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Rethinking the Perpetual Nature of Conservation Easements

Part One

by

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RETHINKING THE PERPETUAL NATURE OF CONSERVATION EASEMENTS

Nancy A. McLaughlin*

As the use of perpetual conservation easements as a land protection tool has grown, so have concerns regarding whether, when, and how such easements may be modified or terminated to respond to changed conditions. This Article argues that the charitable trust doctrine of cy pres should apply to donated conservation easements and, if interpreted as suggested, can provide a principled means of modifying or extinguishing easements that have ceased to provide public benefits sufficient to justify their continued enforcement (or have even arguably become detrimental to the public). The Article argues that a landowner should be viewed as striking the following "cy pres bargain" with the public upon the donation of an easement—the landowner should be permitted to exercise dead hand control over the use of the property encumbered by the easement, but only so long as the easement continues to provide benefits to the public sufficient to justify its enforcement. If, due to changed conditions, the continued protection of the encumbered land for the conservation purposes specified in the easement deed becomes "impossible or impracticable," a court should apply the doctrine of cy pres to restore the appropriate balance between the landowner's desire to exercise dead hand control, and society's interest in ensuring that charitable assets continue to provide benefits to the public. In cases where the donor evidenced a particularly strong personal attachment to the encumbered land and the continued protection of that land for a different conservation purpose is feasible, a court could apply the doctrine of cy pres to modify the easement to change its conservation purpose while continuing to protect the underlying land. Alternatively, in cases where the donor did not evidence a particularly strong personal attachment to the encumbered land, or where the continued protection of that land for a different conservation purpose is not feasible, a court could apply the doctrine of cy pres to extinguish the easement, authorize the sale of the unencumbered land, and direct that the proceeds attributable to the easement be used to accomplish the donor's specified conservation purposes in another location.

No reasonable man, who gave . . . when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found.

—John Stuart Mill¹

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¹ JOHN STUART MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 36 (Boston, William V. Spencer 1864) (1859).

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I. INTRODUCTION

The number of acres encumbered by conservation easements² held by local, state, and regional land trusts³ in the United States increased dramatically over the past two decades, from 128,001 acres in 1980 to more than five million acres in 2003, protected by more than 17,847 conservation easements.⁴ The use of conservation easements as a land protection tool shows no signs of slowing, and, indeed, the average number of acres being encumbered by conservation easements on an annual basis has increased significantly, particularly since the late 1990s: while an average of approximately 165,000 acres were encumbered by conservation easements acquired by local, state, and regional land trusts in each of 1995, 1996, 1997, and 1998, an average of approximately 600,000 acres were encumbered by such easements in each of 1999 and 2000, and an average of approximately 825,000 acres were encumbered by such easements in each of 2001, 2002, and 2003.⁵

² The terms "conservation easement" and "easement" as used in this Article refer to an agreement between the owner of the land encumbered by the easement and the holder of the easement that restricts the development and use of the land to achieve certain conservation goals, such as the preservation of wildlife habitat, agricultural land, or an historic site. Easements encumbering historic structures are referred to herein as "preservation" or "façade" easements.

³ The term "land trust" as used in this Article refers to private, nonprofit charitable organizations that operate to protect land for conservation purposes through a variety of means, including the acquisition of conservation easements, and certain governmental agencies that operate in a manner similar to private land trusts, such as the Maryland Environmental Trust and the Virginia Outdoors Foundation. See Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 61 (2004) ("Virtually all land trusts function as publicly supported charitable organizations. They are organized and operated specifically to provide benefits to the public, and their activities are subject to oversight by state regulators (generally the state attorney general), the IRS, and the public.").

⁴ See Land Trust Alliance, *National Land Trust Census*, at <http://www.lta.org/aboutlta/census.shtml> (last visited Apr. 11, 2005) (on file with the Harvard Environmental Law Review). The Land Trust Alliance, which is the umbrella organization for the nation's local, state, and regional land trusts, periodically collects census data with respect to the local, state, and regional land trusts operating in the United States, but does not collect data with respect to land trusts that operate on a national scale, such as The Nature Conservancy, or government agencies that do not operate in a manner similar to private land trusts, such as the United States Fish and Wildlife Service or state and local governments. Telephone Interview with Martha Nudel, Director of Communications for the Land Trust Alliance (Feb. 12, 2002). National land trusts and government agencies that do not operate in a manner similar to private land trusts also have been acquiring conservation easements. See, e.g., *Conservancy Update*, 53 *NATURE CONSERVANCY* 19, 20 (Fall 2003) (noting that as of the fall of 2003, The Nature Conservancy had protected 1.8 million acres by means of 1682 conservation easements).

⁵ See *Special Report: The 1994 National Land Trust Survey*, EXCHANGE: J. LAND TRUST

As the cache of conservation easements in this country continues to grow, and those easements, the vast majority of which are perpetual,⁶ begin to age, it will become increasingly important to determine whether, when, and how easements that no longer accomplish their intended conservation purposes can be modified or terminated. Despite the best intentions of most members of the land trust community, mistakes are being made, and land trusts are acquiring easements that, with the passage of time, may provide very little public benefit, or even become detrimental to the public. For example, some conservation easements reserve to the owner of the encumbered land development rights that, if fully exercised, would significantly reduce or eliminate the conservation benefits that flow to the public from the continued "protection" of the land.⁷ Other conservation easements encumber tracts that are destined to become islands of open space in an otherwise intensely developed landscape, and it is not unreasonable to assume that at least some of those "island" easements will cease to provide a level of public benefit sufficient to justify their continued enforcement,⁸ or perhaps even become detrimental to the public because they prevent appropriate infill development and thereby increase the pressure to develop other, more environmentally significant lands.

Moreover, as the number of acres subject to easement restrictions continues to grow, the impact and influence that easements will have on land

ALLIANCE, Fall 1994, at 2, 2 (737,000 acres protected by conservation easements as of 1994); Martha Nudel, *Conservation Easements Emerge as the Decade's Top Land Protection Tool*, EXCHANGE: J. LAND TRUST ALLIANCE, Winter 1999, at 5, 5 (approximately 1.4 million acres protected by conservation easements as of 1998); Martha Nudel, *Conserved Acreage, Number of Land Trusts Soared in the 1990s*, EXCHANGE: J. LAND TRUST ALLIANCE, Fall 2001, at 5, 5 (2,589,619 acres protected by conservation easements as of 2000); Rob Aldrich, *Land Trusts Double the Number of Acres Protected*, EXCHANGE: J. LAND TRUST ALLIANCE, Winter 2005, at 10, 10 (5,067,821 acres protected by conservation easements as of 2003).

⁶ While some conservation easements terminate after a specified number of years (and are referred to as "term easements"), the vast majority of conservation easements are granted in perpetuity because most recipient conservation organizations accept only perpetual easements and landowners donating easements are eligible for the various federal and state tax incentives only if their easements are perpetual. See THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 7 (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter CONSERVATION EASEMENT HANDBOOK].

⁷ See, e.g., Stephen J. Small, *Conservation Easements Today: The Good and the Not-So-Good*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 2003, at 32, 33-34 (noting that there are easements being donated and accepted by land trusts that allow far too much construction on the land they protect, and that, until about 2000, "90-plus percent of the inquiries about conservation easements" the author received were from landowners who "really wanted to protect the land," but that, "[i]n the last two or three years, at least one-third of the inquiries about conservation easements [had] come from landowners who think they can get away with something by donating a conservation easement . . .").

⁸ See McLaughlin, *supra* note 3, at 110 n.429 (noting, for example, that the value of a parcel of land as habitat, or as an integral part of a functioning ecosystem, or as part of a rural, agricultural, scenic, or historic landscape, may be substantial at the time an easement is donated, but will decline as the surrounding area is converted to residential, commercial, and industrial development).

use planning is likely to become pervasive, and the need to make modifications and adjustments to account for changed conditions and societal needs may become acute. At some point in time, society simply may not have the luxury of continuing to enforce easements that provide only marginal levels of public benefit. If the pace of development in this country continues unabated,⁹ undeveloped lands and the ecosystem services they provide¹⁰ will become an increasingly scarce resource, and the continued enforcement of easements that provide only marginal levels of public benefit may come at the expense of failing to protect land with far greater conservation value. In other words, we may find ourselves in need of engaging in a form of "conservation triage," where easements that no longer provide sufficient levels of public benefit as measured under contemporary standards are extinguished, and the value attributable to such easements is used to protect increasingly scarce land with far greater conservation value.

There is considerable confusion and uncertainty regarding whether, when, and how ostensibly "perpetual" conservation easements may be modified or terminated to respond to changed conditions. The confusion and uncertainty appear to stem, at least in part, from the fact that conservation easements constitute a novel form of property interest that does not fit neatly within any of the traditional categories of servitude law.¹¹ Traditional servitudes doctrines raised potential difficulties for both the creation and long-term validity of conservation easements primarily because conservation easements are generally held "in gross," meaning that the holder of the easement does not own a parcel of land that is appurtenant to and benefited by the land encumbered by the easement.¹²

⁹ See, e.g., USDA, 1997 National Resources Inventory: Highlights, Revised December 2000, available at <http://www.nrcs.usda.gov/technical/land/pubs/97highlights.html> (last visited Feb. 23, 2005) (noting that in the ten-year period from 1982 to 1992, 1.4 million acres of non-federal land were converted to development each year, while during the following five-year period that figure jumped to 2.2 million, and, thus, the pace of development during the five-year period from 1992 to 1997 was more than one and one-half times that of the previous ten-year period). See also U.S. GEN. ACCT. OFF. REP. GAO/RCED-00-178, COMMUNITY DEVELOPMENT: LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 11–12 (2000) (noting that the nation will face a growing demand for residential, commercial, and industrial development in the years ahead because the population of the United States is expected to increase by almost fifty percent in the next fifty years and, historically, land consumption has increased faster than population growth).

¹⁰ See *infra* note 155 (describing the public benefits in the form of ecosystem services that flow from land in its undeveloped state).

¹¹ See, e.g., Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 22 (1989) (noting that "[c]onservation easements are a new type of property interest, clearly not contemplated by common law"); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 436 (1984) (discussing the question of which body of property law should govern conservation easements).

¹² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES 36, § 1.6 cmt. a (2000) [hereinafter RESTATEMENT OF SERVITUDES] (noting that the primary problem was caused by the rule prohibiting equitable enforcement of restrictive-covenant benefits held in gross).

To facilitate the use of easements for conservation purposes, forty-nine states and the District of Columbia have enacted legislation ("easement enabling statutes") that removes the common law impediments to the creation and validity of conservation easements, provided, in general, that such easements are conveyed to a government agency or charitable organization for one or more of the conservation purposes specified in the legislation.¹³ The easement enabling statutes, however, do not clearly address whether, when, and how an ostensibly "perpetual" conservation easement can be modified or terminated to respond to changed conditions. Indeed, the drafters of the Uniform Conservation Easement Act ("UCEA"), which was promulgated in 1981 and has been adopted in whole or in substantial part by twenty-four states and the District of Columbia, specifically declined to take a firm position on the proper approach to the modification or termination of easements, noting instead that a variety of doctrines, including the doctrine of changed conditions applicable to common law servitudes and the doctrine of *cy pres* applicable to charitable trusts¹⁴ have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to such circumstances.¹⁵

The confusion and uncertainty regarding whether, when, and how ostensibly "perpetual" conservation easements may be modified or terminated

¹³ See RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.01 n.1 (Michael Allan Wolf ed., 2003) (noting that only Wyoming lacks a special statute on the subject). Wyoming enacted an easement enabling statute in February of 2005, to take effect on July 1, 2005. See Act of Feb. 25, 2005, 2005 Wyo. Sess. Laws 127 (providing for conservation easements largely in accordance with the Uniform Conservation Easement Act) (to be codified at WYO. STAT. §§ 34-1-201 to 34-1-207 (2005)). North Dakota's easement enabling statute applies only to term easements encumbering "historic sites." See N.D. CENT. CODE § 55-10-08 (2003). North Dakota also has an unusual statute that limits the duration of any easement, servitude, or nonappurtenant restriction on the use of real property to ninety-nine years, thus making it seemingly impossible to create a perpetual conservation easement in North Dakota. See N.D. CENT. CODE § 47-05-02.1.2 (2003).

¹⁴ Under the doctrine of *cy pres*, if the purpose of a restricted charitable gift or charitable trust becomes "impossible or impracticable" due to changed conditions, and the donor of the gift or settlor of the trust manifested a general charitable intent, a court may formulate a substitute plan for the use of the gift or trust assets for a charitable purpose "as near as possible" to the charitable purpose specified by the donor or settlor. See *infra* note 32 and accompanying text (discussing the doctrine of *cy pres*).

