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## Conservation Easements: Perpetuity and Beyond

Nancy A. McLaughlin

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# Conservation Easements: Perpetuity and Beyond

Nancy A. McLaughlin\*

**perpetuity**... *The quality or state of being perpetual; endless...*<sup>1</sup>  
**perpetual**... *Lasting or destined to last for ever; eternal, unceasing...*<sup>2</sup>  
**in perpetuity**... *To all time, for ever;*<sup>3</sup> *forever;*<sup>4</sup> *of endless duration*<sup>5</sup>  
**perpetual easement**... *An easement to continue in operation and be enforceable forever*<sup>6</sup>

*Perpetual conservation easements are intended to protect the particular land they encumber for the conservation purposes specified in the deed of conveyance “in perpetuity”—or at least until circumstances have changed so profoundly that continued protection of the land for those purposes is no longer feasible. To protect the public interest and investment in perpetual conservation easements, and, at the same time, permit adjustments to be made to respond to changing conditions, such easements should be treated like any other form of charitable asset acquired by a government or charitable entity for a particular charitable purpose—i.e., as subject to equitable charitable trust principles. This Article outlines the considerable support for applying charitable trust principles to perpetual conservation easements, including uniform laws, the Restatement of Property, federal tax law, and case activity on this*

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Professor of Law, University of Utah S.J. Quinney College of Law. J.D. University of Virginia. The author thanks the Georgetown Environmental Law & Policy Institute for the opportunity to present an earlier version of this Article at the 9th Annual Georgetown Regulatory Takings Conference, sponsored by the University of California, Berkeley, Boalt Hall School of Law. This Article builds upon the author's previous works. See Nancy A. McLaughlin, *Could Coalbed Methane Be the Death of Conservation Easements?*, 29 WYO. LAW. 18 (2006); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 423 (2005).

1. 9 OXFORD ENGLISH DICTIONARY 587 (2d ed. 1989).
2. 11 OXFORD ENGLISH DICTIONARY 586.
3. 7 OXFORD ENGLISH DICTIONARY 766.
4. BLACKS LAW DICTIONARY 807 (8th ed. 2004).
5. BALLENTINE'S LAW DICTIONARY 632 (3d ed. 1969).
6. *Id.* at 938.

*issue to date. This Article cautions that perpetual land protection is not appropriate in all circumstances and recommends a more considered use of perpetual conservation easements as a land protection tool. This Article also explores the possible use of a number of nonperpetual conservation easements to accomplish land protection goals.*

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#### INTRODUCTION

*Conservation easements are usually intended to last forever—these are known as perpetual easements.<sup>7</sup>*

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7. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 21 (2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK]. The *Conservation Easement Handbook* has defined perpetual conservation easements in this manner since its first publication in 1988. See THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 7 (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION EASEMENT HANDBOOK] (In response to the common question “How Long Does an Easement Last?” the handbook provides: “An easement can be written so that it lasts forever. This is known as a perpetual easement.”). The *Conservation Easement Handbook* is a publication of the Land Trust Alliance, the umbrella organization for the nation’s land trusts. See <http://www.lta.org> (last visited May 15, 2007).

Over the past quarter century, private landowners have conveyed conservation easements encumbering millions of acres to charitable conservation organizations ("land trusts"), to state agencies organized and operated as land trusts, and to cities, counties, and other municipalities.<sup>8</sup> Many of these easements were donated in whole or in part as charitable gifts, others were sold for cash, and still others were exacted as part of development approval processes. Although not required by the easement enabling legislation in most states,<sup>9</sup> the vast majority of conservation easements conveyed to date (whether through donation, sale, or exaction) were drafted to protect the particular land they encumber "in perpetuity."

The bias in favor of perpetual conservation easements appears to be due to a number of factors. Perpetual easements are generally considered more desirable than term easements (which expire at the end of a specified term, usually a number of years) because term easements offer only temporary land protection and, even if they are repeatedly renewed, can cost far more in the long run than perpetual easements.<sup>10</sup> As noted above, many conservation easements are donated either in whole or in part as charitable gifts, and donors are eligible for federal (and, in many cases, state) tax benefits only if the conservation easements are expressly perpetual.<sup>11</sup> In addition, studies indicate that many landowners are willing to donate or sell conservation easements in large part because of their

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8. Although perpetual conservation easements are also conveyed to agencies of the federal government, such as the U.S. Fish & Wildlife Service, the laws that apply to those federally held easements are beyond the scope of this Article. The growth in the number of acres encumbered by conservation easements has been dramatic. In 1980, the nation's local, state, and regional land trusts held conservation easements encumbering only a modest 128,001 acres. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 423, 423 (2005). As of the end of 2005, that number had grown to more than 6.2 million acres. See LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT (2005), available at <http://www.lta.org/census/>. The 6.2-million-acre figure does not include the millions of additional acres encumbered by conservation easements held by: (i) federal, state, and local governmental entities, for which acreage figures are not readily available, or (ii) land trusts that operate on a national level, such as The Nature Conservancy, which reports that as of the summer of 2006, it held conservation easements encumbering more than 2.7 million acres. See *Betting on the Ranch*, NATURE CONSERVANCY MAG., Summer 2006, available at <http://www.nature.org/magazine/summer2006/misc/art17776.html>.

9. See Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 40, 42 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (noting that, while "there is a philosophical proclivity toward perpetual easements," only four states—California, Colorado, Florida, and Hawaii—require that conservation easements be perpetual).

10. See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 190; Darby Bradley, President, Vt. Land Trust, Land Conservation: The Case for Perpetual Easements (Jan. 2003), [http://www.vlt.org/perpetual\\_easements.html](http://www.vlt.org/perpetual_easements.html) [hereinafter *The Case for Perpetual Easements*].

11. See I.R.C. §§ 170(h)(1), (h)(2)(C), (h)(5)(A) (2006); see also, e.g., VA. CODE ANN. § 58.1-512C.2 (2006). For a discussion of the perpetuity requirements of I.R.C. § 170(h), see *infra* Part I.B.(4).

personal attachment to the particular land encumbered by the easement and their desire to see that land permanently preserved.<sup>12</sup> Indeed, the promise of permanent protection of cherished land has been a key selling point for land trusts attempting to convince private landowners to donate or sell conservation easements.<sup>13</sup>

The growing use of and reliance on perpetual conservation easements to accomplish land protection goals raises a number of important questions. How can perpetual conservation easements be modified or terminated to respond to changed conditions, such as climate change or changes in the surrounding landscape that may degrade or destroy the conservation attributes for which the encumbered land was protected? Who should have the authority to make such modification and termination decisions and what standards (if any) should be applied? Who should be entitled to the increase in the value of the encumbered land when an easement is modified or terminated and formerly restricted development and use rights are reunited with the fee title to the land? Under what circumstances is the use of the perpetual conservation easement as a land protection tool appropriate? And, is it ever possible or desirable to use *nonperpetual* conservation easements to accomplish land protection goals?

Perpetual conservation easements encumbering land<sup>14</sup> were not used on a widespread basis until the mid-1980s and courts are only now beginning to hear cases involving their substantial modification or termination.<sup>15</sup> Accordingly, there is little precedent directly on point

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12. See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 15, 17; Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 44–45 (2004); *The Case for Perpetual Easements*, *supra* note 10.

13. For example, in describing conservation easements on its website, The Nature Conservancy notes:

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 . . . 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.

The Nature Conservancy, Conservation Easements—All About Conservation Easements, <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html> (last visited Apr. 5, 2007); see also 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 37–38 (listing the fact that conservation easements provide permanent protection of the encumbered land as one of the “Four Key Selling Points” of an easement program); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 39 (noting that “[t]he easement holder should be sure to describe the thorough and permanent land and resource protection that easements can provide, and the ability of its organization to ensure this long-term protection.”).

14. Conservation easements are also used to preserve historic structures, and those easements are generally referred to as “façade” or “historic preservation” easements.

15. See Nancy A. McLaughlin, *Could Coalbed Methane Be the Death of Conservation Easements?*, 29 WYO. LAW. 18 (2006) (discussing a case of first impression that was pending

addressing the first three questions posed above. As explained in Part I however, the donation of a perpetual conservation easement to a municipality or land trust (or the purchase of a perpetual conservation easement by a municipality or land trust with funds received or raised for such purchase) creates a charitable trust relationship. In such cases, the municipality or land trust should not be permitted to terminate or modify the easement in contravention of its stated purpose without receiving court approval in a *cy pres* proceeding, where appropriate consideration would be accorded to the intent of the easement grantor and the funders of the project, as well as the public interest in maintaining, modifying, or terminating the easement. Part II describes the policy reasons and authorities supporting the application of similar equitable principles to perpetual conservation easements acquired outside the donation context—i.e., to perpetual easements purchased by municipalities and land trusts with general funds or exacted as part of a development approval process.

Part III cautions that perpetual land protection is not appropriate in all circumstances and recommends a more considered use of the perpetual conservation easement as a land protection tool. Part IV explores the possible use of a number of nonperpetual conservation easements to accomplish land protection goals, and Part V briefly concludes.

#### I. PERPETUAL CONSERVATION EASEMENTS AS CHARITABLE TRUSTS IN THE DONATION CONTEXT

##### A. *Analogy to Charitable Gifts of Fee Title to Land*

To understand why and how charitable trust principles should apply to perpetual conservation easements that are conveyed as charitable gifts to municipalities or land trusts, it is helpful to begin with an analogy. A

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before the Wyoming Supreme Court involving the attempted termination of a perpetual conservation easement). On May 9, 2007, the Wyoming Supreme Court dismissed the case on the ground that the plaintiffs did not have standing to sue to enforce a charitable trust, but invited the Wyoming Attorney General, as supervisor of charitable trusts, “to reassess his position” with regard to the case. *Hicks v. Dowd*, 2007 WY 74, ¶ 33 (Wyo. 2007). The Wyoming Attorney General had earlier declined to participate in the case because “the interests of the public, as the beneficiaries of the conservation easement . . . [were] being represented by arguments of counsel on all sides.” *See id.* ¶ 15 (quoting a May 3, 2004 statement of the attorney general). For other cases involving the modification or termination of a perpetual conservation easement, *see infra* Part I.B.(5) (discussing a case, settled in 1998, involving the attempted “amendment” of a perpetual conservation easement encumbering a 160-acre historic tobacco plantation located on the Maryland Eastern Shore to allow a seven-lot upscale subdivision on the property); Part I.B.(7) (discussing a case, settled in 2006, in which the holder of a perpetual conservation easement authorized the construction of a four-lane road across the encumbered land to provide access to an adjacent Wal-Mart SuperCenter).

gift of fee title to land to a charitable organization or to a city, county, or other municipality to be used for a specific charitable purpose (such as a public park) generally creates a charitable trust.<sup>16</sup> In such cases, the donor has transferred legal title to the land to the municipality or charity to be held for the specified purpose for the benefit of the public, which is the beneficiary of the gift.<sup>17</sup> The conveyance creates a trust relationship, wherein the municipality or charity holds the land in trust for the benefit of the public and owes fiduciary obligations to both the donor and the public to use the land for the specified purpose.<sup>18</sup>

In such cases, the municipality or charity is not free to use the land or the proceeds from its sale for a different public or charitable purpose. Rather, to use the land for other than the donor's specified purpose, the municipality or charity would have to obtain court approval in a *cy pres* proceeding, where: (i) it would have to be established that continued use of the land for the donor's specified purpose has become "impossible or impractical";<sup>19</sup> and (ii) if such a showing is made, the court would supervise the holder's use of the land or the proceeds from its sale for a similar public or charitable purpose.<sup>20</sup> In addition, because the beneficiary

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16. See, e.g., *Town of Cody v. Buffalo Bill Memorial Ass'n*, 196 P.2d 369 (Wyo. 1948) (holding that charitable trust rules applied to a gift of land to a charitable association to be used to memorialize William F. Cody, commonly known as Buffalo Bill, and an attempted transfer of the land to the town of Cody without authorization of a court of equity was void); *City of Salem v. Attorney Gen.*, 183 N.E.2d 859 (Mass. 1962) (holding that a gift of land to the city to be used "forever as public grounds" established a trust restricting the use of the land to public park purposes, and the city could not use three acres of the land for a public school building); Kevin A. Bowman, *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. CIN. L. REV. 595, 608 (1997) (noting that "[m]any courts, following a modern trend, have viewed a dedication of land to a municipality for park purposes as an expression of intent to create a [charitable] trust . . . [where] the municipality act[s] as trustee[] and the general public as beneficiary," and that other courts have applied charitable trust principles to accomplish the same ends without directly finding that a charitable trust existed because trust principles provide the best means of enforcing the intent of the grantor); see also McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 431-32 (noting that even where the donor is treated as having made a restricted charitable gift (sometimes referred to as a "quasi-trust") the same principles apply).

