity.”¹¹⁵ In the original comments to the UCEA the drafters explained “[t]he Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts” and “independently of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts”¹¹⁶ In other words, the UCEA does not and was never intended to abrogate the well-settled principles that apply when property, such as a conservation easement, is conveyed as a charitable gift to a government entity or charitable organization to be used for a specific charitable purpose.¹¹⁷

To address any lingering confusion on this point, on February 3, 2007, NCCUSL approved amendments to the comments to the UCEA to clarify its intention that conservation easements be enforced as charitable trusts in appropriate circumstances. The amended comment to section 3 of the UCEA explains:

The Act does not directly address the application of charitable trust principles to conservation easements because (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement’s validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee’s charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. *However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.*¹¹⁸

¹¹⁵ UCEA *supra* note 14, § 3(b); WYO. STAT. ANN. § 34-1-203(b).

¹¹⁶ UCEA *supra* note 14, § 3 cmt. (emphasis added).

¹¹⁷ As previously discussed, conservation easements could be created and conveyed in a manner that does not create a charitable trust relationship. *See supra* notes 93 and 94 and accompanying text (discussing freely terminable conservation easements).

¹¹⁸ UCEA *supra* note 14, § 3 cmt. (emphasis added).

The amended comment to section 3 of the UCEA concludes

while Section 2(a) [of the Act] provides that a conservation easement may be modified or terminated “in the same manner as other easements,” the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.¹¹⁹

As with the comments to the Uniform Trust Code, these comments should be relied upon as a guide in interpreting the UCEA so as to achieve uniformity among the states that have enacted it.¹²⁰

The Uniform Trust Code, federal tax law, and the Restatement (Third) of Property: Servitudes (“Restatement of Property”) also treat conservation easements as more than two-party contracts or property arrangements that can be modified or terminated at the will of the parties. As previously noted, the Uniform Trust Code explains that the creation and transfer of a conservation easement will frequently create a charitable trust with the holder of the easement acting as trustee of what will ostensibly appear to be a contractual or property arrangement.¹²¹ The Treasury Regulations provide, *inter alia*, that tax-deductible conservation easements can be (i) transferred by their holders only to other government entities or charitable organizations that agree to continue to enforce the easements and (ii) extinguished by their holders only in what essentially is a judicial *cy pres* proceeding.¹²² And the Restatement of Property provides that the substantial modification or termination of conservation easements held by

¹¹⁹ *Id.* By providing that a holder “may” be prohibited from agreeing to terminate an easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding, NCCUSL was leaving open the question of whether conservation easements not acquired as charitable gifts (i.e., purchased with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation) should be governed by similar equitable principles. E-mail to Nancy A. McLaughlin from K. King Burnett, member and past president of NCCUSL (Aug. 17, 2008, 10:51am MST) (on file with authors). For a brief discussion of conservation easements acquired in such nondonative contexts, see *infra* Part II.J.

¹²⁰ See *supra* note 80 (explaining that uniformity can be achieved only if the intent of the drafters of a uniform act becomes the intent of the state legislatures in adopting it); see also UCEA, *supra* note 14, § 6 (“This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.”); WYO. STAT. ANN. § 34-1-206 (2008) (same); WYO. STAT. ANN. § 8-1-103(a)(vii) (2008) (providing that any uniform act shall be interpreted and construed to make uniform the law of the states that enact it). As of August 2008, thirty-four states and the District of Columbia had adopted either the UTC or the UCEA, or both.

¹²¹ See *supra* note 79 and accompanying text.

¹²² See *infra* notes 303 and 304 and accompanying text.

governmental bodies or charitable organizations is governed, not by the real property law doctrine of changed conditions, but by a special set of rules based on the charitable trust doctrine of *cy pres*.¹²³ In their commentary, the drafters of the Restatement of Property explain “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes”¹²⁴ Accordingly, contrary to the assertions made in *The End of Perpetuity*, conservation easements have not been seen as two-party contracts or as governed solely by property law. Rather, the various sources of law and legal analysis discussed above specifically contemplate the application of charitable trust principles to conservation easements.

C. Charitable Trust Principles Are Not a New Control

The End of Perpetuity asserts that the application of charitable trust principles to conservation easements would constitute a new and unanticipated control or burden on easement modification and termination.¹²⁵ This assertion also is not supportable.

The Uniform Conservation Easement Act has contemplated the application of charitable trust principles to conservation easements since 1981, the year in which it was approved by NCCUSL;¹²⁶ the Treasury Regulations have contemplated the application of charitable trust principles to tax-deductible conservation easements since 1986;¹²⁷ the Restatement of Property has, since 2000, recommended that the modification and termination of conservation easements be governed by a special set of rules based on the charitable trust doctrine of *cy pres*;¹²⁸ and the Uniform Trust Code has, since 2000, explained that creation and transfer of a conservation easement will frequently create a charitable trust.¹²⁹ Accordingly, the prospect that

¹²³ See RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11.

¹²⁴ *Id.* § 7.11 cmt. a.

¹²⁵ See *The End of Perpetuity*, *supra* note 4, at 56, 79.

¹²⁶ See *supra* notes 113–119 and accompanying text.

¹²⁷ See *supra* note 122 and accompanying text; see also *Tax Incentives*, *supra* note 42, at 15 (explaining that the Treasury published final regulations interpreting Internal Revenue Code §170(h) in 1986 and those regulations provide substantial guidance with regard to the meaning of many of the concepts introduced into the Code by §170(h)).

¹²⁸ See *supra* notes 123 and 124 and accompanying text.

¹²⁹ See *supra* note 79 and accompanying text. See also Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1216–17 (1989) (explaining the “distinctly public nature” of conservation easements and arguing that “when a conservation easement can no longer serve its intended purpose, a court should apply the doctrine [of *cy pres*] and reform the grant to support the general goal of conservation”); Alexander R. Arpad, Note, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91 (2002) (discussing the application of charitable trust principles to conservation easements and some of the

conservation easements may be subject to charitable trust principles is not a new concept. It has been a part of the legal landscape for over a quarter of a century, roughly coterminous with the widespread use of conservation easements as a land protection tool.¹³⁰

It is also clear that the land trust community has been aware that charitable trust principles may apply to conservation easements and has asserted this to its advantage. For example, in the mid-1990's a controversy arose when the National Trust for Historic Preservation ("the National Trust") approved a landowner's request to substantially amend a perpetual conservation easement without adherence to charitable trust principles ("the Myrtle Grove controversy").¹³¹ The easement in question encumbered a 160-acre historic tobacco plantation located on the Maryland Eastern Shore, and the amendment, which was requested by a subsequent owner of the land after the easement-donor's death, would have permitted a seven-lot upscale subdivision on the property, complete with a single-family residence and ancillary structures, such as a pool, pool house, and tennis courts, on each of the lots.¹³²

The National Trust's approval of the amendment request touched off a storm of protest from conservation groups, the donor's heirs, and the local and national media.¹³³ In objecting to the proposed amendment, the deceased donor's daughter explained her "sense of outrage and betrayal" at the proposed subdivision of the protected property:

The distinction the [National] Trust now makes between a "historic core" and the rest of the property would have made no sense to [my mother] and makes no sense to my sister and me. Had [my mother] been primarily preoccupied with

implications); Jeffrey Tapick, Note, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 287–89 (2002) (discussing the factors that "strongly suggest" a statutory conservation easement functions as a charitable trust, and noting that "the argument that a conservation easement is a 'charitable trust' could be an effective defense against opportunistic or ill-conceived efforts to destroy an easement").

¹³⁰ See *Tax Incentives*, *supra* note 42 at 20–21 (explaining the conservation easements began to be used on a widespread basis in the mid-1980s).

¹³¹ For a detailed discussion of this controversy, see *Amending Perpetual Conservation Easements*, *supra* note 19, at 1041–63. See also *id.* at 1035 n. 12 (explaining that the National Trust is a congressionally-chartered private, nonprofit membership organization dedicated to saving historic places and revitalizing America's communities).

¹³² *Id.* at 1041–42, 1046–50. At the time of the proposed amendment the easement-encumbered land was owned by a prominent Washington D.C. developer. See *id.* at 1044–45. The donor's heirs had sold the encumbered land to the developer after the donor's death, but only after receiving assurances from the National Trust that the restrictions on development and use in the easement would run with the land and bind all future owners. See *id.*

¹³³ *Id.* at 1050–52.

architecture—with the eighteenth century buildings at Myrtle Grove—she could have kept the right to sell some of the farmlands and thus insured herself a much easier old age than she had. She was not a rich woman but chose to deny herself in order to preserve the land.

....

Those who have given easements to the Trust or are thinking of doing so will surely be horrified to find out about the transfer of development rights[,] which a preservationist like my mother sacrificed for herself and her heirs[,] to the next and current owner of Myrtle Grove. Under the proposed amendment, the family of a Washington real estate developer will reap the profits from sale of two-thirds of the farm, a profit which my mother had denied to her own family for the sake of historic preservation. I doubt that such a transfer of development rights is what Congress and the American taxpayer think they are supporting in their appropriations to the Trust.¹³⁴

The National Trust soon acknowledged it had made a mistake and withdrew its approval to amend the conservation easement, and the developer sued the National Trust for breach of contract.¹³⁵ The National Trust then sought the assistance of the Maryland Attorney General in defending the conservation easement on charitable trust grounds.¹³⁶ In July of 1998, the Maryland Attorney General filed suit objecting to the amendment and asserting that, because the donation of the easement created a charitable trust for the benefit of the people of Maryland, the easement could not be amended as proposed without receiving court approval in a *cy pres* proceeding.¹³⁷

In October 1998, the Land Trust Alliance and a number of other conservation and historic preservation organizations filed an amici brief in support of the Maryland Attorney General's position that conveyance of the conservation

¹³⁴ *Id.* at 1051.

¹³⁵ *Id.* at 1054–55.

¹³⁶ *Id.* at 1056.

¹³⁷ *Id.* at 1056–59. The Attorney General asserted that, although in general an easement is an agreement that may be modified with the consent of the holder of the easement and the owner of the encumbered land, “Myrtle Grove is not a mere conservation agreement but a gift in perpetuity to a charitable corporation for the benefit of the people of Maryland” and “[a]s such, it is subject to a charitable trust.” *Id.* at 1057. The Attorney General also pointed out that, even though the Maryland easement-enabling statute provides that a conservation easement may be extinguished or released, in whole or in part, in the same manner as other easements, nothing in the statute or its legislative history indicates that the legislature intended to abrogate the application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation. *Id.*

easement had created a charitable trust.¹³⁸ They pointed out that the Uniform Conservation Easement Act “specifically recognizes the validity of existing charitable trust principles and specifically declines to abrogate existing state law concerning the enforcement of charitable trusts.”¹³⁹ They also cautioned that the court’s decision on the charitable trust issue would have consequences reaching far beyond the controversy at issue and that “[o]nly by providing potential and existing [conservation easement] donors with assurance that the protection they place on their land will be, as they intend, permanent can a voluntary conservation program succeed.”¹⁴⁰

A month later The Nature Conservancy and the Eastern Shore Land Conservancy filed a motion to intervene in the case, asserting that the easement clearly created a charitable trust, and that “[t]he charitable trust doctrine has as its underpinning not only the desire to further charitable and public purposes by being certain that the gift itself is dedicated to those purposes, but it also serves the purpose of encouraging others to make similar gifts based on the assurance that their wishes will be carried out.”¹⁴¹ They warned that the case would establish “extremely important precedent” because, if conservation easements are not enforced according to their terms, it would chill future easement donations and adversely affect the activities of all land trusts.¹⁴²

The Myrtle Grove controversy was settled in December of 1998, with the National Trust agreeing to pay the developer \$225,000, and the parties agreeing that (i) subdivision of the property is prohibited; (ii) any action contrary to the express terms and stated purposes of the easement is prohibited; and (iii) amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except that prior written approval of the attorney general is not required for approvals carried out pursuant to the ordinary administration of the easement in accordance with its terms.¹⁴³

A year later, in 1999, the Land Trust Alliance published an article on conservation easement amendments in its quarterly professional journal.¹⁴⁴

¹³⁸ *Id.* at 1060–61.

¹³⁹ *Id.* at 1061 n.131.

¹⁴⁰ *Id.* at 1061.

¹⁴¹ *Id.* at 1061–62. The Eastern Shore Land Conservancy is a regional land trust that works in six Maryland counties “to sustain the Eastern Shore’s rich landscapes through strategic land conservation and sound land use planning.” Eastern Shore Land Conservancy, <http://www.eslc.org> (last visited Nov. 20, 2008).

¹⁴² *Amending Perpetual Conservation Easements*, *supra* note 19, at 1062.

¹⁴³ *Id.* at 1062–63.

¹⁴⁴ William P. O’Connor, *Amending Conservation Easements: Legal and Policy Considerations*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 1999, at 8. One of the benefits provided to land trust

The article first describes the donation of a conservation easement by Alice, a widowed physician approaching eighty years of age, who was a “knowledgeable and committed conservationist,” spent “several months developing the easement,” and for whom, like many easement donors, permanent protection of her land was the “transcendent goal.”¹⁴⁵ After noting that land trusts can expect to face increasing requests to amend conservation easements as protected lands change hands, the article discusses four potential legal constraints on amendments, one of which is charitable trust law.¹⁴⁶ The article explains:

Amendments to conservation easements may . . . be limited by charitable trust law. Generally speaking, charitable trust law aims to ensure that the public benefits of charitable contributions are enforced to accomplish their intended purposes. A court may terminate a conservation easement restriction only where its particular purpose becomes impracticable and (in that case) only upon payment of appropriate damages to compensate for the loss of the public benefits involved. . . .

State attorneys general may have standing to participate in a conservation easement case based on their capacity as supervisors of charitable trusts. Under that authority, an attorney general could challenge an amendment to a conservation easement he or she determined to violate the state’s charitable trust law.¹⁴⁷

The article concludes “[a]s the use of conservation easements becomes mainstream, land trusts should expect requests for amendments to become more common. With so much at stake, many easement amendment issues will probably be resolved by the courts.”¹⁴⁸

Finally, as discussed in Part I.B. above, the Land Trust Alliance’s Standards and Practices, the 2005 Conservation Easement Handbook, and the Alliance’s Amendment Report all discuss charitable trust law as a potential legal constraint

members of the Alliance is a subscription to this journal. See Land Trust Alliance, Benefits for Land Trust Membership, <http://www.landtrustalliance.org/get-involved/membership/land-trust/benefits> (last visited Nov. 20, 2008).

¹⁴⁵ O’Connor, *supra* note 144, at 8.

¹⁴⁶ *Id.* at 8–10. The other three constraints discussed in the article are (i) state easement-enabling statutes, (ii) federal tax law, and (iii) the provisions of the easement deed (i.e., the typical amendment provision included in a conservation easement deed that grants the holder the discretion to agree only to amendments that are “consistent with the purposes of the easement”). *Id.* at 9–10. For a discussion of amendment provisions included in conservation easement deeds, see *infra* Part II.D.1.a.

¹⁴⁷ O’Connor, *supra* note 144, at 10.

¹⁴⁸ *Id.* at 31.

on conservation easement amendments.¹⁴⁹ Accordingly, *The End of Perpetuity's* characterization of the application of charitable trust principles to conservation easements as a new or unanticipated control or burden is not supportable. What is new is *The End of Perpetuity's* assertion that perpetual conservation easements should be treated as fungible or liquid assets in the hands of their governmental and nonprofit holders.

D. Charitable Trust Principles Do Not Preclude Amendments

In support of its suggestion that charitable gifts of conservation easements be specially exempted from the application of charitable trust principles, *The End of Perpetuity* asserts that such principles (i) deny easement holders the right to amend or terminate conservation easements “on their own,”¹⁵⁰ (ii) require judicial approval of every amendment in a *cy pres* proceeding,¹⁵¹ and (iii) preclude most typical, salutary, and reasonable amendments even with judicial review.¹⁵² None of these assertions is correct. As a threshold matter, and as explained in the foregoing Parts, holders of conservation easements should not be viewed as having the right to substantially modify or terminate the conservation easements they hold “on their own” and as they may “see fit” (as was attempted, for example, in the Myrtle Grove controversy and *Hicks v. Dowd*). In addition, charitable trust principles neither require judicial approval of every amendment in a *cy pres* proceeding, nor preclude typical, salutary, or reasonable amendments. As explained in the following subparts, such principles are much more flexible and nuanced than *The End of Perpetuity* claims, and they apply to conservation easements in a manner that is consistent with both the Land Trust Alliance’s legal and ethical guidelines and federal tax law requirements.

1. Legal Principles Governing Administration of Restricted Charitable Gifts and Charitable Trusts

The legal principles governing the administration and, in particular, the modification or termination of restricted charitable gifts and charitable trusts are fairly straightforward. When a gift is made to a charitable organization to be used

¹⁴⁹ See *supra* notes 51, 53, and 57 and accompanying text.

¹⁵⁰ *The End of Perpetuity*, *supra* note 4, at 62. This same assertion is repeated in similar form throughout the article. See *id.* at 69, 78.

¹⁵¹ *Id.* at 79 (“**Every** modification . . . will be subject to the [*cy pres*] process because no . . . modification that has not been judicially sanctioned will be valid.”) (emphasis in original).

¹⁵² See *id.* at 68 (asserting that “few, typical conservation easement amendments” could meet the criteria for the application of the doctrines of administrative deviation or *cy pres*, and, thus, the application of such doctrines would “preclude most of these amendments,” even with judicial review); *id.* at 69 (asserting that applying the doctrine of *cy pres* to conservation easements would preclude “most of the easement amendments that are typical today”); *id.* at 81 (asserting that applying the doctrine of *cy pres* to easement modifications “could preclude many salutary and reasonable easement modifications, even after a judicial review . . .”).

for a specific charitable purpose, except to the extent granted the discretion either expressly or impliedly in the instrument of conveyance, the organization (i) may not deviate from the administrative terms of the gift without receiving judicial approval pursuant to the doctrine of administrative (or equitable) deviation and (ii) may not deviate from the charitable purpose of the gift without receiving judicial approval pursuant to the doctrine of *cy pres*.¹⁵³ Similar principles generally apply to gifts made for specific charitable purposes to states as well as cities, counties, park districts, and other local government bodies.¹⁵⁴

The powers of a charitable trustee can be divided into four basic categories: express powers, implied powers, powers exercisable pursuant to the doctrine of administrative deviation, and powers exercisable pursuant to the doctrine of *cy pres*. These powers and the manner in which they should apply to the modification and termination of conservation easements are described below.

a. Express Powers

Express powers are discretionary powers conferred on a charitable trustee by the terms of the trust or by statute.¹⁵⁵ These powers enable trustees to administer trusts efficiently, and courts do not interfere with a trustee's exercise of such powers unless the trustee has clearly abused its discretion. As explained in the Restatement (Third) of Trusts:

¹⁵³ See, e.g., SCOTT & FRATCHER, *supra* note 12, § 380 (“The trustees of a charitable trust, like the trustees of a private trust, have such powers as are conferred on them in specific words by the terms of the trust [express powers] or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust [implied powers].”); *id.* § 381 (discussing the doctrine of administrative deviation and noting that “[t]he power of a court of equity to permit or direct a deviation from the terms of the trust is at least as extensive in the case of charitable trusts as it is in the case of private trusts”); *id.* § 399 (discussing the doctrine of *cy pres* generally); *id.* § 399.2 (“Where property is given in trust for a particular charitable purpose, and it is impossible or impracticable to carry out that purpose, the trust does not fail if the testator has a more general intention to devote the property to charitable purposes. In such a case the property will be applied under the direction of the court to some charitable purpose falling within the general intention of the testator.”). See also Brody, *supra* note 12, at 1237 (“To deal with unanticipated circumstances, the law protects charitable trusts by the equitable saving devices of deviation and *cy pres*. These venerable doctrines allow courts to modify restrictions that can no longer be carried out or that impede the purposes of the trust; courts apply similar principles to restricted gifts made to corporate charities.”).

¹⁵⁴ See, e.g., cases cited in *supra* notes 11, 12, & 104; see also RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 33 cmt. d (“The powers of a municipal corporation may be limited by the express provision of statutes. Otherwise, a municipal corporation may act as trustee for purposes that fall within the scope of permitted activities of municipalities. Ordinarily these include such charitable purposes as promotion of health and education, relief of poverty, construction and maintenance of public parks, buildings and works, and the like . . .”).