¹⁵ See Uniform Conservation Easement Act (1981) § 3 cmt. [hereinafter UCEA]; Uniform Law Commissioners, A Few Facts About the Uniform Conservation Easement Act, at http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Mar. 25, 2005) (listing twenty-one states and the District of Columbia as having adopted the UCEA). Georgia, Oklahoma, and Wyoming also have adopted the UCEA in whole or in substantial part. See GA. CODE ANN. §§ 44-10-1 to 44-10-5 (Harrison 2002); 60 OKL. STAT. ANN. tit. 60, § 49.1 (West 2005); Act of Feb. 25, 2005, 2005 Wyo. Sess. Laws 127 (providing for conservation easements largely in accordance with the UCEA) (to take effect on July 1, 2005, and to be codified at WYO. STAT. §§ 34-1-201 to 34-1-207 (2005)). See also Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements As Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 121 (2002) (noting that the drafters of the UCEA apparently believed that "attempting to dictate a consistent legal framework for the modification or termination of easements would interfere too much with other substantive state law").

has caused some commentators to express alarm over the potentially harmful consequences to society when, as is inevitable, some perpetual easements—due to changed conditions, evolving cultural values, or advances in ecological science—cease to provide the public benefit for which they were acquired, or actually become detrimental to the public good. Such commentators argue that society may find itself saddled with obsolete but nevertheless perpetual easement restrictions, or, at best, will have to expend considerable resources to extinguish such restrictions.¹⁶

Other commentators have expressed concern that conservation easements might be too easily extinguished under common law doctrines applicable to real property servitudes that look to measurable economic factors and fail to give appropriate weight to the difficult-to-value public benefits that flow from conservation easements.¹⁷ There also is a concern that unless appropriate compensation is paid to the government agencies and land trusts holding easements upon extinguishment, the public's considerable interest and investment in such easements would be lost, and the resulting economic windfall to the owners of the underlying land would create an incentive for similarly situated landowners (as well as speculators) to challenge the continued validity of easements.¹⁸

¹⁶ See, e.g., Korngold, *supra* note 11, at 441–42 (“It is not entirely clear, for example, that preservation of land is and always will be preferable to its use as a hospital or church providing services to the community, a lower income housing project, a condominium containing recreational facilities and natural settings for its residents, a public recreation area for picnicking, swimming and sports, or a commercial or industrial area providing jobs for an economically depressed region. The choice of the best current use of a parcel of land is difficult enough; more difficult still is the decision today regarding future use, because future needs are more speculative. Rigid choices today may defeat the right of future generations to make critical decisions affecting their lives.”) (internal citations omitted); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 753 (2002) (“[T]he assumption that the present generation is competent to engage in perpetual land use planning reflects an unduly bounded conception of the changes that are likely to occur in nature itself, in scientific knowledge, and, last but certainly not least, in cultural attitudes. Conservation servitudes are ill-suited to adapt to such changes.”).

¹⁷ See, e.g., Dana & Ramsey, *supra* note 11, at 38 (noting that, because of the difficulty in determining the flow of benefits to the public associated with conservation easements and the relative ease in determining the burden imposed by an easement on a property owner, courts could be expected to invoke the property law doctrine of relative hardship for the benefit of the landowner in virtually every case). See also *infra* notes 92 (noting that, in their current form, the property law doctrines of changed conditions, frustration of purpose, or relative hardship would not adequately protect the public's interest or investment in conservation easements) and 155 (describing the public benefits in the form of ecosystem services that can flow from a conservation easement).

¹⁸ See, e.g., Dana & Ramsey, *supra* note 11, at 38–39; *infra* note 248 and accompanying text (noting that easements valued in the hundreds of thousands and even multiple millions of dollars are increasingly common, and the prospect of realizing even a modest percentage of that value upon extinguishment would likely induce landowners and speculators alike to try their hand at “breaking” easements). The public's investment in donated easements comes in a variety of forms, including foregone revenue from the various federal, state, and local tax incentives offered to easement donors; the enactment of easement enabling legislation; attorney general and judicial oversight of the enforcement of easements; federal, state, and local tax benefits provided to easement donees; and public funds expended to staff and operate government agencies that accept easement donations.

Finally, there is a danger that holders of conservation easements may consider themselves free to simply agree with the owners of the encumbered land to substantially modify or extinguish conservation easements in exchange for cash or other compensation, despite the continuing flow of public benefits from an easement or the grantor's intent that the easement be enforced in perpetuity.¹⁹ Given the considerable value attributable to conservation easements (in the form of the development and other use rights restricted thereby), the temptation to holders to look to their inventory of easements as ready sources of cash in the event of financial exigency could be overwhelming.²⁰

The current state of confusion and uncertainty regarding whether, when, and how ostensibly perpetual conservation easements may be modified or terminated will not last forever. As conservation easements continue to proliferate and age nationwide, the confusion and uncertainty will be resolved one way or another, and the manner in which it is resolved will determine the extent to which conservation easements are able to deliver the long-term public benefit they promise.

This Article proposes the following solution: conservation easements donated to counties, cities, and other agencies of state government (hereinafter, "government agencies")²¹ or charitable organizations should be treated as restricted charitable gifts or charitable trusts, and the holders of such easements should be subject to the equitable rules governing a donee's use and disposition of charitable assets—including the well-settled rule that, except to the extent granted the power in the gift or trust instrument, the donee of a restricted charitable gift or charitable trust may not deviate from the administrative terms or charitable purpose thereof without receiving court approval therefor under the doctrine of administrative deviation or *cy pres* (sometimes referred to hereinafter as the "charitable trust rules").

¹⁹ See *infra* Part II.D (discussing how the National Trust for Historic Preservation in the United States believed it was free to simply agree with a subsequent owner of easement-encumbered land to significantly modify the terms of the easement). See also Dana & Ramsey, *supra* note 11, at 35 (noting that a land trust might simply decide that the conservation value of an easement is no longer justified given the costs associated with its enforcement, and this could lead to termination of the easement either directly, by release, or indirectly, by abandonment).

²⁰ See, e.g., Jeffrey M. Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 285–86 (2002) (noting that "state legislators probably hoped that by limiting the eligible holders to government entities and charitable organizations, the easement holder would not be inclined to release a conservation easement without good cause . . . [because they] are obligated to base their actions and decisions primarily out of concerns for the public interest and the interest of land preservation. However, it is not inconceivable that [such a holder] could ignore this mandate, and base its decision to release a viable easement on the best interests of the landowner, [and that] opponents seeking to destroy the easement could approach the easement holder and try and convince them to release the easement, perhaps using political pressure if the holder is a government entity, or through financial inducements if the holder is a private organization.").

²¹ The laws that might govern the modification or termination of conservation easements conveyed to or held by agencies of the federal government are not addressed in this Article.

Charitable trust rules are recommended as the framework within which to modify or terminate conservation easements because such rules were developed and refined over the centuries to deal precisely with the issue presented by conservation easements—how to appropriately balance: (i) the charitable donor's desire to exercise dead hand control over the use of his or her property and (ii) society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public.

Part II of this Article makes the case for applying charitable trust rules to donated conservation easements. Part II argues that when a landowner donates a conservation easement to a government agency or land trust, the landowner should be viewed as making a gift of the real property interest embodied in the easement to the agency or organization for a specified charitable purpose—the protection of encumbered land for the conservation purposes specified in the deed of conveyance. Just as the individual who donates fee title to land to a government agency or charitable organization for a specified charitable purpose (such as for use as a public park or as the site of a home for aged women) can feel confident that the agency or organization cannot simply sell the land or use it for other purposes,²² so should the donor of a conservation easement be able to feel confident that the agency or organization accepting the easement cannot later simply sell or exchange some or all of the restrictions in the easement for cash or other compensation, or continue to enforce the easement for purposes not specified by the donor. Part II also explains that the easement enabling statutes should not be viewed as trumping the application of charitable trust rules to donated easements.

Part II notes that many conservation easement deeds grant the holder, either directly or indirectly, the discretion to interpret and amend the easement in manners that are consistent with the charitable purpose of the easement. Such provisions give the holder of the easement substantial flexibility—without seeking judicial approval—to agree with the owner of the encumbered land to, for example, amend the easement to clarify vague language; correct a drafting error; delete restrictions that advances in ecological science have shown to be detrimental to the conservation purpose of the easement; or permit activities that have no adverse impact on the conservation purposes of the easement. Such provisions should not, however, be interpreted to grant the holder the discretion to amend the easement in manners *not* consistent with the charitable purpose of the easement or to terminate the easement. The extent of a holder's discretion to amend a conservation easement in manners consistent with its charitable purpose is the subject of a separate, future article. This Article focuses on the appli-

²² See, e.g., *City of Salem v. Attorney Gen.*, 183 N.E.2d 859 (Mass. 1962); *Lewis v. Bd. of County Comm'rs*, 128 N.E.2d 818 (Ohio Ct. App. 1954), discussed in note 30, *infra*; see also *infra* note 201 and cases cited therein.

cation of the doctrine of *cy pres* to terminate a conservation easement or modify its charitable purpose when the donor's specified charitable purpose has become "impossible or impracticable" due to changed conditions.

Part III.A argues that a landowner should be viewed as striking the following "*cy pres* bargain" with the public upon the donation of a conservation easement: the landowner should be permitted to exercise dead hand control over the use of the property encumbered by the easement, but only so long as the easement continues to provide benefits to the public sufficient to justify its enforcement. If, due to changed conditions, the continued protection of the encumbered land for the conservation purposes specified in the easement deed becomes "impossible or impracticable," a court should apply the doctrine of *cy pres* to restore the appropriate balance between the landowner's desire to exercise dead hand control and society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public.

Part III.B then explains how the courts work through the *cy pres* process in other contexts, and offers suggestions as to how the courts could work through that process in the conservation easement context.

Using a hypothetical case study (the facts of which are loosely based on a potential challenge to an easement reported in the media), Part III.C then walks the reader through the application of the doctrine of *cy pres* to modify or terminate a conservation easement, the charitable purpose of which has arguably become "impossible or impracticable" because the encumbered land, while once situated in a largely rural, agricultural landscape, is now surrounded by intense, multi-use development.

Part IV concludes by noting that applying the doctrine of *cy pres* to conservation easements as recommended in this Article would accord considerable deference to the right of easement donors to control the use and disposition of their property, but at the same time allow society to modify or terminate easements that cease to provide a level of public benefit sufficient to justify their continued enforcement (or even become detrimental to the public) as measured under contemporary standards. Part IV argues that concerns that extinguishment of easements under the doctrine of *cy pres* would chill future easement donations are misplaced, and that a rational framework for making extinguishment decisions could increase the quality of donations by forcing donors to think more realistically about the long-term future of their easements. Part IV also notes that if charitable trust rules are accepted as the framework within which modification and termination decisions will be made, the parties to easement donation transactions—the donors, the holders, and the public—will be able to rely on a set of rational and at least somewhat predictable rules, and structure their transactions accordingly so as to best accomplish their mutual conservation goals.

Finally, although this Article focuses solely on donated conservation easements, which appear to constitute the majority of easements conveyed to

date,²³ many of the same principles arguably should apply to perpetual conservation easements that are purchased by government agencies and land trusts. The restricted nature of such conveyances, the significant public investment in such easements, and the fact that even purchased easements are held by government agencies or charitable organizations for the benefit of the public and, thus in a trust or quasi-trust relationship, all support the application of charitable trust rules to purchased as well as donated easements.²⁴

II. APPLICATION OF CHARITABLE TRUST RULES TO DONATED EASEMENTS

When a gift is made to a government agency or charitable organization without restrictions on its use or disposition, the agency or organization may use the gift in whatever manner it sees fit, subject only to the general federal and state law requirements applicable to such agency or organization (such as the requirement that the agency or organization use its assets in accordance with its public or charitable mission and, in the case of a charitable organization, the prohibitions on private inurement and private benefit).²⁵ Alternatively, when a gift is made to a government agency or charitable organization for a specified charitable purpose, the weight of authority indicates that, unless granted the power in the instrument of conveyance, the agency or organization may not deviate from the administrative terms or charitable purpose of the gift without receiv-

²³ See McLaughlin, *supra* note 3, at 19–20 n.74 (2004) (explaining that a significant percentage of the easements conveyed to the nation's local, state, and regional land trusts were conveyed after the issuance of the Treasury Regulations interpreting § 170(h) in 1986, and that the available evidence indicates that most of those easements were donated rather than sold to such land trusts).

²⁴ There is very little case law involving the application of the equitable rules governing a donee's use and disposition of charitable assets (including the doctrines of administrative deviation and *cy pres*) to property that was sold, rather than donated, to a government agency or charitable organization for a specified charitable purpose—perhaps because it is rare for an agency or organization that is paying for property to agree to include potentially cumbersome restrictions in the deed of conveyance. However, in at least one case involving a partial sale of land to a government agency for a specified charitable purpose, the court held that such equitable rules applied. See *Cohen v. City of Lynn*, 598 N.E.2d 682 (Mass. App. Ct. 1992) (holding that the conveyance of land to a city by deeds stating that the land was to be used “forever for park purposes” created a public charitable trust; acceptance of the deeds by the city constituted a contract between the grantors and the city that must be observed and enforced; there was “no authority . . . 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”; and that the application of the doctrine of *cy pres* was inappropriate because it had not become impossible or impracticable to carry out the original charitable purpose of the conveyance).