17. The public, as beneficiary, holds equitable title to the property. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 485, 493 (7th ed. 2005).

18. See McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 433-34 (noting that the trustee of a charitable trust effectively serves two masters: (i) the donor of the gift or trust assets and (ii) the public, as the beneficiary of such gift or trust).

19. The precise wording of this standard varies from state to state, and courts and commentators use the terms "impractical" and "impracticable" interchangeably. See MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 512-13 app. (2004) (listing the *cy pres* standard applied in the various states); see also AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 399.3, at 518 (4th ed. 1989) (referring to "impossible or impracticable" as the standard); G.B. BOGERT & G.T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 438, at 157 (rev. 2d ed. 1991) (referring to "impossible, impractical, or inexpedient" as the standard).

20. The doctrine of *cy pres* technically involves a three-step process: if (i) the purpose of a charitable gift or trust becomes "impossible or impractical" due to changed conditions and (ii)

of a charitable trust is the public rather than any particular individual, the state attorney general is typically a necessary party to any *cy pres* proceeding to represent the interests of the public.<sup>21</sup>

The gift of a perpetual conservation easement to a municipality or land trust creates an *identical* trust relationship. The donor has transferred legal title to the easement to the municipality or land trust to be used for a specific charitable purpose—the protection of the encumbered land for the conservation purposes specified in the instrument of conveyance in perpetuity—and the public is the beneficiary of the easement. The municipality or land trust thus holds the easement in trust for the benefit of the public, and owes fiduciary obligations to both the donor and the public to use the easement for its stated purpose.

That the typical conservation easement does not contain the words “trust” or “trustee” is irrelevant. The creation of a trust does not require use of such words in the instrument of conveyance. As Professors Scott and Fratcher explain in their famous treatise on trusts:

An express trust is a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create it and subjecting the person in whom the title is vested to equitable duties to deal with it for the benefit of others.<sup>22</sup>

It is to be noticed that an express trust may arise even though the parties in their own minds did not intend to create a trust. . . . It is the manifestation of intention that controls and not the actual intention where that differs from the manifestation of intention. 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 [i.e., a fiduciary relationship with respect to property].<sup>23</sup>

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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 original purpose specified by the donor. *See, e.g.,* McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 433. However, the second step is generally not a barrier to the application of the doctrine as courts almost invariably find that the donor had a general charitable intent if the gift or trust fails after it has been in existence for some period of time; at least seven states now apply a presumption of general charitable intent; and two states—Delaware and Pennsylvania—have eliminated the requirement entirely. *See id.* at 479–80 (citing FREMONT-SMITH, *supra* note 19, at 177).

21. *See* SCOTT & FRATCHER, *supra* note 19, § 391, at 357, 360–61. For a more detailed discussion of the doctrine of *cy pres*, see Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1040–41 (2006); McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 459–502.

22. *See* SCOTT & FRATCHER, *supra* note 19, § 462.1, at 310.

23. *Id.* § 2.8, at 50; *see also* DUKEMINIER, *supra* note 17, at 498 (“No particular form of words is necessary to create a trust. The words trust or trustee need not be used. The sole question is whether the grantor manifested an intention to create a trust relationship.”); Town of



In addition, the purpose of a conservation easement, which, broadly stated, is environmental protection, is clearly "beneficial to the community" and, therefore, "charitable" as those terms are defined under state law.<sup>24</sup> Indeed, all fifty states and the District of Columbia have enacted statutes facilitating the use of conservation easements ("easement enabling statutes"), and public funds are being poured into generous tax incentive and easement purchase programs precisely because conservation easements are beneficial to the community.

Finally, the fact that some easement donors may be primarily or even solely motivated by selfish factors, such as the desire to obtain tax benefits or establish memorials to themselves or their families, should be immaterial to the question of whether the donation is considered "charitable" for state law purposes. The only question courts should and generally do ask is whether the gift advances the public interest in some substantial way.<sup>25</sup> The Supreme Court of Pennsylvania explained the reason for this rule in 1888:

How many donations to public charities are made out of pure love to God and love to man, free from the stain or taint of every consideration that is personal, private or selfish? Who can say that the millionaire who founds a hospital or endows a college, and carves his name thereon in imperishable marble, does so from love to God and love to his fellow, free from the stain of selfishness? Yet, is the hospital or the college any the less a public charity because the

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Chelmsford v. Greater Lowell Council Boy Scouts of Am., No. 261762, 2001 Mass. LCR Lexis 89, at 229 (Mass. Land Ct. Apr. 26, 2001) ("No magical incantation, e.g., 'in trust,' is required to create a trust.") (quoting Hillman v. Roman Catholic Archbishop of Fall River, 24 Mass. App. Ct. 241, 244 (1987)).

24. See RESTATEMENT (THIRD) OF TRUSTS § 28(f) (2003) ("Charitable trust purposes include . . . purposes that are beneficial to the community"); *id.* § 28 cmt. 1 ("[A] trust is charitable if its purpose is to promote . . . environmental quality" and "[a] trust to promote the contentment or well being of members of the community is charitable. Thus, a trust to beautify a city or to preserve the beauties of nature, or otherwise to add to the aesthetic enjoyment of the community, is charitable."); McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 434 n.39 (noting that "[s]tate courts and legislators have specifically declined to frame a precise definition of the term 'charitable' because ideas regarding social benefit and public good change from time to time, and the concept of charity must be able to adjust and expand to take into account the changing needs of society, new discoveries, and the varying conditions, characters, and needs of different communities" and that "[t]he donation of conservation easements . . . is precisely the type of new and unanticipated 'charitable' activity that should be deemed to fall within the broad reach of that term."); *cf.* Chattowah Open Land Trust v. Jones, 636 S.E.2d 523, 525 (Ga. 2006) (holding that a devise of a decedent's home and surrounding acreage to a land trust to maintain the property in perpetuity exclusively for conservation purposes within the meaning of I.R.C. § 170(h) "unambiguously created a charitable trust," and the fact that the decedent's will failed 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).

25. See BOGERT & BOGERT, *supra* note 19, § 366, at 61; *see also* SCOTT & FRATCHER, *supra* note 19, § 348, at 6 ("It is the purpose to which the property is to be devoted that determines whether the trust is charitable, not the motives of the testator in giving it.").

primary object of the founder or donor may have been to gratify his vanity, and hand down to posterity a name which otherwise would have perished with his millions? There is ostentation in giving, as well as in the other transaction of life. In some instances donations to public charities may be in part due to this cause; in others, there may be the expectation of indirect pecuniary gain or return. . . . It would be as vain as it would be unprofitable for a human tribunal to speculate upon the motives of men in such cases. Nor is it necessary for any legal purpose. The money which is selfishly given to public charity does as much good as that which is contributed from a higher motive, and in a legal sense the donor must have equal credit therefor. We must look elsewhere for a definition of a legal public charity.<sup>26</sup>

Because a municipality or land trust holds a donated perpetual conservation easement in trust for the benefit of the public, it should not be free to simply agree with the owner of the encumbered land to terminate the easement, or modify it in contravention of its purpose, even in exchange for cash or other compensation. Rather, to deviate from the stated purpose of the easement, either through outright termination or by substantially amending the easement,<sup>27</sup> the municipality or land trust should be required to obtain court approval in a *cy pres* proceeding. In such a proceeding: (i) it would have to be established that the charitable purpose of the easement has become “impossible or impractical”; and (ii) if such a showing is made, the court would supervise the modification or termination of the easement, the payment of compensation to the holder equal to the value of the rights relinquished, and the holder’s use of such compensation to accomplish similar conservation purposes in some other manner or location. In addition, because the public is the beneficiary of a conservation easement, the state attorney general typically would be a necessary party to the proceeding to represent the interests of the public.

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26. *Fire Ins. Patrol v. Boyd*, 15 A. 553, 554–55 (Pa. 1888).

27. Amendments that are consistent with the purpose of a perpetual conservation easement would not require court approval in a *cy pres* proceeding. Many perpetual conservation easements contain an “amendment provision” that expressly grants the holder the discretion to simply agree with the owner of the encumbered land to execute amendments that are consistent with the purpose of the easement. See McLaughlin, *The Myrtle Grove Controversy*, *supra* note 21, at 1072–74. In addition, even in the absence of such an express power to amend, the holder of a perpetual conservation easement should be deemed to have the implied power to simply agree to amendments that are necessary or appropriate to carrying out the purpose of the easement and are not forbidden by its terms, such as amendments that clarify vague language, correct a drafting error, increase the level of protection of the encumbered property, or add additional acreage to the easement. See *id.* at 1075–77. To the extent changed circumstances necessitate an amendment that is consistent with the purpose of a conservation easement but exceeds the holder’s express or implied powers, the holder can seek judicial approval of the amendment pursuant to the more liberal doctrine of administrative (or equitable) deviation. See *id.* at 1039–1041.

A finding that the charitable purpose of a conservation easement has become "impossible or impractical" pursuant to the doctrine of *cy pres* does not mean that the easement is no longer a valid property interest under the state's easement enabling statute or other real property laws, and, thus, that the holder is not entitled to compensation upon its modification or termination. The easement's validity as an interest in real property is a separate and distinct legal inquiry. Moreover, blindly applying inapt principles of real property law to defeat the public's interest and investment in conservation easements would be contrary to public policy and produce absurd results—i.e., pointless windfalls to owners of easement-encumbered land at the public's expense.<sup>28</sup>

Because a conservation easement is a charitable asset that belongs to the public, the holder should be compensated for the full value of the rights relinquished as a result of the easement's modification or termination. This value should equal the difference between: (i) the fair market value of the encumbered land immediately after the modification or termination of the easement, and (ii) the fair market value of the encumbered land immediately before the modification or termination of the easement; or, stated in another way, the extent to which the modification or termination of the easement increases the fair market value of the encumbered land.<sup>29</sup>

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28. See *Bennett v. Comm'r of Food & Agric.*, 576 N.E.2d 1365, 1367 (Mass. 1991) (in declining to apply common law real property rules to invalidate a restriction in a conservation easement that did not conform precisely to the definition of a conservation easement in the enabling statute, the court explained: "Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force."); see also *infra* Part I.B.(2) (discussing the inappropriateness of conferring windfalls on the owners of easement-encumbered land).