¹⁵⁵ See UTC, *supra* note 15, § 815(a)(1), (2)(C) (providing that a trustee, without authorization by the court, may exercise (1) powers conferred by the terms of the trust and (2) except as limited by the terms of the trust, any other powers conferred by the UTC); WYO. STAT. ANN. § 4-10-815(a)

When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.¹⁵⁶

....

. . . A court will not interfere with a trustee's exercise of a discretionary power (or decision not to exercise the power) when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties. . . . Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.¹⁵⁷

This rule has important ramifications in the conservation easement context. Land trusts and government entities that negotiate for the inclusion of an amendment provision in the easement deeds they acquire—as many do—have the express power to agree with the current and any subsequent owners of the easement-encumbered land to amend the easements in manners authorized by the provision. Moreover, courts will not interfere with a holder's exercise of this amendment discretion unless there has been a clear abuse.

Although there are variations, the typical amendment provision grants the holder of a conservation easement the power to agree to amendments that further, or are not inconsistent with, the purpose of the easement.¹⁵⁸ It is also generally

(i), (ii)(C) (2008) (same). *See also* SCOTT & FRATCHER, *supra* note 12, § 380 (discussing a trustee's express powers). For powers conferred by statute, see UTC, *supra* note 15, § 414 (modification or termination of uneconomic trusts), § 417 (combination and division of trusts), § 807 (delegation to agent), and § 816 (specific statutory powers, such as power to settle a claim by or against the trust); WYO. STAT. ANN. §§ 4-10-415, -418, -807, -816 (same); *see also* SCOTT & FRATCHER, *supra* note 12, § 186 (discussing the Uniform Trustees' Powers Act).

¹⁵⁶ RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 87.

¹⁵⁷ *Id.* § 87 cmt. b; *see also* UTC, *supra* note 15, § 814(a) (“[T]he trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”); WYO. STAT. ANN. § 4-10-814(a) (same); MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 145 (2004) (noting that trust instruments often confer broad discretionary powers on the trustee, and “[c]ourts do not interfere with exercises of discretion unless it can be clearly shown that the exercise was not within the bounds of reasonable judgment. The duty of the court is not to substitute its own judgment for that of the trustee but to consider whether [the trustee] has acted in good faith, from proper motivation, and within the bounds of [reasonable] judgment . . .”).

¹⁵⁸ The 2005 edition of the Conservation Easement Handbook provides the following as a sample amendment provision:

Grantor and Holder recognize that circumstances could arise which justify amendment of certain of the terms, covenants, or restrictions contained in this Conservation Easement, and that some activities may require the discretionary

assumed that this type of amendment provision is permissible under federal tax law, which requires that the conservation purpose of a tax-deductible conservation easement be “protected in perpetuity.”¹⁵⁹

Although there is no data on the prevalence of the use of amendment provisions, the Conservation Easement Handbook has discussed the wisdom of including an amendment provision in conservation easement deeds since its first publication in 1988.¹⁶⁰ The 2005 edition of the Handbook provides that “[m]any

consent of Holder. To this end, Grantor and Holder have the right to agree to amendments and discretionary consents to this Easement without prior notice to any other party, provided that in the sole and exclusive judgment of the Holder, such amendment or discretionary consent *furtheres or is not inconsistent with the purpose of this grant.*

2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 377 (emphasis added); *id.* at 317 (defining Grantor to include the original grantor of the easement and any successors in interest to the property). For prior iterations of the typical amendment provision, see 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 164 (authorizing amendments that are “consistent with the purpose of [the] Easement”); Thomas S. Barrett & Stefan Nagel, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENTS AND COMMENTARY FROM “THE CONSERVATION EASEMENT HANDBOOK” 22 (1996) [hereinafter 1996 MODEL CONSERVATION EASEMENT] (authorizing amendments that are “consistent with the purpose of [the] Easement”).

¹⁵⁹ See I.R.C. § 170(h)(5)(A). The requirement that the conservation purpose of a tax-deductible easement be “protected in perpetuity” should establish the basic parameters for a permissible grant of amendment discretion to the holder of the easement. The conservation purpose of an easement would not be protected in perpetuity if the easement could be amended in manners that adversely impact or change such purpose. Alternatively, the conservation purpose of an easement is not jeopardized if the holder of the easement is given the discretion to agree to only those amendments that further, or are consistent with, such purpose. Whether the typical amendment provision should be interpreted to grant the holder the discretion to agree to “trade-off” amendments (i.e., amendments that both negatively impact and further the conservation purpose of an easement, but the net effect of which could be considered to be neutral with respect to or further such purpose) is an open question. The IRS has yet to take a formal position on the extent to which it believes tax-deductible conservation easements may be permissibly amended. In a report on The Nature Conservancy issued in 2005, the Staff of the Senate Finance Committee explained that “[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity.” STAFF OF S. COMM. ON FINANCE, 109th Cong., REPORT ON THE NATURE CONSERVANCY, Executive Summary 9 (2005), microformed on CIS No. 2005-5362-27 (Cong. Info. Serv.), available at <http://www.senate.gov/finance/sitepages/TNC%20Report.htm> (last visited Nov. 20, 2008) [hereinafter 2005 SENATE FINANCE COMMITTEE REPORT]. The Staff noted that “[m]odifications made to correct ministerial or administrative errors are permitted under present law [sic] Federal tax law.” *Id.* at 9 n. 20. But the Staff expressed concern with regard to trade-off amendments, such as an amendment to an easement that would permit the owner of the encumbered land to construct a larger home on the land in exchange for more limited use of the property for agricultural purposes. See *id.* at Pt. II 5. The Staff explained that trade-off amendments “may be difficult to measure from a conservation perspective,” and that the “weighing of increases and decreases [in conservation benefits] is difficult to perform by TNC and to assess by the IRS.” *Id.*

¹⁶⁰ See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 205–06 (“Because easements are perpetual, there are bound to be changed circumstances over time that require amendment . . . and many consider it prudent to set the ground rules ahead of time”); 1996 MODEL

easement drafters . . . consider it prudent to set the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses,”¹⁶¹ and “[a]mendment provisions are becoming more common to assure and limit the Holder’s power to modify.”¹⁶² And in its recently published Amendment Report, the Land Trust Alliance instructs

land trusts should negotiate with easement grantors for the desired level of amendment discretion and include an amendment provision in easement deeds expressly granting them such discretion so there is no confusion or misunderstanding regarding the land trust’s ability to agree to amendments in the stated circumstances.¹⁶³

Given the courts’ hands-off approach to a trustee’s exercise of its express powers, the typical amendment provision grants the holder of a conservation easement considerable discretion to agree to amendments “on its own” and as it may “see fit” (i.e., without obtaining attorney general or court approval), provided such amendments are consistent with or further the purpose of the easement. In some cases, of course, an easement grantor may not wish to grant the holder such broad amendment discretion. For example, the grantor may wish to provide that the holder’s amendment discretion does not extend to amendments that would increase the level of subdivision or development permitted on the encumbered land (the 2005 edition of the Conservation Easement Handbook offers this as an option for an amendment provision).¹⁶⁴ Alternatively, the grantor may wish to grant the holder the discretion to agree to amendments that are consistent with the purpose of an easement during the grantor’s lifetime, but prohibit amendments after the grantor’s death (a well-respected land trust operating on the West Coast

CONSERVATION EASEMENT, *supra* note 158, at 82 (same). Both the 1988 edition of the Conservation Easement Handbook and the 1996 Model Conservation Easement, which were published eight years apart, confusingly note that “[u]ntil quite recently, most conservation easements have been silent regarding amendments.” See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 205; 1996 MODEL CONSERVATION EASEMENT, *supra* note 158, at 82. The 1996 Model Conservation Easement further notes that this silence was “at least in part to avoid encouraging the notion that [easement] terms can be easily changed.” 1996 MODEL CONSERVATION EASEMENT, *supra* note 158, at 82.

¹⁶¹ 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 468.

¹⁶² *Id.* at 377 (emphasis in original omitted).

¹⁶³ *LTA Amendment Report*, *supra* note 44, at 31 (providing also “[t]ransparency of intent is an ethical obligation; if land trusts wish to modify a conservation easement in certain circumstances, land trusts should put their donors, grantors, landowners, members, funding sources and the general public on notice that amendments may occur”).

¹⁶⁴ See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 377 (“Notwithstanding the foregoing, the Holder and Grantor have no right or power to consent to any action or agree to any amendment that would . . . increase the level of residential development permitted by the express terms of this Conservation Easement . . .”).

offers this as an option to its easement grantors).¹⁶⁵ And some grantors may not wish to grant the holder *any* discretion to amend the carefully negotiated terms of a conservation easement deed. As in all other charitable contexts, however, the government entities and land trusts acquiring conservation easements should decline to accept easements if the grantor refuses to grant them an appropriate level of discretion with regard to the administration of the easement over the long term.¹⁶⁶

Indeed, the experience of government entities and land trusts with regard to gifts of conservation easements is somewhat analogous to the experience of museums with regard to gifts of artwork. In a 1994 book, Professor Malaro, a leading commentator on museum governance issues, explained that, while in the past museums were willing to accept gifts of artwork subject to all manner of restrictions (such as restrictions requiring permanent display or permanent retention), “with [the] growing interest in the role of museums, their obligations to the public, and the collateral responsibilities of museum trustees, a more thoughtful stand is being taken by some museums on the issue of restricted gifts.”¹⁶⁷ Professor Malaro offered, as an example of this more thoughtful stand, the 1986 International Council of Museums’ Code of Professional Ethics, which provides “[o]ffers [of gifts] that are subject to special conditions may have to be rejected if the conditions proposed are judged to be contrary to the long-term interest of the museum and its public.”¹⁶⁸

Importantly, although recognizing that restrictions placed on a museum’s use of artwork could lead to less than optimal deployment of its assets over time, neither Professor Malaro nor the museums argued that museums and the

¹⁶⁵ The Land Trust of Napa County provides the following amendment provision as an option to its easement grantors:

11.5. *Permitted Amendment by Original Granting Owner Only.* If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the original Granting Owner and the Trust may jointly amend this Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Easement or the status of the Trust under any applicable laws . . . , (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration, (iii) the original Granting Owner must consent to the amendment, whether or not that original Granting Owner continues to own the __Easement Area/Property__, and (iv) no amendment is permitted once the original Granting Owner is deceased.

Land Trust of Napa County Model Conservation Easement Form (January 2008 draft) (on file with authors).

¹⁶⁶ See, e.g., Brody, *supra* note 12, at 1233 (noting that “[p]hilanthropic institutions are under constant pressures to obtain funds and to yield to donor demands in doing so, but charities have the obligation to accept restrictions carefully”).

¹⁶⁷ MARIE C. MALARO, MUSEUM GOVERNANCE 79–80 (1994).

¹⁶⁸ *Id.*

gifts or artwork they accept should be exempted from the rules that govern the administration of all other forms of restricted charitable gifts. Rather, museums developed institutional policies regarding the acceptance of restricted gifts and began to refuse gifts subject to use restrictions that might conflict with their basic education goals.¹⁶⁹ The Land Trust Alliance's strong recommendation in its recently published Amendment Report that land trusts negotiate for the flexibility to amend conservation easements consistent with their stated purposes reflects a similar evolution; a recognition that land trusts should not bind themselves to enforcing restrictions in a conservation easement deed that might, over time, conflict with the conservation purpose of the easement and the land trust's basic conservation goals.¹⁷⁰

b. Implied Powers

Charitable trustees are also deemed to have certain "implied powers" to do what is "necessary or appropriate" to carry out the purposes of a trust and not forbidden by the terms of the trust.¹⁷¹ The Uniform Trust Code and Wyoming's version of the Uniform Trust Code provide that, without authorization by the court and except as limited by the terms of the trust, a trustee may exercise (i) "all powers over the trust property which an unmarried competent owner has over individually owned property" and (ii) "any other powers appropriate to achieve the proper . . . management . . . of the trust property."¹⁷² In their commentary, the drafters of the Uniform Trust Code explain that this section is "intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust."¹⁷³

¹⁶⁹ *Id.* at 80–81, 106.

¹⁷⁰ Government entities and land trusts also have a responsibility to consider *ex ante* when it is (and is not) appropriate to protect land in perpetuity with a conservation easement. In appropriate circumstances, land protection tools that are more easily modifiable and terminable, such as leases or management agreements, should be employed. See *Perpetuity and Beyond*, *supra* note 18, at 704–07 (discussing the circumstances in which it may (and may not) be appropriate to acquire perpetual conservation easements).

¹⁷¹ See SCOTT & FRATCHER, *supra* note 12, § 186; GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 551 (West 2008) ("Implied powers are those which are not clearly and directly given by the settlor or a court or by statute but which equity believes the creator of the trust or a court granting express powers intended should exist. They are implied or inferred from the terms and purposes of the trust. If a settlor has directed the trustee to accomplish a certain objective, he must be deemed to have intended that the trustee use the ordinary and natural means for obtaining that result.") (emphasis in original). For an example of implied powers of a charitable trustee, see *Wilstach Estate*, 1 Pa. D. & C.2d 197 (1954) (holding that the trustees of an art collection had the implied power to sell items out of the collection where such items were deemed to be making no contribution to the collection as a whole).

¹⁷² UTC, *supra* note 15, § 815(a)(2)(A), (B); WYO. STAT. ANN. § 4-10-815(a)(ii)(A), (B) (2008).

¹⁷³ UTC, *supra* note 15, § 815, cmt.

One of the duties of a trustee is to administer the trust in accordance with its terms and purposes.¹⁷⁴ Accordingly, even in the absence of an amendment provision, the holder of a conservation easement could be deemed to have the implied power to agree to amendments that further the purpose and proper management of the easement and are not inconsistent with its terms.¹⁷⁵

Despite the Uniform Trust Code's broad grant of power to a trustee to manage trust property, courts traditionally have been reluctant to find that a trustee has powers not expressly granted in the trust instrument.¹⁷⁶ The boundaries of a holder's implied power to agree to amendments that are consistent with the purpose of a conservation easement are therefore uncertain. To increase clarity and reduce litigation, government entities and land trusts should, at the time of the acquisition of a conservation easement, negotiate for the express power to agree to amendments that are consistent with the purpose of the easement and memorialize that grant of discretion in the conservation easement deed (as recommended by the Land Trust Alliance).¹⁷⁷ And with regard to existing conservation easements that do not contain an amendment provision, judicial or legislative clarification of the extent of a holder's power to simply agree to such amendments may be desirable.¹⁷⁸

¹⁷⁴ See *id.* § 801; WYO. STAT. ANN. § 4-10-801.

¹⁷⁵ See also *Amending Perpetual Conservation Easements*, *supra* note 19, at 1075–77 (explaining that conservation easements could be interpreted to grant their holders the implied power to agree to amendments that are clearly neutral with respect to or enhance the charitable purposes of the easements, and that such an interpretation would be consistent with the goals underlying the charitable trust rules).

¹⁷⁶ See SCOTT & FRATCHER, *supra* note 12, § 186 (noting that, as a result, it is customary in well-drawn instruments to make provisions in express words conferring upon the trustee powers that are or may become necessary or appropriate for the efficient administration of the trust).

¹⁷⁷ Some land trusts reportedly do not negotiate for the inclusion of an amendment provision in the conservation easement deeds they accept because they want to avoid giving easement grantors, subsequent landowners, and the public the impression that conservation easements can be amended. If a land trust intends to amend the easements it holds, it should negotiate for the discretion to do so in good faith at the time it acquires easements and memorialize that grant of discretion in the easement deeds. To do otherwise raises serious questions about the extent of the land trust's legal power to simply agree to amendments and potentially exposes the land trust to claims of fraudulent solicitation. See also *supra* note 163 (noting the Land Trust Alliance's admonition in its Amendment Report that transparency of intent is also an ethical obligation).

¹⁷⁸ See, e.g., UTC, *supra* note 15, § 201(c) (providing that a judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights); WYO. STAT. ANN. § 4-10-201(c) (same). The comments to the UTC provide in relevant part:

The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to . . . provide a trustee with instructions even in the absence of an actual dispute. . . . Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties.

Formal amendments may also be unnecessary in some cases. Letters of interpretation from the holder are occasionally used in lieu of amendments to clarify points of confusion or ambiguity.¹⁷⁹ Strengthening the development or use restrictions in an existing easement or adding land to an existing easement should be viewed as an additional charitable gift (as opposed to an amendment to the terms of an existing gift), and such an additional gift can be accomplished through a separate instrument rather than an amendment in any event. Moreover, as noted in the Land Trust Alliance's recently published Amendment Report, "[m]any future amendment requests can be avoided by careful drafting of easements in the first instance."¹⁸⁰

c. Doctrines of Administrative Deviation and Cy Pres

To the extent changed circumstances necessitate amendments to a conservation easement that exceed the holder's express or implied powers, the holder can seek judicial approval of such amendments pursuant to the doctrine of administrative deviation or the doctrine of *cy pres*, as the case may be. These doctrines are distinct. The doctrine of administrative deviation applies to the modification of an administrative term (but not the purpose) of a trust, and is sometimes described as permitting a court to modify the means by which the purpose is to be accomplished.¹⁸¹ The doctrine of *cy pres*, on the other hand, applies to the modification of the charitable purpose of a trust.¹⁸²

UTC, *supra* note 15, § 201 cmt. *See also* Uniform Management of Institutional Funds Act (1972) and Uniform Prudent Management of Institutional Funds Act (2006), both of which allow for the removal of restrictions placed by donors on the use of institutional funds outside of a court proceeding in carefully prescribed circumstances. *See* Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Management of Institutional Funds Act (1972), *available at* <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/umifa72.htm> (last visited Nov. 20, 2008); Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Prudent Management of Institutional Funds Act (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/umoifa/2006final_act.htm (last visited Nov. 20, 2008) [hereinafter UPMIFA]. *Cf.* Part III *infra*, (explaining that there are constitutional limits on the ability of state legislatures to control the administration of restricted charitable gifts and charitable trusts).

¹⁷⁹ *See* Sheila McGrory-Klyza, *An Ounce of Prevention, Head Off Future Violations With An Interpretation Letter*, 27 SAVING LAND: J. LAND TRUST ALLIANCE, Spring 2008, at 26 (discussing the use of interpretation letters in lieu of amendments); *see also* O'Connor, *supra* note 144, at 9 ("Sometimes amendment of the easement is necessary to clarify points of confusion, although letters of understanding between the easement holder and landowner should suffice in many cases.").

¹⁸⁰ *LTA Amendment Report*, *supra* note 44, at 19.

¹⁸¹ *See, e.g.*, FREMONT-SMITH, *supra* note 157, at 182–84 (describing the doctrine of administrative deviation and noting it is a complement to the doctrine of *cy pres*); RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. a (describing the doctrine of administrative deviation as allowing courts, in certain circumstances, to modify the means of accomplishing a trust purpose).

¹⁸² *See, e.g.*, FREMONT-SMITH, *supra* note 157, at 173–82 (describing the doctrine of *cy pres*); *id.* at 183 ("The power of the courts to permit deviations [from the terms of a trust] should not be confused with the *cy pres* power. The latter is applicable when the purposes are no longer capable of

Courts have traditionally been more willing to permit trustees to deviate from the administrative terms (as opposed to the charitable purpose) of a trust.¹⁸³ This is presumably because courts recognize that charitable donors are less likely to be wedded to the administrative terms of their trusts, particularly if altering administrative terms will better accomplish the donor's overall charitable purpose. In other words, courts presumably recognize that altering the administrative terms of a trust is less likely to chill future charitable donations than altering the donor's specified charitable purpose.¹⁸⁴

(1) *Administrative Deviation*

To the extent a holder wishes to amend the means by which the conservation purpose of an easement is pursued, but the holder has neither the express nor implied power to agree to the amendment, the holder should seek court approval of the amendment pursuant to the doctrine of administrative deviation. Under the traditional formulation of the doctrine of administrative deviation, a court could authorize a trustee to deviate from an administrative term only if, owing to circumstances not known to the settlor and not anticipated by him, compliance with the term would defeat or substantially impair the accomplishment of the purposes of the trust.¹⁸⁵ The modern tendency, however, has been to permit a trustee to deviate from an administrative term in situations where continued compliance with the term is deemed to be undesirable, inexpedient, or inappropriate, and regardless of whether the settlor had foreseen the circumstances.¹⁸⁶

being accomplished. The power to permit deviations does not usually extend to the purposes of the trust, but is confined to matters relating solely to administration.”).

¹⁸³ See, e.g., Brody, *supra* note 12, at 1237 n. 171 (“If the restriction relates to the donor’s charitable purpose, the courts apply the doctrine of cy pres. . . . By contrast, when the restriction is merely administrative, the courts apply the more flexible trust doctrine of equitable deviation.”).