²⁵ See AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS*, § 348.1, at 8–9 (4th ed. 1989). The private inurement and private benefit doctrines generally require that, to maintain tax-exempt status, none of the income or assets of a charitable organization may be permitted to directly or indirectly unduly benefit any person, whether related to the organization or not. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 484, 522 (8th ed. 2003).

ing judicial approval therefor under the doctrine of administrative deviation or *cy pres*—and this principle holds true whether the donor is treated as having created a charitable trust or merely as having made a restricted charitable gift (sometimes referred to as a “quasi-trust”) under state law.²⁶

For example, in the leading case in this area, *St. Joseph's Hospital v. Bennett*, a testator bequeathed a share of the residue of his estate to a charitable corporation operating St. Joseph's Hospital “to be held as an endowment fund and the income used for the ordinary expenses of maintenance” of the hospital.²⁷ The corporation brought an action seeking authorization to use the fund for purposes other than “ordinary expenses of maintenance,” and the New York attorney general opposed the action on the ground that the bequest was a gift in trust.²⁸ The New York Court of Appeals held that, while “no trust arises . . . in a technical sense” and “the charitable corporation is not bound by all the limitations and rules which apply to a technical trustee,” a charitable corporation “may not, however, receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands.”²⁹ In fact, gifts of all types of property to government agencies and charitable organizations for specified charitable purposes are classified as either restricted charitable gifts or charitable trusts, and unless granted discretionary powers in the instrument of conveyance, the donees are obligated to seek court approval to deviate from the administrative terms or charitable purposes of such gifts or trusts under the doctrine of administrative deviation or *cy pres*.³⁰

²⁶ See SCOTT & FRATCHER, *supra* note 25, § 348.1, at 9, 16. See also MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 51 (2002) (explaining the development of the law with regard to restricted charitable gifts and charitable trusts).

²⁷ *St. Joseph's Hospital v. Bennett*, 22 N.E.2d 305, 306 (N.Y. 1939).

²⁸ See *id.*

²⁹ See *id.* at 308. See also *Blumenthal v. White*, 683 A.2d 410 (Conn. 1996) (holding that, while a gift of land to a city with instructions that the land be used as a public park and never transferred did not create a trust “in strict sense, it may be so regarded,” that the city held the land as a “quasi-trustee,” and that the doctrine of administrative deviation should be applied to permit the city to deviate from the terms of the trust to carry out the testator's intent). A few of the rules applicable to charitable trusts are not applicable to restricted charitable gifts or “quasi-trusts.” See SCOTT & FRATCHER, *supra* note 25, § 348.1, at 10–11 (“The circumstances under which and the proceedings by which creditors can reach the property are different . . .”).

³⁰ See, e.g., *Lewis v. Bd. of County Comm'rs*, 128 N.E.2d 818 (Ohio Ct. App. 1954) (holding that devise of testator's residence and residue of estate to county “for the purpose of being kept, maintained and operated as a home for old ladies” created a charitable trust); *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 the memory of 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 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); *Am. Inst. of Architects v. Attorney Gen.*, 127 N.E.2d 161 (Mass. 1955) (stating that a gift of the residue of a testatrix's estate to the American Institute of Architects to maintain “scholarships for advanced study by deserving architects,

Under the doctrine of administrative deviation, a court may permit the donee of a restricted charitable gift or the trustee of a charitable trust to deviate from the administrative terms (as opposed to the charitable purpose) of the gift or trust if, owing to circumstances not known to the donor and not anticipated by him, compliance with such terms would "defeat or substantially impair" the accomplishment of the purpose of the gift or trust.³¹ Under the doctrine of *cy pres*, if the purpose of a restricted charitable gift or charitable trust becomes "impossible or impracticable" due to changed conditions, and the donor of the gift or settlor of the trust manifested a general charitable intent in making the gift or creating the trust, a court may formulate a substitute plan for the use of the gift or trust assets for a charitable purpose "as near as possible" to the original charitable purpose of the donor or settlor.³²

The government agency or charitable organization holding a restricted charitable gift or serving as trustee of a charitable trust holds legal title to the assets on behalf of the public, which is the beneficiary of the gift or trust.³³ While such agency or organization is obligated to honor and enforce the terms of the gift or trust, such agency or organization also has a duty to seek the application of administrative deviation if it believes that continued compliance with one or more terms of the gift or trust would "defeat or substantially impair" the accomplishment of the charitable purpose of the gift or trust, or the application of *cy pres* if it believes that it has become "impossible or impracticable" to carry out the charitable purpose of the gift or trust.³⁴ In other words, the holder of a restricted charitable gift

and/or deserving students of architecture" created a "quasi trust," and use of the gift was restricted to the purposes set forth in the testatrix's will); *Newhall v. Second Church & Soc'y of Boston*, 209 N.E.2d 296 (Mass. 1965) (holding that church receiving a gift of silver vessels dedicated to baptismal purposes was subject to a duty to use the vessels for such purposes and could not sell them without court authorization). See also MARIE C. MALARO, MUSEUM GOVERNANCE 79 (1994) [hereinafter MALARO, MUSEUM GOVERNANCE] (noting that "when a museum accepts an object for its collection, for example, with a condition requiring permanent display or permanent retention, the museum bows to the 'dead hand'; it agrees that utilization of the object will be controlled forever by the donor"); *infra* note 121 (describing a museum's obligation to seek court approval under the doctrine of administrative deviation or *cy pres* to deviate from the terms of a restricted gift of artwork).

³¹ See SCOTT & FRATCHER, *supra* note 25, § 399, at 479.

³² See, e.g., *id.*, § 399.2, at 489-90; G. B. BOGERT & G. T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431, at 95 (rev. 2d ed. 1991). See also FREMONT-SMITH, *supra* note 26, at 49 ("By the end of the twentieth century the *cy pres* doctrine and its companion doctrine of deviation had been adopted by statute, case law, or dictum in forty-nine states.").

³³ See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 348 (1959) ("A charitable 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 by whom the property is held to equitable duties to deal with the property for a charitable purpose."); SCOTT & FRATCHER, *supra* note 25, § 348, at 8 ("The trustees of a charitable trust are under a duty 'to deal with the property for a charitable purpose.' In the case of a private trust it is the duty of the trustees to deal with the property for the benefit of the designated beneficiary or beneficiaries In the case of a charitable trust, property is devoted to the accomplishment of purposes that are beneficial or may be supposed to be beneficial to the community.").

³⁴ See BOGERT & BOGERT, *supra* note 32, § 435, at 130 (noting that if the trustees of a

or 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.³⁵

In addition, because the beneficial interest in a restricted charitable gift or charitable trust is vested in the public rather than individual beneficiaries, the attorney general is given the power to bring a proceeding on behalf of the public to enforce the terms of the gift or trust.³⁶ The attorney general, as the representative of the public, is also generally a necessary party and entitled to be heard in a proceeding involving the application of the doctrine of administrative deviation or *cy pres*.³⁷

This Part argues that a landowner who donates a conservation easement to a government agency or land trust should be viewed as making a gift of the real property interest embodied in the easement³⁸ to the agency or organization for a specified charitable purpose³⁹—that is, the protec-

charitable trust believe that it has become impossible or impracticable to carry out the trust as originally planned, they have a "duty to bring a suit in equity to secure a decree applying *cy pres*"; FREMONT-SMITH, *supra* note 26, at 438-39 (noting that a trustee has the duty to petition the court for the application of administrative deviation if he knows or should know of circumstances that justify such action; that a trustee's duty to seek the application of the doctrine of *cy pres* is implicit in the duty of loyalty; that in a situation where it becomes impossible, impracticable, or wasteful to continue to fulfill the original purposes, the trustee cannot fulfill his duty to the public beneficiaries unless he seeks modification under the *cy pres* doctrine; that interpretation of the traditional duty of loyalty to make explicit that it includes the duty to seek revision of purposes when they can no longer be carried out would assure that charitable funds will be used for purposes beneficial to the public on a contemporaneous basis; and that while the attorney general can bring a *cy pres* petition on his own motion, it would be preferable for trustees to understand this as one of their duties rather than let it pass to the state by default).

³⁵ Elias Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, at 979 (1957) ("A charitable trust serves two masters—the property owner who created it and society which is its beneficiary.").

³⁶ See SCOTT & FRATCHER, *supra* note 25, § 348.1, at 9 (noting that the "Attorney General can maintain a suit to prevent a diversion of the property to purposes other than those for which it was given" in the case of both charitable trusts and gifts to charitable corporations).

³⁷ See *id.* § 391, at 360-61.

³⁸ It is assumed that a conservation easement constitutes a property interest sufficiently substantial to be the subject of a charitable gift or a charitable trust. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 581 (6th ed. 2000) (noting that trust property may be *any interest* in property that can be transferred, including contingent remainders, leasehold interests, choses in action, royalties, and life insurance policies); UCEA, *supra* note 15, § 1(1) (defining a conservation easement as a "nonpossessory interest in property"); *id.* §§ 1, 2(a) (providing that a conservation easement may be conveyed in the same manner as other easements, subject to the requirement that the holder thereof be a government agency or charitable organization); Arpad, *supra* note 15, at 130 (concluding that most modern conservation easements can constitute the *res* of a trust). See also *infra* notes 236 and 237 and accompanying text (discussing the ways in which the nature of the property interest embodied in a conservation easement could be conceptualized).

³⁹ It is also assumed that a conservation easement donated to a government agency or charitable organization for one or more of the conservation purposes specified in the applicable state easement enabling statute is donated for a "charitable" purpose as that term is defined under state law and, thus, would be subject to the equitable rules governing a charitable donee's use and disposition of charitable assets, including the doctrines of administra-

tion of encumbered land for the conservation purposes specified in the deed of conveyance. As with any gift of property that is conveyed to and accepted by a government agency or charitable organization pursuant to a written instrument stating that the property is to be used for a specified charitable purpose, the holder of a conservation easement should be bound by the deed of conveyance and, except to the extent granted the power in the deed, should not be permitted to deviate from the administrative terms or stated purpose thereof without receiving court approval therefor under the doctrine of administrative deviation or *cy pres*. In other words, except to the extent granted the power in the deed of conveyance, the holder of a donated easement should not be permitted to agree with the owner of the encumbered land to modify or terminate the easement unless and until: (i) compliance with one or more of the administrative terms of the easement threatens to defeat or substantially impair the charitable purpose of the easement, and a court applies the doctrine of administrative deviation to authorize the modification or deletion of such term or terms, or (ii) the charitable purpose of the easement has become impossible or impractica-

tive deviation and *cy pres*. See SCOTT & FRATCHER, *supra* note 25, § 399, at 479 (“The *cy pres* doctrine is applicable only to dispositions for charitable purposes . . .”); FREMONT-SMITH, *supra* note 26, at 48, 173 (noting that while some commentators have questioned the importance of the state law definition of a “charitable” purpose in light of the overriding consideration of tax exemption and consequent deference to the definition of charitable purposes in the Internal Revenue Code, the state law definition of a charitable purpose is probably of greatest continuing importance in connection with the application of the doctrines of administrative deviation and *cy pres*). State 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. See SCOTT & FRATCHER, *supra* note 25, § 368, at 133–34. See also, e.g., BOGERT & BOGERT, *supra* note 32, § 369, at 82, 83 (noting that it is inadvisable to bind courts to any set formula, as they need latitude to include new purposes as society develops and public opinion changes). Thus, while the courts have held that certain purposes are clearly charitable—namely the relief of poverty, the advancement of knowledge or education, the advancement of religion, the promotion of health, and governmental or municipal purposes (such as the erection of public buildings, bridges, and the like)—there also exists a very expansive general or “catchall” category of charitable purposes, into which falls a vast number of miscellaneous purposes that have been deemed beneficial to the community. See SCOTT & FRATCHER, *supra* note 25, § 368, at 130; RESTATEMENT (THIRD) OF TRUSTS § 28(f) (2001) [hereinafter RESTATEMENT OF TRUSTS]. The donation of conservation easements, which is facilitated in forty-nine states and the District of Columbia through the enactment of easement enabling legislation and heavily subsidized through federal, state, and local tax incentives, is precisely the type of new and unanticipated “charitable” activity that should be deemed to fall within the broad reach of that term. In addition, the fact that an easement donor may be primarily or solely motivated by selfish factors (such as the desire to create a permanent monument to himself or the desire to convert some of the equity in his land to cash in the form of tax savings) should be immaterial to the question of whether the donation is considered to be charitable. All the courts should (and generally do) ask is whether the net result of the gift is to advance the public interest in some substantial way. See BOGERT & BOGERT, *supra* note 32, § 366, at 61. See also SCOTT & FRATCHER, *supra* note 25, § 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.”).

ble due to changed conditions, and a court applies the doctrine of *cy pres* to authorize either a change in the conservation purpose for which the encumbered land is protected, or the extinguishment of the easement, the sale of the land, and the use of the proceeds attributable to the easement to accomplish the donor's specified conservation purpose or purposes in some other manner or location.⁴⁰ In addition, in either case the state attorney general, as the representative of the easement beneficiary (the public), should be given the opportunity to intervene in the proceeding.⁴¹

As discussed in Part II.A.2 below, many conservation easement deeds grant the holder, either directly or indirectly, the discretion to amend the easement in manners consistent with (or neutral with respect to) the charitable purpose of the easement, thereby eliminating the need to seek judicial approval under the doctrine of administrative deviation for such amendments.⁴² In addition, as a practical matter, even in the absence of such a grant of discretion in the easement deed, the holder of an easement can make uncontroversial amendments without seeking judicial approval because no person with standing is likely to object.⁴³ However, modifying an easement in a manner that would adversely affect the continued protection of the encumbered land for the conservation purposes specified in the easement (such as by deleting the restrictions on subdivision and development in the easement) or extinguishing an easement would constitute a change in the charitable purpose of the easement and would require the application of the doctrine of *cy pres* (where it would have to be established in the context of a judicial proceeding that the donor's specified charitable purpose had become "impossible or impracticable").⁴⁴

⁴⁰ The doctrines of administrative deviation and *cy pres* are distinct in that the former applies to a modification of the *administrative terms* of a charitable gift or trust, and the latter applies to a modification of the *charitable purpose* of a charitable gift or trust. See, e.g., Report of Committee on Charitable Trusts and Foundations, *Cy Pres and Deviation: Current Trends In Application*, 8 REAL PROP. PROB. & TR. J. 391, at 398-400 (1973) [hereinafter Report of Committee on Charitable Trusts and Foundations] (noting, however, that in practice the line between the two doctrines is less than precise). To illustrate the application of the doctrine of administrative deviation to modify an administrative term (as opposed to the charitable purpose) of an easement, assume that thirty years ago a landowner donated an easement to a land trust for the purpose of preserving wildlife habitat and forestland, and included a "no burn" provision in the easement that prohibits the owner of the land and the holder of the easement from engaging in controlled burns on the property or permitting naturally caused fires to run their course. While the "no burn" provision might have been considered prudent at the time of the donation of the easement, due to changed conditions and advances in ecological science such a provision might now be deemed to defeat or substantially impair the charitable purpose of the easement (that is, the protection of the encumbered land for the purpose of preserving wildlife habitat and forestland). Modifying the easement to delete the no burn provision would serve to enhance, rather than alter, the charitable purpose of the easement and could be accomplished through the application of the doctrine of administrative deviation.