29. Support for this valuation method can be found in *Hartford National Bank v. City of Bristol*, 321 A.2d 469 (Conn. 1973), which involved a charitable trust that held, "in gross," certain covenants restricting the development and use of land in perpetuity. Upon the condemnation (and resulting termination) of the covenants, the Connecticut Supreme Court held that the trustee was entitled to compensation equal to the difference between the value of the land free of the covenants (i.e., after the taking) and the value of the land subject to the covenants (i.e., before the taking), or the extent to which termination of the covenants increased the value of the land. In fact, the "before and after" method is the standard method by which nonpossessory interests in land are valued for purposes of compensating their owners in the condemnation context. See, e.g., *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 630 (1961) (in determining the value of an existing in gross flowage easement that was condemned by the government, the court noted that "[t]he valuation of an easement upon the basis of its destructive impact upon . . . the servient fee is a universally accepted method of determining its worth."); see also McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 491–98 (explaining that conservation easements are generally valued for *acquisition* purposes—i.e., for purposes of establishing their purchase price in easement purchase programs or calculating the federal and state tax benefits provided to easement donors—using the "before and after" method, and for a variety of fairness and policy reasons this same method, applied in reverse, should be used to compensate the public for its loss upon the termination of a conservation easement); *id.* at 482–84 (explaining the inappropriateness and

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, or as otherwise provided in the applicable easement enabling statute<sup>30</sup>—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.<sup>31</sup> 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 (and, in some cases, with the added requirement of the holding of a public hearing and receipt of approval from a public official), 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.

The foregoing discussion relates to perpetual conservation easements conveyed to municipalities or land trusts in whole or in part as

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consequences of a provision in an easement deed specifying that a smaller amount be paid to the holder upon termination).

30. Most easement enabling statutes provide that a conservation easement can be modified or terminated in the same manner as other easements. The Uniform Conservation Easement Act, which has been adopted in whole or in substantial part by twenty-four states and the District of Columbia, is a prime example. See *infra* Part I.B.(1). However, a few easement enabling statutes impose further conditions on the modification or termination of a conservation easement. See, e.g., MASS. GEN. LAWS ch. 184, § 32 (2007) (providing that the holder of a conservation easement may release the easement, in whole or in part, only after the holding of a public hearing and receipt of approval by a public official or officials); N.J. STAT. ANN. § 13:8B-5, B-6 (2007); VA. CODE ANN. § 10.1-1704 (2007) (providing that land encumbered by certain "open space" conservation easements held by public bodies may not be "converted or diverted" from open space land use unless, *inter alia*, the conversion or diversion is determined by the public body to be "essential to the orderly development and growth of the locality").

31. Two categories of persons have been arguing that perpetual conservation easements can be modified or terminated in the same manner as other easements and, thus, without regard to the express terms of the easements or the intent of the parties involved in their creation: (i) purchasers of easement-encumbered land who wish to develop or otherwise used the land in manners inconsistent with the easement, see, e.g., McLaughlin, *The Death of Conservation Easements*, *supra* note 15; *infra* Part I.B.(5) (discussing the Myrtle Grove controversy), and (ii) a few government and land trust holders of easements who wish to avoid state attorney general and court oversight of their activities because they view such oversight as inconveniently costly and cumbersome.

charitable gifts. However, a charitable trust relationship is also created when a municipality or charity purchases a perpetual conservation easement with funds that were received or raised expressly for such purchase. In such cases, the municipality or charity should be similarly bound to devote the funds to the purpose for which they were received or raised and, thus, the same two sets of state laws should apply.<sup>32</sup>

*B. Additional Support for Applying Charitable Trust Principles to Perpetual Conservation Easements*

*1. The Uniform Conservation Easement Act*

The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Conservation Easement Act (UCEA) in 1981, and the UCEA has since been adopted in whole or in substantial part by twenty-four states and the District of Columbia.<sup>33</sup> The UCEA provides, in part, that a conservation easement may 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), but “the Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”<sup>34</sup> In the original comments to the UCEA the drafters explained that “the 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 “independent of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts.”<sup>35</sup>

On February 3, 2007, the NCCUSL approved amendments to the comments to the UCEA to clarify its intention that conservation easements be enforced as charitable trusts.<sup>36</sup> The comment to section 3 of the UCEA, as amended, 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

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32. See, e.g., *St. Joseph's Hosp. v. Bennett*, 22 N.E.2d 305, 308 (N.Y. 1939) (holding that a charitable corporation “may not . . . receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands.”).

33. See NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM CONSERVATION EASEMENT ACT (1981), available at [http://www.law.upenn.edu/blj/ulc/ucea/2007\\_final.htm](http://www.law.upenn.edu/blj/ulc/ucea/2007_final.htm) [hereinafter UCEA]; McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 426.

34. See UCEA, *supra* note 33, §§ 2(a), 3(b).

35. See *id.* § 3 cmt.

36. See UCEA, *supra* note 33.

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.<sup>37</sup>

The comment to section 3 of the UCEA, as amended, concludes:

[W]hile 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.<sup>38</sup>

This comment also refers to the Restatement (Third) of Property: Servitudes and to the Uniform Trust Code (discussed below), both of which contemplate the application of charitable trust principles to conservation easements.<sup>39</sup>

## 2. *The Restatement (Third) of Property: Servitudes*

The American Law Institute published the Restatement (Third) of Property: Servitudes in 2000.<sup>40</sup> Section 7.11 of the Restatement recommends that the modification and termination of conservation easements held by governmental bodies or charitable organizations be governed not by the real property law doctrine of changed conditions, but by a special set of rules. Section 7.11 provides, in general, that if changed conditions render the purpose of a conservation easement impossible or impracticable, a court can modify or terminate the easement in a *cy pres* proceeding.<sup>41</sup> In their commentary, the drafters of the Restatement explain that “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation

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37. See *id.* § 3 cmt.

38. See *id.*

39. See *id.*

40. See RESTATEMENT (THIRD) PROPERTY: SERVITUDES (2000).

41. See *id.* § 7.11 cmts. b, c.

servitudes.”<sup>42</sup> The drafters of the Restatement do not appear to have contemplated that in the absence of changed conditions, holders of conservation easements could simply agree with the owners of the encumbered land to substantially modify or terminate such easements.<sup>43</sup> Indeed, the protective provisions of Section 7.11 of the Restatement would make little sense if governmental bodies and charitable organizations were free to substantially modify or terminate conservation easements that continue to serve the conservation or preservation purposes for which they were created.

The Restatement also provides that if it becomes impossible to accomplish the purpose of a conservation easement, a court has the power to terminate the easement upon payment to the holder of “appropriate damages and restitution.”<sup>44</sup> In their comments, the drafters of the Restatement recommend:

If the servient owner is responsible for the loss of the servitude's utility, damages should be measured by the replacement value of the servitude, or in appropriate cases, by the increased value of the servient estate that will result from termination of the servitude. If the servient owner is not responsible for the changes that have made the servitude useless for conservation or preservation purposes, damages sufficient to replace the servitude may be unfair. In that case, restitution, without more, may be appropriate. Restitution may include amounts invested in acquisition and improvement of the servitude, as well as tax and other governmental benefits received by the servient owner as a result of the creation of the servitude.<sup>45</sup>

I disagree with the Restatement's recommendation regarding the *amount* of damages and restitution to be paid to the holder to the extent implementing that recommendation would result in a windfall to the owner of the encumbered land. Pursuant to the Restatement's recommendation, if an easement is terminated and the owner of the encumbered land was not responsible for the loss of the easement's utility, the holder could receive something less (and likely far less) than the value of the easement at the time of its termination as established under the “before and after” method. But allowing any of the economic value attributable to a conservation easement upon its termination to inure to the benefit of the owner of the encumbered land *under any*

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42. See *id.* § 7.11 cmt. a.

43. See *id.* (“The rules stated in this section are designed to safeguard the public interest and investment in conservation servitudes to the extent possible, while assuring that the land may be released from the burden of the servitude *if it becomes impossible for it to serve a conservation or preservation purpose.*” (emphasis added)).

44. See *id.* § 7.11(2), (3) cmts. c, d.

45. See *id.* § 7.11 cmt. c. The Restatement refers to conservation easements as “conservation servitudes.” See *id.* §§ 1.6(1), 7.11.

*circumstances* would confer an undue windfall benefit on such owner at the expense of the public.

The owner of land encumbered by a conservation easement has no claim to any of the value attributable to the easement, having either: (i) conveyed the easement to the government or nonprofit holder to be held and enforced for the benefit of the public (generally in exchange for cash or tax benefits based on the value of the easement as established under the “before and after” method);<sup>46</sup> or (ii) acquired the encumbered land with at least constructive notice of the easement and, if by purchase, for a price reflecting the diminution in the value of the land as a result of the easement. In addition, the fact that the charitable purpose of a conservation easement has become impossible or impractical due to changed conditions does not necessarily mean there has been a decline in the *economic* value of the holder’s property interest—i.e., its right to restrict the development and use of the encumbered land. Thus, regardless of the cause, upon the termination of a conservation easement the holder should be entitled, at a minimum, to the full value inherent in the easement as established under the “before and after” method at that time unless the easement deed specifically provides otherwise.<sup>47</sup>

### 3. *The Uniform Trust Code*

The NCCUSL approved the Uniform Trust Code (UTC) in 2000 and nineteen states and the District of Columbia have since adopted it in some form.<sup>48</sup> Section 414 of the UTC, which allows for the modification or termination of certain “uneconomic” trusts, specifically provides that it does not apply to “an easement for conservation or preservation”—thereby implying that other UTC sections do apply to such easements in

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46. It is of little consequence that the donor of a conservation easement may have received less than the full value of the easement as established under the “before and after” method at the time of its donation in the form of tax benefits. The making of a charitable gift by definition involves an economic sacrifice. In no other *cy pres* context would a person who had made a charitable gift be entitled (or even claim to be entitled) to any of the value inherent in the donated property simply because such person had not been fully compensated for the gift in the form of tax benefits.

47. See *supra* note 29 and accompanying text. In appropriate circumstances, the holder should be entitled to replacement value (assuming such value is greater than the value of the easement as established under the “before and after” method), as well as punitive damages. This discussion has assumed that the easement deed does not provide for the payment of a lesser amount to the holder of the easement upon the easement’s termination. For a discussion of the inappropriateness and consequences of such a provision, see McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 482–84.

48. See NAT’L CONF. OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM TRUST CODE (2005), available at <http://www.law.upenn.edu/bll/ulc/uta/2005final.htm> [hereinafter UTC]; Nat’l Conf. of Comm’rs on Uniform State Laws, A Few Facts About the Uniform Trust Code, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-utc2000.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp) (last visited Apr. 8, 2007).



appropriate circumstances.<sup>49</sup> The UTC drafters explain in their commentary that:

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.<sup>50</sup>

#### 4. Federal Tax Law

The dramatic growth over the past several decades in the use of perpetual conservation easements as a land protection tool has been fueled, in large part, by the federal charitable income, gift, and estate tax deductions offered to landowners who donate conservation easements to government entities or land trusts.<sup>51</sup> Those federal tax incentives are available, however, only with respect to conservation easements that satisfy certain requirements set forth in the Internal Revenue Code and Treasury Department regulations. Pursuant to those requirements, a tax-deductible conservation 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,<sup>52</sup> thereby creating a charitable trust relationship;<sup>53</sup>
- (ii) transferable only to another government entity or charitable organization that agrees to continue to enforce the easement;<sup>54</sup> and
- (iii) extinguishable by the holder only in what essentially is a *cy pres* proceeding—i.e., 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

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49. See UTC, *supra* note 48, § 414(d).