¹⁸⁴ See, e.g., BOGERT ET AL., *supra* note 171, § 561 (“The terms of the trust having to do with the manner in which the trustee should act in order to obtain the primary objectives are not on the same level of importance but are rather minor and auxiliary. The jurisdiction of equity to enforce trusts should and does include the power to vary the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have.”).

¹⁸⁵ RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 167. *In re Pulitzer*, 249 N.Y.S. 87 (N.Y. Surr. Ct. 1931), *aff’d mem.*, 260 N.Y.S. 975 (N.Y. App. Div. 1932), is a classic example of the application of the doctrine of administrative deviation. Mr. Pulitzer created a trust for the benefit of his descendants, funded it with stock in a corporation that published a newspaper to which he had devoted his life, and expressly forbade the trustees from selling the stock. When the newspaper later became unprofitable and the prohibition on the sale of the stock threatened the trust corpus, the trustees sought and received judicial approval to sell the stock. In approving the deviation from the “no sale of stock” administrative term, the court explained “[t]he dominant purpose of Mr. Pulitzer must have been the maintenance of a fair income for his children and the ultimate reception of the unimpaired corpus by the remaindermen.” *Id.* at 94.

¹⁸⁶ See *Amending Perpetual Conservation Easements*, *supra* note 19, at 1039; S.C. Dep’t of Mental Health v. McMaster, 642 S.E.2d 552, 557 (S.C. 2007) (applying the doctrine of administrative

Under the UTC and Wyoming's version of the UTC, the standard for administrative deviation is similarly liberal while not being unbridled. Both first provide that a court may modify the administrative terms of a trust if, because of circumstances not anticipated by the settlor, modification will further the purposes of the trust.¹⁸⁷ The comments to the UTC explain that the purpose of this provision "is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes."¹⁸⁸ Both the UTC and Wyoming's version of the UTC also provide that a court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.¹⁸⁹ The comments to the UTC explain that this provision "broadens the court's ability to modify the administrative terms of a trust" and "is an application of the requirement . . . that a trust and its terms must be for the benefit of its beneficiaries," which, in the conservation easement context, is the public.¹⁹⁰ The comments further explain that, "[a]lthough the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property."¹⁹¹ The UTC and Wyoming's version of the UTC also specifically authorize a court to (i) modify a trust to achieve the settlor's tax objectives, provided the modification is not contrary to the settlor's probable intention,¹⁹² and (ii) reform a trust to correct mistakes of fact or law.¹⁹³

As the foregoing discussion indicates, courts in both common law and UTC jurisdictions have fairly broad discretion to authorize a deviation from the terms of a conservation easement, provided such deviation is consistent with the easement's overall purpose.

deviation to alter an administrative term of a charitable trust and explaining "[c]onsiderable flexibility will always be allowed in the details of the execution of a trust, so as to adapt it to the changed conditions").

¹⁸⁷ UTC, *supra* note 15, § 412(a); WYO. STAT. ANN. § 4-10-413(a) (2008).

¹⁸⁸ UTC, *supra* note 15, § 412 cmt. (noting also that, while it is necessary that there be circumstances not anticipated by the settlor, the circumstances may have been in existence when the trust was created).

¹⁸⁹ *Id.* § 412(b); WYO. STAT. ANN. § 4-10-413(b).

¹⁹⁰ *See* UTC, *supra* note 15, § 412 cmt.

¹⁹¹ *Id.* *See also* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002) ("The UTC provides for this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. The result is a liberalizing nudge, but one founded in traditional doctrine.").

¹⁹² UTC, *supra* note 15, § 416; WYO. STAT. ANN. § 4-10-417.

¹⁹³ UTC, *supra* note 15, § 415; WYO. STAT. ANN. § 4-10-416.

(2) Cy Pres

To the extent a holder wishes to amend a conservation easement in a manner contrary to its purpose (such as to permit subdivision and development of the land),¹⁹⁴ or to terminate the easement (which would clearly be contrary to its purpose),¹⁹⁵ the holder should be required to obtain court approval pursuant to the doctrine of *cy pres*. Under the traditional formulation of the doctrine of *cy pres*, if (i) the charitable purpose of a gift or trust becomes illegal, impossible, or impracticable, and (ii) the donor is determined to have had a general charitable intent, then (iii) a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is as near as possible to the purpose specified by the donor.¹⁹⁶

Courts and legislatures have made some modest changes to the traditional formulation of the doctrine of *cy pres*.¹⁹⁷ In states that have adopted the UTC, the doctrine can now be applied if the charitable purpose of a trust becomes unlawful, impossible, impracticable, or wasteful.¹⁹⁸ The requirement of general charitable intent is also generally no longer a barrier to the application of the doctrine. Courts almost invariably find that a donor had a general charitable intent if the gift or trust fails after it has been in existence for some period of time, the UTC

¹⁹⁴ See *supra* notes 131–143 and accompanying text (discussing the Myrtle Grove controversy).

¹⁹⁵ As previously noted, the purpose of a conservation easement generally is the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance in perpetuity.

¹⁹⁶ See, e.g., RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 399 (“If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.”); RONALD CHESTER, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431 (3d ed. 2005) (explaining that the words “*cy pres*” are Norman French for “as near,” and the phrase when expanded to its full implication was “*cy pres comme possible*,” which meant “as near as possible”). *Jackson v. Phillips*, 96 Mass. 539 (1867), is perhaps the most famous example of the application of the doctrine of *cy pres*. That case involved a charitable trust created to promote the abolition of slavery. When the purpose of the trust became “impossible or impracticable” as a result of the adoption of the Thirteenth Amendment to the Constitution, the court applied the doctrine of *cy pres* and instructed the trustees to use the trust assets to aid former slaves and assist necessitous persons of African descent.

¹⁹⁷ Changes have been modest because of the principle of *stare decisis* and constitutional limits on the ability of state legislatures to encroach upon the judicial *cy pres* power. See *infra* notes 331–341 and accompanying text.

¹⁹⁸ UTC, *supra* note 15, § 413(a); WYO. STAT. ANN. § 4-10-414 (2008). See also *infra* note 281 (explaining that the wasteful standard was added to the UTC primarily to deal with the problem of surplus funds and such standard should not be applied to authorize the termination of conservation easements when purportedly “better” conservation opportunities present themselves).

and the Restatement (Third) of Trusts apply a presumption of general charitable intent, and some states have eliminated the requirement entirely.¹⁹⁹ And courts increasingly have determined that, upon the modification of a trust pursuant to the doctrine of *cy pres*, the substitute charitable purpose need not be the one that is as near as possible to the donor's original purpose, but simply one that is "reasonably similar or close to" such purpose, or "falling within the general charitable purpose" of the settlor.²⁰⁰

2. The End of Perpetuity's *Incorrect Interpretation of Charitable Trust Principles*

As should, by now, be clear, *The End of Perpetuity's* analysis of the manner in which the foregoing principles affect the amendment and termination of conservation easements is incorrect. The article fails to acknowledge that flexibility to amend conservation easements consistent with their stated purposes can be and often is built into conservation easement deeds through the use of an amendment provision, and that the use of such provisions is strongly recommended by the Land Trust Alliance.²⁰¹ The article references implied powers only in passing,

¹⁹⁹ See *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 63, at 478–80. See also UTC, *supra* note 15, § 413 cmt. ("Subsection (a) . . . modifies the doctrine of *cy pres* by presuming that the settlor had a general charitable intent . . ."). Wyoming's version of the UTC similarly presumes the settlor had a general charitable intent. See WYO. STAT. ANN. § 4-10-414(a).

²⁰⁰ RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. d.

²⁰¹ See *supra* Part II.D.1.a (discussing amendment provisions). *The End of Perpetuity* refers to an amendment provision only once in a footnote. See *The End of Perpetuity*, *supra* note 4, at 68, n. 193. This footnote provides in relevant part

if the easement grantor is well-enough represented to provide an amendment clause in his or her conservation easement, the easement will be exempt from the doctrine of *cy pres*; otherwise not. One has to wonder; if application of the doctrine is so crucial to the proper management of conservation easements [should] having a clever lawyer should [sic] exempt a grantor from its application.

This footnote illustrates the author's misreading of charitable trust principles. As discussed in Part II.D.1.a, *supra*, the typical amendment provision grants the holder of a conservation easement broad discretion to agree to amendments, but only if the amendments are consistent with or further the purpose of the easement. Accordingly, the typical amendment provision does not exempt a conservation easement from the doctrine of *cy pres*, and it would be contrary to the requirements for tax-deductible easements under federal tax law if it did. Rather, the holder of a conservation easement containing a typical amendment provision would still be required to obtain court approval in a *cy pres* proceeding to (i) terminate the easement (which would clearly be contrary to its purpose) or (ii) amend it in a manner that is not consistent with its purpose (such as was attempted in the Myrtle Grove controversy). Also, given the discussion of the wisdom of using amendment provisions in the various iterations of the Conservation Easement Handbook, the Land Trust Alliance's strong recommendation in favor of the use of such provisions in its Amendment Report, and the increasing focus of state attorneys general and the IRS on the issue of amendments (see *supra* note 19 and *infra* notes 295 and 296 and accompanying text), any reasonably well-prepared attorney involved in a conservation easement transaction would consider the issue of amendments to be a key component of the negotiation process.

quickly dismissing them as having little relevance,²⁰² and conflates the doctrines of administrative deviation and *cy pres*.²⁰³ The article also lumps all amendments together, claiming, incorrectly, that charitable trust principles both require judicial approval of every amendment in a *cy pres* proceeding and preclude most typical, salutary, and reasonable amendments even with judicial review.²⁰⁴

As the discussion in the previous subpart indicates, charitable trust principles should apply differently to different types of amendments—namely (i) amendments that are consistent with or further the purpose of an easement and (ii) amendments that are contrary to the purpose of an easement. The holder of a conservation easement should be permitted to agree to amendments that are consistent with or further the purpose of a conservation easement in one of three ways:

- pursuant to an express power granted to the holder in an amendment provision included in the easement deed, the exercise of which should not be second-guessed by a court unless there has been a clear abuse of discretion;²⁰⁵
- pursuant to the holder's implied power to do what is necessary or appropriate to carry out the terms of the easement;²⁰⁶ or
- in the absence of an express or implied power, with court approval obtained pursuant to the doctrine of administrative deviation, which is more flexible than the doctrine of *cy pres*.²⁰⁷

On the other hand, the holder of a conservation easement should be permitted to agree to amendments that are contrary to the purpose of the easement (such as those attempted in the Myrtle Grove controversy), or to the outright termination of the easement (which would clearly be contrary to its purpose), only with court approval in a *cy pres* proceeding.²⁰⁸

These principles do not unduly constrain the discretion of holders of conservation easements given that (i) the Land Trust Alliance sanctions only amendments that are consistent with or further the purpose of an easement in its Standards and Practices, its Amendment Report, and the Conservation

²⁰² See *The End of Perpetuity*, *supra* note 4, at 68–69.

²⁰³ See *id.* at 68.

²⁰⁴ See *supra* notes 150–152 and accompanying text.

²⁰⁵ See *supra* Part II.D.1.a.

²⁰⁶ See *supra* Part II.D.1.b.

²⁰⁷ See *supra* Part II.D.1.c.

²⁰⁸ See *id.*

Easement Handbook,²⁰⁹ (ii) land trusts that have adopted formal amendment policies generally authorize only such amendments,²¹⁰ (iii) it is generally assumed that only such amendments comply with federal tax law requirements,²¹¹ and (iv) government entities and land trusts can and often do negotiate for the inclusion of an amendment provision in conservation easement deeds that expressly grants them the discretion to agree to such amendments.²¹² Indeed, most of the “typical” amendments that *The End of Perpetuity* claims would be precluded by the application of charitable trust principles are those that are likely to be consistent with or further the purpose of a conservation easement and, thus, could be agreed to by the holder pursuant to the discretion granted to it in an amendment provision.²¹³ Moreover, the requirement under state charitable

²⁰⁹ See *supra* notes 49–58 and accompanying text.

²¹⁰ For example, The Vermont Land Trust’s amendment policy provides that amendments that “have a better or at least neutral effect on the resources conserved” may be recommended to the Board for approval, and lists consistency with “the overall purposes of the conservation easement” and “any other written expressions of the original Grantor’s intent” as amendment principles. *LTA Amendment Report*, *supra* note 44, at Appendix A-1. The Nature Conservancy’s amendment policy provides that, before authorizing an amendment, its staff must “make a determination that the proposed changes would not in any way diminish the overall goals and objectives of the original conservation easement” and “the Conservancy is bound by the conservation purposes as outlined in the original conservation easement.” *Id.* at Appendix A-2. The Colorado Open Lands amendment policy provides that “[a]n amendment must have either a beneficial or neutral effect on the conservation values protected by the conservation easement.” *Id.* at Appendix A-3. The Marin Agricultural Land Trust’s amendment policy provides “[t]he proposed amendment [must] strengthen or have a neutral effect on the Protected Values of the easement. No amendment will be considered that could result in a net degradation of the Protected Values” and “[t]he proposed amendment [must be] consistent with the purpose of the easement.” *Id.* at Appendix A-4. The Society for the Protection of New Hampshire Forests’s amendment policy provides that an amendment must not be inconsistent with the purposes of the original easement and the policy does not permit modifications “where additional land outside the easement Property is protected in return for modification of the easement.” *Id.* at Appendix A-5. The Brandywine Conservancy’s amendment policy provides that “an amendment must be consistent with the conservation purposes of the existing easement” and, “if the landowner initiates the amendment, it must provide a net conservation benefit.” *Id.* at Appendix A-6.

²¹¹ See *supra* note 159 and accompanying text.

²¹² See *supra* Part II.D.1.a.

²¹³ *The End of Perpetuity* refers to the following as typical amendments, “the correction of technical errors in the easement document; clarification of ambiguities; tightening of restrictions; expansion of the area covered by the easement; relocation or modification of reserved development rights; increase in [a landowner’s] reserved rights in exchange for increased conservation on the easement parcel; . . . and modifications to reflect changes in the law, or to improve enforcement and management of the easement.” See *The End of Perpetuity*, *supra* note 4, at 67–68. All such amendments could, in the right circumstances, be consistent with or further the purpose of a conservation easement. The extent to which any of these amendments are “typical,” however, is unclear. See, e.g., *infra* notes 231–233 and accompanying text (discussing the low reported rate of amendments agreed to by land trusts); *supra* note 159 (discussing the Senate Finance Committee’s concern with “trade-off” amendments due to the difficulty in weighing increases and decreases in conservation benefits).

trust law of court approval in a *cy pres* proceeding for the outright termination of a conservation easement, or for amendments that are contrary to the purpose of an easement, is consistent with federal tax law requirements applicable to tax-deductible conservation easements.²¹⁴

It may, of course, sometimes be unclear whether a proposed amendment is consistent with or contrary to the purpose of a conservation easement. As previously explained, however, courts should not second-guess a holder's exercise of its power to amend a conservation easement pursuant to an amendment provision included in the easement deed absent a clear abuse of that discretion.²¹⁵ On the other hand, highly questionable calls should be subject to state attorney general and court oversight to ensure that the public interest and investment in the conservation easement is protected.²¹⁶

To summarize, contrary to the assertions made in *The End of Perpetuity*, applying charitable trust principles to conservation easements would not (i) categorically deny easement holders the right to amend conservation easements "on their own"; (ii) require holders to obtain judicial sanction of every amendment in a *cy pres* proceeding; or (iii) preclude most typical, salutary, and reasonable amendments even with judicial review. Rather, amendments that are consistent with or further the charitable purpose of an easement could be agreed to through the exercise of a holder's express or implied powers, or with court approval obtained in a more flexible administrative deviation proceeding. It is only when a holder wishes to terminate a conservation easement, or modify it in a manner contrary to its stated purpose (as was attempted in the Myrtle Grove controversy), that court approval in a *cy pres* proceeding would be required.

E. Amendments are Not a Relatively Common Occurrence

The End of Perpetuity asserts that "[e]asement modification (amendment) is a relatively common occurrence."²¹⁷ This representation is inconsistent with what appears to be both reported and common knowledge in the land trust

²¹⁴ See *supra* note 159 and accompanying text (discussing federal tax law requirements as they relate to amendments); *infra* notes 302–306 and accompanying text (discussing federal tax law requirements generally).

²¹⁵ See *supra* Part II.D.1.a.

²¹⁶ The Myrtle Grove controversy is a case in point. See *supra* notes 131–143 and accompanying text.

²¹⁷ *The End of Perpetuity*, *supra* note 4, at 26 n.3.

community.²¹⁸ While some land trusts have written amendment policies,²¹⁹ and, as discussed above, negotiate for the inclusion of an amendment provision in the easement deeds they accept, amendments are, in fact, not a relatively common occurrence.

The Land Trust Alliance's Standards and Practices specifically provide that easement amendments "are not routine,"²²⁰ and the commentary thereto explains that amendments "are not common."²²¹ The 2005 edition of the Conservation Easement Handbook explains:

When the terms of an easement are negotiated, both the landowner and the holder should consider those provisions unchangeable. Although altered circumstances and conditions may someday justify an amendment to the document, an organization or landowner should never agree to a conservation easement with the idea that its terms will be changed later.²²²

The Land Trust Alliance's recently published Amendment Report similarly provides that conservation easements should be amended only in "exceptional circumstances."²²³ And the Amendment Report concludes by providing the following "key points" to land trusts regarding amendments:

²¹⁸ While adding land to, or strengthening the development and use restrictions in, existing conservation easements may be relatively common and uncontroversial, as noted in Part II.D.1.b, *supra*, those actions should be viewed as the making of additional charitable gifts rather than modifications to the terms or purposes of existing gifts.

²¹⁹ See *supra* note 210 (describing a number of land trust amendment policies); Jason B. van Doren, *Summary of the 2004 Conservation Easement Violations & Amendments Study*, EXCHANGE: J. LAND TRUST ALLIANCE, Summer 2005, 24, 25 (noting that forty-five percent of the land trusts surveyed had a written amendment policy).

²²⁰ *LTA Standards and Practices*, *supra* note 48, at 14 (Practice 11I. Amendments).

²²¹ *Commentary on Practice 11I*, *supra* note 51.

²²² 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 183. This language was carried forward in only slightly modified form from the 1988 edition of the Conservation Easement Handbook, which provides:

When the terms of an easement are negotiated, both the grantor and the grantee should consider those provisions unchangeable. Although altered circumstances and conditions *may* someday justify an amendment to the document, amendments should be viewed with extreme caution. No organization or property owner should ever agree to a conservation easement with the idea that its terms will be changed later.

1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 121 (emphasis in original).

²²³ *LTA Amendment Report*, *supra* note 44, at 9 ("Exceptional circumstances sometimes warrant easement amendments . . ."); *id.* at 32 ("To minimize risks, the land trust's amendment policy and supporting materials should underscore that easements are perpetual, *amended only in exceptional circumstances*, and that all amendments must clearly serve the public interest—not solely the interests of the landowner.") (emphasis added).

Focus on good initial easement drafting to avoid the need for future amendments to the greatest extent possible. Adopt and use standard easement format and boilerplate provisions that reduce errors and ambiguity.

Discuss the land trust's amendment policy with the easement donor/grantor and any direct funders of the project and include in the easement deed an amendment provision that expressly grants the land trust the desired level of amendment discretion.

Consider amendments with great caution; *amendments should never be viewed as the norm.*²²⁴

The amendment policies adopted by many land trusts reflect a similarly conservative approach to amendments. In addition to limiting amendments to those that are consistent with or further the purpose of a conservation easement,²²⁵ such policies generally provide that amendments are reserved for exceptional, extraordinary, and very limited, special circumstances. For example, The Nature Conservancy ("TNC"), which held conservation easements encumbering over 2.3 million acres as of 2008,²²⁶ provides in its amendment policy:

Conservation easements held by the Conservancy should be designed and written so as to avoid the need for an amendment or modification of the easement terms. It is the Conservancy's presumption that a conservation easement will not be amended or modified. In exceptional cases or in unforeseen circumstances, this presumption may be rebutted provided [TNC's amendment procedures, which comply with charitable trust principles, are followed].²²⁷

The Society for the Protection of New Hampshire Forests ("SPNHF"), a well-respected state-wide land trust, provides in its amendment policy:

²²⁴ *Id.* at 85 (emphasis added).

²²⁵ See *supra* note 210 and accompanying text.

²²⁶ Conservation Easement Modifications—The Nature Conservancy's Approach and Experience, Philip Tabas, VP/General Counsel, February 15, 2008 (on file with authors).