⁴¹ See *supra* note 37 and accompanying text.

⁴² See *infra* notes 77-78 and accompanying text.

⁴³ See *infra* note 80 and accompanying text.

⁴⁴ See *infra* Part II.A.2.

The following Sections support the application of charitable trust rules to donated conservation easements. Section A explains why a conservation easement donated to a government agency or charitable organization should be treated as a restricted charitable gift or charitable trust subject to charitable trust rules. Section B explains that the easement enabling statutes should not be viewed as trumping the application of charitable trust rules to donated easements. Section C describes a case in which a probate court determined that a façade easement encumbering an historic structure constituted a “charitable interest” under state law and authorized extinguishment of the easement pursuant to the doctrine of *cy pres*. Section D describes the abortive attempt of the National Trust for Historic Preservation of the United States to simply agree with the owner of easement-encumbered land to substantially modify the easement, and the position of the attorney general for the state of Maryland that the easement constituted a charitable trust and could not be modified in the absence of court approval in the context of an administrative deviation or *cy pres* proceeding. Section E briefly concludes by noting that the application of charitable trust rules to donated easements would not place undue burdens on the holders of such easements.

A. Status of a Donated Conservation Easement as a Restricted Charitable Gift

1. When Is a Charitable Gift Restricted?

If there is no written instrument evidencing the gift of property to a government agency or charitable organization, or if the written instrument does not contain any restrictions on the donee’s use or disposition of the property, the gift is unlikely to be treated as restricted.⁴⁵ In addition, if there is a written instrument evidencing the gift of property to a government agency or charitable organization, and the donor expressly grants the agency or organization the discretion to retain, sell, or otherwise use the property as it sees fit in furtherance of its public or charitable mission, the gift clearly is not restricted. Thus, for example, a person may donate valuable artwork to a museum and expressly state in the instrument of conveyance

⁴⁵ See MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 106–07 (1985) [hereinafter MALARO, LEGAL PRIMER] (describing a case in which a Maryland court determined that a nonprofit historical society had the right to dispose of a valuable desk it had received years earlier as a gift from a patron, despite the insistence of the donor’s heirs that there was an implicit understanding between the donor and the society that the desk would always be retained for display by the society, because there was no deed of gift evidencing the conveyance. The court stated that “[g]ifts cannot be presumed to be conditional. Their conditions must be clearly set forth, as the memories of men do fade with time.”); *Persan v. Life Concepts, Inc.*, 738 So. 2d 1008, 1010 (Fla. Dist. Ct. App. 1999) (holding that a charitable organization had the right to sell land given to it pursuant to a deed containing no restrictions, despite testimony of the donor that the land was intended to be used for the construction and operation of living facilities for disabled adults).

that the museum may retain the artwork as part of its collection, or sell or exchange the artwork for cash or some other form of compensation that can be used by the museum in furtherance of its charitable mission.⁴⁶

A gift of property to a government agency or charitable organization will also be deemed to be unrestricted if the instrument of conveyance contains language concerning the donee's use of the property, but such language is couched in terms of a request, suggestion, or entreaty (rather than a command), and an examination of the instrument of conveyance in its entirety and the circumstances surrounding its execution indicate that the donor intended such language to be merely precatory in nature.⁴⁷ Thus, for example, in *In re James' Estate*, the testator bequeathed the residue of his estate (consisting of approximately \$25 million) to a foundation established in his name and provided in his will that it was his "wish and desire" that the foundation pay specified shares of its income to seventeen charitable organizations named in the will on an annual basis.⁴⁸ The will also provided that "the expression of [the testator's] wishes and desires . . . shall not be taken to control or limit the absolute discretion of the trustees . . . of the foundation."⁴⁹ After an examination of the will and the circumstances surrounding its execution, the court held that the language regarding the payment of shares of income to the seventeen named charitable organizations was intended to be merely precatory in nature and was not intended to control or limit the absolute discretion granted to the trustees of the foundation with regard to the use of the funds.⁵⁰

⁴⁶ See, e.g., STEPHEN E. WEIL, *RETHINKING THE MUSEUM* 113 (1990) (noting that in 1979, the Corcoran Gallery of Art sold one hundred nineteenth-century European paintings from its collection through public auction, and excerpting the preface to the auction catalogue, which states that "[i]n the case of the European paintings owned by William Wilson Corcoran, the donor himself (in what is an extraordinary example of farsighted museum philanthropy) stipulated in his deed of gift that their disposition was at the discretion of the Trustees.").

⁴⁷ See, e.g., BOGERT & BOGERT, *supra* note 32, § 324, at 376-77; *id.* § 48, 74 ("The primary question in every case [involving precatory language] is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended."); SCOTT & FRATCHER, *supra* note 25, § 351, at 49-50 ("Where the settlor uses language expressive of a desire rather than of a command, precatory rather than mandatory language, it is a question of interpretation whether his intention is to leave the donee or legatee free to decline to carry out the designated charitable purpose, or to impose a binding obligation on him to devote the property to the designated purpose.").

⁴⁸ *In re James' Estate*, 130 N.Y.S.2d 693 (N.Y. Sup. Ct. 1954).

⁴⁹ *Id.* at 697-98.

⁵⁰ See *id.* See also SCOTT & FRATCHER, *supra* note 25, § 348.1, at 18 n.11 ("If the donor uses precatory language and does not manifest an intention to impose a binding restriction on the use of the property, the corporation is not bound thereby."). *In re Hamilton's Estate*, 186 P. 587 (Cal. 1919), involved language included in a will that, while precatory in nature, was nonetheless found to impose legally binding restrictions on the legatee's use and disposition of the property. In *In re Hamilton's Estate*, the testator devised the residue of his estate (consisting of approximately \$60,000) to the Right Reverend William J. Walsh, Archbishop of Dublin, with the "request" that masses be offered for the repose of his soul and the souls of his relatives in certain designated churches in Dublin. After examin-

Alternatively, where the instrument of conveyance states that the gift is made for a specified charitable purpose and no words of "request, suggestion, or entreaty" appear in the instrument, the courts routinely hold that, except to the extent the donee is granted discretion in the instrument, the donee is bound by the instrument and may not deviate from the express terms or stated purpose thereof without receiving court approval therefor under the doctrine of administrative deviation or *cy pres*.⁵¹ The charitable gifts of land involved in *Nickols v. Commissioners of Middlesex County* are somewhat analogous to the donation of a conservation easement and illustrate how a statement of purpose in a deed of conveyance can impose an enforceable obligation on the donee to both: (i) use the property that is the subject of the gift for the stated purpose; and (ii) refrain from taking any action that is contrary to that stated purpose.⁵² *Nickols* involved a gift of the shore and woodlands surrounding Walden Pond to the Commonwealth of Massachusetts.⁵³ Executed in 1922, the deeds conveying the property provided, in part, as follows:

[The] parcels are . . . subject to the restriction and condition that no part of the premises shall be used for games, athletic contests, racing, baseball, football, motion pictures, dancing, camping, hunting, trapping, shooting, making fires in the open, shows or other amusements such as are often maintained at or near Revere Beach and other similar resorts, it being the sole and exclusive purpose of this conveyance to aid the Commonwealth in preserving the Walden of Emerson and Thoreau, its shores and nearby woodlands for the public who wish to enjoy the [p]ond, the woods and nature, including bathing, boating, fishing and picnicking.⁵⁴

ing the testator's will in its entirety and the circumstances surrounding its execution, the Supreme Court of California held that the testator intended to impose a duty on the Archbishop to use the funds to procure the saying of masses in the designated churches, and that a valid charitable trust had been created. In support of its decision, the court noted, *inter alia*, that, while the word "request" is one of petition or favor, "very frequently . . . a . . . command or positive direction is, as a matter of polite or deferential expression, cast in the form of a request," and that there was no relation or bond between the testator and the archbishop which would make the latter a natural object of the testator's bounty. *See id.* at 588, 590.

⁵¹ *See, e.g., supra* notes 26–30, accompanying text, and cases cited therein. *See also* Estate of Heil, 259 Cal. Rptr. 28 (Cal. Ct. App. 1989) (holding that a provision in the testator's will directing that the residue of his estate be "given to the State of Nevada for the preservation of the wild horses in Nevada" was not precatory in nature, as it "contain[ed] no words of entreaty, request, wish or recommendation, which constitute the essence of a precatory statement," and, instead created a charitable trust and imposed an "imperative obligation" on the state).

⁵² *Nickols v. Commissioners of Middlesex County*, 166 N.E.2d 911 (Mass. 1960).

⁵³ *Id.* at 914.

⁵⁴ *Id.*

In the late 1950s, the Commissioners of Middlesex County, who were charged with overseeing the use and management of the shore and woodlands (the "Commissioners"): (i) substantially increased the size of the beach area by removing more than one hundred large trees and nearby undergrowth,⁵⁵ (ii) widened the beach from a width of eight to ten feet to fifty feet by cutting down the embankment on the pond shore and using the excavated material to fill in the pond, (iii) built additional parking spaces, which involved substantial cutting of trees, (iv) provided access to the pond by a road for fishermen, and (v) planned to build a paved concrete ramp or ramps from an existing parking area to the beach and a concrete bath house about one hundred feet long at the bottom of the slope close to the new beach.⁵⁶ Four citizens and residents of Concord filed a petition with the court seeking to force the Commissioners to observe the terms of the deeds of conveyance and to refrain from conduct in violation of the deeds.⁵⁷ The Commissioners argued that the statement of purpose in the deeds did not impose a restriction, condition, trust, obligation, or burden with respect to their use of the shore and woodlands, and that the purpose of the gifts was not to preserve Walden Pond and the nearby woodlands in their natural state.⁵⁸

The Supreme Judicial Court of Massachusetts first noted that property conveyed to a governmental body, corporation, or trustee for particular public purposes may be subject to an enforceable obligation or trust to use the property for those purposes.⁵⁹ The court then noted that whether a gift subject to a "condition" or stating a "purpose" imposes a trust or obligation on the donee is a matter of interpretation of the particular instrument and determination of the donor's intent, and that the donor's intent is to be ascertained from a study of the instrument as a whole in light of the circumstances attending its execution.⁶⁰

After examining the deeds of conveyance and the circumstances surrounding their execution, the court held that the language in the deeds stating that the "sole and exclusive purpose" of the gifts "to aid the Commonwealth in preserving the Walden of Emerson and Thoreau" was not merely precatory in nature and, instead, defined the terms of the trust or obligation imposed upon the Commonwealth when it accepted the gifts.⁶¹ The court also determined that the dominant purpose of the gifts was to preserve the pond area "as closely as practicable in its state of natural beauty," and that the subsidiary purpose of the gifts—to provide the pub-

⁵⁵ The opinion states that the trees that were cut were "for the most part, things of great beauty . . . that might have endured as beautiful trees for many years." *See id.* at 914-15.

⁵⁶ *See id.* at 915.

⁵⁷ *See id.* Under Massachusetts law, the citizens had standing to sue "as citizens by mandamus to enforce a public duty of interest to citizens generally." *Id.* at 916.

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.* at 917.