50. See *id.* § 414 cmt.

51. See generally McLaughlin, *Tax Incentives*, *supra* note 12, at 10–17.

52. See I.R.C. § 170(h) (2006). The charitable purpose of a tax-deductible conservation easement is the protection of the encumbered land for one or more of the following four conservation purposes in perpetuity: (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).

53. See *supra* Part I.A. (explaining that an express trust may be created even though the parties do not call it a trust; it is sufficient if what they appear to have in mind is what the courts mean when they speak of a trust—a fiduciary relationship with respect to property).

54. See Treas. Reg. § 1.170A-14(c)(2) (1999).

development of the land to the holder to be used for similar conservation purposes.<sup>55</sup>

To satisfy the latter two of these requirements, most conservation easements expressly state that they can be transferred or extinguished only in the manner described.

Congress is free to condition the receipt of federal tax incentives upon the conveyance of a particular form of charitable gift.<sup>56</sup> It is quite clear from the above requirements that neither Congress nor the Treasury Department intended that government and nonprofit holders of tax-deductible, perpetual conservation easements would be able to substantially modify or terminate such easements upon satisfaction of only the requirements in a state's easement enabling statute.<sup>57</sup> Instead, the principles of the doctrine of *cy pres* are intended to apply in addition or as an overlay to the provisions in a state's easement enabling statute governing the modification or termination of conservation easements.<sup>58</sup>

55. See *id.* § 1.170A-14(g)(6)(i). These "extinguishment" requirements track the doctrine of *cy pres*, see *supra* notes 20–21 and accompanying text, and are distinguishable from the real property law doctrine of changed conditions because of the requirement that the holder of the easement receive compensation upon extinguishment and use such compensation for similar conservation purposes. See, e.g., RESTATEMENT (THIRD) OF PROPERTY, *supra* note 40, § 7.11 cmt. c (noting that in other instances where changed conditions lead to the termination of a servitude, such as in residential subdivisions, there is seldom an entitlement to damages).

56. See *Gillespie v. Comm'r*, 75 T.C. 374, 378–79 (1980).

57. See also S. REP. NO. 96-1007, at 605–06 (1980) ("[T]he 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) . . . [and] . . . 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."). Stephen J. Small, one of the principal authors of the Treasury regulations, states:

[t]o those who suggest [the judicial proceeding required by the Treasury regulations] may be a cumbersome way to deal with the problem [of termination due to changed conditions], 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.

FEDERAL TAX LAW OF CONSERVATION EASEMENTS 16-4 (1997).

58. Land trusts are required to file Form 990 (Return of Organization Exempt from Income Tax) with the Internal Revenue Service annually. In response to concerns about the improper modification and termination of perpetual conservation easements, beginning in 2006, land trusts holding conservation easements are 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 section 170(h)(3) and the related regulations) at the time of transfer. See INTERNAL REVENUE SERV., 2006 INSTRUCTIONS FOR SCHEDULE A TO FORM 990 (2006), available at <http://www.irs.gov/pub/irs-pdf/i990-ez.pdf>.

### 5. *The Myrtle Grove Controversy*

In 1975, Margaret Donoho donated a perpetual conservation easement restricting the development and use of a 160-acre historic tobacco plantation ("Myrtle Grove") located on the Maryland Eastern Shore to the National Trust for Historic Preservation in the United States ("National Trust").<sup>59</sup> Myrtle Grove had been in Donoho's family since the 1700s, and the manor house, law office, outbuildings, and formal grounds are listed on the National Register of Historic Places.

When Donoho's father died in 1963, Donoho received 160 acres of the original property, and her brother received the remaining 425 acres. Shortly thereafter, the brother sold his share for development into five-acre residential lots. Donoho deeply resented her brother's action because she felt it destroyed the land's open space character, and she was determined to protect Myrtle Grove from similar development. After meeting with a representative of the National Trust, who informed her that a perpetual conservation easement would apply to all future owners and forever protect Myrtle Grove from similar development, Donoho donated a perpetual conservation easement to the National Trust.

The deed of easement encumbering Myrtle Grove states that the grantor "desires to preserve the Myrtle Grove main dwelling and its surrounding site comprising some 160 acres . . . in substantially its present condition," and that the purpose of the easement is "preserving . . . protecting and maintaining the historic, architectural, cultural and scenic values of said land and the improvements thereon." The deed expressly prohibits certain activities, including: (i) subdivision of the land, except for one tract of not less than five acres that may be selected by a descendant of Donoho for the erection and maintenance of a single private residence ("Heir's Lot"); (ii) construction or maintenance of buildings or structures on the land other than the manor house, the law office, and outbuildings adjacent thereto; outbuildings incidental to a farming operation; and the private residence on the Heir's Lot; and (iii) any activities, actions, or uses detrimental or adverse to water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation. The deed provides that the easement restricts the use of the land and improvements thereon "in perpetuity," and "run[s] as a binding servitude in perpetuity with the land." There is no provision in the deed authorizing the grantee to agree with Donoho or a subsequent owner of the encumbered land to modify or terminate the perpetual easement.

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59. The following discussion is derived from McLaughlin, *The Myrtle Grove Controversy*, *supra* note 21, and citations to primary source materials can be found in that article.

After Donoho's death, her descendants exercised their right to create the Heir's Lot and then sold the entire property, subject to the perpetual easement, to a prominent Washington, D.C. developer. At the time of the sale, the heirs received written assurances from the National Trust that the restrictions on development and use in the perpetual easement would, indeed, run with the land and bind all future owners. Several years after the sale, however, the National Trust "conceptually approved" the developer's request to amend the easement to: (i) narrow its application to a forty-seven-acre "historic core" surrounding the historic manor house, and (ii) permit a six-lot subdivision on the remainder of the property, complete with a single-family residence and ancillary structures, such as a pool, pool house, and tennis courts, on each of the six lots. In exchange, the National Trust was to receive \$68,700, a buffer easement intended to protect the scenic view from the entrance drive to the property (but the buffer area was already protected by the existing easement), modification of some of the terms of the existing easement, and new easements encumbering three of the residential lots to be located outside the historic core.

The National Trust's approval of the amendment request touched off a storm of protest from conservation groups, Donoho's heirs, and the local and national media. Donoho's daughter wrote to the National Trust to express her "sense of outrage and betrayal" at the proposed subdivision. In a second letter she noted:

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

The National Trust soon acknowledged it had made a mistake and withdrew its approval. The developer then sued the National Trust for breach of contract, asking for either specific performance of the alleged agreement to amend or damages of not less than \$250,000.

With the assistance of the National Trust, the Maryland Attorney General defended the perpetual easement, asserting that the easement constitutes a charitable trust and could not be amended as proposed without receiving court approval in the context of a *cy pres* proceeding, where it would have to be shown that the charitable purpose of the easement had become "impossible or impractical." The attorney general explained that:

- (i) in 1975, the people of Maryland received a charitable gift from Donoho in the form of a conservation easement preserving the

- scenic, natural, and historical characteristics of Myrtle Grove (and specifically prohibiting its subdivision) in perpetuity;
- (ii) 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"; and
  - (iii) 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, "[n]othing in [the] statute or its legislative history... indicates the legislature's intent to abrogate application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation.

Acknowledging that rigid adherence to the terms and purposes of a conservation easement in perpetuity might, over time, prove contrary to the wishes of the donor and the interests of the public, the attorney general noted that the charitable trust doctrines of administrative deviation and *cy pres* (with their established standards and requirement of judicial approval) provide the framework within which the National Trust could consider making changes to the easement.

The Land Trust Alliance, the Chesapeake Bay Foundation, Preservation Maryland, and several other historic preservation organizations filed an amicus brief arguing that the easement's unambiguous language and settled Maryland law dictated that the easement constituted a charitable trust. They noted that, while the Maryland easement enabling statute provides the procedural requisites for amending conservation easements (i.e., agreement of the owner of the land and the holder of the easement), the statute does not and cannot extinguish the overriding legal principles governing the circumstances under which the holder of an easement may agree to amendments—i.e., charitable trust principles. They pointed out that the UCEA specifically declined to abrogate the application of charitable trust principles to conservation easements. They also cautioned that the court's decision on the charitable trust issue would have consequences reaching far beyond Myrtle Grove, and that a voluntary conservation program can succeed only by providing potential and existing conservation easement donors assurance that the protections they place on their land will be, as they intend, permanent.

The Eastern Shore Land Conservancy, The Nature Conservancy, and five landowners who owned land either adjoining or in close proximity to Myrtle Grove filed a motion to intervene asserting, *inter alia*, that the proposed subdivision would have an adverse effect on the

natural attributes of the area; many of the adjacent or nearby landowners had acquired their properties and encumbered them with conservation easements in part because of the existence of the Myrtle Grove easement; and the proposed amendment of what the public considered to be a perpetual easement would severely compromise the ability of conservation organizations to both solicit future easement donations and raise the funds necessary to continue their operations. They noted that “[t]he charitable trust doctrine has as its underpinning not only the desire to further charitable and public purposes . . . [but] also serves the purpose of encouraging others to make similar gifts based on the assurance that their wishes will be carried out,” and warned that the Myrtle Grove case would establish “extremely important precedent.”

The Myrtle Grove case was settled in 1998, with the National Trust agreeing to pay the developer \$225,000.<sup>60</sup> The parties also agreed that: (i) subdivision of the encumbered 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.<sup>61</sup> By approving those settlement terms in its consent decree, the trial court arguably supported the attorney general’s position that the perpetual conservation easement constitutes a charitable trust and, thus, that the National Trust may not agree with the owner of the encumbered land to terminate or modify the easement in contravention of its stated purpose unless it first receives approval for such action in a *cy pres* proceeding.

The National Trust continues to hold the easement encumbering Myrtle Grove.

#### 6. *In re Preservation Alliance for Greater Philadelphia*

*In re Preservation Alliance for Greater Philadelphia* involved a façade easement encumbering an historic house located in Philadelphia’s Germantown neighborhood (known as Mayfair House).<sup>62</sup> The easement had been donated to the Preservation Alliance for Greater Philadelphia

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60. See Consent Judgment at 2–3 & Exhibit C, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. July 16, 1999) (on file with author).

61. See *id.*

62. *In re Preservation Alliance for Greater Philadelphia*, O.C. No. 759 (Ct. Com. Pl. of Philadelphia County, Pa. June 28, 1999). The following discussion is derived from McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 8, at 450–51, and citations to additional primary source materials can be found in that article.

in 1981. At the time of the donation Mayfair House was occupied and in good condition, but over the course of time the house became dilapidated. In 1999, the Preservation Alliance petitioned the court requesting that the court apply the doctrine of *cy pres* to authorize: (i) extinguishment of the façade easement and demolition of Mayfair House, and (ii) replacement of the easement with a declaration of covenants designed to permanently preserve the site of the house as a park and prevent construction on the site of any buildings incompatible with the historic architectural character of Germantown. Both the Pennsylvania Attorney General and the attorney for the city of Philadelphia were notified of and consented to the petition.

In its decree, the court first stated that the Preservation Alliance held the façade easement as a "charitable interest" subject to the Pennsylvania Decedents, Estates, and Fiduciaries Code, which includes a statutory formulation of the doctrine of *cy pres*. The court then determined that due to changed circumstances there was no reasonable contemplation of restoring Mayfair House to any proper use; the purpose of the façade easement, insofar as it attempted to preserve Mayfair House, had been frustrated; and the charitable intent of the donor had been to preserve the historic fabric of the Germantown neighborhood in addition to Mayfair House. The court concluded that the donor's intent would be best served by granting the petition. Accordingly, the court authorized extinguishment of the façade easement and replacement of the easement with a declaration of covenants as requested by the Preservation Alliance.