²²⁷ *LTA Amendment Report*, *supra* note 44, at Appendix A-2. TNC's amendment procedures require that, other than with respect to amendments that are *de minimis*, involve the imposition of additional restrictions on the encumbered property, or are in the nature of a clarification of the terms of an easement rather than a change thereto, the organization must secure the approval of the relevant state authority that provides oversight of charitable organizations in the state where the property is located (generally the state attorney general) and seek court approval when appropriate. *Id.*

SPNHF's conservation easements are achieved through voluntary agreements with landowners. Once an easement is executed, SPNHF is bound to uphold the terms of the easement as negotiated. SPNHF's record in upholding the terms and purposes of the original easement will determine whether future donors will put their trust in SPNHF.

It is SPNHF's policy to hold and enforce conservation easements as written. Amendments to conservation easements will be authorized only under exceptional circumstances and then only under [SPNHF's amendment guidelines].²²⁸

The Brandywine Conservancy, a well-respected regional land trust, provides in its amendment policy:

Amendment is an extraordinary procedure and not available to a landowner as a matter of right, unless the easement itself or Federal, state, or local law mandates that a particular amendment must be adopted.²²⁹

And the Little Traverse Conservancy, another well-respected regional land trust, provides in its amendment policy:

The Little Traverse Conservancy acquires and holds conservation easements for the purpose of protecting land for the benefit of current and future generations. Prior to donating or selling their conservation easement, landowners are assured that the easement is permanent. The Conservancy has an obligation to monitor, enforce, and uphold conservation easements to assure that these conservation easements will stand the test of time.

Conservation easement amendments are viewed by the Conservancy as being appropriate in only very limited, special circumstances.²³⁰

²²⁸ *Id.* at Appendix A-5. The New Hampshire Attorney General is working with SPNHF to develop guidelines regarding Attorney General and court oversight of conservation easement modifications and terminations pursuant to charitable trust principles. *See supra* note 19.

²²⁹ *LTA Amendment Report, supra* note 44, at Appendix A-6. The mission of the Brandywine Conservancy, which is located in Chadds Ford, Pennsylvania, is "to conserve the natural and cultural resources of the Brandywine River watershed and other selected areas with a primary emphasis on conservation of water quantity and quality." Brandywine Conservancy, Environmental Management Center, Our Mission, <http://www.brandywineconservancy.org/conserving.html> (last visited Nov. 21, 2008).

²³⁰ Little Traverse Conservancy Land Protection Policy: Policy For Amendments to Conservation Easements (on file with authors), *available at* <http://learningcenter.lta.org/attached->

Finally, studies conducted by the Land Trust Alliance confirm that conservation easement amendments are relatively rare.²³¹ The more recent study, which was based on data gathered from the over 1,000 land trusts that responded to the Land Trust Alliance's 2003 National Land Trust Census, reports that "[t]he total number of conservation easement amendments reported . . . [represents] about 2.5 percent of the total 17,847 easements [held by land trusts]."²³² The earlier study, conducted in 1999, found that only "[a]pproximately 4 percent of the more than 7,400 conservation easements held by local and regional land trusts ha[d] been amended . . ."²³³ Accordingly, contrary to the assertion made in *The End of Perpetuity*, amendments to conservation easements are not a "relatively common occurrence." Rather, amendments are the exception rather than the rule, and are reserved for exceptional, extraordinary, and very limited, special circumstances.

F. *Standing to Sue*

The standing rules that apply in the charitable context are designed to balance the need to protect charitable organizations from nuisance suits with the need for organizational accountability.²³⁴ In the conservation easement context, this balancing can be described as follows. Government and nonprofit holders of conservation easements need the freedom to administer the easements they hold without fear of possible nuisance suits by neighboring landowners or

files/0/50/5086/12_03.doc (last visited Nov. 20, 2008). The mission of the Little Traverse Conservancy is "to protect the natural diversity and beauty of northern Michigan by preserving significant land and scenic areas, and fostering appreciation and understanding of the environment." Little Traverse Conservancy, About Us, Mission Statement, <http://landtrust.org/LTC/aboutusTABLE.htm> (last visited Nov. 21, 2008).

²³¹ See van Doren, *supra* note 219; René Wieser, *Conservation Easement Amendments: Results from a Study of Land Trusts*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 2000, 9.

²³² See van Doren, *supra* note 219, at 26.

²³³ See Wieser, *supra* note 231, at 9 (quoting Jean Hocker, then President of the Land Trust Alliance, as stating "[t]he fact that so few easements have been amended indicates that land trusts have been appropriately cautious about making amendments").

²³⁴ As explained by the Panel on the Nonprofit Sector:

Courts and state legislatures have been unwilling to subject charitable organizations to the risk of unrestricted claims of breach of trust by members of the public for good reason: the potential for nuisance lawsuits would deter service on charitable boards and the cost of defending such claims would come out of charitable funds. States have addressed the need to balance protection from such lawsuits with organizational accountability by granting standing to sue to a limited number of persons

Strengthening the Transparency, Governance, and Accountability of Charitable Organizations: A Supplement to the Final Report to Congress and the Nonprofit Sector (Panel on the Nonprofit Sector), April 2006, at 29, available at www.nonprofitpanel.org/Report/index.html (last visited Nov. 20, 2008) [hereinafter *Supplement to Nonprofit Report*]. The Panel on the Nonprofit Sector was convened in October 2004 at the encouragement of the leaders of the Senate Finance Committee to consider and recommend actions to strengthen good governance and ethical conduct within public charities and private foundations. See *id.* at 3.

other members of the public because such suits could entail the expenditure of significant public or charitable funds on unwarranted litigation and discourage service on land trust boards. On the other hand, as evidenced by *Hicks v. Dowd*,²³⁵ the Myrtle Grove controversy,²³⁶ and the Wal-Mart controversy,²³⁷ there must be a means by which grantees of conservation easements can be held accountable for actions taken or not taken that are in violation of their fiduciary obligations to both easement grantors and the public. Negligence, malfeasance, and the use of assets for purposes other than those specified by the donor are not unknown in the charitable context,²³⁸ and there is no reason to believe that the government entities and land trusts holding conservation easements will be the first class of entities in history to be immune to such abuses. In fact, a variety of factors would support the view that such entities should be subject to more oversight than the typical holder of charitable assets, rather than less, including (i) the significant public investment in conservation easements and the conservation and historic values they protect,²³⁹ (ii) the enormous economic value inherent in the development and use rights restricted by conservation easements,²⁴⁰ (iii) the political, financial, and

²³⁵ See *supra* note 3.

²³⁶ See *supra* notes 131–143 and accompanying text.

²³⁷ In the Wal-Mart controversy, Chattanooga County, Tennessee, which held a perpetual conservation easement, permitted the construction of a four-lane road across the protected land to provide access to a Wal-Mart SuperCenter. See *Perpetuity and Beyond*, *supra* note 18, at 695–700. Several environmental groups and a citizen filed suit alleging, *inter alia*, that the road violated the terms of the easement. See *id.* at 696–97. The case settled on terms favorable to the public, as beneficiary of the easement, and in accordance with charitable trust principles. See *id.* at 698.

²³⁸ See FREMONT-SMITH *supra* note 157, at 19–115 (describing the history of charitable trust law and the need, evident from almost the first emergence of charities as legal entities, for the supervision of those entrusted with charitable assets to help prevent negligence, maladministration, and diversion of such assets to purposes contrary to those specified by the donors). See also Marion Fremont-Smith & Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995–2002*, 42 EXEMPT ORG. TAX REV. 25 (Oct. 2003); Marion R. Fremont-Smith, *Pillaging of Charitable Assets: Embezzlement and Fraud*, 46 EXEMPT ORG. TAX REVIEW 333 (Dec. 2004); Stephanie Strom, *Report Sketches Crime Costing Billions: Theft From Charities*, N.Y. TIMES, March 29, 2008, at A10.

²³⁹ The public investment in conservation easements is substantial and takes many forms, including (i) the generous federal (and, in some cases, state) tax benefits provided to easement donors, (ii) the significant public funds being appropriated for easement purchase programs, (iii) the tax-exempt status of the land trusts acquiring easements, and (iv) public funding of the operations of the government entities acquiring and enforcing easements.

²⁴⁰ A conservation easement can reduce the fair market value of the land it encumbers by hundreds of thousands or even millions of dollars. See, e.g., *Tax Incentives*, *supra* note 42, at 25 (noting, in 2004, that in the 17 reported conservation easement valuation cases, courts determined that the easements had reduced the value of land they encumber at the time of their donation by as much as \$4.97 million and as little as \$20,800, with an average diminution in value of approximately 43%). See also *supra* note 3, noting that the conservation easement at issue in *Hicks v. Dowd* had an estimated value of over \$1 million at the time it was donated in 1993. Given the increase in land values and development pressures in Wyoming since 1993, that conservation easement is likely worth considerably more now.

other pressures that may be brought to bear on both governmental and nonprofit holders to substantially modify, release, or terminate conservation easements, and (iv) the increasing importance of land conservation as undeveloped land becomes more scarce.

If the only parties with standing to sue to enforce a conservation easement were the owner of the encumbered land and the holder of the easement, as *The End of Perpetuity* suggests,²⁴¹ there would be no party able to call the holder of a conservation easement to account if it breached the fiduciary duties it should be deemed to have accepted when it accepted the easement.²⁴² While that lack of oversight might suit some of the governmental and land trust holders of conservation easements, it would clearly be contrary to the public interest and investment in such easements. *The End of Perpetuity* objects to the notion that the state attorney general or other representative of the public might have standing to “second guess” the decision of a land trust and landowner to substantially modify or terminate a conservation easement.²⁴³ But in no other charitable context are those entrusted with charitable assets to be used for specific purposes the first, last, and only authority on fundamental matters relating to the management and disposition of such assets. Moreover, for the reasons noted immediately above, it would be unwise (as well as unprecedented) to specially exempt charitable gifts of conservation easements from the principles that govern the administration of all other charitable gifts.

The standing rules in the charitable context are also carefully calibrated to balance the competing needs of administrative efficiency and organizational accountability. Accordingly, it is unlikely that government or nonprofit holders will be subject to nuisance suits as a result of the application of charitable principles to conservation easements. In most cases standing to enforce a restricted charitable gift or charitable trust has been limited to the state attorney general.²⁴⁴

²⁴¹ See *The End of Perpetuity*, *supra* note 4, at 63–67.

²⁴² Pursuant to the Uniform Conservation Easement Act and Wyoming’s version of that act, an entity eligible to be a holder of a conservation easement may be granted a third-party right of enforcement in a conservation easement deed. See UCEA, *supra* note 14, §§ 1(3), (3)(a)(3); WYO. STAT. ANN. §§ 34-1-201(b)(iii), -203(a)(iii) (2008). Granting standing to such a third party is optional, however, and the holder must consent to the grant as a party to the easement. Accordingly, such third parties cannot be relied upon to call easement holders to account for breaches of their fiduciary duties.

²⁴³ See *The End of Perpetuity*, *supra* note 4, at 63–64.

²⁴⁴ See Susan Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAWAII L. REV. 593, 619 (1999) (“[S]tanding to enforce breaches of fiduciary duties in the charitable context is still limited in most cases to the attorney general.”); FREMONT-SMITH, *supra* note 157, at 324 (“The common law not only conferred supervisory powers and duties on the attorney general to enforce charitable funds, . . . it largely excluded other members of the general public from so doing.”).

This is “based not on a denial of the public’s interest, but on the purely practical consideration that it would be impossible to manage charitable funds, or even to find individuals to take on the task, if fiduciaries were to be constantly subject to harassing litigation.”²⁴⁵

A leading treatise on trust law explains the rationale for granting standing to the state attorney general in the charitable context:

The public benefits arising from [a] charitable trust justify the selection of some public official for its enforcement. Since the Attorney General protects the rights of the people of the state, he has been chosen as the protector, supervisor, and enforcer of charitable trusts, both in England and in the several states. This is true either because of a specific delegation of that power by statute, by reason of a general statutory statement of his duties, because of judicial decision, or some combination of the above.²⁴⁶

The public benefits arising from a conservation easement similarly justify the selection of the Attorney General as the protector, supervisor, and enforcer of the easement. Accordingly, the state attorney general should have standing to sue to enforce a conservation easement on behalf of the public.²⁴⁷

In some cases courts have also granted standing to enforce a charitable trust to co-trustees or co-directors of charitable organizations.²⁴⁸ For example, *Holt v. College of Osteopathic Physicians & Surgeons*, the Supreme Court of California

²⁴⁵ FREMONT-SMITH, *supra* note 157, at 324–25.

²⁴⁶ CHESTER, BOGERT & BOGERT, *supra* note 196, § 411. *See also* *Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 935 (Cal. 1964) (explaining “[b]eneficiaries of a charitable trust, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf. . . . Since there is usually no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public, the Attorney General has been empowered to oversee charities as the representative of the public, a practice having its origin in the early common law”).

²⁴⁷ This was recognized by the drafters of the Uniform Conservation Easement Act. The act grants standing to (i) an owner of an interest in the real property burdened by the easement, (ii) a holder of the easement, (iii) a person having a third-party right of enforcement, and (iv) any person authorized by other law. UCEA, *supra* note 14, § 3(a). The comments to the act explain “the Act also recognizes that the state’s other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.” *Id.* § 3 cmt. *See also* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 391 cmt. a (noting that, in some states, the local district or county attorney rather than the attorney general is charged with maintaining suits to enforce charitable trusts).

²⁴⁸ *See* FREMONT-SMITH, *supra* note 157, at 334. *See also* CHESTER, BOGERT & BOGERT, *supra* note 196, § 411 (“A few state statutes permit proceedings to enforce a charitable trust or to remedy

granted standing to a minority of the directors of a charitable corporation to sue to redress alleged breaches of trust by the majority.²⁴⁹ The court noted that, although the Attorney General has primary responsibility for the enforcement of charitable trusts, the need for adequate enforcement is not wholly fulfilled by the authority given him.²⁵⁰ The court explained:

The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment.²⁵¹

The court pointed out that, because co-trustees and co-directors are both few in number and charged with the duty of managing the charity's affairs, they are unlikely to subject a charity to harassing litigation.²⁵² They are also in the best position to learn about breaches of trust and bring the relevant facts to a court's attention.²⁵³ This is certainly the case with regard to land trusts, many of which have small boards of directors, operate at the local level, and make decisions with regard to the easements they hold that are not readily apparent to the state attorney general or the public because they relate to privately-owned land to which the public may not have visual or physical access.²⁵⁴

a breach of trust to be commenced by one other than the Attorney General, such as a co-trustee or an officer or director of a charitable corporation.”).

²⁴⁹ See *Holt*, 394 P.2d at 932.

²⁵⁰ *Id.* at 936.

²⁵¹ *Id.* at 935.

²⁵² *Id.* at 936.

²⁵³ *Id.* (noting also that permitting suits by co-directors and co-trustees does not usurp the responsibility of the Attorney General, since he would be a necessary party to such litigation). See also *Supplement to Nonprofit Report*, *supra* note 234, at 29 (“States have addressed the need to balance protection from [harassing] lawsuits with organizational accountability by granting standing to sue to a limited number of persons, such as directors and trustees, who are well-positioned to know if the charity is not behaving appropriately and are unlikely to bring frivolous actions.”).

²⁵⁴ Tax-deductible conservation easements protecting habitat or an ecosystem need not grant the public either physical or visual access to the subject property. See Treas. Reg. § 170A-14(d)(3)(iii). Physical or visual access to property encumbered by an open-space easement donated pursuant to a “clearly delineated governmental policy” is similarly not required unless the conservation purpose of the donation would be “undermined or frustrated” without public access. See *id.* § 1.170A-14(d)(4)(iii)(C). See also STEPHEN J. SMALL, FEDERAL TAX LAW OF CONSERVATION EASEMENTS 5-2 (1997) (explaining that, when Congress was considering revisions to the federal charitable income tax deduction provision for conservation easement donations in 1980, a number of Congressmen and interest groups were strongly opposed to a requirement of public access to easement-encumbered land, claiming that “donors who had to ‘open up’ their land to the public simply would not be interested in making easement donations”).

Courts also occasionally grant standing to private persons who are deemed to have a “special interest” in the enforcement of a charitable trust. To obtain such a grant of standing, however, a person generally must show that she is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled.²⁵⁵ Premised on the proposition that the attorney general is best suited to represent the interests of the public, courts traditionally have been conservative in granting standing to parties with a special interest (*Hicks v. Dowd* being a case in point).²⁵⁶ In a review of standing cases involving charitable trusts decided between 1980 and 2001, Marion Fremont-Smith, author of *Governing Nonprofit Organizations*, determined “[t]he overriding factor in almost every one of the cases in which individuals were granted standing was the lack of effective enforcement by the attorney general or another government official.”²⁵⁷ As Professor Susan Gary explains:

Courts will defer to a determination previously made by the attorney general. That is, if the attorney general has reviewed the case and declined to pursue it, a court is unlikely to grant standing to a private party, especially in a state with a strong record of charitable enforcement by the attorney general. In contrast, if the court perceives lax enforcement efforts or lack of resources or interest on the part of the attorney general, the

²⁵⁵ See, e.g., SCOTT & FRATCHER, *supra* note 12, § 391.

²⁵⁶ In *Hicks v. Dowd*, discussed *supra* note 3, the Wyoming Supreme Court denied standing to sue to enforce a conservation easement to a resident of the county in which the protected land is located, but invited the Wyoming Attorney General to reassess his position with regard to the case. See also, e.g., *Rhone v. Adams*, 986 So. 2d 374 (Ala. 2007) (holding that a church and a school, which were among numerous entities that could, in the trustees’ discretion, receive charitable contributions under a charitable trust, did not have standing to maintain an action for the enforcement of the trust because they were merely potential as opposed to actual beneficiaries of the trust); *In re Clement Trust*, 679 N.W.2d 31 (Iowa 2004) (holding that a local community center did not have standing to maintain an action for the enforcement of a charitable trust because the center was merely a potential beneficiary of the trust); *Nixon v. Hutcherson*, 96 S.W.3d 81 (Mo. 2003) (holding that parents who were potential beneficiaries of an education trust to benefit needy children did not have standing to maintain an action for the enforcement of the trust because their interest was no greater than the interest of all other members of the putative class); *Forest Guardians v. Powell*, 24 P.3d 803 (N.M. Ct. App. 2001) (holding that children attending New Mexico public schools did not have standing to maintain an action for the enforcement of a school lands trust created under a state statute, which constituted a charitable trust); *In re Milton Hershey Sch.*, 911 A.2d 1258 (Pa. 2006) (holding that the alumni association of the Milton Hershey School did not have standing to question an agreement reached between the board of managers of the school and the Pennsylvania Attorney General regarding the administration of the school, and explaining that the trust agreement did not contemplate the alumni association acting as a “shadow board” with standing to challenge actions taken by the managing board).

²⁵⁷ FREMONT-SMITH, *supra* note 157, at 331, 333.

court may be willing to supplement the “official” enforcement and grant standing to a private party with special interests.²⁵⁸

On balance, the courts have been appropriately conservative in granting standing to parties with a special interest. Accordingly, treating conservation easements as charitable trusts is unlikely to expose holders of easements to harassment by such parties.

The UTC expands the traditional common law rule regarding who has standing to sue to enforce a charitable trust to include the settlor of a charitable trust.²⁵⁹ Professor Ronald Chester explains the reason for this expansion:

²⁵⁸ See Gary, *supra* note 244, at 628. For examples of grants of standing to parties with a special interest, see *Hooker v. The Edes Home*, 579 A.2d 608 (D.C. 1990) (granting standing to elderly indigent widows eligible for admittance to a charitable home for the aged when the board of trustees proposed to close the home and relocate the residents because the widows were members of a small sharply defined class of potential beneficiaries and were challenging whether the trustees’ proposed action was compatible with the settlor’s intent rather than the day-to-day management of the trust); *Kapiolani Park Pres. Soc’y v. Honolulu*, 751 P.2d 1022 (Haw. 1988) (granting standing to members of the public who used a public park to sue to enjoin the lease of a portion of the park for use as a restaurant where the attorney general actively joined in supporting the alleged breach of trust); *In re Trust of Hill*, 509 N.W. 2d 168, 172 (Minn. Ct. App. 1993) (granting standing to sue to enforce a charitable trust to an individual who was both a former trustee of the trust and a descendant of the settlor because such individual was “in a position to understand the purpose and operation of the trust” and the attorney general had elected not to participate in the proceedings); *Paterson v. Paterson Gen. Hosp.* 235 A.2d 487, 495 (N.J. Super. Ct. Ch. Div. 1967) (granting standing to sue to prevent the relocation of a charitable hospital corporation to a nearby township to the city in which the corporation was located and to two individual residents and taxpayers of the city because “[w]hile public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest”). See also Edward C. Halbach, Jr., *Standing To Enforce Trusts: Renewing and Expanding Professor Gaubatz’s 1984 Discussion of Settlor Enforcement*, 62 U. MIAMI L. REV. 713, 721 (2008) (arguing that, based on “the unusually comprehensive and refined, and fundamentally sound, reasoning” of the court in *Hooker*, “[i]f, as has become common in recent years, a conservation easement is granted to a governmental entity or other nonprofit organization to be held upon charitable trust or the equivalent (usually, for tax reasons, perpetually), owners of adjoining or perhaps nearby land, and in some circumstances others, such as downstream land owners, who benefit more than the public generally should be recognized as having special-interest standing [but only] to compel adherence to the easement’s charitable purpose” and not to question the day-to-day management of the easement).