⁶¹ *See id.* at 918-19.

lic with a venue for bathing, boating, fishing, and picnicking—could be facilitated only to the extent it was not inconsistent with the dominant purpose.⁶² The court noted a number of factors that influenced its decision, including the following: at least one of the donors was a member of the Emerson family; the “Walden of Emerson and Thoreau” was a “forest lake” in a simple rural area and in the year of the gift remained as close to its natural state as a great pond less than twenty miles from the State House could remain at the beginning of the automobile age; the donors were “doubtless displeased” by the use of the area for commercial purposes prior to 1910 and concerned about the problems associated with the growing use of the pond area by the public in 1922; and the deeds contained a contrasting reference to Revere Beach, a notoriously commercialized portion of the Massachusetts coast.⁶³

While the court acknowledged that the specific restrictions and conditions contained in the deeds of conveyance prohibiting certain sports, amusements, and other activities were appropriate methods of preserving the pond in its natural state, such conditions and restrictions were not exhaustive, and the Commonwealth was prohibited from engaging in any activity that was contrary to the overarching, dominant purpose of the gifts—preserving the “Walden of Emerson and Thoreau” in its state of natural beauty.⁶⁴ The court entered a judgment commanding the Commissioners to refrain from further violations of the provisions of the deeds, and to take action (by replanting, landscaping, and erosion prevention) to reduce the damage already caused to the pond area and adjacent woodlands.⁶⁵

2. *The Restricted Nature of a Gift of a Conservation Easement*

Conservation easements are conveyed to government agencies and charitable organizations by written instrument, usually in the form of a deed.⁶⁶ The typical deed conveying a conservation easement contains a statement of purpose similar to the statement of purpose contained in the deeds involved in *Nickols*. The following, excerpted from the revised Model Conservation Easement in the *Conservation Easement Handbook*,⁶⁷ is illustrative of the statement of purpose contained in a typical deed conveying a conservation easement:

⁶² See *id.* at 919.

⁶³ See *id.* at 917–19.

⁶⁴ See *id.*

⁶⁵ See *id.* at 921.

⁶⁶ See THOMAS S. BARRETT & STEFAN NAGEL, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENTS AND COMMENTARY FROM “THE CONSERVATION EASEMENT HANDBOOK” 12 (1996) [hereinafter *Model Conservation Easement*].

⁶⁷ *Id.*

It is the purpose of this Easement to assure that the Property will be retained forever . . . in its [e.g., natural, scenic, historical, agricultural, forested, and/or open space] condition and to prevent any use of the Property that will . . . impair or interfere with the conservation values of the Property. Grantors intend that this Easement will confine the use of the Property to such activities . . . as are not inconsistent with the purpose of this Easement.⁶⁸

The American Heritage Dictionary defines the word "assure" to mean "to remove doubt" or "to make certain of" and the word "forever" to mean "for everlasting time; eternally."⁶⁹ Giving the words in the first sentence their ordinary and usual meaning, the purpose of the typical conservation easement is to "remove doubt" or "make certain" that the particular property encumbered by the easement will be retained for "everlasting time" or "eternally" in its natural, scenic, historical, agricultural, forested, and/or open space condition, and to prevent any use of such property that would impair or interfere with its conservation values. The second sentence then expressly states that the grantor's intent in conveying the easement is to confine the use of the encumbered property to activities not inconsistent with that stated purpose. As in *Nickols*, no precatory words (such as "wish or desire") are used in the statement of purpose in the typical deed conveying an easement, and such statement should be construed as intending to impose an obligation on the donee to use the easement to accomplish the stated charitable purpose—that is, to protect the specified conservation values of the encumbered land for "everlasting time" or "eternally."⁷⁰

The circumstances attending the execution of the typical deed conveying an easement further support the conclusion that the grantor intends to impose an obligation on the donee to use the easement to protect the specified conservation values of the encumbered land "for everlasting time" or "eternally" (and does not intend to make an unrestricted gift of the easement—or the value attributable thereto—to the donee that the

⁶⁸ *Id.* at 13. The term "Property" used in the statement of purpose refers to the specific land encumbered by the easement as described in a legal description attached to the easement as an exhibit. *See id.* at 12, 26.

⁶⁹ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 113, 712 (3d ed. 1992).

⁷⁰ The typical deed conveying a conservation easement also contains a formal grant clause similar to the following: "Grantors hereby voluntarily grant and convey to Grantee a conservation easement *in perpetuity* over the Property of the nature and character and to the extent hereinafter set forth." *See Model Conservation Easement, supra* note 66, at 13 (emphasis added). The idiom "in perpetuity" is defined to mean "for an indefinite period of time; forever." *See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1350 (3d ed. 1992). Accordingly, the formal grant clause in the typical deed conveying a conservation easement reinforces the conclusion that the donor intends to obligate the donee to use the easement to protect the specified conservation values of the encumbered property "forever."

donee may use as it sees fit to accomplish its charitable mission). The few surveys of easement donor motivations that have been conducted indicate that easement donors are primarily motivated to donate their easements by a strong personal attachment to and concern about the long-term stewardship of their land.⁷¹ Moreover, there is no indication that the agencies and organizations accepting easements suggest to donors that the donation of an easement constitutes a gift of a fungible asset that the donee is free to later sell or exchange (in whole or in part) for cash or other compensation. To the contrary, easement donees typically represent to potential donors that the terms of their easements will be permanent, and that by accepting an easement, the donee is agreeing to honor and enforce those terms "in perpetuity" or "forever."⁷²

Although the donation of a conservation easement represents a unique form of a restricted charitable gift, in that it essentially represents a restricted gift of the right to restrict certain land uses, it is analogous to the restricted gifts of land in *Nickols* and arguably should be interpreted in a similar manner. Just as the statement of purpose in the deeds involved in *Nickols* defines the terms of the obligation imposed upon the Commonwealth of Massachusetts and prohibits the Commonwealth from engaging in any activity that is contrary to such purpose, so should the statement of purpose in a deed conveying a conservation easement define the terms of the obligation imposed upon the donee and prohibit the donee from engaging in any activity contrary to such purpose (including modification of the easement in manners inconsistent with such purpose or termination of the easement). Thus, while the deed conveying a conservation easement may not expressly state that the donee cannot modify the easement in manners inconsistent with its stated purpose or extinguish the easement, such

⁷¹ See McLaughlin, *supra* note 3, at 41–47 (discussing three surveys of easement donor motivation).

⁷² See, e.g., Jackson Hole Land Trust, *Frequently Asked Questions*, "What is a conservation easement?," at http://www.jhlandtrust.org/our_work/faq.php#3 (last visited Feb. 23, 2005) ("A conservation easement is a voluntary contract between a landowner and a land trust, government agency, or another qualified organization in which the owner places permanent restrictions on the future uses of some or all of his or her property to protect scenic, wildlife, or agricultural resources The easement is donated by the owner to the land trust, which then has the *authority and obligation to enforce the terms of the easement in perpetuity*. The landowner still owns the property and can use it, sell it, or leave it to heirs, *but the restrictions of the easement stay with the land forever.*") (emphasis added) (on file with the Harvard Environmental Law Review); *infra* Part II.D (describing how the National Trust for Historic Preservation in the United States made such representations to the donor of an easement). See also KAREN F. MARCHETTI, PLANNING AND MANAGING CONSERVATION EASEMENTS: THE LEGAL PERSPECTIVE, LAND TRUST ALLIANCE RALLY 2002 37 (Oct. 2002) (on file with the Harvard Environmental Law Review) ("[I]t is unlikely that a conservation easement was granted with the expectation that the land trust might at its pleasure dispose of the easement and apply the proceeds to its general conservation purposes, as with trade lands. It is implicit in a *perpetual* easement that the purposes of the gift, the preservation of that particular parcel of land, will be honored barring unforeseeable or extremely improbable circumstances.").

restrictions on the donee's use and disposition of the easement should be viewed as implicit in the overarching charitable purpose of the gift.⁷³

Moreover, since 1986 any donor of a conservation easement interested in claiming a federal charitable income tax deduction has generally been required to include a provision in the deed of conveyance stating, in effect, that the restrictions in the easement may be extinguished only if and when changed conditions have made the continued use of the property for the conservation purposes specified in the easement "impossible or impractical," and only then in the context of a judicial proceeding.⁷⁴ Since 1986 any donor of an easement interested in claiming a federal charitable income tax deduction also has been required to include a provision in the deed of conveyance prohibiting the donee from transferring the easement, whether or not for consideration, except to another government agency or publicly supported charity that agrees to continue to carry out the conservation purposes of the easement.⁷⁵ Those provisions, which are likely to have been included in many if not most easement deeds since 1986,⁷⁶ reinforce the conclusion that the donor of an easement does not intend to grant the donee the discretion to terminate the easement (or effectively terminate the easement by agreeing to modify the easement to remove the substantive restrictions on the development and use of the encumbered land).

Without running afoul of the requirements for the charitable income tax deduction, an easement donor may include a provision in the deed of conveyance expressly granting the holder the discretion to agree to amendments that are consistent with (or neutral with respect to) the stated purpose of the easement, thereby eliminating the need for the holder to seek judicial approval for such amendments under the doctrine of administrative deviation.⁷⁷ In addition, even in the absence of such an express "amendment provision," many easement deeds contain provisions that could be interpreted to grant the holder such discretion.⁷⁸ Such provisions give the

⁷³ See *infra* Part II.D (discussing proposed amendments to the Myrtle Grove easement that were inconsistent with the charitable purpose of the easement).

⁷⁴ See Treas. Reg. § 1.170A-14 (as amended by T.D. 8069, 51 Fed. Reg. 1496 (Jan. 14, 1986)); Treas. Reg. § 1.170A-14(g)(6). See also *Model Conservation Easement*, *supra* note 66, at 17, 71. An astute reader will note that this "extinguishment" provision bears a remarkable resemblance to the doctrine of *cy pres*. See *infra* notes 203–209 and accompanying text for a more detailed discussion of the extinguishment provision.

⁷⁵ See Treas. Reg. § 1.170A-14(c)(2) (2004). The restriction on transfer provision is intended to prevent the holder of an easement from circumventing the requirements with regard to extinguishment by transferring the easement (through a sale or exchange) to the owner of the encumbered land, in whose hands the easement is likely to be extinguished under the doctrine of merger.

⁷⁶ See *supra* note 23.

⁷⁷ See, e.g., *Model Conservation Easement*, *supra* note 66, at 22, 82.

⁷⁸ For example, the *Model Conservation Easement* expressly grants to the holder of the easement the right "[t]o preserve and protect the conservation values of the Property." See *Model Conservation Easement*, *supra* note 66, at 13. To avoid any question regarding the scope of the discretion granted to an easement holder, however, it is recommended that a

holder of an easement the flexibility to simply agree with the owner of the encumbered land to, for example, amend the easement to clarify vague language; correct a drafting error; delete restrictions that advances in ecological science have shown to be detrimental to the conservation purpose of the easement (such as a "no burn" restriction relating to forested areas); or permit activities that the owner of the land wishes to engage in that were not contemplated by the easement donor and have no adverse impact on the continued protection of the land for the conservation purposes specified in the easement.⁷⁹ Moreover, as a practical matter, even in the absence of such amendment or discretionary provisions, the holder of a conservation easement can simply agree with the owner of the encumbered land to make uncontroversial amendments to the easement because no person with standing is likely to object.⁸⁰

The amendment or discretionary provisions described above should not, however, remove the obligation of the holder to seek judicial approval of proposed amendments that are *not* consistent with the conservation purposes of the easement, or a proposed extinguishment of an easement. Modifying an easement in a manner that would adversely affect the continued protection of the encumbered land for the conservation purposes specified in the easement (such as by deleting the restrictions on subdivision and development in the easement) or extinguishing an easement would constitute a change in the *charitable purpose* of the easement and would require the application of the doctrine of *cy pres* (where it would have to be established in the context of a judicial proceeding that the donor's specified charitable purpose had become "impossible or impracticable").

provision be included in the easement deed expressly granting the holder the right to amend the easement deed in any manner consistent with (or neutral with respect to) the stated purpose of the easement. See SCOTT & FRATCHER, *supra* note 25, § 186, at 10 ("Because of the reluctance of many courts to find that the trustee has powers that are not clearly expressed in the trust instrument, and because of the resulting doubts that arise as to the existence of certain powers, it is customary in well-drawn trust instruments to make provisions in express words conferring upon the trustee powers that are or may become necessary or appropriate for the efficient administration of the trust. The administration of the trust may be seriously impeded not only by the lack of such powers but also by doubts, even though the doubts are not well founded, as to the existence of the powers.").

⁷⁹ There will, of course, be situations in which it is not clear whether a proposed amendment is "consistent with" the conservation purposes of the easement and, thus, falls within the discretion granted to the holder of the easement in the easement deed. For example, the holder of an easement may determine that relocation of a designated house site on the encumbered land is "consistent with" the conservation purposes of the easement, but reasonable people might disagree with that determination. To avoid damaging negative publicity and potential liability for breach of fiduciary duties, the holder of an easement should interpret its discretionary authority to make amendments conservatively, and consider petitioning the court for instructions when there is a question as to whether a proposed amendment falls within such authority.

⁸⁰ See *infra* Part III.B.1 (discussing who might have standing to bring or intervene in an action involving a conservation easement). From the holder's perspective, it would be far preferable to be granted express authority to agree to amendments that are consistent with (or neutral with respect to) the charitable purpose in the easement deed, thereby reducing the potential for lawsuits alleging a breach of the holder's fiduciary duties.