This case is notable for two reasons. It is the only reported case to date in which a court has authorized the extinguishment of a perpetual conservation easement. In addition, the court authorized extinguishment of the easement according to *cy pres* principles and in a proceeding in which the Pennsylvania Attorney General and the attorney for the city of Philadelphia participated as representatives of the public. Thus, although the Pennsylvania easement enabling statute mirrors the UCEA in providing that a conservation easement may be modified or terminated "in the same manner as other easements,"<sup>63</sup> both the court and the parties to the proceeding determined that the holder of the easement was not permitted to simply agree with the owner of the encumbered land to extinguish the easement and, instead, was required to obtain court approval for such action in *cy pres* proceeding.

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63. See 32 PA. STAT. ANN. § 5055(a) (West 2006).

### 7. *The Wal-Mart Controversy*

On or about May 1, 1996, the East Ridge Development Company (ERD) conveyed a conservation easement encumbering approximately eight acres of woodland located in the city of Chattanooga and adjoining South Chickamauga Creek (the "Property") to the city.<sup>64</sup> The easement was granted "in perpetuity" and provides that it "shall continue as a servitude running in perpetuity with the Property."<sup>65</sup> The easement states that the Property possesses scenic, open space, and recreational values of great importance to the people of the city and the state of Tennessee, and that the easement will be an integral component of a greenway along the creek and will help implement the greenways plan identified by the National Park Service in its 1994 study "Greenways of the Southeast Tennessee River Valley."<sup>66</sup> The purpose of the easement is to: (i) assure that the Property will be retained forever in its scenic, recreational, and open space condition; and (ii) prevent any use of the Property that will significantly impair or interfere with its conservation values.<sup>67</sup>

The easement grants certain rights to the city of Chattanooga, including the right to allow public access to the Property for such purposes as recreational trail use and wildlife observation, and the right to construct and maintain boardwalks, trails, wildlife viewing platforms, and associated structures.<sup>68</sup> The easement reserves to ERD and its successors and assigns the "right to transit the [P]roperty at all reasonable times to gain access to the grantor's other holdings," but also specifically prohibits a range of activities on the Property including the construction of buildings, surface alteration, soil degradation, and the dumping of waste or debris.<sup>69</sup> The easement also provides that "[a]ny activity or use of the Property inconsistent with the purpose of [the] easement is prohibited," and the easement "shall be liberally construed in favor of the grant to effect the purpose of the easement and the policy and purpose of" Tennessee's easement enabling statute.<sup>70</sup> By accepting the easement,

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64. See Final Order at 2, *Tenn. Envtl. Council et al. v. Bright Par 3 Assocs., L.P. et al.*, No. 03-0775 (Ch. Ct. Hamilton County, Tenn. Dec. 19, 2006) (on file with author); Grant Deed of Conservation Easement by East Ridge Development Company in favor of the City of Chattanooga (May 2006) [hereinafter *Conservation Easement*] (on file with author).

65. See *Conservation Easement*, *supra* note 64, at 2, 4.

66. See *id.* at 1.

67. See *id.* at 2.

68. See *id.*

69. See *id.* at 3.

70. See *id.* at 3, 4; see also TENN. CODE ANN. § 66-9-302 (2006). Tennessee's easement enabling statute provides:

It is the finding of the general assembly that the protection of the state's land, water, geological, biological, historical, architectural, archaeological, cultural, and scenic resources is desirable for the purposes of maintaining and preserving the state's natural and cultural heritage, and for assuring the maintenance of the state's natural



the city specifically agreed "to honor the intentions of grantor stated [t]herein and to preserve and protect in perpetuity the Conservation Values of the Property for the benefit of this generation and generations to come."<sup>71</sup>

In 1999, Osborne Building Corporation, the successor by merger to ERD, made plans to develop land adjacent to the Property that was zoned for commercial use.<sup>72</sup> In June of 2003, Osborne and associated parties (the "developers") began constructing a Wal-Mart SuperCenter, complementary retail space, and parking areas on that adjacent land.<sup>73</sup> Shortly after construction began, Tennessee Environment Council, Inc., the Coalition for Responsible Progress, and Sandy Kurtz (collectively, the "plaintiffs") petitioned the Chancery Court for Hamilton County, Tennessee (the "trial court") for a restraining order, alleging that the development and construction activities adversely and unlawfully affected the conservation easement.<sup>74</sup> The trial court dismissed the complaint, ruling that the plaintiffs lacked standing to sue to enforce the conservation easement.<sup>75</sup> The plaintiffs appealed, and the Tennessee Court of Appeals reversed, finding that the plaintiffs had standing to bring the action under Tennessee's easement enabling statute, which provided that "conservation easements may be enforced by . . . the holders and/or beneficiaries of the easement."<sup>76</sup>

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and social diversity and health, and for encouraging the wise management of productive farm and forest land.

71. See Conservation Easement, *supra* note 64, at 2.

72. See Final Order, *supra* note 64, at 2.

73. See Memorandum Opinion and Order at 2, *Tenn. Envtl. Council et al. v. Bright Par 3 Assocs., L.P. et al.*, No. 03-0775 (Ch. Ct. Hamilton County, Tenn. Dec. 19, 2006) (on file with author). The developers were Osborne, Bright Par 3 Associates, L.P., DBS Corporation, and Corker Group, Inc. See *id.* at 1.

74. See *id.* at 2. Tennessee Environment Council, Inc. (TEC) is a Tennessee nonprofit organization with a mission to educate and advocate for the protection of Tennessee's environment and public health. See Final Order, *supra* note 64, at 3. The Coalition for Responsible Progress (CFRP) is an organization of public interest groups and citizens, including residents of Chattanooga and Tennessee, working to prevent the detrimental impact of development on health and the environment in the Chattanooga area. See *id.* Sandy Kurtz, a resident of Chattanooga and member of TEC and CFRP, was very involved in the protection of the environment in Tennessee and Chattanooga and personally used the Property for educational and recreational purposes and enjoyed the scenic and open space benefits protected by the easement. See *id.*

75. See Memorandum Opinion, *supra* note 73, at 2.

76. See *id.* The Tennessee Court of Appeals determined that "any resident of Tennessee is a beneficiary of the easement, and thus has standing to enforce it." See *Tenn. Envtl. Council et al. v. Bright Par 3 Assocs., L.P. et al.*, No. E2003-01982-COA-R3-CV, 2004 Tenn. App. LEXIS 155, at \*10 (Tenn. Ct. App. Mar. 8, 2004). In 2005, Tennessee's easement enabling statute was revised to provide:

An action affecting any conservation easement granted on or after July 1, 2005, may be brought by: (1) An owner of an interest in the real property burdened by the easement; (2) A holder of the easement; (3) A person having third-party right of

In late 2003 or early 2004, a four-lane access road to the Wal-Mart development that crossed a portion of the Property was constructed.<sup>77</sup> In April of 2005, the plaintiffs filed an amended complaint adding the city of Chattanooga as a defendant and alleging, *inter alia*, that the developers had “degraded and destroyed” an area that included the Property “so that they might profit personally at the public expense.”<sup>78</sup> The suit received a great deal of media attention because a candidate for the U.S. Senate and former mayor of Chattanooga had, through his private development company, both acquired the Property encumbered by the easement and sold the adjacent land to Wal-Mart.<sup>79</sup> Media reports alleged that, while serving as mayor, the candidate had allowed top officials in his staff to facilitate the sale of the land to Wal-Mart by permitting construction of the access road across the Property in violation of the conservation easement. The *Chattanooga Times Free Press* reported:

The lawsuit revolves around the abrogation of a contract accepted by the City Council in 1996 to protect the land at the heart of the dispute...for public use and enjoyment in perpetuity. . . . Two city mayoral administrations, and the city councils that presided during those administrations, allowed the abrogation of the covenant for that land. . . . Residents of Chattanooga have a right to know how and why that occurred . . . . Citizens who might in the future consider offering land for conservation easements also should know whether such covenants will be strictly construed and protected, or whether, and how, they might easily be violated by a compliant city government to suit a developer's interest.<sup>80</sup>

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enforcement; (4) The attorney general, if the holder is no longer in existence and there is no third-party right of enforcement; or (5) A person authorized by other law.

See TENN. CODE ANN. § 66-9-307(a) (2006).

77. See Final Order, *supra* note 64, at 4; see also Marc Perrusquia, *Land Sale Predates Corker as Mayor; But Road to Wal-Mart on Site Prompts Questions of Conflict*, COM. APPEAL (Memphis, TN), Sept. 18, 2006, at A1 (“The new four-lane road cut off a western section of the wooded, 7.8 acre preserve . . . officials also agreed to allow storm water to drain onto the preserve, stirring complaints from nature lovers that it’s now often flooded and overgrown with weeds.”).

78. See Second Amended and Restated Complaint Including Petition for Extraordinary Relief at 9, *Tenn. Envtl. Council et al. v. Bright Par 3 Assocs., L.P. et al.*, No. 03-0775 (Ch. Ct. Hamilton County, Tenn. Apr. 11, 2005) (on file with author).

79. See *Honor the Public's Interest*, CHATTANOOGA TIMES FREE PRESS, Oct. 17, 2006, at B6; see also, e.g., *Mr. Corker and Candor*, CHATTANOOGA TIMES FREE PRESS, Oct. 13, 2006, at B6; Perrusquia, *supra* note 77; Marc Perrusquia and Richard Locker, *Old Lawsuit Back to Haunt Corker in Race; Reinstated Environmental Case Questions Ethics of Business Deal*, COM. APPEAL (Memphis, TN), Aug. 20, 2006, at A1.

80. See *Honor the Public's Interest*, *supra* note 79; see also, e.g., Perrusquia, *supra* note 77 (“Th[e] July 2003 closing involved a \$4.6 million land sale by then-Mayor Bob Corker’s private company to the developers of a Wal-Mart SuperCenter. To close the deal, Corker’s lawyers needed—and received—final city authorization for a new road through a nature preserve.”); *Mr. Corker and Candor*, *supra* note 79 (“The core issue is whether city government, before and after

In December of 2006, the parties settled the dispute. The developers agreed to: (i) transfer approximately eight acres of land to the plaintiffs or their designee to be used "for conservation and environmental purposes for the benefit of people of the State of Tennessee and the citizens of the City"; (ii) pay \$500,000 to the plaintiffs to be used to "purchase real property in Tennessee that shall be used for conservation and environmental purposes for the benefit of the citizens of the State of Tennessee and the City"; and (iii) pay the costs, fees, and expenses that the plaintiffs incurred in bringing the action.<sup>81</sup>

In its final order approving the settlement and dismissing the case the trial court noted, as a "Finding of Fact," that the conservation easement constituted a "charitable gift" within the meaning of the Tennessee Charitable Beneficiaries Act of 1997.<sup>82</sup> When the suit was filed in 2003, that act included a statutory formulation of the doctrine of *cy pres*, which provided, in relevant part, that if a charitable gift becomes impossible or impracticable to enforce and the donor manifested a general intent to devote the gift to charity, the court "has jurisdiction to order the disposition or administration of the charitable gift as nearly as possible to fulfill the general charitable intention of the donor."<sup>83</sup> The trial court found that the settlement provided for a substitute donation of property that fulfilled, as nearly as possible, the general charitable and conservation intentions of the original easement.<sup>84</sup>

The trial court's "Conclusions of Law" were extensive, including that: (i) the purpose of the charitable grant of the easement had become, in part, impossible or impracticable to enforce; (ii) it would be inequitable and wasteful to alter the road or any other portion of the Wal-Mart development because the road was constructed after the trial court initially dismissed the action and before the Tennessee Court of Appeals reinstated it, and the road was being used; and (iii) it was, therefore, necessary to provide an alternative remedy.<sup>85</sup> The court determined that the plaintiffs and the residents of Tennessee and

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Mr. Corker became mayor, properly protected the conservation easement it had accepted in 1996.").