²⁵⁹ See UTC, *supra* note 15, § 405(c) (“The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”); WYO. STAT. ANN. § 4-10-406(c) (same). The traditional rule regarding who has standing to sue to enforce a charitable trust is summarized in the Restatement (Second) of Trusts:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 391.

Charitable trust abuses are not being effectively policed in most jurisdictions because of lax attorney general oversight and restrictive standing rules for “specially interested beneficiaries.” More enforcement certainly is needed, which is one reason for the [grant of standing to settlors]. . . . The grantor is a logical source to provide such additional enforcement because of his particular interest in the observance of the terms of the transfer.²⁶⁰

Pursuant to the UTC settlor standing provision, which has been adopted in Wyoming, the donor of a conservation easement should have standing to sue to enforce the easement.²⁶¹ Of course, easement donors eventually die, and it remains to be seen whether the donor of a conservation easement who has sold or otherwise transferred the encumbered land would have an interest in suing to enforce the easement. Easement donors who have sold or otherwise transferred the encumbered land may be disinclined to expend (or simply may not have) the time and resources required to litigate, or may have other reasons for not wishing to enforce the easement.²⁶²

The End of Perpetuity misconstrues the manner in which the UTC’s grant of standing to the settlor of a charitable trust would apply in the conservation easement context by failing to understand that the “trust” at issue is the restricted grant of the easement rather than the entity holding the easement.²⁶³ As noted above, the “settlor” who should be granted standing to sue to enforce a conservation easement under the UTC is the donor of the easement. The founders of the organization holding the easement, the successors of such founders, the original officers and board members of the organization and their successors, the trustees

²⁶⁰ Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?* 37 REAL PROP. PROB. & TRUST J. 611, 628–29 (2003).

²⁶¹ Both the UTC and Wyoming’s version of the UTC provide that the “settlor” of a “charitable trust” may maintain a proceeding to enforce the trust. See UTC, *supra* note 15, § 405(c); WYO. STAT. ANN. § 4-10-406(c). Both define “settlor” to include a person “who creates . . . a trust.” See UTC, *supra* note 15, § 103(15); WYO. STAT. ANN. § 4-10-103(a)(xviii). The comments to the UTC provide that “the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust.” See UTC, *supra* note 15, § 414 cmt. Accordingly, the donor of a conservation easement should be viewed as the settlor of a charitable trust and should have standing to sue to enforce the easement on that ground. See also *supra* Parts I.A, II.A, and II.B. (explaining in detail why the donation of a conservation easement to a government entity or charitable organization should be viewed as creating a charitable trust or its functional equivalent).

²⁶² The Lowhams, through the Lowham Limited Partnership, donated the easement involved in *Hicks v. Dowd* to the Board of Commissioners. See *supra* note 3. Accordingly, the Lowhams, through the partnership, are the “settlors” of the trust created by the conveyance of the easement and should have standing to sue to enforce the easement on that ground. The Lowhams have, however, declined to become involved in the case for undisclosed reasons.

²⁶³ See *supra* note 261.

past, present, and future of the organization, and anyone who contributed cash or other property to the organization are not “settlers” of the trust created by the gift of a conservation easement.²⁶⁴ One can analogize to a gift of cash to the University of Wyoming to be used for a specific charitable purpose, such as to fund scholarships for students majoring in political science. The donation of the cash to the University should be deemed to create a charitable trust (or its functional equivalent) of which the University should be deemed to be acting as trustee.²⁶⁵ The University should have a duty to administer the trust in accordance with the donor’s specified purpose,²⁶⁶ and, under the UTC, the trust should be enforceable by the donor as “settlor.”²⁶⁷ However, the myriad of other donors to the University, the University’s founders, the successors of such founders, and the past, present, and future officers, board members, or trustees of the University would not be “settlers” of the trust, and would not have standing to sue to enforce the trust on that ground.

In short, granting standing to sue to enforce a conservation easement to the state attorney general, a co-fiduciary, the donor of the easement, and, in certain limited circumstances, a party with a “special interest” is highly unlikely to expose

²⁶⁴ *The End of Perpetuity* asserts that such persons could have standing to sue to enforce a conservation easement donated to a land trust as “settlers.” See *The End of Perpetuity*, *supra* note 4, at 64–67.

²⁶⁵ See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 28 cmt. a (explaining that a donation to a charitable institution to be used for a specific purpose, such as to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is a trustee). In discussing the high-profile lawsuit between Princeton University and the heirs of the donors of a large charitable gift to the University to be used for a specific charitable purpose, Professor Iris Goodwin explains:

Then as now, the common law rule is that, whether the charity is formed as a corporation or as a trust, restricted gifts to a charitable entity are governed by the law of trusts. Thus under the common law, a restricted gift to Princeton places Princeton in the role of trustee with respect to those funds, notwithstanding that Princeton is organized as a corporation. Princeton operated under the same constraints with respect to a restricted gift as would the trustees of a trust. Changing the purpose to which Robertson funds might be applied once they were in Princeton’s hands was not an option for Princeton under the common law.

Iris J. Goodwin, *Ask Not What Your Charity Can Do For You: Robertson v. Princeton Provides Liberal-Democratic Insights Into Cy Pres Reform*, forthcoming in the *Arizona Law Review* and available on SSRN.

²⁶⁶ See UTC, *supra* note 15, § 801 (requiring a trustee to administer the trust in good faith and in accordance with its terms and purposes and the interests of the beneficiaries); WYO. STAT. ANN. § 4-10-801 (same); UTC, *supra* note 15, § 801 cmt. (“This section confirms that the primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.”). See also *American Nat’l Bank v. Miller*, 899 P.2d 1337, 1339 (Wyo. 1995) (“A trustee . . . acts on behalf of both the beneficiaries and the grantor of the trust. A fundamental duty of a trustee is to carry out the terms of the trust. . . . ‘The clearly expressed intention of the settlor should be zealously guarded’” (citing *First Nat’l Bank & Trust Co. v. Brimmer*, 504 P.2d 1367, 1371 (Wyo. 1973))).

²⁶⁷ See *supra* note 261.

easement holders to harassing litigation. Moreover, such grants of standing are necessary to ensure that holders of conservation easements can be held accountable for breaches of their fiduciary duties. Indeed, if not even the attorney general were granted standing, egregious breaches of trust would go unremedied to the detriment of the public and the charitable sector as a whole.²⁶⁸ It would also be unprecedented to exempt the holders of a particular subset of charitable gifts made for specific purposes from the standing rules applicable to all other such gifts simply because some of the holders would prefer that their actions not be “second-guessed” by those charged under the law with protecting the public interest and investment in charitable assets.

As a practical matter, many land trusts may be relieved to learn that the state attorney general has standing to sue to enforce conservation easements. Negligence, malfeasance, and the use of conservation easements for purposes other than those specified by the donors on the part of even just a few holders could undermine the credibility of all holders and reduce public confidence in the use of conservation easements as a land protection tool. A credible threat of enforcement by state attorneys general can be expected to deter this type of behavior. Such a threat can also be expected to significantly reduce the incidence of landowner violations of easements, as well as requests by landowners to substantially modify or terminate easements contrary to donor intent and the public interest.

G. Cy Pres Will Not be a Sword in the Hands of Landowners, Developers, or State Attorneys General

The End of Perpetuity claims that “[i]n the hands of a well-financed legal team the doctrine of *cy pres* could be stood on its head” and become “a sword in the hands of landowners and developers, not just a shield for conservation interests.”²⁶⁹ Although it is the courts that make the final judgment regarding the application of the doctrine of *cy pres*,²⁷⁰ *The End of Perpetuity* asserts that “under the guise of *cy pres* a court may assume authority to do a number of things, whether or not they are consistent with the theory of *cy pres*,”²⁷¹ and that applying charitable trust principles to conservation easements in a sensible and insightful fashion “assumes a judiciary far more knowledgeable, patient, and sympathetic to nuance . . . than is likely to be the case.”²⁷² *The End of Perpetuity* further asserts that “[w]hether the flexibility thus derived from an equitable proceeding should

²⁶⁸ For examples of the important role played by the attorney general in ensuring the enforcement of conservation easements, see *Hicks v. Dowd*, discussed *supra* note 3, and the Myrtle Grove controversy, discussed *supra* notes 131–143.

²⁶⁹ *The End of Perpetuity*, *supra* note 4, at 82.

²⁷⁰ See, e.g., CHESTER, BOGERT & BOGERT, *supra* note 196, § 435 (explaining that the *cy pres* power is vested in the courts); *infra* note 286 (same).

²⁷¹ *The End of Perpetuity*, *supra* note 4, at 81.

²⁷² *Id.* at 78 n. 225.

be more a source of comfort than concern will be more dependent upon the judge assigned to the case than the theory of the doctrine itself.²⁷³ These assertions are untoward, unwarranted, and unsupported.

First, landowners have standing to sue to modify or terminate the conservation easements encumbering their land even in the absence of charitable trust principles.²⁷⁴ In addition, without the protection of charitable trust principles, owners of easement-encumbered land would have a greater likelihood of persuading courts to modify or terminate conservation easements. The real property law doctrines that would likely apply to conservation easements in the absence of charitable trust principles—the doctrines of changed conditions and relative hardship—were developed in the context of private servitudes and are not designed to recognize or protect the public interest in land use restrictions.²⁷⁵ Moreover, when such doctrines apply, there is rarely any payment made to the holder of the extinguished land use restrictions, as there should be when a conservation easement is extinguished to avoid unjustly enriching the owner of the encumbered land at the public's expense.²⁷⁶

Charitable trust principles, on the other hand, provide significant protection of both the public interest and investment in conservation easements. Charitable gifts are particularly favored by the courts and are construed to uphold the donor's charitable purpose whenever possible.²⁷⁷ Indeed, it would be a profound departure from settled precedent for courts to authorize the termination of a conservation easement pursuant to the doctrine of *cy pres* if the easement continued to provide significant benefits to the public. For example, in declining to apply the doctrine

²⁷³ *Id.* at 81.

²⁷⁴ See, e.g., UCEA, *supra* note 14, § 3(a)(1) (providing that an action affecting a conservation easement may be brought by an owner of an interest in the real property burdened by the easement); WYO. STAT. ANN. § 34-1-203(a)(i) (2008) (same).

²⁷⁵ See, e.g., RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11 cmt. a (applying a special set of rules based on the doctrine of *cy pres* to the modification and termination of conservation easements and explaining that, “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes, which are subject to modification and termination under § 7.10 [the property law doctrine of changed conditions]”); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 488 (1984) (noting that the doctrine of relative hardship, which focuses on the conflict between individual landowners, is too narrow to encompass the public interest, which must be considered in the case of conservation servitudes).

²⁷⁶ See RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11 cmt. c (“In other instances where changed conditions lead to termination of servitudes . . . there is seldom an entitlement to damages. The opposite is true with conservation servitudes.”).

²⁷⁷ See, e.g., *Crippled Children's Found. v. Cunningham*, 346 So. 2d 409, 411 (Ala. 1977) (“[C]haritable gifts are viewed with particular favor and every presumption, consistent with the language of the instrument, should be employed to sustain them.”); *Harris v. Georgia Military Acad.*, 146 S.E.2d 913, 915 (Ga. 1966) (“Gifts or trusts for charitable purposes are favorites of the law and the courts . . . [and] courts of equity, it is said, will go to the length of their judicial

of *cy pres* to create a new class of beneficiaries of a charitable trust, the purpose of which was to provide scholarships to needy students attending the University of Wyoming and Casper Community College, the Wyoming Supreme Court explained:

We have found no authority which authorizes a court to make any such change merely deemed desirable. . . . The clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the trust instrument reveals a careful and painstaking expression of the use and purposes to which the settlor's financial accumulations shall be devoted. A settlor must have assurance that his solemn arrangements and instructions will not be subject to the whim or suggested expediency of others after his death.²⁷⁸

A leading treatise on trust law similarly explains:

The line between impossibility and impracticability on the one side, and inconvenience or slight undesirability on the other, may be difficult to draw. Although several of the *cy pres* statutes use the word "impracticable" (and two "inexpedient") as a basis for *cy pres* application . . . , the court will not substitute a new scheme merely because it or the trustee believes it would be a better plan than that which the settlor provided.²⁷⁹

power to sustain such gifts."); *Webb v. Webb*, 172 N.E. 730, 735 (Ill. 1930) ("Gifts to charity have always been looked upon with favor by the courts. Every presumption consistent with the language used will be indulged to sustain them."); *In re Carlson's Estate*, 358 P.2d 669, 671–72 (Kan. 1961) ("[C]haritable trusts, being favorites of the law, are to be upheld wherever possible, and instruments providing for their creation will be liberally construed to carry out the beneficent intention of the donor."); *In re Estate of Homburg*, 697 So. 2d 1154, 1158 (Miss. 1997) ("[C]haritable trusts are favored and should be enforced where possible."); *Board of Trustees of Univ. of N. C. v. Unknown Heirs*, 319 S.E.2d 239, 242 (N.C. 1984) ("It is a well recognized principle that gifts and trusts for charities are highly favored by the courts. Thus, the donor's intentions are effectuated by the most liberal rules of construction permitted."); *Mercy Hosp. of Williston v. Stillwell*, 358 N.W.2d 506, 509 (N.D. 1984) ("It is well recognized that charitable gifts are favored by the law and by the courts. . . . Courts will give effect to charitable gifts where it is possible to do so consistent with recognized rules of law."); *Maxcy v. City of Oshkosh*, 128 N.W. 899, 909 (Wis. 1910) ("Courts here, as anciently, look with favor upon all donations to charitable uses, and give effect to them where it is possible to do so consistent with rules of law, and to that end the most liberal rules the nature of the case will admit of, within the limits of ordinary chancery jurisdiction, will be resorted to if necessary."); *Bentley v. Whitney*, 281 P. 188, 190 (Wyo. 1929) ("The provisions of instruments creating charitable trusts are favorably regarded by the courts and are generally construed with the utmost liberality in order to carry out the laudable purpose of the donor.").

²⁷⁸ *First Nat'l Bank & Trust Co. of Wyoming v. Brimmer*, 504 P.2d 1367, 1371 (Wyo. 1973).

²⁷⁹ CHESTER, BOGERT & BOGERT, *supra* note 196, § 439. *See also, e.g., In re Estes Estate*, 523 N.W.2d 863, 870 (Mich. Ct. App. 1994) ("While we have no doubt that [the trustee's] proposed uses for the funds are benevolent, they contradict [the settlor's] specific purpose for the trust and,

Accordingly, contrary to the assertion in *The End of Perpetuity*, it is extremely unlikely that a court, “under the guise of *cy pres*,” would “assume authority to do a number of things,” such as bow to the request of a landowner to terminate a conservation easement to allow for the development of the encumbered land. Rather, given the traditional conservatism of the courts in applying the doctrine of *cy pres*, as well as the high stakes involved in the termination of a conservation easement,²⁸⁰ courts are likely to err on the side of refusing to apply the doctrine absent compelling evidence that the conservation purpose of an easement has become impossible or impracticable.²⁸¹ Moreover, in the event circumstances warrant the termination of a conservation easement pursuant to the doctrine of *cy pres*, the public’s interest and investment in the easement would be protected. In applying the doctrine the court would require the payment of an appropriate share of the proceeds from the subsequent sale or development of the land to the

absent compelling evidence that this purpose is obsolete, impracticable, or inappropriate, we will not condone a release.”); *In re Estate of Wilson*, 452 N.E.2d 1228, 1233 (N.Y. 1983) (“The court, of course, cannot invoke its *cy pres* power without first determining that the testator’s specific charitable purpose is no longer capable of being performed by the trust.”).

²⁸⁰ The stakes involved in the termination of a conservation easement are high because termination will generally result in the development and more intensive use of the underlying land and, thus, the substantially irreversible destruction of the land’s unique ecological, aesthetic, or historic values.

²⁸¹ Courts are likely to be conservative in their application of the doctrine of *cy pres* to terminate conservation easements even in jurisdictions that have added “wasteful” to the *cy pres* standard. The wasteful standard was added to the UTC primarily to deal with the problem of surplus funds. *See* English, *supra* note 191, at 179 n.164 (“Cases of waste normally involve situations where the funds allocated to the particular charitable scheme far exceed what is needed.”). The Restatement (Third) of Trusts, which also adds wasteful to the *cy pres* standard, explains:

Another type of case appropriate to the application of *cy pres* . . . is a situation in which the amount of property held in the trust exceeds what is needed for the particular charitable purpose to such an extent that the continued expenditure of all of the funds for that purpose, although possible to do, would be wasteful. (The term “wasteful” is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely “better use” will suffice.)

RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. c(1). Given the purpose of adding wasteful to the *cy pres* standard, the traditional conservatism of the courts in applying the doctrine of *cy pres*, the high stakes involved in the termination of a conservation easement, and the deference that should be accorded to the intent of donors so as not to chill future conservation easement donations, courts should not apply the wasteful standard to terminate conservation easements simply because a “better use” could arguably be made of the protected land or the holder’s share of the proceeds from extinguishment of the easement. Of course, some government entities and land trusts might prefer to be able to terminate conservation easements when purportedly “better” conservation or other opportunities come along. If that is the case, however, they should not be acquiring perpetual conservation easements. Rather, they should be negotiating in good faith with landowners for short-term contracts, management agreements, terminable easements, or other temporary means of the land protection. *See supra* notes 93 and 94 and accompanying text (discussing terminable conservation easements).

holder of the easement (on behalf of the public) and retain jurisdiction of the matter until the holder reports that the proceeds have been expended toward the accomplishment of similar conservation purposes.²⁸²

The End of Perpetuity also conjures up the specter of development-minded attorneys general filing suit to modify or terminate easements so that developers can build shopping centers that will strengthen the tax base and reduce unemployment.²⁸³ While one could hypothesize without end about the potential misuse of authority, the actions of state attorneys general to date indicate that their inclination is to defend, rather than attempt to terminate, conservation easements.²⁸⁴ Moreover, state attorneys general are charged with protecting the public interest in charitable assets and they have fulfilled this role for centuries in all manner of charitable endeavors. They also take seriously their obligation to ensure that the intent of charitable donors is honored because they recognize that disregarding donor intent would chill future charitable donations, which would be contrary to the public interest.²⁸⁵ Thus, while state attorneys general may not always have the resources needed to assiduously police the substantial modification and termination of conservation easements, there is no credible support for the assertion that they will file suits to modify or terminate conservation easements in favor of development interests and in contravention of donor intent. In addition,

²⁸² See, e.g., *Perpetuity and Beyond*, *supra* note 18, at 681–82 (explaining the doctrine of *cy pres* and how it should apply in the conservation easement context).

²⁸³ See *The End of Perpetuity*, *supra* note 4, at 80.

²⁸⁴ See *supra* note 19 and accompanying text.

²⁸⁵ See, e.g., *supra* note 101 and accompanying text (describing the amici brief filed in *Madigan* in which forty-five states emphasized the importance of honoring the intent of charitable donors). In a case decided by the Montana Supreme Court in April of 2008, the Montana State Attorney General (appellant in the case) and eleven state attorneys general who filed an amici brief similarly emphasized the importance of honoring donor intent. See *In re The Charles M. Bair Family Trust*, 183 P3d 61 (Mont. 2008). *Bair* involved a charitable trust created for the primary purpose of establishing and maintaining a family museum. *Id.* at 72. The Montana Supreme Court held that the board of advisors of the trust had breached its fiduciary duty by not using principal and income from the trust necessary to establish and maintain the museum. *Id.* at 74–76. In their amici brief, eleven states acknowledged that state attorneys general are both authorized and obligated under state law to enforce the intent of charitable donors. *In re The Charles M. Bair Family Trust*, Brief of Amici Curiae Michigan et al. 2 (No. DA 06-0586, Dec. 22, 2006). The states explained:

[A]merican charity law has as its foremost goal the creation and preservation of a climate conducive to robust philanthropic activity for the benefit of the public as a whole. This goal requires the continued confidence of donors that their gifts will be used according to their charitable intentions.