As with any gift of property that is conveyed to and accepted by a government agency or charitable organization pursuant to a written instrument stating that the property is to be used for a specified charitable purpose, the donee of a conservation easement should be bound by the deed of conveyance and, *except to the extent granted discretion in the deed*, should not be permitted to deviate from the terms or stated purpose thereof without receiving court approval therefor under the doctrines of administrative deviation or *cy pres*. To paraphrase the New York Court of Appeals in *St. Joseph's Hospital*, nothing in authority, statute, or public policy prevents a donor from leaving his property to a charitable corporation for a specified charitable purpose and having his clearly expressed intention enforced.⁸¹

B. Easement Enabling Statutes Do Not Trump the Application of Charitable Trust Rules

The easement enabling statutes do not appear to trump the application of the equitable rules governing a charitable donee's use and disposition of charitable assets in the conservation easement context. To the contrary, many of the easement enabling statutes expressly provide that equitable rules—which include the charitable trust rules—may apply to conservation easements. For example, twenty-five states and the District of Columbia have adopted the provision in the UCEA that provides that 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*.”⁸² In explaining that provision, the drafters of the UCEA noted that “[t]he Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and the enforcement of charitable trusts*.”⁸³ In addition, twenty-two states and the District of

⁸¹ *St. Joseph's Hospital v. Bennett*, 22 N.E.2d 305, 307 (N.Y. 1939).

⁸² See UCEA, *supra* note 15, § 3(b) (emphasis added). See also ALA. CODE § 35-18-3(b) (2004); ALASKA STAT. § 34.17.020(b) (Michie 2004); ARIZ. REV. STAT. ANN. § 33-273.B (West 2004); ARK. CODE ANN. § 15-20-409(b) (Michie 2003); DEL. CODE ANN. tit. 7 § 6903(b) (2003); D.C. CODE ANN. § 42-203(b) (2004); GA. CODE ANN. § 44-10-4(c) (Harrison 2002); IDAHO CODE § 55-2103(2) (Michie 2004); IND. CODE ANN. § 32-23-5-6(b) (West 2004); KAN. STAT. ANN. § 58-3812(b) (2004); KY. REV. STAT. ANN. § 382.820(2) (Banks-Baldwin 2004); ME. REV. STAT. ANN. tit. 33 § 478.3 (West 2004); MINN. STAT. § 84C.03(b) (2004); MISS. CODE ANN. § 89-19-7(2) (2004); NEV. REV. STAT. § 111.430.2 (Michie 2004); N.M. STAT. ANN. § 47-12-4.B (Michie 2003); OKLA. STAT. ANN. tit. 60, § 49.4.B (West 2005); OR. REV. STAT. § 271.755(2) (2003); 32 PA. STAT. ANN. tit. 32, § 5055(c)(1) (West 2004); S.C. CODE ANN. § 27-8-40(B) (Law. Co-op. 2004); S.D. CODIFIED LAWS § 1-19B-58 (Michie 2003); TEX. NAT. RES. CODE ANN. § 183.003(b) (Vernon 2003); VA. CODE ANN. § 10.1-1010.F (Michie 2004); W.VA. CODE ANN. § 20-12-5(b) (Michie 2002); WIS. STAT. ANN. § 700.40(3)(b) (West 2004); Act of Feb. 25, 2005, 2005 Wyo. Sess. Laws 127 (to take effect on July 1, 2005, and to be codified at WYO. STAT. §§ 34-1-201 to 34-1-207 (2005)).

⁸³ UCEA, *supra* note 15, § 3, cmt. (emphasis added). The drafters of the UCEA declined to specify the proper approach to the modification or termination of easements in

Columbia have adopted the UCEA provision expressly granting standing to bring an action affecting a conservation easement to any "person authorized by other law."⁸⁴ In explaining that provision, the drafters of the UCEA noted that, in addition to the owner of the encumbered land, the holder of the easement, and any party expressly granted a third party right of enforcement in the easement deed, "the Act also recognizes that the state's other applicable law may create standing in other persons" and offered as an example the state attorney general, who, independently of the easement enabling statute, "could have standing in his capacity as supervisor of charitable trusts."⁸⁵ Accordingly, the UCEA and the easement enabling statutes in the states (and the District of Columbia) that adopted the provisions noted above leave the door open for the application of charitable trust rules to conservation easements if appropriate under a state's other applicable law.

The statutes in the remaining states adopt a variety of approaches with regard to the modification or termination of conservation easements. Some are silent with regard to modification or termination,⁸⁶ others provide only that a conservation easement may be modified or terminated in the same manner as other easements,⁸⁷ and still others provide that a conservation easement may be modified or terminated only after the satisfaction of certain conditions, such as the holding of a public hearing and

the event of changed conditions, noting instead that a variety of doctrines, including the doctrine of changed conditions applicable to common law servitudes and the doctrine of *cy pres* applicable to charitable trusts, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to such circumstances. *See id.* *See also* Arpad, *supra* note 15, at 121 (noting that the drafters of the UCEA apparently believed that "attempting to dictate a consistent legal framework for the modification or termination of easements would interfere too much with other substantive state law").

⁸⁴ *See* UCEA, *supra* note 15, § 3(a)(4). *See also* ALASKA STAT. § 34.17.020(a)(4) (Michie 2004); ARIZ. REV. STAT. ANN. § 33-273.A.4 (West 2003); ARK. CODE ANN. § 15-20-409(a)(4) (Michie 2003); DEL. CODE ANN. tit. 7, § 6903(a)(4) (2004); D.C. CODE ANN. § 42-203(a)(4) (2004); FLA. STAT. ANN. § 704.06(9)(d) (West 2005); GA. CODE ANN. § 44-10-4(a)(4) (Harrison 2002); IDAHO CODE § 55-2103(1)(d) (Michie 2004); IND. CODE ANN. § 32-23-5-6(a)(4) (West 2004); KAN. STAT. ANN. § 58-3812(a)(4) (2004); KY. REV. STAT. ANN. § 382.820(1)(d) (Banks-Baldwin 2004); LA. REV. STAT. ANN. § 9:1274(4) (West 2005); MINN. STAT. § 84C.03(a)(4) (2004); MISS. CODE ANN. § 89-19-7(1)(f) (2004); *id.* § 89-19-7(1)(d) (expressly granting standing to the Mississippi attorney general); NEV. REV. STAT. § 111.430.1(d) (Michie 2004); OKLA. STAT. ANN. tit. 60, § 49.4.A.3 (West 2005); OR. REV. STAT. § 271.755(1)(d) (2003); PA. STAT. ANN. tit. 32, § 5055(a)(6) (West 2004); S.C. CODE ANN. § 27-8-40(A)(4) (Law. Co-op. 2004); TEX. NAT. RES. CODE ANN. § 183.003(a)(4) (Vernon 2004); VA. CODE ANN. § 10.1-1013.8 (Michie 2004); *id.* § 10.1-1013.8 (expressly granting standing to the Virginia attorney general); W.VA. CODE ANN. § 20-12-5(a)(4) (Michie 2003); WIS. STAT. ANN. § 700.40(3)(a)(4) (West 2004). *See also* TENN. CODE ANN. § 66-9-307 (2004) (providing that conservation easements may be enforced by the beneficiaries of the easement or their bona fide representatives).

⁸⁵ UCEA, *supra* note 15, § 3, cmt.

⁸⁶ *See, e.g.*, CAL. CIV. CODE §§ 815-815.10 (West 2005); HAW. REV. STAT. ANN. §§ 198-1 to 198-5 (Michie 2004).

⁸⁷ *See, e.g.*, LA. REV. STAT. ANN. § 9:1273.A (West 2005); UTAH CODE ANN. § 57-18-5 (2004).

approval by a public official.⁸⁸ None of the statutes, however, expressly precludes the application of charitable trust rules to conservation easements,⁸⁹ and it is not clear why the donation of the property interest embodied in a conservation easement to a charitable organization or government agency for a specified charitable purpose should be exempt from the equitable rules that govern the use and disposition of all other types of property interests donated to charitable organizations or government agencies for specified charitable purposes.

The status of the conservation easement as an interest in real property should not set it apart from the universe of all other charitable gifts, particularly when one considers that charitable trust rules are routinely applied to fee simple interests in land that have been donated to government agencies or charitable organizations for specified charitable purposes.⁹⁰ In addition, the fact that there are lingering questions regarding the precise nature of the property interest embodied in a conservation easement,⁹¹ and that a conservation easement represents only a partial interest in land (which means that the owner of the encumbered land would be a necessary party to any administrative deviation or *cy pres* action), complicates but should not negate the application of charitable trust rules to donated conservation easements. Moreover, the charitable trust rules were developed and refined over the centuries to deal precisely with the issue presented by conservation easements—how to appropriately balance: (i) a charitable donor's desire to exercise dead hand control over the use of his or her property and (ii) society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public.⁹²

⁸⁸ See, e.g., MASS. GEN. LAWS ch. 184, § 32 (Law. Co-op. 2005); N.J. STAT. ANN. § 13:8B-5 (West 2005). See also VA. CODE ANN. § 10.1-1704 (Michie 2004) (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.").

⁸⁹ Some obliquely provide that a conservation easement may be enforced by "proceedings in equity" or "equitable proceedings" or "appropriate equitable relief." See, e.g., MICH. COMP. LAWS § 324.2144(1) (2004); MONT. CODE ANN. § 76-6-210(1) (2004); N.C. GEN. STAT. § 121-39(a) (2003).

⁹⁰ See, e.g., *supra* note 30 and cases cited therein; *infra* note 201 and cases cited therein. See also 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).

⁹¹ See *infra* notes 236 and 237 and accompanying text (discussing the ways in which the property interest embodied in a conservation easement could be conceptualized).

⁹² See *infra* Part III.A (discussing the "cy pres bargain"). See also generally FREMONT-SMITH, *supra* note 26 (describing the history of the development of the equitable rules governing a donee's use and disposition of charitable assets, including the need, evident from almost the first emergence of charities as legal entities, for the supervision of those

If the deed conveying a conservation easement states that the purpose of the easement is to protect certain conservation attributes of the encumbered land forever or in perpetuity, and grants to the donee the discretion to amend the terms of the deed only in manners consistent with such purpose, the donee should be bound by the terms of the deed, and should not be permitted to agree to amendments that are inconsistent with such purpose or to extinguish the easement without receiving judicial approval therefor in a *cy pres* proceeding (where it would have to be established that the donor's specified charitable purpose had become "impossible or impracticable"). If the donee of a conservation easement wishes to be free to terminate the easement or modify its charitable purpose in accordance with only those conditions imposed under the applicable state easement enabling statute, it should negotiate for the inclusion of a provision to that effect in the deed of conveyance, and the import of such provision should be explained to the prospective donor. In other words, the prospective donor should be put on notice that the donee will be free to simply agree with a subsequent owner of the encumbered land to modify the easement in any manner it sees fit or extinguish the easement, subject only to whatever conditions might be imposed under the easement enabling statute, such as the holding of a public hearing and approval of a public official, and the general federal and state laws applicable to the donee, such as the prohibitions on private inurement and private benefit. However, granting such broad discretion to the donee to agree to modify or terminate a conservation easement could render the easement ineligible for the federal charitable income tax deduction (a requirement of which is that the conservation purpose of the easement be "protected in perpetuity").⁹³ In addition, in light of the fact that landowners appear to be pri-

entrusted with charitable assets to help prevent negligence, maladministration, and diversion of charitable funds to purposes contrary to those specified by the donor). Applying the property law doctrines of changed conditions, frustration of purpose, or relative hardship in their current form to modify or terminate conservation easements conveyed to government agencies and charitable organizations would be inappropriate because those doctrines were developed in the context of private transactions entered into by private parties for private benefit and, thus, would not adequately protect the public's interest or investment in conservation easements. See, e.g., Korngold, *supra* note 12, § 7.11, at 484–89 (arguing that the doctrine of changed conditions might not allow courts to terminate conservation easements even if it were in the public interest, and that the doctrine of relative hardship, which focuses on the conflict between individual landowners, is too narrow to encompass the public interest). See RESTATEMENT OF SERVITUDES, *supra* note 12, § 7.11, cmts. a, b (recommending that the modification or termination of conservation easements conveyed to government agencies and charitable organizations be governed by a special set of rules based, in part, on the doctrine of *cy pres*, and noting that these servitudes should be afforded more stringent protection than privately held conservation servitudes because of the public interest involved). Accordingly, if the property law doctrines of changed conditions, frustration of purpose, or relative hardship are invoked to modify or terminate conservation easements conveyed to government agencies and charitable organizations, they should be applied in a manner consistent with the equitable rules governing a donee's use and disposition of charitable assets.

⁹³ See I.R.C. § 170(h)(5)(A) (2004); Treas. Reg. § 1.170A-14(g)(6) (2004). See also

marily motivated to donate their easements by a strong personal attachment to and concern about the long-term stewardship of their land,⁹⁴ even those not interested in claiming federal tax benefits may be unwilling to grant such broad discretion to the donee.

Accordingly, in the case of a conservation easement donated to a government agency or charitable organization, the stated purpose of which is the protection of certain conservation attributes of the encumbered land forever or in perpetuity, and that grants the donee the discretion to amend the easement only in manners consistent with its stated purpose, the equitable rules governing a donee's use and disposition of charitable assets should apply in addition or as an overlay to the provisions in the easement enabling statute addressing modification or termination. Thus, for example, in a state that provides that a conservation easement may be modified or terminated in the same manner as other easements (that is, by agreement of the parties thereto), the holder of the easement should be required to obtain judicial approval of a proposed modification that is inconsistent with the stated purpose of the easement, or a proposed extinguishment of the easement in a *cy pres* proceeding *before* agreeing with the owner of the encumbered land to so modify or terminate the easement. Similarly, in a state that provides that a conservation easement may be modified or terminated only after the satisfaction of certain conditions, such as the holding of a public hearing and approval by a public official, the holder of an easement should be required to obtain judicial approval of a proposed modification that is inconsistent with the stated purpose of the easement or a proposed extinguishment of the easement in a *cy pres* proceeding *and* satisfy the public hearing and public official approval requirements.