81. See Michael Davis, *Parties Announce Settlement in Wal-Mart Case*, CHATTANOOGA TIMES FREE PRESS, Dec. 20, 2006, at A1; Final Order, *supra* note 64, at 7.

82. See Final Order, *supra* note 64, at 2.

83. See TENN. CODE ANN. § 35-13-106 (2003). That provision was repealed in 2004 when Tennessee adopted the Uniform Trust Code, which also contains a statutory formulation of doctrine of *cy pres*. See TENN. CODE ANN. § 35-15-413 (2006) ("[I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful . . . The court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes."). The Tennessee version of the Uniform Trust Code also includes the section referring to conservation and preservation easements discussed in Part I.B.(3), *supra*.

84. See Final Order, *supra* note 64, at 4.

85. See *id.* at 5-7.

Chattanooga were fairly and adequately compensated under the terms of the settlement for any losses they may have suffered as beneficiaries of the easement.<sup>86</sup> The court also determined that the property and cash transferred to the plaintiffs, which is to “be applied to effect the same purpose as that of the original grant of the Easement,” constitutes a reasonable and adequate substitute for any portion of the Property that may have been affected or taken as a result of the road construction or the Wal-Mart development.<sup>87</sup>

The developers presumably agreed to settle the case on terms favorable to the plaintiffs and the public for a number of reasons.<sup>88</sup> They likely wanted to avoid additional negative publicity in the run up to the November election.<sup>89</sup> They likely were aware that in Tennessee, as in other jurisdictions, donations to charities are “peculiar[ly] favored by the courts.”<sup>90</sup> The trial court had earlier ruled that the plaintiffs could be entitled to recover punitive as well as compensatory damages.<sup>91</sup> And absent a settlement favorable to the plaintiffs and the public, the court might have ordered the Property restored to its condition before the construction of the road and the Wal-Mart development.<sup>92</sup>

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86. See *id.* at 2, 6–7.

87. See *id.* at 5, 7.

88. Although the court did not order that the road be removed and the Property restored to its condition before the development, the terms of the settlement were favorable to the plaintiffs and the public. See *A Victory for Conservation*, CHATTANOOGA TIMES FREE PRESS, Dec. 20, 2006, at B6 (noting that the settlement “should serve as a warning to developers and public officials that they may not negligently disregard protective easements deeded to the city for conservation value and permanent public use” and “the settlement’s terms . . . favor the plaintiffs and clearly suggest that the road was wrongly allowed and built”).

89. See Brian Lazenby & Herman Wang, *Settlement Reached on Easement Lawsuit*, CHATTANOOGA TIMES FREE PRESS, Oct. 14, 2006, available at <http://www.timesfreepress.com/absolutenm/templates/politicalnews.aspx?articleid=5952&zoneid=66> (“The proposed settlement eliminates the scheduled deposition of Mr. Corker [the candidate] next Friday, two days after the start of early voting in Tennessee.”).

90. *Dickson v. Montgomery*, 31 Tenn. 348, 362 (1851); accord *Hardin v. Indep. Order of Odd Fellows*, 51 Tenn. App. 586, 597 (1963) (“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 consistently 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.”); see also TENN. CODE ANN. § 35-13-102(a) (2006) (“[T]he public policy of Tennessee, as declared in its cases and statutes, favors gifts to charity that improve the general welfare through acts of philanthropy.”).

91. See Memorandum Opinion, *supra* note 73, at 5–6 (citing to the RESTATEMENT (THIRD) OF PROPERTY, *supra* note 40, § 8.5 cmt. a, which provides that because the resources protected by a conservation easement “provide important public benefits, but are often fragile and vulnerable to degradation or loss [by] actions of the holder of the servient estate,” conservation easements “should be vigorously protected by the full panoply of remedies available to protect property interests,” and, in addition to injunctions, “damages to both compensate the public for irreplaceable losses and deter servient owners from conduct that threatens the protected interests are appropriate.”).

92. See TENN. CODE ANN. § 35-13-103 (providing that a gift instrument that specifies the charitable purpose of a charitable gift controls the administration of that gift); see also SCOTT & FRATCHER, *supra* note 19, § 291.1, at 77–78 (“We have seen that the interest of the beneficiaries

Both the trial court's Conclusions of Law and the developers' willingness to settle bolster the view that a government or nonprofit holder of a conservation easement is not free to simply agree with the owner of the encumbered land to substantially modify or terminate the easement.<sup>93</sup> Rather, the holder of a conservation easement must obtain court approval for any such action in a *cy pres* proceeding, where appropriate consideration will be accorded to the interests of all relevant parties, including the public as beneficiary of the easement.

### C. *The Policy Underlying the Doctrine of Cy Pres*

Deference is accorded to the intent of charitable donors under the doctrine of *cy pres* 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. However, because of society's competing interest in ensuring that assets perpetually devoted to specific charitable purposes continue to provide benefits to the public, the doctrine of *cy pres* places limits on a donor's ability to exercise control over the use of charitable assets. When property is donated to a municipality or charitable organization for a specific charitable purpose, the donor essentially strikes a bargain with the public: the donor is permitted to exercise control over the use of the property, but only so long as the prescribed use of the property continues to provide an appropriate level of benefit to the public.<sup>94</sup>

In addition, although municipalities and charitable organizations operate to benefit the public, history has shown that they cannot always

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in the trust property is not cut off by a transfer by the trustee in breach of trust to a third person who at the time of the transfer has notice that the transfer is in breach of trust, and that the transferee can be charged as constructive trustee of the property, and compelled to restore it to the trust."); *id.* § 297.4, at 123 ("Where the trust is evidenced by a written instrument, the transferee is chargeable with notice of the legal effect of provisions in the instrument. If under the instrument as interpreted by the court, the trustee has not power to make the transfer, the transferee is not protected merely because he was not unreasonable in interpreting the instrument as empowering the trustee to make the transfer. This is true even though the transferee acted under advice of counsel."); *id.* § 392, at 380 ("The mere fact that the trustees of a charitable trust have for a long time applied the trust property to purposes other than those designated by the settlor does not preclude the court from directing that the trust should be administered according to its terms"). The law governing the enforcement of charitable gifts is derived from the law of charitable trusts. *See* *Carl J. Herzog Found. v. Univ. of Bridgeport*, 243 Conn. 1, 7 n.2 (1997).

93. In this case, the city of Chattanooga effectively agreed with the developers to modify or terminate the easement by allowing the developers to violate the easement.

94. *See* Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1112 (1993) (describing the bargain).

be trusted to act in accordance with the public interest.<sup>95</sup> Indeed, municipalities and charitable organizations entrusted with charitable assets will almost inevitably be subject to financial, political, and other pressures that could cause them to act in manners contrary to the public interest. Hence, a certain level of attorney general and court oversight has proven necessary to ensure that such entities administer the charitable assets they hold in accordance with the public interest.

The charitable trust rules and, in particular, the doctrine of *cy pres*, protect the public interest and investment in perpetual conservation easements and, at the same time, permit adjustments to be made to respond to changed conditions. The requirements of the *cy pres* doctrine—including the “impossibility or impracticality” standard, the representation of the public interest by the attorney general, and the vesting of ultimate decision-making authority in a court—help to ensure that perpetual conservation easements are not terminated or modified in contravention of their stated purposes without consideration of both the intent of the parties involved in the easement’s creation<sup>96</sup> and the interests of the public in maintaining, modifying, or terminating the easement. Just as importantly, if a perpetual conservation easement is modified or terminated under the *cy pres* doctrine, the court will supervise both the payment of appropriate compensation to the holder and the holder’s use of such compensation for similar conservation purposes. The doctrine of *cy pres* thus balances our respect for the right of individuals to control the use and disposition of their assets and our desire to encourage charitable gifts with the need to ensure that assets perpetually devoted to charitable purposes continue to provide benefits to the public.

## II. PERPETUAL CONSERVATION EASEMENTS OUTSIDE THE DONATION CONTEXT

In some cases, perpetual conservation easements are purchased by municipalities and land trusts with general funds or acquired by such entities as part of development approval processes. There are a number of compelling reasons to require that *all* perpetual conservation

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95. See generally FREMONT-SMITH, *supra* note 19 (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).

96. The parties involved in the creation of a perpetual conservation easement include the easement grantor, the easement grantee, and any parties who subsidized the acquisition of the easement. Taxpayers subsidize the acquisition of conservation easements through the federal and state tax incentives offered to easement donors, the public funds appropriated to easement purchase programs, and the tax-exempt status of land trusts. In addition, individuals and foundations subsidize the acquisition of conservation easements through donations of cash and services to the government entities and land trusts that acquire such easements.

easements—regardless of how they were acquired—be terminated or modified in contravention of their stated purposes only in the context of a *cy pres* or similar proceeding.

Ad hoc, unsupervised modifications and terminations of ostensibly “perpetual” conservation easements would significantly undermine public confidence in the use of such easements as a land protection tool and chill future easement sales and donations. It is not difficult to imagine that absent the application of the “impossibility or impracticality” standard and attorney general and court oversight, municipalities and charitable organizations could be convinced to substantially modify or terminate some of the perpetual conservation easements they hold without giving appropriate consideration to either the intent of the parties involved in the creation of the easements or the public interest in the continued enforcement of the easements.<sup>97</sup> Moreover, when confronted with the modification or termination of an expressly perpetual conservation easement in contravention of the public interest, members of the public as well as prospective easement grantors are unlikely to think that the method of acquisition should be relevant to the question of whether the easement should continue to be enforced.

In most states, municipalities and land trusts are free to negotiate for the acquisition of *nonperpetual* conservation easements—e.g., term conservation easements or conservation easements that are drafted to endure indefinitely but expressly grant the holder some level of (and perhaps complete) discretion to simply agree with the owner of the encumbered land to modify or terminate the easement.<sup>98</sup> Accordingly, when municipalities and land trusts instead acquire *perpetual* conservation easements, it should be assumed that the perpetual nature of the restrictions was a material component of the transaction to at least one of the parties involved, whether it be the grantor, the grantee, or the public (which in one way or another invested in the easement). For example, a landowner who sells a perpetual conservation easement to a government entity or land trust might well have refused to do so if informed that “perpetual” has a peculiar, diminished meaning in the easement purchase context—i.e., enforceable only until the holder and a subsequent owner of the land decide to substantially modify or terminate the easement.<sup>99</sup> Similarly, a local government or board of commissioners that agreed to variances or zoning changes in exchange for the permanent

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97. Cases in point include the Myrtle Grove and Wal-Mart controversies discussed in Parts I.B.(5) and I.B.(7), *supra*, and the attempted termination of a perpetual conservation easement discussed in McLaughlin, *The Death of Conservation Easements*, *supra* note 15.