Id. at 3. The states also warned of the “dangerous practical downside to repudiating donors’ legitimate expectations”—it would discourage charitable giving to the detriment of the public as a whole. *Id.* at 17–19. *Madigan* and *Bair* and the amici briefs filed in those cases illustrate that state attorneys general view themselves as having a significant role in the regulation of charities and, in particular, in ensuring that charitable organizations and other trustees administer the assets they hold on behalf of the public in accordance with the purposes specified by charitable donors.

even if such a suit were filed, the authority to apply the doctrine of *cy pres* is vested in the courts rather than the attorney general,²⁸⁶ and for the reasons noted above, it would be a profound departure from settled precedent for a court to authorize the termination of a conservation easement (or the modification of an easement in contravention of its stated purpose, such as to permit the subdivision and development of the land), if the easement continued to provide significant benefits to the public.

In short, *The End of Perpetuity's* assertion that state attorneys general and the courts will profoundly misuse the doctrine of *cy pres* to modify and terminate conservation easements in favor of development interests is both remarkable and unsupported, and such an assertion should clearly not drive the development of the law or policy in this context.

H. Federal Constraints Do Not Deter Improper Modifications or Terminations

The End of Perpetuity argues that, while courts could find sufficient legal basis to apply charitable trust principles to conservation easements, they nonetheless should choose not to because such principles are neither needed nor prudent.²⁸⁷ It is asserted that the constraints imposed by federal tax law on the operation of nonprofit organizations in general, and on holders of tax-deductible conservation easements in particular, “constitute substantial remedies and disincentives to the improper termination or modification of conservation easements.”²⁸⁸ As explained below, however, federal tax law constraints operate primarily to ensure that charitable organizations use their assets for charitable purposes and refrain from conferring economic benefits on private parties. Those constraints were not intended to and do not ensure that government entities and charitable organizations comply with their fiduciary obligations under state law to (i) administer the charitable gifts they solicit and accept in accordance with the gifts’ stated terms and purposes, and (ii) absent express or implied powers, deviate from those stated terms or purposes only with court approval obtained in administrative deviation or *cy pres* proceedings. State attorneys general and state courts are the proper enforcers of such state law fiduciary obligations, not the Internal Revenue Service (“IRS”).

²⁸⁶ See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. d (“The *cy pres* power is vested in the court, not in the trustee or the Attorney General, who is, however, a necessary party entitled to notice of the proceeding.”); RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 399, Reporter’s Notes cmt. d (“In a proceeding for the application of the *cy pres* doctrine, the Attorney General is a necessary party. But it is for the court and not the Attorney General to determine what application should be made.”).

²⁸⁷ See *The End of Perpetuity*, *supra* note 4, at 62.

²⁸⁸ *Id.* at 56.

Indeed, *The End of Perpetuity's* claim that the constraints imposed by federal tax law constitute substantial remedies and disincentives to “improper” terminations or modifications is colorable only if one has accepted the article’s implicit assertion that conservation easements are unrestricted charitable gifts that can be liquidated in whole or in part by their government or land trust holders to fund other land conservation activities or even increase the holders’ operating budgets or stewardship endowments. If one recognizes that government entities and charitable organizations are bound by state law to abide by both the terms and purposes of the charitable gifts they solicit and accept, it is clear that federal tax law constraints cannot be relied upon to ensure that such entities comply with these state law fiduciary obligations.

The federal tax law prohibitions on private benefit and private inurement and the organizational requirements for public charities operate primarily to (i) prohibit charitable organizations from conferring economic benefits on private parties,²⁸⁹ and (ii) ensure that charitable organizations use their assets for charitable purposes.²⁹⁰ A land trust that agrees to terminate a perpetual conservation

²⁸⁹ The private benefit prohibition addresses transfers of value by charities to non-charities absent receipt in exchange of cash, property, or services of at least equal value. See Joint Committee on Taxation, *Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations* 5 (JCX-29-05), April 19, 2005, available at <http://www.house.gov/jct/x-29-05.pdf> (last visited Nov. 20, 2008) [hereinafter *JCT Charities Report*]. Private inurement, a narrower concept, arises when a person in a position to influence the decisions of an exempt organization (an “insider”) receives benefits from the organization disproportionate to her contribution to the organization, such as unreasonable compensation. *Id.* at 52–53. Private inurement can be viewed as a subset of private benefit. *Id.* at 53. The private inurement prohibition does not prohibit transactions between a tax-exempt organization and those who have a close relationship to it. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 486 (8th ed. 2003). Instead, such transactions are tested against a standard of “reasonableness,” which calls for a roughly equal exchange of benefits between the parties and looks to how comparable charitable organizations, acting prudently, conduct their affairs. *Id.* Both private inurement and private benefit may occur in many different forms, including, for example, the payment of excessive compensation, the payment of excessive rent, the making of inadequately secured loans, and, important in the conservation easement modification and termination context, the receipt of less than fair market value on the sale or exchange of property. See *JCT Charities Report, supra*, at 53. Historically, the only sanction for a private inurement violation was revocation of the charitable organization’s tax exempt status. *Id.* at 38. However, the intermediate sanctions rules enacted in 1996 permit the IRS to instead impose excise taxes on disqualified persons who receive excess benefits and, in certain circumstances, on organization managers who approved the transaction. *Id.* An “excess benefit transaction” is a transaction in which an economic benefit is provided by an applicable tax-exempt organization, directly or indirectly, to or for the use of a disqualified person, and the value of the economic benefit provided by the organization exceeds the value of the consideration (including the performance of services) received for providing such benefit. See Internal Revenue Service, 2007 Instructions for Form 990 and Form 990-EZ 16 (2007), available at www.irs.gov/pub/irs-pdf/i990-ez.pdf (last visited Nov. 20, 2008).

²⁹⁰ Under the organizational test, an organization’s activities must further exempt purposes and the organization’s assets must be dedicated to exempt purposes in perpetuity. *JCT Charities Report, supra* note 289, at 48–49. Satisfaction of the organizational test may be achieved by adopting certain

easement or amend it in a manner that transfers valuable development or use rights to the owner of the encumbered land without receiving cash or other compensation of equivalent value in exchange would presumably violate the private benefit or private inurement prohibition.²⁹¹ On the other hand, it is not clear that a land trust would violate the private benefit, private inurement, or organizational requirements if it agreed to terminate a conservation easement, or modify it in a manner contrary to its terms or purpose, provided it received appropriate compensation and used that compensation in a manner consistent with its general charitable mission.²⁹² Accordingly, even assuming the IRS had sufficient resources to carefully monitor the activities of the over 1,700 land trusts operating across the nation,²⁹³ these federal tax law requirements cannot be relied upon to ensure that land trusts administer the conservation easements they solicit and accept in accordance with the easements' stated terms and purposes. Rather, state attorneys general and state courts are the proper enforcers of such state law fiduciary obligations.²⁹⁴

formal requirements in the founding documents of the organization. *Id.* at 48. For example, an organization must limit its purpose to one or more exempt purposes and must not be permitted to engage in activities that do not further exempt purposes (except to an insubstantial extent). *Id.*

²⁹¹ See *supra* note 289 (explaining that private inurement and private benefit can occur when a charitable organization receives less than fair market value on the sale or exchange of its property). See also *LTA Amendment Report*, *supra* note 44, at 25–26 (“[A] land trust cannot participate in an amendment that conveys either a net financial gain (more than in *incidental private benefit*) to any party or any measurable benefit at all to a board or staff member or other land trust ‘insider’ (other than fair compensation for services). A land trust that does so risks losing its tax-exempt status or suffering intermediate sanctions.”) (emphasis in original).

²⁹² Although private inurement and private benefit can involve noneconomic benefits (see, e.g., Treas. Reg. § 1.501(c)(3)–1(d)(1)(iii), Example 1), the private inurement, private benefit, and organizational requirements were not designed to ensure that charitable organizations abide by their state law fiduciary obligation to administer the charitable gifts they solicit and accept in accordance with the gifts' stated terms and purposes.

²⁹³ See Steven T. Miller, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, Remarks at the Georgetown Law Center Seminar on Representing and Managing Tax-Exempt Organizations (Apr. 24, 2008) (transcript on file with authors), available at <http://philanthropy.com/documents/v20/i14/gtown2008.pdf> (last visited Nov. 20, 2008) (noting that staffing at the IRS has remained fairly constant while the nonprofit sector has experienced dramatic growth—i.e., in 1998 there were approximately 650,000 § 501(c)(3) organizations with \$990 billion in gross receipts, and by early 2008 there were 1.2 million § 501(c)(3) organizations and their gross receipts had more than doubled).

²⁹⁴ Most state constitutions prohibit government entities from transferring their assets to private persons without adequate consideration. See, e.g., 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW § 21.07, at 21–25 (“Local government property cannot be conveyed to a private party without adequate consideration, for to do so would constitute an improper gift of public property or the granting of a subsidy contrary to state constitutional constraints.”). Like the private benefit and private inurement prohibitions, however, these constitutional prohibitions do not ensure that government entities administer the conservation easements they solicit and accept in accordance with the easements' stated terms and purposes. If all government holders were required to do is avoid running afoul of the constitutional prohibition, they would be free to sell, trade, release, extinguish, or otherwise dispose of conservation easements in whole or in part as they might

The requirement that charitable organizations annually report their conservation easement modification or termination activities to the IRS similarly does not ensure that land trusts will comply with their state law fiduciary obligations.²⁹⁵ This is a reporting requirement; it does not authorize the IRS to prevent or cure a land trust's violation of its state law fiduciary obligations.²⁹⁶ Moreover, as acknowledged in *The End of Perpetuity*, this reporting requirement, as well as the private benefit, private inurement, and organizational requirements, are not applicable to government entities, and government entities hold thousands of perpetual conservation easements.²⁹⁷

see fit, provided only that they received appropriate compensation and used that compensation consistent with their broad public missions. As with land trusts, the administration of conservation easements in accordance with their stated terms and purposes depends on a government entity's fiduciary obligations under state law.

²⁹⁵ Charitable organizations are required to file Form 990 (Return of Organization Exempt from Income Tax) with the IRS annually. Since 2006, charitable organizations holding conservation easements have been required to attach a statement to Schedule A of Form 990 containing, *inter alia*, the following information (i) the number of easements modified, sold, transferred, released, or terminated during the year and the acreage of those easements; (ii) the reason for the modification, sale, transfer, release, or termination; and (iii) the identity of the recipient (if any) of the benefit of such modification, sale, transfer, release, or termination, and a statement regarding whether such recipient was a qualified organization as defined in Internal Revenue Code § 170(h)(3) and the related Treasury Regulations at the time of transfer. See Internal Revenue Service, 2006 Instructions for Schedule A to Form 990 (2006) (on file with authors).

²⁹⁶ The effectiveness of this requirement even as an information gathering tool may depend largely on voluntary compliance by the organizations holding conservation easements. This requirement does indicate, however, that the IRS is concerned about the improper modification and termination of tax-deductible conservation easements. See also *supra* note 159 (discussing the Staff of the Senate Finance Committee's concerns regarding improper conservation easement modifications).

²⁹⁷ See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 8 ("Hundreds of public agencies across the country also hold conservation easements. The total number of easements held by federal, state, and local agencies has not been documented, although a 2004 survey by American Farmland Trust counted 9,453 easements on nearly 1.5 million acres of farmland, held primarily by state and local agencies."). *The End of Perpetuity* recommends changing federal tax law to apply the private benefit, private inurement, and reporting requirements to federal, state, and local government entities. *The End of Perpetuity*, *supra* note 4, at 83. Even if such changes were determined to be legally permissible, for the reasons previously discussed they would not ensure that government entities comply with their state law fiduciary obligations. *The End of Perpetuity's* alternative recommendation—that the law be changed to eliminate government entities as qualified organizations eligible to receive tax-deductible conservation easements (see *id.*)—is similarly unwise. Such a change would severely curtail the well-respected easement acquisition programs of many government entities, including the Maryland Environmental Trust (see www.dnr.state.md.us/met/ (last visited Nov. 20, 2008)), the Virginia Outdoors Foundation (see www.virginiaoutdoorsfoundation.org/ (last visited Nov. 20, 2008)), and the City of Boulder, Colorado (see http://www.ci.boulder.co.us/index.php?option=com_content&task=view&id=2985&Itemid=1076 (last visited Nov. 20, 2008)). Such a change would also do nothing to ensure that the remaining class of eligible donees of tax-deductible conservation easements—charitable organizations (primarily land trusts)—comply with their state law fiduciary obligations.

Finally, the Treasury Regulation requirement that an “eligible donee” of a tax-deductible conservation easement “have a commitment to protect the conservation purposes of the donation”²⁹⁸ also does not ensure that holders of conservation easements will comply with their state law fiduciary obligations. The Treasury Regulations specifically provide that a conservation group has the requisite commitment if the group is organized or operated primarily or substantially for one of the conservation purposes enumerated in § 170(h) of the Internal Revenue Code—as virtually all land trusts are.²⁹⁹ Moreover, even if it were determined that a land trust or government entity did not have the requisite commitment as a result of its amendment or termination activities and, thus, that the entity was no longer an eligible donee, such a determination would not ensure that the entity administered its existing easements in accordance with their stated terms and purposes. Rather, such a determination would merely preclude the entity from acquiring additional tax-deductible conservation easements in the future.³⁰⁰

The real check that federal tax law places on the conservation easement amendment and termination activities of both land trusts and government entities depends on state charitable trust law. Congress is free to condition the receipt of federal tax incentives upon the conveyance of a particular form of charitable gift,³⁰¹ and in the conservation easement context, the gift must be in the form of a restricted charitable gift or charitable trust. That is, the easement must, *inter alia*, be

- (i) conveyed as a charitable gift to a government entity or charitable organization to be held and enforced for the benefit of the public for a specific charitable purpose—the protection of the particular land encumbered by the easement for one or more of the conservation purposes enumerated in the Internal Revenue Code “in perpetuity”;³⁰²

²⁹⁸ Treasury Regulation § 1.170A-14(c)(1).

²⁹⁹ *See id.*

³⁰⁰ The Treasury Regulations also ambiguously provide that an eligible donee “must have the resources to enforce the [conservation easement] restrictions” but “need not set aside funds” to do so. *Id.* Again, even if it were determined that a land trust or government entity did not have the requisite resources as a result of its amendment or termination activities, and, thus, was no longer an eligible donee, such a determination would not ensure that the entity administered its existing easements in accordance with their stated terms and purposes.

³⁰¹ *See Gillespie v. Comm’r*, 75 T.C. 374, 378–79 (1980) (ruling that whether a particular transfer qualifies for a federal estate tax charitable deduction is a matter of federal concern, and Congress may prescribe requirements for tax-deductible gifts to charity).

³⁰² *See generally* I.R.C. § 170(h); Treas. Reg. § 1.170A-14. A tax-deductible conservation easement must be “granted in perpetuity” and its conservation purpose must be “protected in perpetuity.” *See* I.R.C. §§ 170(h)(1)(C), (2)(C), (5)(A). The conservation purposes enumerated

(ii) expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement;³⁰³ and

(iii) extinguishable by the holder only in what essentially is a *cy pres* proceeding—in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes.³⁰⁴

The interest in the property retained by the easement donor must also be subject to legally enforceable restrictions that will prevent any uses of the property that are inconsistent with the conservation purposes of the easement.³⁰⁵ And, at the time of the donation, the possibility that the conservation easement will be “defeated” by the performance of some act or the happening of some event must be so remote as to be negligible.³⁰⁶ To satisfy these various requirements, most conservation easement deeds expressly provide, among other things, that the easement is granted in perpetuity and can be transferred or extinguished only in the manner described above.³⁰⁷

in the Internal Revenue Code are (i) protection of open space, including farmland and forestland; (ii) protection of wildlife habitat; (iii) historic preservation; and (iv) protection of land for public recreation or education. *See id.* § 170(h)(4). For a history and explanation of Internal Revenue Code § 170(h), see *Tax Incentives*, *supra* note 42, at 10–17.

³⁰³ *See* Treas. Reg. § 1.170A-14(c)(2) (“A deduction shall be allowed for . . . [the donation of a conservation easement] only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement . . . whether or not for consideration, unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee . . .”).

³⁰⁴ *See id.* § 1.170A-14(g)(6); *see also* I.R.S. Priv. Lt. Rul. 200836014 (June 3, 2008) (providing that the easement at issue met the requirements of Treas. Reg. § 1.170A-14(g)(6) because it “provides for no means to extinguish the restrictions other than by judicial proceeding and all proceeds received by the Donee are to be used in a manner consistent with the original conservation purposes of the Easement”). For a discussion of how the donee’s share of the proceeds should be calculated upon extinguishment of a conservation easement, see *Perpetuity and Beyond*, *supra* note 18, at 682; *Condemning Conservation Easements*, *supra* note 61, at 1933–59.

³⁰⁵ *See* Treas. Reg. § 1.170A-14(g)(1).

³⁰⁶ *See id.* §§ 1.170-1(e), -14(g)(3).

³⁰⁷ *See, e.g.*, Lowham Easement, *supra* note 8, at 8 (restriction on transfer provision); *id.* at 9 (extinguishment and perpetuity provisions). *The End of Perpetuity* dismisses the federal tax law requirements as ineffectual. *See The End of Perpetuity*, *supra* note 4, at 46 (“Of course . . . even though a conservation easement meets all of these requirements, that will not prevent the parties from ignoring these requirements and terminating or modifying an easement as they see fit.”). As the Myrtle Grove controversy, the Wal-Mart controversy, and *Hicks v. Dowd* illustrate, however,

It is clear from both the foregoing requirements and the legislative history to Internal Revenue Code § 170(h) that neither Congress nor the Treasury Department intended that government and nonprofit holders would be able to substantially modify or terminate tax-deductible perpetual conservation easements “on their own” and as they might “see fit” from time to time.³⁰⁸ As previously discussed, however, the authority of the IRS to require that holders enforce conservation easements consistent with their terms and stated purposes over the long term is uncertain.³⁰⁹ Accordingly, in conditioning deductibility on

landowners and holders of easements ignore these requirements, which are consistent with state charitable trust law, at their peril. Moreover, to the extent land trusts advocate for an interpretation of state law that would render these federal tax law requirements ineffectual (as does *The End of Perpetuity*), they put at significant risk the federal tax benefits provided to conservation easement donors.

³⁰⁸ For example, the Senate Report discussing § 170(h) provides:

By requiring that the conservation purpose be protected in perpetuity, the committee intends that the perpetual restrictions must be enforceable by the donee organization (and successors in interest) against all other parties in interest (including successors in interest)

. . . The requirement that the conservation purpose be protected in perpetuity also is intended to limit deductible contributions to those transfers which require that the donee (or successor in interest) hold the conservation easement . . . exclusively for conservation purposes (i.e., that [the easement] not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction . . . exclusively for conservation purposes).

See S. Rep. No. 96-1007, at 605–06 (1980).