C. In Re Preservation Alliance for Greater Philadelphia

In at least one case a court assumed without discussion that a donated façade easement constituted a charitable interest and applied the doctrine of *cy pres* to authorize the extinguishment of the easement.⁹⁵ *In re*

supra note 74 and accompanying text (noting that, since 1986, any donor of a conservation easement interested in claiming a federal charitable income tax deduction has generally been required to include a provision in the deed of conveyance stating, in effect, that the restrictions in the easement may be extinguished only if and when changed conditions have made the continued use of the property for the conservation purposes specified in the easement "impossible or impractical," and only then in the context of a judicial proceeding).

⁹⁴ See *supra* note 71 and accompanying text.

⁹⁵ *In re* Preservation Alliance for Greater Philadelphia, O.C. No. 759 (Ct. Com. Pl. of Philadelphia June 28, 1999) (decree granting extinguishment of façade easement) (on file with the Harvard Environmental Law Review) [hereinafter Decree]. See also Transcript of Hearing on Emergency Petition for Extinguishment of Façade Easement, *In re* Preservation Alliance for Greater Philadelphia, O.C. No. 759 (Ct. Com. Pl. of Philadelphia June 28, 1999) [hereinafter Transcript] (on file with the Harvard Environmental Law Review). Al-

Preservation Alliance for Greater Philadelphia involved a façade easement encumbering an historic building located in Philadelphia's Germantown neighborhood (known as "Mayfair House"). The easement had been donated to the Preservation Alliance for Greater Philadelphia (the "Preservation Alliance") in 1981. At the time of the donation of the easement Mayfair House was occupied and in good condition, but over the course of time the building became dilapidated and eventually was determined to have no economic use. 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 Continuing and Additional Covenants designed to permanently preserve the site of the house as park land and prevent construction on the site of any buildings incompatible with the historic architectural character of Germantown.⁹⁶ Both the attorney general for Pennsylvania and the attorney for the City of Philadelphia were notified of and consented to the Preservation Alliance's petition; as did at least one neighborhood civic group.⁹⁷ The court 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; the charitable intent of the donor had been to preserve the historic fabric of the Germantown neighborhood in addition to the specific historic structure; and the donor's intent would be best served by authorizing the extinguishment and replacement of the façade easement as requested by the Preservation Alliance.⁹⁸

D. *The Myrtle Grove Controversy*

To date no decision has been reported in which a court has applied the doctrines of administrative deviation or *cy pres* to modify or terminate a conservation easement.⁹⁹ The history of the conservation easement

though the court did not expressly state that it was applying the doctrine of *cy pres* to extinguish the easement, the application of that doctrine can be assumed from: (i) the court's holding, *see* Decree at 1, that the façade easement constituted a "charitable interest" subject to Pennsylvania's Decedent's, Estates and Fiduciaries Code, 20 PA. STAT. ANN. §§ 101-8815 (West 2004), which includes the statutory formulation of the doctrine of *cy pres*, *see id.* § 6110, and (ii) the fact that the holder of the easement represented to the court that it held the façade easement in or as a charitable trust, and requested that the court extinguish the easement and replace it with other covenants pursuant to the doctrine of *cy pres*. *See* Transcript at 7-8.

⁹⁶ *See* Transcript, *supra* note 95, at 5-8.

⁹⁷ *See id.* at 26, 4-5.

⁹⁸ *See* Decree, *supra* note 95. The easement enabling statute in Pennsylvania mirrors the UCEA in stating that the statute does "not affect the power of a court to modify or terminate a conservation or preservation easement in accordance with the principles of law and equity . . ." *See* 32 PA. STAT. ANN. § 5055(c)(1) (West 2004); *supra* notes 15, 82, and 83 (discussing the UCEA).

⁹⁹ *See supra* note 2 (defining the term "conservation easement" for purposes of this Ar-

encumbering Myrtle Grove, an historic 160-acre former tobacco plantation located on Maryland's eastern shore, however, illustrates both: (i) the intent of the donor of a perpetual easement to impose an enforceable obligation on the donee to enforce the terms of the easement "in perpetuity" or "forever"; and (ii) the Maryland attorney general's opinion that a donated, perpetual conservation easement constitutes a restricted charitable gift or a charitable trust that may not be modified in manners inconsistent with its purpose or terminated in the absence of court approval in the context of an administrative deviation or *cy pres* proceeding.

In 1975, Margarét Donoho donated a perpetual conservation easement encumbering Myrtle Grove to the National Trust for Historic Preservation in the United States (the "National Trust"). Myrtle Grove had been in Donoho's family for eight generations, and Donoho had inherited Myrtle Grove at the death of her father, when she and her brother divided the original Myrtle Grove property along an existing road. At her father's death Donoho received approximately 165 acres of the property, along with an early eighteenth-century farmhouse located thereon, and her brother received the remaining 425 acres. The brother later sold his share of the property for development into five-acre residential lots, now known as the "Bantry subdivision." Donoho deeply resented the Bantry subdivision because she felt it destroyed that land's open space character, and she was determined to protect her portion of the original Myrtle Grove property from similar development. After meeting with a consultant from the National Trust, who informed her in a letter that "[a] landowner who gives an easement can enjoy the feeling of knowing that his land will be forever protected from the pressure of destructive change This easement is perpetual and applies to future owners as well," Donoho decided that she could best protect Myrtle Grove from undesirable development by donating a perpetual conservation easement to the National Trust.¹⁰⁰

The deed of easement encumbering Myrtle Grove states that the Grantor (Donoho) desires to preserve Myrtle Grove in "substantially its present condition," and that the purpose of the easement is "preserving [the land and improvements thereon] and protecting and maintaining the historic, architectural, cultural and scenic values of [the] land and the improvements thereon for the continuing benefit of the people of the State of Maryland and the United States of America."¹⁰¹ The deed also provides that it restricts the use of the Myrtle Grove property "in perpetuity," and "constitute[s] a binding servitude" on the land.¹⁰² The restrictions on de-

ticle to mean easements encumbering land (as opposed to historic structures)).

¹⁰⁰ See Peter S. Goodman, *In Maryland, Fighting to Save a "Way of Life"; Family in Court to Protect Land, Fulfill Matriarch's Wishes*, WASH. POST, Mar. 20, 1998, at C1.

¹⁰¹ Deed of Easement by Margaret Henry Donoho, Grantor, and the National Trust for Historic Preservation In the United States, Grantee 1 (Dec. 13, 1975) (on file with the Harvard Environmental Law Review).

¹⁰² *Id.* at 2.

velopment and use in the deed include: (i) a prohibition on 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 dwelling (referred to hereinafter as the "Heirs' Lot"), and (ii) a prohibition on the construction or maintenance of buildings or structures on the land other than: the main dwelling (the early eighteenth-century farmhouse) and outbuildings adjacent thereto; the historic law office that was located on the property at the time of the donation of the easement; and outbuildings commonly or appropriately incidental to a farming operation, including a caretaker's house.¹⁰³

Donoho died in 1988. In 1989, Donoho's heirs, unable to afford the inheritance taxes on Myrtle Grove, sold the property subject to the easement for \$3 million to a trust established by a prominent Washington, D.C., developer, Herbert Miller, for the benefit of his wife (the "Miller Trust"). The sale was made only after the heirs received confirmation from the National Trust that the restrictions on the development and use of the property in the easement would be binding on all future owners of the land.¹⁰⁴

In October of 1993, after the Millers had renovated the eighteenth-century farmhouse, built a caretaker's house, barn, guest cottage, pond, pool house, pool, dock, tennis court, and garage apartment, and attempted unsuccessfully to sell the property for \$6.5 million, the attorney for the Miller Trust asked the National Trust to amend the conservation easement to permit the land to be subdivided into eight parcels.

In February of the following year, after discussions and exchange of correspondence between the Miller Trust and the National Trust, the president of the National Trust signed and sent to the Millers a "Concept Approval" letter that confirmed and documented the terms and conditions on which the National Trust consented to the amendment of Donoho's easement. The letter provided that: (i) the easement would be amended to confine its terms to a forty-seven acre "Historic Core" on Myrtle Grove, (ii) the Heirs' Lot could be subdivided into three residential lots, and (iii) the remaining acreage could be subdivided into five residential lots. The subdivided lots were to be subject to easements of their own that, among other things, would restrict tree cutting and brush clearing and require the National Trust's approval of the design, site, and screening of the single-family

¹⁰³ *Id.* at 3.

¹⁰⁴ Before the sale of Myrtle Grove, the attorney for Donoho's estate, who was assisting the heirs with the sale, asked a representative from the National Trust how confident the heirs could be that the easement could "not be broken legally and that its restrictions will not dissolve over time . . . making possible previously prohibited activities or outright subdivision by a later purchaser," to which the representative responded that easement restrictions "never dissolve over time" and that the National Trust "has the authority to enjoin and reverse unauthorized subdivision." See Memorandum of Law in Support of Attorney General's Motion for Summary Judgment at 9, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Apr. 21, 1999) [hereinafter Attorney General's Memorandum] (on file with the Harvard Environmental Law Review).

residence and ancillary structures (such as pools, pool houses, tennis courts, and the like) permitted on each of the lots. In exchange for agreeing to the subdivision plan, the National Trust was to receive a buffer zone easement over a twenty-five acre lot adjacent to Myrtle Grove and up to \$68,700 in funding to enforce the new easements on the subdivided lots.¹⁰⁵ The Concept Approval letter had been prepared by an attorney for the National Trust, who apparently thought that modifying Donoho's easement was merely a contractual matter between the National Trust and the subsequent owner of the land, and did not consider that the donated easement may constitute a restricted charitable gift or a charitable trust.¹⁰⁶

The decision by the National Trust to amend the easement and permit the subdivision of Myrtle Grove touched off a storm of protest from conservation groups and Donoho's family.¹⁰⁷ In addition, the local county planning commission questioned whether the National Trust had the legal ability to alter the easement and tabled the Myrtle Grove subdivision request until that question could be answered. Although the National Trust initially defended its decision to amend the easement,¹⁰⁸ pressure from conservation groups and Donoho's family eventually prompted it to retract its decision and acknowledge that "it had made 'a serious mistake' in allowing development of the lush, waterfront Myrtle Grove . . ."¹⁰⁹

Almost three years later, in February of 1997, the Miller Trust sued the National Trust for breach of contract.¹¹⁰ In July of 1998, the attorney general for the state of Maryland filed a separate, collateral suit asserting that Donoho's donation of the easement created a charitable trust for the

¹⁰⁵ See Letter from Richard Moe, President, National Trust for Historic Preservation in the United States, to Mr. and Mrs. Herbert S. Miller (Feb. 7, 1994) (on file with the Harvard Environmental Law Review).

¹⁰⁶ The attorney for the National Trust sent the Concept Approval letter to the president of the National Trust for his signature without discussion, and the president apparently signed the letter without reading it. See Attorney General's Memorandum, *supra* note 104, at 13.

¹⁰⁷ See, e.g., Goodman, *supra* note 100 ("[W]hen Donoho's relatives found out about the deal, they were outraged. They rallied a group of environmental organizations that saw matters similarly").

¹⁰⁸ See *id.* (noting that in correspondence subsequent to the Consent Approval letter, the staff of the National Trust touted the purported benefits of the agreement with the Millers—"new land under easement, more vegetation and more money flowing to the trust to pursue its mission").

¹⁰⁹ Melody Simmons, *Maryland Sues on Plan for Farm on Shore; Group had Decided to Allow Development of Protected Land*, BALT. SUN, July 10, 1998, at 1B. See also Attorney General's Memorandum, *supra* note 104, at 14 (noting that the President of the National Trust requested that the Vice President and General Counsel investigate the matter; the Vice President concluded that the National Trust had not considered its "fiduciary responsibility with respect to the easement" or "the intent of the donor" in approving the Myrtle Grove subdivision; and that, in June of 1994, the Vice President wrote a letter to the attorney for the Miller Trust stating that the National Trust's approval of the easement amendment and proposed subdivision had been "improvidently granted, and must now be withdrawn") (internal quotations omitted).

¹¹⁰ See Attorney General's Memorandum, *supra* note 104, at 14.

benefit of the people of Maryland and asking the court to enforce the terms of the trust.¹¹¹

Both cases were settled in December of 1998, with the National Trust agreeing to pay the Miller trust \$225,000, and the parties agreeing that no action would be taken to amend, release (in whole or in part), or extinguish the Myrtle Grove easement without the express written consent of the attorney general, except consent of the attorney general is not required for approvals carried out pursuant to the ordinary administration of the easement in accordance with its terms.¹¹² The *Washington Post* reported that the settlement ended an "embarrassing episode" for the National Trust.¹¹³

The Myrtle Grove controversy provides a compelling example of the intent of the donor of an expressly perpetual easement to impose an enforceable obligation on the donee to enforce the terms of the easement "in perpetuity" or "forever." When Donoho donated her easement prohibiting the subdivision and development of Myrtle Grove (except for the Heir's Lot) in perpetuity, she clearly did not intend that the National Trust could simply agree with a subsequent owner of the land to modify or extinguish some or all of those prohibitions in exchange for cash or some other form of compensation. Donoho's intent that the National Trust would honor and enforce the terms of her easement, and thereby preserve, protect, and maintain the historic, architectural, cultural, and scenic values of Myrtle Grove in perpetuity, is clear from both the terms of the deed of conveyance and the circumstances surrounding its execution.