98. See *infra* Part IV (discussing nonperpetual conservation easements).

99. See *supra* note 12 and accompanying text (noting that many landowners who sell conservation easements are motivated in large part by a desire to ensure the permanent protection of the particular land encumbered by the easement).

protection of a certain amount of acreage through the conveyance of a perpetual conservation easement might not have agreed to the exchange if it understood that the next group of elected officials could simply undo that protection by releasing the easement. Maintaining public confidence in perpetual conservation easements as a land protection tool requires that such easements continue to be enforced for as long as they provide the public benefits for which they were acquired, and that they be modified or terminated in contravention of their stated purposes only in the context of a *cy pres* or similar proceeding—where appropriate consideration would be accorded to both the intent of the parties involved in the creation of the easement and the public interest in maintaining, modifying, or terminating the easement.

The Restatement (Third) of Property recommends that *cy pres* principles apply to the modification and termination of *all* perpetual conservation easements held by governmental bodies or charitable organizations, regardless of how such easements were acquired.<sup>100</sup> The drafters recognized the strong public interest and substantial public investment in all such easements, and noted that such easements will only continue to increase in importance “as population growth exerts ever-greater pressures on undeveloped land, ecosystems, and wildlife.”<sup>101</sup> The drafters believed that *cy pres* principles provide the appropriate balance with respect to all such easements by “safeguard[ing] the public interest and investment” in such easements, while at the same time “assuring that the land may be released from the burden of the [easement] if it becomes impossible for it to serve a conservation . . . purpose.”<sup>102</sup>

Finally, although the law in analogous areas is unclear and inconsistent, there is some case law that would support the application of charitable trust principles to perpetual conservation easements acquired in the nondonative context. For example, *In re Village of Mount Prospect* involved a village’s proposed sale of a lot that had been dedicated to the village “for public purposes” pursuant to a subdivision ordinance.<sup>103</sup> The appellate court of Illinois affirmed the lower court’s holding that the dedication had created a charitable trust,<sup>104</sup> but that the doctrine of *cy pres* could not be applied to authorize the village’s sale of the lot because

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100. See RESTATEMENT (THIRD) OF PROPERTY, *supra* note 40, § 7.11.

101. See *id.* § 7.11 cmt. a.

102. See *id.*

103. 522 N.E.2d 122, 125 (Ill. App. Ct. 1988) (“At the time of the dedication, the Village had an ordinance in effect which required subdividers to dedicate at least one lot in every 60 to the Village....”).

104. *Id.* (“When land is dedicated for public usage, the municipality becomes the trustee for the benefit of the public. Once the dedication is accepted, the city acquires legal title to the land upon an express charitable trust to use the property for public purposes.” (citations omitted)).



continued use of the lot for public purposes had not become impossible or impractical.<sup>105</sup>

Similarly, *Cohen v. City of Lynn* involved a city's sale to a developer of land the city had earlier purchased pursuant to deeds stating that the land is to be used "forever for park purposes."<sup>106</sup> The appeals court of Massachusetts affirmed the lower court's holding that the city held the land in a public charitable trust, but that the city's sale of the land could not be authorized pursuant to the doctrine of *cy pres* because it had not become impossible or impracticable to carry out the purpose of the trust.<sup>107</sup> The court further held that trust obligations could not be impaired by the enactment of special legislation purporting to authorize the city to sell the land and, thus, the sale was null and void and the parcel had to be restored to its pre-sale condition.<sup>108</sup> The city and the developer argued that because the grantors had received substantial payment for the land, the conveyance had not been a gift and, thus, no trust was established.<sup>109</sup> In response, the court noted: "We have found no authority, nor is any cited to us, to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust."<sup>110</sup>

As the foregoing indicates, there are likely to be significant barriers to the substantial modification or termination of perpetual conservation easements whether such easements are acquired in the donative or nondonative context. Accordingly, this form of land protection is not appropriate in all circumstances.

### III. THE PROPER USE OF PERPETUAL CONSERVATION EASEMENTS

The dramatic growth in the use of perpetual conservation easements as a land protection tool can be attributed, in large part, to ever-increasing development pressures, a growing understanding of the need to incorporate privately owned land into conservation efforts, and a

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105. The court noted that the lot was "a grassy area with grass, trees and shrubs" and not merely a vacant lot, as the village claimed; moreover, "it was practical and feasible to keep the lot in its present condition"; and fifty-six residents of the village had, by petition, objected to the sale. *Id.* at 127-28.

106. 598 N.E.2d 682, 685 (Mass. App. Ct. 1992).

107. *See id.* at 685-87. The lower court judge found that "the parcel possessed 'a beautiful scenic ocean view' and was 'suitable for park purposes' . . . and . . . 'at the time of the purported conveyance to [the developer] the parcel 'was a popular area for walkers, riders, and joggers' and 'provided a scenic vista of open space suitable for park purposes and reinforced the 'greenness' of the area.'" *Id.* at 683-84.

108. *See id.* at 687. The court noted: "It has long been held that the contract obligations arising from a charitable trust such as exists in the present case cannot be impaired legislatively." *Id.*

109. The purchase price for the land was \$20,000, and the grantors were paid \$18,500 and donated the remaining \$1,500. *Id.* at 685.

110. *Id.*

perceived inability to protect that land from development through regulatory measures. In the headlong rush to protect as many acres as possible, however, it appears that the fundamental issue of when it may be appropriate (and *not* appropriate) to restrict the development and use of land in perpetuity has been largely ignored.

Perpetual conservation easements are supposed to be difficult to substantially modify or terminate. They are intended to protect the particular land they encumber for the conservation purposes specified in the deed of conveyance “forever” or “in perpetuity”—or at least until circumstances have changed so profoundly that continued protection of the land for those purposes is no longer feasible. A requirement that government and nonprofit holders of perpetual conservation easements obtain court approval in a *cy pres* or similar proceeding before agreeing to substantially modify or terminate such easements ensures this type of long-term protection. It insulates the easements from the short-term financial, political, and other pressures to develop the land that may be brought to bear on such holders, and places a significant hurdle in the path of substantial modification or termination—i.e., the “impossibility or impracticality” standard.

In many cases, the type of long-term protection provided by a perpetual conservation easement will be desirable. For example, when land has unique or otherwise significant conservation values (whether historic, habitat, scenic, open space, or other natural or ecological values), and it is anticipated that such land will retain those values over time, it may make sense to commit the land to the type of long-term protection provided by a perpetual conservation easement. In such cases, policymakers and government and nonprofit holders of easements might reasonably determine that the public benefits derived from ensuring the long-term protection of such lands will outweigh the inconvenience and expense associated with the few court proceedings that may be required to later undo some of the protections. Indeed, Congress appears to have made just such a calculation when it enacted federal tax incentives for donors of perpetual conservation easements in 1980. The legislative history indicates that Congress intended to subsidize the acquisition of perpetual conservation easements only if such easements protect “unique or otherwise significant land areas or structures,”<sup>111</sup> and Congress

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111. See S. REP. NO. 96-1007, at 603 (1980). In response to recent reports of abuse, the Internal Revenue Service is auditing a host of conservation easement donation transactions and is attempting, through litigation, to more clearly define the types of perpetual conservation easements that are eligible for federal tax incentives. See *Turner v. Comm’r*, 126 T.C. 299 (2006) (holding that the IRS properly disallowed federal charitable income tax deductions claimed with respect to the donation of a conservation easement because the easement did not preserve open space or an historically important land area or certified historical structure); *Glass v Comm’r*, 471 F.3d 698 (6th Cir. 2006) (affirming the Tax Court’s holding that taxpayers were entitled to

anticipated that the need to substantially modify or terminate such easements due to changed conditions would be rare.<sup>112</sup>

However, the type of long-term protection afforded by perpetual conservation easements is not appropriate in all circumstances. For example, consider rural, agricultural land located on the edge of a burgeoning metropolitan area that the local government wishes to protect from development temporarily (to encourage appropriate in-fill development and minimize sprawl), but also foresees will need to be developed in approximately thirty years to accommodate a growing population. Such land arguably should not be protected from development through the acquisition of perpetual conservation easements. Restricting the development of that land in perpetuity would be contrary to the long-range land use plan for the region, would be difficult (and potentially expensive) to undo, and could cause development to leapfrog into more environmentally sensitive areas. In such a case, it arguably would be preferable to protect the land from development using tools that can be more easily modified or terminated in response to changing conditions, such as some form of land use regulation or, perhaps, *nonperpetual* conservation easements, which, as discussed in Part IV, could take a variety of forms.<sup>113</sup>

The extent to which government entities and land trusts are acquiring perpetual conservation easements in arguably inappropriate circumstances is unclear. Anecdotal evidence suggests, however, that such easements are being acquired on a somewhat indiscriminate basis,<sup>114</sup> and without a clear understanding of the long-term implications of their

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federal charitable income tax deductions with respect to the donation of two conservation easements because the easements protected a relatively natural habitat of plants or wildlife). For a description of the reports of abuse, see Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL L. 47 (2005).

112. In deciding to not address the possible future extinguishment of tax-deductible, perpetual conservation easements in the Internal Revenue Code, Congress was apparently influenced by testimony from representatives of the land trust community, who 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, 248 (1980).

113. Only a few state easement enabling statutes require that conservation easements be consistent with local land use plans. Accordingly, it is possible that landowners in such a rural, agricultural area might have a different idea regarding the appropriate long-range land use plan for the region, and will convey perpetual conservation easements to a willing land trust in an attempt to protect the region from development.

114. See, e.g., JEFF PIDOT, LINCOLN INST. OF LAND POL’Y, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (2005), available at [https://www.lincolninstitute.edu/pubs/dl/1051\\_Con%20Easements%20PFR013.pdf](https://www.lincolninstitute.edu/pubs/dl/1051_Con%20Easements%20PFR013.pdf).

status as perpetual instruments.<sup>115</sup> Judicial or legislative clarification of the law as it applies to the modification or termination of perpetual conservation easements should help to promote more considered use of such easements as a land protection tool.<sup>116</sup> When the implications of perpetuity sink in—i.e., if it is clarified that perpetual conservation easements cannot be substantially modified or terminated without court approval in a *cy pres* or similar proceeding—policymakers, government entities, and land trusts may be motivated to contemplate the use of other, more easily modifiable or terminable means of land protection in appropriate circumstances.

#### IV. NONPERPETUAL CONSERVATION EASEMENTS

Municipalities and land trusts could negotiate for the acquisition of a variety of *nonperpetual* conservation easements, such as term easements or easements that are drafted to endure indefinitely but expressly grant the holder some level of (and perhaps complete) discretion to simply agree with the owner of the encumbered land to substantially modify or terminate the easement.<sup>117</sup> Landowners are unlikely to be willing to *donate* nonperpetual conservation easements because federal charitable income and gift tax deductions are available only with respect to the

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115. See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 195 (noting obliquely that “a holder may terminate its conservation easement through its own action [i.e., release]” but such action “might result in an inquiry or even a lawsuit by the state attorney general.”).

116. Some have proposed modifying state law to *change* (rather than merely clarify) the manner in which perpetual conservation easements may be modified or terminated in contravention of their stated purposes. For example, some have proposed that state law be changed to allow for such modification or termination outside of a court proceeding and upon the approval of a politically appointed state “easement modification and termination board.” Setting aside the questions of whether it would be feasible to change the law applicable to conservation easements in all fifty states and the District of Columbia and whether such changes would chill easement conveyances, it is possible that such changes would apply prospectively only due to the constitutional prohibition on impairment of contracts. See, e.g., BOGERT & BOGERT, *supra* note 19, § 397.