³⁰⁹ Stephen J. Small, one of the principal authors of the Treasury Regulations interpreting Internal Revenue Code § 170(h), published a treatise on the federal tax laws relating to conservation easements in 1986. See SMALL, *supra* note 254. In that treatise Small explains that the IRS’s authority may not extend far enough to require that at some distant point in the future easements be extinguished only in the context of judicial proceeding, as opposed to by mutual consent of the landowner and the donee organization. *Id.* at 16-4, -5. The IRS’s concern, he notes, is whether the gift qualifies for a deduction at the time it is made, and not what tax, civil, or criminal liabilities ought to be imposed if something unexpected happens in two or twenty years. *Id.* at 16-5. If the highest court in a state were to determine that holders of perpetual conservation easements are free to simply agree with the owners of the encumbered land to release, extinguish, or terminate the easements, in whole or in part, regardless of the easements’ terms and the state’s charitable trust laws, the IRS could take the position that conservation easement donations in the state are no longer eligible for federal tax incentives. In such a case, it would be clear at the time of donation that a conservation easement could not comply with federal tax law requirements regardless of its terms. And if a government entity or land trust agreed to substantially modify or terminate a conservation easement in contravention of the “restriction on transfer,” “extinguishment,” and other federal tax law requirements, the IRS could take the position that conservation easements donated to that holder are no longer eligible for federal tax incentives because there would be no assurance that the conservation purposes of such easements would be “protected in perpetuity” as is required under Internal Revenue Code § 170(h)(5)(A). Again, however, neither determination would ensure that government entities or land trusts administer their existing easements in accordance with their stated terms and purposes. Rather, such determinations would merely preclude the affected entities from acquiring additional tax-deductible conservation easements in the future.

the eligibility requirements noted above, Congress and the Treasury Department must have been relying on state charitable trust law to ensure that, over time, conservation easements would be enforced in accordance with their stated terms and purposes, and terminated in whole or in part only in judicial *cy pres* proceedings.³¹⁰

Reliance on the states for the enforcement of perpetual conservation easements over the long term is appropriate. As explained by the Panel on Nonprofits in its report to Congress, the regulation of the behavior of charitable fiduciaries is and should remain principally a state, rather than a federal, function because (i) state judges and attorneys general have the greatest expertise in disputes involving corporate and trust governance and fiduciary responsibilities and (ii) it is state courts, rather than the Tax Court or the IRS, that possess the broad range of equitable powers necessary to protect assets dedicated to charitable purposes.³¹¹

As a final note, it bears comment that the argument made in *The End of Perpetuity* cannot be limited, as a matter of logic, to conservation easements and land trusts. *The End of Perpetuity's* basic argument is that charitable trust rules are inconvenient, costly, and cumbersome and federal tax laws alone impose sufficient constraints on charitable organizations. If that argument were persuasive as to charitable gifts of conservation easements made to land trusts, it would be similarly persuasive as applied to any gift made to any charitable organization to be used for

³¹⁰ In discussing the “restriction on transfer” requirement, Stephen J. Small notes that, “although the law in many states would permit interested parties to step in and sue to prevent a future transfer [of a conservation easement] . . . contrary to the original intent of the donor,” requiring that the instrument of conveyance prohibit future transfers except to another government entity or charitable organization that agrees to continue to enforce the easement “provide[s] a better legal basis for any future litigation to prevent impermissible transfers.” See SMALL, *supra* note 254, at 3–6. And in explaining the “extinguishment” requirement, Small notes that such provision represents a recognition by the IRS that changes in economic and natural conditions may make continuing to protect the encumbered land for conservation purposes impossible or impractical, and that in such circumstance the easement can be extinguished by judicial proceedings, the property sold or exchanged, and the holder’s share of the proceeds used for similar conservation purposes. *Id.* at 16–4. He further notes:

To those who suggest [the judicial proceeding required by the Treasury regulations] may be a cumbersome way to deal with the problem [of extinguishment], I would respond that these restrictions are supposed to be perpetual in the first place, and the decision to terminate them should not be made solely by interested parties. With the decision-making process pushed into a court of law, the legal tension created by such judicial review will generally tend to create a fair result.

Id.

³¹¹ See *Supplement to Nonprofit Report*, *supra* note 234, at 28–29. The report explains that state courts may order accountings, remove and appoint trustees and directors, dissolve the charitable entity, force fiduciaries to restore losses caused by breach of their duties, and enjoin trustees from further wrongdoing, and that neither the IRS nor the Tax Court possesses the same broad equitable powers over the actions of charitable fiduciaries. See *id.* at 28.

a specific purpose (including gifts of cash, personal property, and fee title to land). That, of course, would render donors' carefully wrought requirements as to how their gifts are to be used unenforceable, and reverse hundreds of years of precedent with regard to the administration of charitable gifts.

I. Donor Motivations

The End of Perpetuity acknowledges that conservation easements are conveyed in the form of charitable trusts, stating

a court could find that a conservation easement is granted subject to the "restriction" that the terms of the easement be enforced in perpetuity for the benefit of the public. This would seem to be the essence of the requirements of the Code for deductible easements and consistent with the terms of most easements. Such intent also constitutes the essence of what it takes to create a charitable trust.³¹²

The article then asserts, however,

these 'restrictions' are not imposed on the donation unilaterally by the donor. They are required by federal tax law. Accordingly, one can argue about whether the donor really made a classic restricted charitable gift, imposing the donor's own preferences and restrictions on the land trust, or whether the donor simply sought to follow the requirements of the tax code to be eligible to claim a charitable donation.³¹³

There is, however, no justification for distinguishing conservation easements from other forms of restricted charitable gifts or charitable trusts on this ground. First, there is no evidence that landowners donate conservation easements designed to protect the particular land encumbered by the easement in perpetuity solely because of the requirements under federal tax law, or that absent such requirements landowners would be willing to donate easements that holders were free to liquidate, in whole or in part, as they might see fit from time to time. In fact, the evidence is to the contrary. As previously noted, surveys indicate that many landowners donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved.³¹⁴ In addition, the promises of

³¹² *The End of Perpetuity*, *supra* note 4, at 74.

³¹³ *Id.*

³¹⁴ See *supra* note 42 and accompanying text.

permanent protection of cherished land that land trusts make to prospective easement grantors strongly suggest that such protection is a significant factor motivating easement donations.³¹⁵

More importantly, it is not necessary for courts to engage in the difficult (if not impossible) task of attempting, years after the donation of a conservation easement, to ascertain and weigh the various factors that may have motivated the donation or the form in which it was made. Courts do not attempt to tease out the various factors that motivate the creation of charitable trusts in other contexts, and they should not do so here.³¹⁶ Whether the donor of a tax-deductible conservation easement conveyed the easement in a form that created a charitable trust because he wanted tax benefits, because he actually cared about the perpetual protection of the land, because he wanted to create a memorial to himself and his family, or, as is likely in most cases, because he was motivated by some combination of these and other factors, should be irrelevant—the donor's intent to convey the easement in a form that creates a charitable trust is clear from the terms of the easement deed and that is the only evidence that should matter.³¹⁷

Even the hypothetical easement donor who is motivated solely by tax incentives cannot be said to lack the intent to create a charitable trust. Such a donor must summon the requisite intent and express it by conveying his easement in a form that creates a charitable trust to receive the tax benefits he desires. And Congress requires that donors convey tax-deductible easements in this form to ensure that the public interest and investment in such easements will be appropriately protected.

Indeed, followed to its logical extreme, *The End of Perpetuity's* argument would render all conveyances made to comply with federal tax law requirements,

³¹⁵ See *supra* notes 25–40 and accompanying text.

³¹⁶ See, e.g., RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 368 cmt. d (“If the purposes to which the property is by the terms of the trust to be devoted are charitable purposes, the motive of the settlor in creating the trust is immaterial. Thus, if a testator leaves property upon trust to establish an educational institution, the trust is charitable although by the terms of the trust the institution is to be called by the name of the testator, and although his motive in creating the charitable trust was to acquire fame for himself rather than to promote education. Even if the motive of the testator in disposing of his property is to spite his heirs, the trust is none the less a charitable trust if the purposes are charitable.”); GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 366 (West 2008) (“It is immaterial what state of mind in the settlor induced him to transfer the property. He may have founded the trust solely to satisfy his family pride or for self-glorification, in order to emulate and rival a neighbor's bounty, or to establish a memorial and cause future generations to remember him and his family. The courts are not concerned with these incidental psychic or sentimental advantages to the settlor or his family. They should, and generally do, direct their attention merely to the question whether the net result of the trust in operation will be to advance some substantial public interest.”).

³¹⁷ See *supra* note 89 and accompanying text (explaining that the parties' intent must generally be ascertained from the language of the instrument itself).

such as those creating charitable remainder trusts or charitable lead trusts,³¹⁸ unenforceable under state law. After all, the argument could always be made that the grantors of such trusts did not really intend to make the conveyances in the form that they were made; they just did so to satisfy the requirements of the tax code. That argument is simply untenable. There also is no question that such trusts are enforceable under state law.³¹⁹

J. Purchased and Exacted Conservation Easements

The End of Perpetuity also argues that conservation easements donated as charitable gifts should be exempted from the application of charitable trust principles because some conservation easements are purchased for their full value, some are exacted as part of development approval processes, and some are acquired in the context of mitigation.³²⁰ But the fact that some conservation easements are not conveyed in whole or in part as charitable gifts is not a justification for permitting government or land trust holders to avoid their fiduciary obligations with regard to those that are. Indeed, the same argument could be made with

³¹⁸ In general, a charitable remainder trust is a trust that provides for distributions to one or more noncharitable beneficiaries for life or a term of years, followed by a charitable remainder interest. In a charitable lead trust, the charitable interest precedes the distribution of the remainder to private individuals. The structure and the details of these split-interest trusts are usually determined by the tax objectives of the settlor and the associated requirements of the federal income and transfer tax provisions. See Halbach, *supra* note 258, at 732. In fact, the IRS provides numerous sample forms for such trusts. For just a small sampling, see, e.g., Rev. Proc. 2007-45, 2007-29 I.R.B. 89 (inter vivos charitable lead annuity trusts); Rev. Proc. 2007-46, 2007-29 I.R.B. 102 (testamentary charitable lead annuity trusts); Rev. Proc. 2005-53, 2005-34 I.R.B. 339 (inter vivos charitable remainder unitrust for a term of years); Rev. Proc. 2005-54, 2005-34 I.R.B. 353 (inter vivos charitable remainder unitrust with consecutive interests for two measuring lives).

³¹⁹ See, e.g., Halbach, *supra* note 258, at 732 (explaining that the charitable and private interests in charitable remainder and charitable lead trusts are not only enforceable under state law, they are also entitled to protection against the adverse effects of trustee misconduct, such as a trustee's breach of its fiduciary duty of impartiality in making investment decisions). As in the charitable remainder and charitable lead trust context, to facilitate compliance, enforcement, and consistency in interpretation, the Treasury Department should develop sample conservation easement provisions that satisfy the requirements of Internal Revenue Code § 170(h) and the Treasury Regulations interpreting that section. Such provisions could address, for example, the circumstances under which a tax-deductible conservation easement can be amended, transferred, or extinguished; the calculation and division of proceeds upon extinguishment; and the holder's use of its share of the proceeds upon extinguishment.

³²⁰ See *The End of Perpetuity*, *supra* note 4, at 82. Even in the purchase context there often is a charitable gift component. Many conservation easements are acquired in "bargain purchase" transactions (in which the landowner is paid some percentage of the value of the easement and makes a charitable donation of the remaining percentage), and others are purchased with funds received or raised specifically for the purpose of acquiring the easement. Charitable trust principles should apply in such cases. See *supra* notes 11 and 12 and accompanying text (discussing the application of charitable trust principles to gifts to charitable organizations to be used for specific charitable purposes, whether cash or property); *supra* notes 44-47 and accompanying text (discussing fraudulent solicitation).

respect to fee title to land, which is sometimes donated to a land trust or government entity to be used for a specific charitable purpose (such as a public park or nature preserve), and other times acquired in an unrestricted fashion through purchase, exaction, in the context of mitigation, or even as a donation with the understanding that the land may be sold at the discretion of the donee and the proceeds used in accordance with the donee's general charitable mission (these latter gifts are generally referred to as "trade lands").³²¹ Rather than argue that all gifts of land be treated as unrestricted charitable gifts because some land is acquired without restriction as to its future use, government entities and land trusts appear to understand that some of their fee title holdings are legally restricted and some are not, and that they are required by law to administer those assets accordingly.³²² The same should be true with regard to conservation easements.

Moreover, even if uniformity in the rules governing the administration of all conservation easements were the ultimate goal, the solution would not be, as suggested in *The End of Perpetuity*, to treat all conservation easements, regardless of how acquired, as fungible or liquid assets in the hands of their government or nonprofit holders. Such a solution would do violence to the well-settled principles governing the administration of charitable gifts and the expectations of easement grantors. Such a solution would be contrary to the requirements for tax-deductible conservation easements set forth in the Internal Revenue Code and Treasury Regulations. And such a solution would render the administration of conservation easements on behalf of the public even more vulnerable to manipulation, error, and abuse.³²³ If uniformity in the rules governing the administration of conservation easements is desired, the proper solution is to apply charitable trust or similar equitable principles to the administration of all perpetual conservation easements, regardless of how acquired, as recommended in the Restatement (Third) of Property: Servitudes.³²⁴

³²¹ See Kendall Slee, *Selling Real Estate for Revenues*, EXCHANGE: J. LAND TRUST ALLIANCE, Summer 1999, at 15, 17 (discussing "trade lands" transactions).

³²² For example, the Standards and Practices developed by the Land Trust Alliance provide that a land trust may receive land with the intent of using the proceeds from its sale to advance its mission, but in such a case the land trust must provide clear documentation to the donor of its intent to sell the land before accepting the property. See *LTA Standards and Practices*, *supra* note 48, at 9 (Practice 8L). There is, of course, no justification for not similarly requiring a land trust to disclose to a conservation easement donor its intent to later amend or terminate the easement as it may "see fit." See also, *e.g.*, *Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) (explaining that it is settled state law that land received by a municipality as a gift to be used for a specific purpose is subject to the law of trusts).

³²³ See *supra* note 96 and accompanying text (discussing the manipulation, error, and abuse that could occur if government and nonprofit holders could substantially modify or terminate conservation easements "on their own" and as they "see fit").

³²⁴ See RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11. See also *Perpetuity and Beyond*, *supra* note 18, at 701–04 (providing additional support for this proposition).

K. Prevalence of Improper Modifications and Terminations

A final argument offered by *The End of Perpetuity* in favor of creating a special judicial exemption from the application of charitable trust principles for donated conservation easements is the “scant evidence of a current serious problem of improper easement termination or modification in the United States today.”³²⁵ This argument is also unconvincing. If there are few improper terminations and modifications, the likely explanation is that most holders assume they are not free to terminate conservation easements, or modify them in manners contrary to their stated purposes, “on their own” and as they may “see fit.”³²⁶ Moreover, if it were determined that charitable trust principles do not apply to conservation easements and, thus, that holders are free to substantially modify or terminate easements on their own and as they may see fit, the hundreds of government entities and land trusts holding conservation easements across the nation would suddenly find themselves sitting on a treasure trove of valuable development and use rights that, despite the intention of the easement donors, could be liquidated at will. And the temptation on the part of such holders to yield to political, financial, and other pressures to agree to substantially modify and terminate the easements would only increase over time as the encumbered lands change hands and the development and use rights restricted by the easements appreciate in value.³²⁷ Accordingly, the “scant evidence of a current serious problem of improper easement termination or modification in the United States today” is not a justification for exempting conservation easements from the application of charitable trust principles. To the contrary, the prevailing stability is a tribute to the salutary effect of those principles.

³²⁵ See *The End of Perpetuity*, *supra* note 4, at 62. For a discussion of cases involving the improper termination or substantial modification of conservation easements, see *Perpetuity and Beyond*, *supra* note 18, at 690–93 (discussing the Myrtle Grove controversy); *id.* at 695–700 (discussing the Wal-Mart controversy). See also *Hicks*, 157 P.3d at 914. Whether this evidence is “scant” is a matter of opinion.

³²⁶ See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 188 (warning that “[a]ll applicable state laws, charitable trust laws, contract laws, nonprofit corporation laws, public trust laws, and federal tax laws must be followed when amendments [and by extension, terminations] are made”); O’Connor, *supra* note 144, at 31 (discussing charitable trust law as one of four potential legal constraints on amendments and providing “[w]ith so much at stake, many easement amendment issues will probably be resolved by the courts”); *supra* notes 302–306 (discussing the federal tax law requirements for tax-deductible conservation easements). It is also possible that some holders of conservation easements have agreed to improper amendments but no party with standing to sue was aware of the amendments or understood that such amendments were improper.

³²⁷ New owners of easement-encumbered land cannot be expected to have the same conservation proclivities as the easement donors. See, e.g., Darla Guenzler, *Creating Collective Easement Defense Resources: Options and Recommendations* (Bay Area Open Space Council), May 6, 2002, at v (on file with authors) (noting that “the conservation community anticipates a wave of litigation as successor landowners assume control of easement-protected properties”). Indeed, individuals and developers might purchase easement-encumbered land for a much reduced price due to the existence of the easement and then pressure the holder to substantially modify or terminate the easement in the hope of receiving an economic windfall.

III. A DETOUR—ATTEMPTING TO DO AWAY WITH THE DOCTRINE OF *CY PRES*

Rather than argue, as does the author of *The End of Perpetuity*, that donated conservation easements should simply be exempted from charitable trust principles, a few members of the land trust community have taken a different tack. These individuals advocate for the enactment of state legislation that would both exempt conservation easements from charitable trust principles and replace those principles with a complex administrative process. Pursuant to this process, a politically-appointed state board would authorize the substantial modification or termination of conservation easements if it deemed such actions to be “in the public interest.”³²⁸ These legislative proposals appear to have been inspired by the same misconceptions regarding the application of charitable trust principles to conservation easements as are set forth in *The End of Perpetuity*.³²⁹ These proposals also suffer from a variety of problems, the most important of which are discussed briefly below.

First, the legislative proposals are motivated in part by a supposed dichotomy between the interests of the public and honoring donor intent. But that is a false dichotomy. Honoring donor intent is itself in the public interest because failure to do so would chill future charitable donations and reduce the diversity of projects and programs in the charitable sector. Accordingly, a conservation easement termination procedure that is truly in the public interest would accord considerable deference to the intent of easement donors, as is the case under the doctrine of *cy pres*.³³⁰

³²⁸ See Darby Bradley, *Amending Perpetual Conservation Easements, Confronting the Dilemmas of Change: A Practitioner's View* 20 (Dec. 2007) (unpublished manuscript, on file with authors) [hereinafter *A Practitioner's View*]; Andrew C. Dana, *Conservation Easement Amendments: A View From the Field* 22 (2006) (unpublished manuscript, on file with authors) [hereinafter *A View From the Field*].

³²⁹ See *A Practitioner's View*, *supra* note 328, at Abstract (asserting, incorrectly, that if conservation easements are charitable trusts, they can only be amended with court approval); *id.* at 7 (asserting, incorrectly, that the doctrine of *cy pres*, with its “impossible or impracticable” standard, would apply to all easement amendments); *A View From the Field*, *supra* note 328, at 14 (asserting, incorrectly, “[i]f charitable trust law is applied . . . land trusts, attorneys general and the judiciary must apply the administrative deviation or *cy pres* framework to **all** questions pertaining to conservation easement amendment, no matter how trivial”) (emphasis in original). As explained in Part II.D.1.a, *supra*, an amendment provision included in a conservation easement deed grants the holder broad discretion to agree to amendments that are consistent with the purpose of the easement *without court approval*, and a court will not second-guess a holder's exercise of such discretion absent a clear abuse. In addition, a *cy pres* proceeding is required only when a holder wishes to terminate a conservation easement, or modify it in a manner contrary to its stated purpose (as was attempted in the Myrtle Grove controversy).

³³⁰ The doctrine of *cy pres* was developed and refined over the centuries to carefully balance respect for donor intent with society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide an appropriate level of benefit to the public. See *Perpetuity*

Second, the legislative proposals could be vulnerable to challenge on constitutional grounds. In the famous *Dartmouth College v. Woodward* case, the United States Supreme Court held unconstitutional the New Hampshire legislature's attempt to amend Dartmouth College's charter to effectively transfer control of the college to the state.³³¹ The Court determined that such legislation would impair the implied contracts between the college and its benefactors in contravention of section 10 of Article I of the Constitution of the United States, which provides, in part, that no state shall pass any law impairing the obligation of contracts.³³² In support of the Court's holding, Chief Justice Marshall explained:

It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these [charitable] gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college . . . believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature.³³³

Following *Dartmouth College*, numerous courts have held that the legislature cannot interfere with charitable trusts either by changing the method of control or administration of such trusts or by providing that the trust property shall be devoted to purposes other than those designated by the donors.³³⁴ Some decisions are based on the states' inability to impair contracts made between charitable donors and their donees.³³⁵ Other decisions are based on the doctrine of separation

and Beyond, *supra* note 18, at 700. Deference is accorded to the intent of charitable donors under the doctrine because of a deeply rooted tradition of respecting an individual's right to control the use and disposition of his or her property and a concern that failing to honor the wishes of charitable donors would chill future charitable donations. *Id.* According to donor intent also facilitates a diversity of projects and programs within the nonprofit sector as well as social and ideological pluralism within the larger liberal polity. Goodwin, *supra* note 265, at 7.

³³¹ *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

³³² *See id.*

³³³ *Id.* at 647. With respect to the changes the legislation would have made to the college's charter, Chief Justice Marshall noted:

This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

Id. at 654.

³³⁴ *See* SCOTT & FRATCHER, *supra* note 12, § 399.5. *See also* BOGERT ET AL., *supra* note 316, § 397 (“[A] legislature has no power to alter the purpose of a charitable trust by statute. It has not succeeded to the prerogative cy pres power vested in the crown in England, even assuming that this type of cy pres is recognized in the United States.”).

³³⁵ *See, e.g.*, *Kapiolani Park Pres. Soc’y v. Honolulu*, 751 P.2d 1022, 1026–27 (Haw. 1988) (ruling that if legislation had the effect of granting the city the power to lease a portion of parkland

of powers and the judiciary's jurisdiction over the administration of charitable trusts.³³⁶

The constitutionality of statutes that apply to all trusts and are calculated to both increase the efficiency of trust administration and ensure that the public

held in a charitable trust in derogation of the express terms of the trust, "it would have been beyond the legislature's power and unconstitutional" because "[u]nder Article I, Section 10 of the Constitution of the United States, the states [are] forbidden to enact laws impairing the obligation of contracts" and "it always seems to have been accepted that the limitation on the impairment of contracts extended to the legislature of the Territory of Hawaii"); *Salem v. Attorney General*, 183 N.E.2d 859, 862 (Mass. 1962) (finding legislation authorizing the city to use as a site for a school building a portion of land that had been conveyed to the city to be used forever as a public park invalid because "acceptance of the grant by the city constituted a contract between the donor and the donee that must be observed and enforced"); *Adams v. Plunkett*, 175 N.E. 60, 64–65 (Mass. 1931) (finding legislation providing a scheme for the management of a hospital different from that established by the gift creating the hospital invalid because a completed gift for a public charity duly accepted constitutes a contract between the donor and the donee, the sanctity of which is under the protection of the U.S. Constitution, and neither state legislation nor a change to the state's Constitution can impair that contract); *Reno v. Goldwater*, 558 P.2d 532, 534 (Nev. 1976) (determining legislation authorizing a city to sell park property to be inapplicable to land that had been donated to the city for use as a public park and playground because "[w]hen the City accepted the gift of land . . . a contract was created obligating the City to hold such property in trust for the people of Reno to enjoy as a park and playground. That obligation could not later be impaired by legislative enactment"); *Goldstein v. Trustees of Sailors' Snug Harbor*, 98 N.Y.S. 2d 544, 556 (N.Y. App. Div. 1950) (finding legislation granting the Governor of the state of New York the power to appoint three additional trustees of a charitable trust invalid because "[t]he Legislature is without the power to alter the directions of a testator or divest vested rights").

³³⁶ See, e.g., *Hartford v. Larrabee Fund Assoc.*, 288 A.2d 71, 74 (Conn. 1971) (finding legislation attempting to change the manner in which a charitable trust was administered invalid under the separation of powers provision of Connecticut's Constitution because "jurisdiction over the administration of charitable trusts rests exclusively in the judicial department"); *Opinion of the Justices*, 371 N.E.2d 1349, 1355 (Mass. 1978) (opining that legislation that would change the trustees and possibly change the beneficiaries of a charitable trust established under the will of Benjamin Franklin would be invalid under the separation of powers provision of Massachusetts's Constitution, and explaining "[a]lthough the Legislature does possess some authority to alter charitable trusts, this authority is narrowly limited . . . [i]t is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres."); *S.C. Dep't of Mental Health v. McMaster*, 642 S.E.2d 552, 566 (S.C. 2007) (holding that the court was the proper entity to authorize the sale of property impressed with a charitable trust and explaining "[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court). Compare *Trustees of New Castle Common v. Gordy*, 93 A.2d. 509 (Del. 1952), in which the court held that legislation authorizing the trustees of a charitable trust to sell real estate held in the trust was valid because the "no sale" provision in the trust agreement was an administrative term; the species of property in which the trust corpus could be invested was of secondary importance to the purpose of the trust, which was to benefit the inhabitants of the town; and the sale of the land was not only consistent with the fundamental purpose of the trust but in all likelihood would promote it. The court in *Gordy* was careful to note:

In this country . . . the powers of the Legislature over charitable trusts is not co-extensive with the prerogative of the Crown. It is limited by principles of American constitutional law. . . . For example, the Legislature may not exercise the

will obtain the benefits prescribed by the donors is not in question.³³⁷ Examples include statutes setting forth the powers and duties of the attorney general with regard to the supervision and enforcement of charities, statutes requiring charities to file reports with the attorney general or a court, and statutes granting the judicial power of *cy pres* and describing the method of its exercise.³³⁸ In addition, a statute intended to increase the efficiency of the administration of a category of charitable trusts, but that respects the judiciary's role and the expressed intentions of the donors, has also been determined to pass constitutional muster.³³⁹ The legislation proposed with regard to conservation easements would, however, go much further. It would alter the substance of the existing contracts between easement donors and donees because most easement deeds expressly provide that the easement is perpetual and can be terminated only in a judicial proceeding. It would remove primary jurisdiction over the administration of a category of charitable gifts from the courts. And it would largely disregard rather than respect the expressed intentions of easement donors—to protect particular parcels of land in perpetuity as specified in the easement deeds—by enabling a politically-appointed state board to authorize the substantial modification or termination

power of a Chancellor under the doctrine of *cy pres* and thus divert the corpus of the trust to uses other than those specified. . . . Nor may it terminate a charitable trust or change the methods of its administration.

Id. at 515.

³³⁷ See BOGERT ET AL., *supra* note 316, § 397.

³³⁸ *Id.*

³³⁹ See Opinion of the Justices, 306 A.2d 55 (N.H. 1973) (opining that the Uniform Management of Institutional Funds Act (see *supra* note 178), which authorizes institutions to invest endowment funds on a total return basis and permits the release of restrictions on the investment and use of institutional funds with the donor's consent, would not constitute an improper encroachment upon the functions of the judicial branch). *Cf.* Opinion of the Justices, 133 A.2d 792, 795–96 (N.H. 1957) (opining that legislation that would permit trustees to use for the general care of cemeteries surplus funds from charitable trusts created for the purpose of maintaining specific cemetery lots would be unconstitutional as it “would be an exercise of what amounts to a legislative power of *cy pres* with respect to all cemetery trusts having surplus income, without regard to established principles of law . . . or the terms of the trusts. . .”). See also UPMIFA, *supra* note 178, § 6(d) (permitting institutions to apply *cy pres* to institutional funds without court approval in carefully limited circumstances and with safeguards to ensure fidelity to donor intent). The Reporter for the UPMIFA drafting committee explains that the act permits institutions to exercise the *cy pres* power without court approval only with respect to “small, old funds” (i.e., where significant time has passed since the donation and the cost of a court proceeding would exceed the value of the fund), and only after notification to the attorney general who can intervene if necessary to protect the intent of the donors. See Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1329–31 (2007) (noting that UPMIFA “emphasizes the importance of donor intent”). See also John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312 (2003) (discussing constitutional limits on the retroactive application of certain provisions of the Uniform Trust Code).

of easements whenever it deemed such actions to be “in the public interest.”³⁴⁰ Accordingly, the constitutionality of such legislation would be suspect.³⁴¹

State legislation authorizing the substantial modification or termination of conservation easements when a politically-appointed state board deems it to be in the public interest would also be inconsistent with the provisions of federal law authorizing tax benefits for the donation of perpetual conservation easements. As previously noted, at the time of the donation of a tax-deductible conservation easement the possibility that the easement will be defeated by the performance of some act or the happening of some event must be so remote as to be negligible.³⁴² In addition, the conservation purpose of a tax-deductible conservation easement must be “protected in perpetuity,” such an easement must be transferable by its holder only to another government entity or charitable organization that agrees to continue to enforce the easement, and such an easement must be extinguishable by its holder only in what essentially is a judicial *cy pres* proceeding.³⁴³ Accordingly, the proposed legislation would radically alter the expectations of Congress and the Treasury Department with regard to the administration and termination of tax-deductible conservation easements. Such legislation could also render future easement donations in the adopting state ineligible for federal tax incentives, which, in turn, could significantly reduce the number of easement donations in the state.³⁴⁴

It has been argued that Congress should simply amend federal tax law to authorize tax benefits for the donation of conservation easements that are terminable through the proposed state administrative process.³⁴⁵ But Congress would surely hesitate to make such a change. State boards are likely to give greater

³⁴⁰ Legislation employing a “public interest” standard would not ensure the fidelity to donor intent that has heretofore been considered necessary for a statute to pass constitutional muster. See *supra* note 339. Although the legislative proposal in *A Practitioner’s View* includes donor intent as one of a myriad of factors that the state board would consider in assessing a proposed amendment or termination, the overriding consideration would be whether the change is “in the public’s interest.” See *A Practitioner’s View*, *supra* note 328, at 19–22.

³⁴¹ See also *Kapiolani Park*, 751 P.2d at 1027–28 (providing that legislation that would have the effect of granting a city the power to lease a portion of parkland held in a charitable trust in derogation of the express terms of the trust would also “violate[] the basic principles of equity” and, “in effect, defraud the donors”).

³⁴² See *supra* note 306 and accompanying text.

³⁴³ See *supra* notes 302–304, and accompanying text.

³⁴⁴ In a state adopting the proposed legislation, the possibility that a conservation easement would be defeated by the performance of some act or the happening of some event might not be so remote as to be negligible. In addition, it is not readily apparent how a conservation easement in such a state could be drafted to comply with the “protected in perpetuity,” “restriction on transfer,” “extinguishment,” and other federal tax law requirements.

³⁴⁵ See *A View From the Field*, *supra* note 328, at 23 n.53.

weight to state and local interests (including economic interests) than to national conservation interests when considering proposals to modify or terminate easements.³⁴⁶ Moreover, the legislative history to the federal tax incentives indicates that Congress intended to subsidize the acquisition of conservation easements only if they protect “unique or otherwise significant land areas or structures” in perpetuity,³⁴⁷ and Congress anticipated that the need to substantially modify or terminate such easements due to changed conditions would be rare.³⁴⁸ In other words, Congress did not intend to subsidize the acquisition of fungible conservation easements. Congress also was and remains concerned about abuse,³⁴⁹ and changing federal tax law to permit the acquisition of fungible conservation easements would heighten those concerns.³⁵⁰ Indeed, lobbying for a change in federal tax law to authorize tax benefits for the donation of conservation easements that are terminable through the proposed state administrative process could have unintended consequences; for example, it might lead to more extensive federal

³⁴⁶ One has only to read about the controversies surrounding the designation of National Monuments to understand that state and local economic interests are often perceived to be at odds with national conservation interests. *See, e.g.*, Robert B. Keiter, *KEEPING FAITH WITH NATURE* 184 (2003) (noting that President Clinton’s use of his executive power under the Antiquities Act to establish the 1.7 million-acre Grand Staircase-Escalante National Monument in southern Utah provoked angry responses from the state’s Republican political leaders, as well as its rural communities where both the president and his secretary of the interior were hung in effigy on the day of the announcement).

³⁴⁷ *See* S. REP. NO. 96-1007, at 603 (1980).

³⁴⁸ In deciding to not address the possible future extinguishment of tax-deductible easements in the Internal Revenue Code, Congress was apparently influenced by testimony from representatives of the land trust community. Those representatives maintained that, because of their well-planned easement acquisition programs, few conservation easements were likely to cease to accomplish the conservation purposes for which they were acquired and such an “unlikely” occurrence would be better addressed in the Treasury regulations. *See Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong. 245 (1980) (statement of Samuel W. Morris, President, French and Pickering Creeks Conservation Trust, Inc.); *id.* at 248 (statement of William Sellers, Director, Brandywine Conservancy).

³⁴⁹ *See generally, e.g.*, S. REP. NO. 96-1007, at 603 (1980) (noting Congressional concern about abuse and measures incorporated into Internal Revenue Code § 170(h) to curb abuse); 2005 SENATE FINANCE COMMITTEE REPORT, *supra* note 159 (recommending reforms to curb abuses in the conservation easement donation context); Staff of the Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures*, at 277–87 (JCS-2-05), Jan. 27, 2005, available at <http://www.house.gov/jct/s-2-05.pdf> (last visited Nov. 20, 2008) (same).

³⁵⁰ *See, e.g.*, Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND, RESOURCES & ENVTL. L. 47, 52–55 (2006) (describing reports of abuse and recommendations for reform); JEFF PIDOT, LINCOLN INST. OF LAND POL’Y, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* (2005) (on file with authors and available from the Lincoln Institute of Land Policy) (same).

involvement in the donation, administration, and termination of tax-deductible conservation easements, or a narrowing in the type of conservation easements donations eligible for federal tax incentives.³⁵¹

In addition, even if the proposed state legislation were determined to be constitutional and Congress could be convinced to change federal tax law to subsidize the acquisition of fungible conservation easements (i) if applied retroactively, such legislation would likely be viewed as a betrayal of past easement donors, and (ii) if applied prospectively, such legislation would likely significantly decrease future conservation easement donations. Many landowners donate conservation easements because they wish to ensure that *their* land will be protected from development and other harmful uses “in perpetuity”—or for as long as such protection continues to be possible or practicable, as is permitted under existing law. Accordingly, the prospect that a politically-appointed state board could authorize the substantial modification or termination of easements when it deemed such actions to be “in the public interest” would likely anger past easement donors and chill future donations. It could also drive landowners and their legal advisors away from the use of conservation easements and force them to try to utilize other vehicles (perhaps irrevocable trusts or reciprocal covenants) to more permanently protect the conservation and historic values of the subject land.

Finally, the legislative proposals also appear to be driven in part by a concern that the doctrine of *cy pres* is too constraining, permitting, as it does, the termination or substantial modification of conservation easements only if it can be shown that the charitable purpose of the easement has become impossible or impracticable.³⁵² There appears to be some fear that projects of great importance to the public (such as the construction of highways or electric transmission towers and lines) could be precluded or hindered by the existence of conservation easements and the protection afforded to them by the doctrine of *cy pres*. That fear is unfounded. In circumstances where it is determined that the best place to locate a public works project is on land that has been protected by a conservation easement because it has significant conservation or historic values, the public can simply condemn the easement. None of the conservation easement-enabling statutes precludes condemnation, and half of the statutes expressly provide that easements are subject to condemnation.³⁵³ The real danger is not that conservation easements will endure in the face of more important public needs. Rather, the danger is that,

³⁵¹ Lobbying for legislative changes at the state level could also have unintended consequences. The legislation a state might ultimately enact could be contrary to the interests of land trusts and the use of conservation easements as a land protection tool.

³⁵² See generally *A Practitioner's View*, *supra* note 328.

³⁵³ See *Condemning Conservation Easements*, *supra* note 61, at 1929.

absent even minimal statutory or judicial safeguards, easement-encumbered land will become the path of least resistance for condemning authorities.³⁵⁴

As the foregoing indicates, there are significant problems with attempting to fundamentally redefine the nature of a perpetual conservation easement through state legislation and apply that new definition to either existing or future conservation easements. Moreover, current law, if properly understood and applied to conservation easements, would make the proposed legislation unnecessary. Government entities and land trusts can achieve much of the flexibility they desire by simply (i) negotiating for the discretion to amend conservation easements consistent with their stated purposes at the time of acquisition, as recommended by the Land Trust Alliance, (ii) seeking judicial or legislative clarification of a holder's power to agree to such amendments when an easement deed is silent on the issue, and (iii) acknowledging the need to obtain court approval pursuant to the doctrine of *cy pres* to terminate easements (or modify them in manners inconsistent with their stated purposes), as is contemplated under federal tax law in any event.³⁵⁵ And in situations where government entities and land trusts desire or anticipate the need for greater flexibility, they should employ more easily modifiable or terminable means of land protection.³⁵⁶ They should not, however, acquire expressly perpetual conservation easements as charitable gifts and represent that they have the obligation to carry out the donors' intent in perpetuity,³⁵⁷ and then later attempt to fundamentally change the rules of the game by legislative fiat. They should also take care, with respect to future easements, not to kill the goose that laid the golden egg with new legislative rules that compromise the qualities donors prize most in conservation easements.

IV. CONCLUSION

Applying the equitable principles that govern the administration of charitable trusts to donated conservation easements is consistent with both state law

³⁵⁴ See *id.*; see also *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (Or Not)*, 26 VA. ENVTL. L.J. 399 (2008) (discussing the delegation of federal condemnation authority to public utilities to construct transmission facilities in National Interest Electric Transmission Corridors and its potential impact on easement-encumbered land).

³⁵⁵ It may be desirable to seek more broad based legislation addressing the amendment and termination of conservation easements. Such legislation could clarify the extent to which holders of conservation easements have the implied power to agree to amendments that are consistent with the easements' stated purposes. Such legislation could also give content to the judicial *cy pres* standard as it is applied in the conservation easement context. Codification of the rules governing amendments and terminations could be expected to increase compliance and accountability on the part of holders and promote uniformity in easement administration.

³⁵⁶ Such means could include unrestricted fee acquisitions, management agreements, leases, terminable easements, and land use regulation.

³⁵⁷ See *supra* Part II.B (describing the representations made by land trusts to easement donors, funders, and the public regarding the perpetual nature of conservation easements).

governing the administration of charitable gifts made for specific purposes and federal law authorizing landowners to claim charitable income, gift, and estate tax deductions for the donation of conservation easements. It is also recommended by the drafters of the Uniform Conservation Easement Act, the Uniform Trust Code, and the Restatement (Third) of Property: Servitudes, all of whom recognized that conservation easements should be afforded more stringent protection than privately held servitudes because of the public interest and investment in such easements. Applying charitable trust principles to conservation easements also cannot be said to be a new or unanticipated development, having been recognized as part of the legal landscape for over a quarter of a century and asserted by the land trust community to its benefit in the past. Finally, the application of such principles to conservation easements is also consistent with the legitimate expectations of conservation easement donors, funders, and the general public, none of whom anticipate that conservation easements will be fungible or liquid assets in the hands of their government or nonprofit holders.

Charitable trust principles also do not unduly constrain the discretion of the government and nonprofit holders to engage in the day-to-day management of the easements they hold. Broad flexibility to amend conservation easements in manners consistent with their stated purposes can be and often is built into conservation easement deeds in the form of an amendment provision. In addition, even holders who have failed to negotiate for the inclusion of amendment provisions in the easements they hold are not condemned forever to enforce a portfolio of immutable documents. Rather, such holders may have certain implied powers to agree to amendments that are consistent with an easement's stated purposes. And if the scope of a holder's implied powers to agree to such amendments is not sufficiently clear, the holder can seek judicial or legislative clarification of the extent of its implied powers or court approval of such amendments in an administrative deviation proceeding. It is only when a holder wishes to terminate a conservation easement, or modify it in a manner contrary to its stated purpose (as was attempted in the Myrtle Grove controversy), that court approval in a *cy pres* proceeding would be required.

Government and nonprofit holders of conservation easements also need the flexibility to engage in the day-to-day management of the easements they hold without fear of possible nuisance suits by neighboring landowners or other members of the public. At the same time, as evidenced by *Hicks v. Dowd*, the Myrtle Grove controversy, and the Wal-Mart controversy, there must be a means by which grantees of conservation easements (whether government entities or land trusts) can be held accountable for actions taken or not taken that are in violation of their fiduciary obligations to both easement donors and the public. Charitable trust principles are that means. The standing rules in the charitable context are carefully calibrated to balance the competing needs of administrative efficiency and organizational accountability. They grant standing to a select group of persons best suited to represent the interests of the public, and they exclude all

others so as to protect charities from harassment through litigation. In the end, if understood by easement grantees and applied sensibly, consistently, and with appropriate consideration for the context, charitable trust principles will provide government and nonprofit holders with the flexibility they need to accomplish their public or charitable conservation missions and, at the same time, ensure that such holders are accountable for actions taken or not taken that are in violation of their fiduciary obligations.

As a final note, if some believe that the public interest would be better served if governmental and nonprofit holders could substantially modify or terminate conservation easements “on their own” and as they may “see fit,” the appropriate approach is not to argue that charitable gifts of perpetual conservation easements be specially excepted from the rules governing the administration of all other charitable gifts made for specific purposes. Rather, holders that desire this extraordinary level of discretion should negotiate for it up-front and in good faith at the time they acquire conservation easements and memorialize that grant of discretion in the easement deeds. And if these holders wish to continue to receive the subsidy of the federal tax incentives, as they presumably do, they will have to convince Congress to change federal law so that landowners can receive tax benefits for the donation of conservation easements that are fungible or liquid assets. Congress, of course, may not be willing to subsidize the acquisition of such easements, and landowners may not be willing to donate them.