117. As previously noted, most easement enabling statutes do not require that conservation easements be perpetual, although some require that easements have a minimum term, see 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 189, and others impose certain conditions on modification or termination, such as the holding of a public hearing and the receipt of approval from a public official, see *supra* note 30 and accompanying text. In addition, although many conservation easements are created pursuant to statute: (i) common law appurtenant conservation easements can be created, see C. Timothy Lindstrom, *Changes in the Law Regarding Conservation Easements: An Update*, 5 WYO. L. REV. 557–58 (2005) (explaining that the acquisition of conservation easements along with small anchor parcels to which they were appurtenant was common practice in Wyoming before the state enacted easement enabling legislation in 2005); and (ii) common law in gross conservation easements have been recognized, see RESTATEMENT (THIRD) OF PROPERTY, *supra* note 40, § 1.6 Reporter’s Note; *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005) (holding that an easement in gross conveyed for conservation and historic preservation purposes fifteen years before the enactment of Virginia’s easement enabling statute was nonetheless valid).

donation of perpetual conservation easements.<sup>118</sup> However, nonperpetual conservation easements could be acquired by purchase or exaction.

A number of unconventional nonperpetual conservation easements are discussed below: term-terminable conservation easements, conditionally terminable conservation easements, and freely terminable conservation easements. This Part is not intended as an endorsement of the use of nonperpetual conservation easements. Rather, it raises more questions than it answers, and is intended to accomplish only two modest goals: (i) to alert the reader to the possible creation of a variety of nonperpetual conservation easements; and (ii) to demonstrate the fundamental difference between a *perpetual* conservation easement, which does not grant the holder the discretion to simply agree with the owner of the encumbered land to modify or terminate the easement in contravention of its stated purpose, and a *nonperpetual* conservation easement, which, as described below, can be drafted to expressly grant the holder such discretion.

#### A. *Term-Terminable Conservation Easements*

As previously noted, term conservation easements are drafted to expire at the end of a specified term, usually a number of years, and for a number of reasons generally have been disfavored.<sup>119</sup> To illustrate why term conservation easements are undesirable, and why term-terminable conservation easements may be preferable to both perpetual and term easements in some circumstances, consider the rural, agricultural land located on the edge of a burgeoning metropolitan area that was discussed in the previous Part. Assuming the local government has determined that it is preferable to use conservation easements rather than some other form of land protection (such as regulation) to temporarily protect this land from development, the local government has a number of options.

The first option is the perpetual conservation easement. As discussed in the previous Part, however, acquiring perpetual conservation easements in this area arguably would be unwise. The need to develop at least some of this land in thirty years is foreseeable, and there would be significant legal (and likely also practical—i.e., public relations) barriers to the substantial modification or termination of the perpetual easements.

The local government could alternatively consider the purchase of thirty-year term conservation easements. However, thirty-year term conservation easements are likely to cost the local government

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118. A landowner donating a nonperpetual conservation easement would not be eligible for a federal charitable income tax deduction and could be liable for federal gift tax. See I.R.C. §§ 170(h), 2522(d) (2006).

119. See *supra* note 10 and accompanying text.

substantially the same as perpetual conservation easements.<sup>120</sup> Moreover, at the end of the thirty-year term, when the easements expire, the value inherent in the previously restricted development and use rights would inure to the benefit of the owners of the land rather than the local government.<sup>121</sup>

A third option is the purchase of term-terminable conservation easements. Like a traditional term easement, a term-terminable conservation easement would prohibit development and certain other uses of the encumbered land for a specified term of years. However, at the end of the term, instead of simply expiring (like a traditional term easement), the term-terminable easement would expressly grant the local government the discretion to continue enforcing the easement or to release some or all of the development and use restrictions in the easement in exchange for cash or other compensation. After the end of the term, the local government could make decisions regarding the continued enforcement or sale of the easements' restrictions based on its assessment of contemporary development needs. Term-terminable easements would protect the encumbered land from development during the specified term,<sup>122</sup> and at the end of the term give the local government both considerable control over whether and how development in the easement-encumbered area will occur,<sup>123</sup> and the right to receive compensation for the release of the development and use restrictions

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120. The value of a term conservation easement can be calculated using the same "before and after" method used to calculate the value of a perpetual conservation easement. Thus, the value of a thirty-year term easement would equal the difference between: (i) the fair market value of the land immediately before the acquisition of the easement, and (ii) the fair market value of the land immediately after the acquisition of the easement (i.e., what a willing buyer would pay a willing seller for the land subject to restrictions prohibiting its development and certain other uses for thirty years). Where a term easement prohibits the development of land for a significant period of time (i.e., decades), the market value of that land immediately after the acquisition of the easement is likely to be substantially the same as the market value of the land if the easement were perpetual. *See, e.g., Stanley Works v. Comm'r*, 87 T.C. 389, 399-421 (1986) (valuing a thirty-and-a-half-year term conservation easement using the "before and after" method, and calculating the "after" value as if the easement were perpetual).

121. At the end of the thirty-year term, the owners of the previously encumbered land would own the land free of the easements' restrictions.

122. Similar to the conveyance of a perpetual conservation easement, the conveyance of a term or term-terminable conservation easement should be deemed to create a charitable trust relationship during the specified term. Thus, the holder of a term or term-terminable conservation easement should not be permitted to agree to substantially modify or terminate the easement during the specified term without receiving court approval in a *cy pres* or similar proceeding, where it would have to be shown that continued protection of the land for the conservation purposes specified in the deed of conveyance has become impossible or impractical during the term.

123. For example, the local government could negotiate for certain conditions and limitations on development (such as requiring clustering or lots of a certain size) before agreeing to release the development and use restrictions in an easement.

contained in the easements.<sup>124</sup> Term-terminable easements would thus provide the local government with the flexibility needed to respond to changed conditions, and at the same time avoid the economic windfall to the owners of the encumbered land that results from the use of traditional term easements.

*B. Conditionally and Freely Terminable Conservation Easements*

Another possible form of nonperpetual conservation easement is the terminable conservation easement, which could take a variety of forms. For example, a conditionally terminable conservation easement could be drafted so that, while it may endure indefinitely, it expressly grants the holder the discretion, under certain limited circumstances, to simply agree with the owner of the encumbered land to modify or terminate the easement in contravention of its stated purpose. Thus, for example, a landowner could convey to a land trust a conservation easement that restricts the development and use of her 100-acre farm for the purpose of protecting the land's rural, agricultural, scenic, and wildlife habitat attributes, but also grants the holder the right to simply agree with the landowner (or her successors in interest) to substantially modify or terminate the easement if and when *the holder* rather than a court determines that the stated purpose of the easement has become "impossible or impractical."<sup>125</sup> In other words, while the *cy pres* standard of impossibility or impracticality would still apply, the requirement of court approval would be eliminated.<sup>126</sup>

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124. The "before and after" method should be used to calculate the amount of compensation payable to the local government. See *supra* note 29 and accompanying text. States and municipalities are generally prohibited from transferring public funds or public assets to private individuals for less than full compensation. See, e.g., 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW § 21.07, at 21-25 (1981) ("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."); Nicholas J. Wallwork & Alice S. Wallwork, *Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit from Public Funds*, 25 ARIZ. ST. L.J. 349, 350 n.8 (1993) (listing the state constitutions containing such prohibitions).

125. A court is unlikely to question the holder's exercise of such modification or termination discretion unless there has been a clear abuse of that discretion. See, e.g., FREMONT-SMITH, *supra* note 19, at 145 ("Courts 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].").

126. The easement should provide that the holder must be compensated for any rights relinquished using the "before and after" method, and it should specify how the holder must use such compensation (e.g., to protect land with similar conservation attributes or in the same locality).

A freely terminable conservation easement would be drafted in a similar manner, except it would expressly grant the holder the right to simply agree with the owner of the encumbered land to modify or terminate the easement whenever the holder deems such modification or termination to be consistent with its public or charitable mission. Thus, a freely terminable conservation easement arguably would give the holder the discretion to "horse-trade" the easement (or some of the development and use restrictions contained therein) for cash or other compensation that could be used to accomplish the holder's public or charitable mission in some other manner. For example, the holder of a freely terminable conservation easement might determine that it would be consistent with its mission to terminate the easement and use the compensation received to purchase another conservation easement encumbering land with higher conservation values and, perhaps, to supplement its stewardship and operating funds. However, the extent to which the substantial modification or termination of a conservation easement that continues to provide significant benefits to the public could be deemed consistent with the public or charitable mission of the holder is unclear. The substantial modification or termination of a conservation easement is similar in some respects to the deaccessioning of artwork from a museum's collection (i.e., both conservation easements and artwork constitute unique and valuable public assets), and museums have had difficulty justifying the deaccessioning of artwork in some circumstances.<sup>127</sup>

The use of a variety of nonperpetual conservation easements as land protection tools would be a new development. Such easements would raise a host of difficult questions that are beyond the scope of this Article, including: (i) whether and to what extent easement grantors, funders, policymakers, and the taxpaying public would be willing to grant municipalities or land trusts such broad discretion to modify or terminate conservation easements;<sup>128</sup> (ii) whether and to what extent nonperpetual conservation easements would crowd out more traditional forms of land

127. See generally Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213 (1997). Deaccessioning is the permanent removal of an object of art from a museum's collection. MARIE C. MALARO, MUSEUM GOVERNANCE 50 (1994).

128. Many easement grantors, as well as funders of specific conservation easement acquisition projects, are interested in protecting the particular land encumbered by the easement either for sentimental reasons or because of the land's unique conservation values. Accordingly, it seems clear that at least some (and perhaps many) easement grantors and funders would be unwilling to grant holders broad modification and termination discretion. In addition, the federal tax incentive program is aimed at encouraging the donation of conservation easements that protect "unique or otherwise significant land areas or structures," see S. REP. NO. 96-1007, at 603 (1980), and Congress and the Treasury Department have determined that the national public interest and investment in such easements can be appropriately protected only if the easements are expressly perpetual and substantially modifiable or terminable by the holder only with court approval in what essentially is a *cy pres* proceeding. See *supra* Part I.B.(4).



use planning and protection, such as regulation, to the detriment of the public good;<sup>129</sup> and (iii) the wisdom of permitting municipalities and land trusts to develop what could amount to largely unregulated markets in land development and use rights. Moreover, although municipalities and land trusts might have the legal right to substantially modify or terminate a nonperpetual conservation easement without public oversight or approval, such action could be quite controversial and subject to public criticism or condemnation. Conservation easements are unique and valuable assets, and their substantial modification or termination likely would be viewed as a sale of the public's property. Accordingly, even in the nonperpetual conservation easement context, municipalities and land trusts might prefer to legitimize their substantial modification or termination decisions by obtaining attorney general or some other form of public approval.

#### CONCLUSION

A wide variety of authority supports the application of charitable trust principles and, in particular, the doctrine of *cy pres*, to perpetual conservation easements. This should come as no surprise given that the doctrine of *cy pres* was developed and refined over the centuries to deal precisely with the issue presented by perpetual conservation easements—how to adjust when the charitable or public purpose to which property has been perpetually devoted becomes obsolete or inappropriate due to changed conditions. It is hoped that the application of charitable trust principles to perpetual conservation easements will soon be confirmed, either through judicial decisions or clarification of state statutory law. Such confirmation would help to ensure that the public interest and considerable investment in perpetual conservation easements is appropriately protected. Such confirmation would also stimulate and inform a critical debate about the relative merits of perpetual and nonperpetual conservation easements, as well as other, more traditional forms of land use protection and planning, such as regulation.

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129. See John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1 (2005) (arguing that the use of voluntary conservation easement conveyances undermines and crowds out the regulatory option).