The Myrtle Grove easement, like virtually all conservation easements, expressly provides that its purpose is to protect certain attributes of the particular land encumbered by the easement in perpetuity, and that statement of purpose is not couched in the form of a "request, suggestion, or entreaty." In addition, the Myrtle Grove property had been in Donoho's

¹¹¹ See *id.* at 28; *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Apr. 21, 1999) (Consent Judgment), at 1-2 [hereinafter Consent Judgment] (on file with the Harvard Environmental Law Review). In November of 1998, 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 there were significant clusters of preserved lands adjacent to and in the immediate area of Myrtle Grove (including a 500-acre parcel owned by The Nature Conservancy that is directly opposite the entrance to Myrtle Grove, supports an unusually old hardwood forest, and provides habitat for a small population of the endangered Delmarva Fox Squirrel); that amending the Myrtle Grove easement to permit the proposed subdivision would have an adverse effect on the natural attributes of the area and on the use, value, and enjoyment of properties adjacent to or near Myrtle Grove; that 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 that the proposed subdivision would severely compromise the ability of conservation organizations to both solicit easement donations and raise the funds necessary to continue their operations. See Motion to Intervene, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Apr. 21, 1999) (on file with the Harvard Environmental Law Review).

¹¹² See Consent Judgment, *supra* note 111.

¹¹³ See Peter S. Goodman, *Agreement Saves Estate on Maryland's Eastern Shore; Trust had Wrongly Approved Subdivision*, WASH. POST, Dec. 11, 1998, at G7.

family for eight generations; she had a deep, personal attachment to the land. She donated the easement precisely because she abhorred the subdivision and development of the portion of the original Myrtle Grove property inherited by her brother and wished to permanently prevent the same thing from happening to her portion of the land. Moreover, her decision to donate the easement was influenced, in large part, by the National Trust's representation to her that the easement would be binding on all future owners of the land and, thus, would "forever protect" Myrtle Grove from destructive change.

Accordingly, just as the statement of purpose in the deeds in *Nickols*—the preservation of the "Walden of Emerson and Thoreau"—defined the terms of the obligation or trust imposed upon the Commonwealth of Massachusetts and prohibited the Commonwealth from engaging in any activity that was contrary to such purpose,¹¹⁴ so should the statement of purpose in the Myrtle Grove easement—to preserve, protect, and maintain the historical, architectural, cultural, and scenic values of Myrtle Grove in perpetuity—be deemed to define the terms of the obligation or trust imposed upon the National Trust and prohibit the National Trust from engaging in any activity that is contrary to such purpose.

Modifying the Myrtle Grove easement to narrow its application to a forty-seven acre "historic core," and permit an eight-lot subdivision on the remaining acreage, complete with a single-family residence and ancillary structures (such as a pool, pool house, and tennis courts) on each of the eight lots, obviously would be contrary to the stated purpose of the easement, just as enlarging the beach area, cutting down old-growth trees, and building a road, concrete ramps, and a concrete bathhouse at Walden Pond was contrary to the stated purpose of the gifts in *Nickols*. Thus, although the deed conveying the Myrtle Grove easement did not expressly state that the donee could not modify the easement in manners inconsistent with its stated purpose or extinguish the easement, such a restriction on the donee's use and disposition of the easement is implicit in the overarching purpose of the gift.

This was the position asserted by the attorney general for the State of Maryland. In the Memorandum of Law in Support of Attorney General's Motion for Summary Judgment, the attorney general argued that while, 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 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."¹¹⁵ The attorney general acknowl-

¹¹⁴ See *Nickols v. Commissioners of Middlesex County*, 166 N.E.2d 911, 914 (Mass. 1960). See also *supra* notes 52–65 and accompanying text.

¹¹⁵ Attorney General's Memorandum, *supra* note 104, at 30. See also *id.* at 2–3:

Under Maryland law, a trust is created when property is held by one party, a trust-

edged that the Maryland easement enabling legislation provides that a conservation easement may be “extinguished or released, in whole or in part, in the same manner as other easements,” but noted that “[n]othing in [the] statute or its legislative history . . . indicates the legislature’s intent to abrogate the application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation.”¹¹⁶

The attorney general further asserted that the proposed eight lot subdivision of the property, which would permit the construction of a single-family residence, as well as ancillary structures such as a swimming pool, pool house, and tennis courts, on each of the eight lots would “frustrate the purposes of the . . . charitable trust.”¹¹⁷ The attorney general noted that “[i]n situations where compliance with the Myrtle Grove charitable trust is impossible or impracticable or would defeat or substantially impair its purposes, the doctrines of *cy pres* and [administrative] deviation provide avenues of change . . . under the jurisdiction of this court of equity.”¹¹⁸ There was, however, no indication that the charitable purpose of the Myrtle Grove easement had become “impossible or impracticable,” or that any of the terms of the easement were “defeat[ing] or substantially impair[ing]” that purpose.¹¹⁹

tee, for the benefit of another. A trust is charitable if its purpose and intent is charitable. Here, Mrs. Donoho gave property, a preservation easement on Myrtle Grove, to the National Trust, for the benefit of Maryland’s people, for charitable purposes: to preserve the property in perpetuity for future generations. By her gift, she created a charitable trust. The Miller Trust’s efforts to transmogrify Myrtle Grove into a multiple-lot subdivision violates the express terms and purposes of the trust.

¹¹⁶ *Id.* at 29. See also MD. CODE ANN., REAL PROP. § 2-118(d) (2004).

¹¹⁷ Attorney General’s Memorandum, *supra* note 104, at 28 (emphasis added).

¹¹⁸ *Id.* at 31.

¹¹⁹ See *id.* See also *supra* note 111 (noting that Myrtle Grove was adjacent to and in the immediate area of significant amounts of similarly protected lands). Not all state attorneys general can be expected to be as proactive as the Maryland attorney general in protecting the public’s interest in conservation easements. For example, in 1993, the owners of a 1043 acre ranch located in Johnson County, Wyoming, conveyed a conservation easement to the Board of Johnson County Commissioners (the “Board”) “to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the Ranch.” See Memorandum in Opposition to Defendants’ Motion for Summary Judgment and in Support of Plaintiffs’ Motion for Summary Judgment at 1–2, *Hicks v. Dowd*, No. 2003-0057 (Wyo. Dist. Ct. Oct. 27, 2003) [hereinafter Plaintiffs’ Memorandum] (on file with the Harvard Environmental Law Review); *Conservation Easement Litigation Heads to Court*, CASPER STAR TRIB., Dec. 15, 2003. In accordance with the agreement of the parties, the Board later conveyed the easement to a tax-exempt organization created by the Board. Plaintiffs’ Memorandum at 2, 4. In 1999, the easement donors sold the ranch subject to the easement, and in 2002 the Board adopted a resolution that would extinguish the easement and allow the value attributable thereto to inure to the benefit of the new owners of the ranch. *Id.* at 4–5, 23. A resident of Johnson County and a Wyoming corporation that publishes a newspaper of general circulation in that county filed suit alleging, *inter alia*, that the easement is held in a charitable trust, and that the tax-exempt organization may not extinguish the easement without receiving court approval therefor in the context of a *cy pres* proceeding. *Id.* at 1–16. The Wyoming attorney general was given notice of the proceeding, but declined to intervene, noting that “the interests of the public, as beneficiaries of the conservation easement . . .

E. Conclusion

Land trusts have generally resisted the characterization of a conservation easement donation as a restricted charitable gift or a charitable trust on the grounds that judicial as well as attorney general involvement in the easement modification or termination process would be unduly burdensome.¹²⁰ It is not clear, however, why land trusts should be considered a breed apart from other charitable organizations and allowed to pursue their charitable goals free from the type of oversight exercised by the courts and state attorneys general over other charitable organizations.¹²¹ In addition, exempting land trusts and conservation easements from the longstanding rules governing a charitable donee's use and disposition of its charitable assets seems particularly unwise given the lack of a formal accreditation program for the nation's land trusts, the growing number of reports of incompetent and even "rogue" land trusts, and the importance of land use decisions to society.¹²²

Treating donated conservation easements as restricted charitable gifts or charitable trusts also would not appear to impose undue burdens on the holders of such easements. The government agencies and charitable organizations acquiring conservation easements have the ability to minimize the need for easement modifications and terminations through: (i) strategic

are being represented by arguments of counsel on all sides." See Letter from Patrick J. Crank, Wyoming Attorney General, to Judge John C. Brackley (May 3, 2004) (on file with the Harvard Environmental Law Review). The case is scheduled to go to trial in October of 2005. See E-mail from Dennis Kervin, counsel for the plaintiffs, to Nancy A. McLaughlin (Apr. 13, 2005) (on file with the Harvard Environmental Law Review). The *Hicks* case illustrates that state attorneys general cannot necessarily be relied upon to protect the public's interest in conservation easements. See also SCOTT & FRATCHER, *supra* note 25, § 391, at 361, 363 (noting that the attorney general is charged with many duties that have nothing to do with the enforcement of charitable trusts and the result has been more or less sporadic enforcement of charitable trusts). This suggests that measures should be taken to expand the class of persons who have standing to enforce a conservation easement, such as granting third-party rights of enforcement in the easement deed. See *infra* notes 141-142 and accompanying text (discussing standing issues).

¹²⁰ See Arpad, *supra* note 15, at 144-45 (noting that land trusts generally have avoided using trust language in conservation easements because: (i) as evidenced in the Myrtle Grove controversy, "involvement of the attorney general can be a mixed blessing to conservation easement holders, although it should be a substantial safeguard for the public as beneficiaries," and (ii) "the potential for increased administrative costs in order to meet the fiduciary standards of a trustee," including the potential cost of court proceedings for *cy pres* or administrative deviation that would be necessary to approve any substantial easement modification).

¹²¹ Museums, for example, have long accepted their obligation to seek court approval to deviate from restrictions placed on their use or disposition of charitable gifts of artwork. See MALARO, LEGAL PRIMER, *supra* note 45, at 109 ("As a general rule, a legal restriction imposed by a donor (as distinct from a moral restriction founded on precatory language) and accepted by the museum subsequently cannot be waived by the museum of its own accord. If the museum wishes relief, it must seek court approval either in a *cy pres* action or in an action based on the doctrine of equitable deviation.").

¹²² See McLaughlin, *supra* note 3, at 64-68 (discussing the lack of accreditation of land trusts and increasing reports of incompetent and even "rogue" land trusts); Korngold, *supra* note 11, at 455-63 (discussing the importance of land use decisions to society).

planning for conservation easement acquisitions (which would, for example, reduce the likelihood of "island easements" that may lose their conservation value over time as they are surrounded by developed lands), and (ii) careful drafting of easement deeds (which would, for example, reduce the need for amendments to correct drafting errors or clarify vague language). In addition, such agencies and organizations can build into easement deeds (with the donors' acquiescence) provisions granting them the flexibility to simply agree with the owners of the encumbered land to amend the easements in manners consistent with the conservation purposes of such easements.¹²³ If a conservation easement contains such a grant of discretion, the donee would be required to seek court approval only for proposed amendments that are *not* consistent with the conservation purposes of the easement (such as those contemplated in the Myrtle Grove controversy) and for the wholesale extinguishment of the easement and the use of the proceeds attributable thereto to accomplish similar conservation purposes in another location. Once it is understood that significant flexibility can be built into easement deeds, and that court approval of amendments or extinguishments that are not permitted pursuant to the terms of an easement deed could legitimize such actions (and shield the holder from potential legal liability), there may be less resistance on the part of land trusts to the idea of treating easements as restricted charitable gifts or charitable trusts.

The following Part discusses how the doctrine of *cy pres* could be applied to modify or terminate a conservation easement, the charitable purpose of which has become impossible or impracticable due to changed conditions.¹²⁴

III. CONSERVATION EASEMENTS AND THE DOCTRINE OF *CY PRES*

A. *The Cy Pres Bargain*

Before discussing the application of the doctrine of *cy pres* in the conservation easement context, it is important to describe the nature of the bargain that an individual strikes with the public upon the making of a restricted charitable gift or the creation of a charitable trust.¹²⁵ While the

¹²³ See *supra* notes 77–78 and accompanying text. See also *supra* note 80 and accompanying text (noting that, even in the absence of such a grant of discretion, the holder of a conservation easement could simply agree with the owner of the underlying land to make uncontroversial amendments to the easement (such as to correct a drafting error or clarify vague language) because no person with standing is likely to object, but that from the holder's perspective, it would be far preferable to be granted express authority to agree to such amendments in the easement deed, thereby reducing the potential for lawsuits alleging a breach of the holder's fiduciary duties).

¹²⁴ A detailed discussion of how the administrative terms of a conservation easement, the charitable purpose of which has *not* become impossible or impracticable, could be amended in manners consistent with (or neutral with respect to) such purpose is the subject of a separate, future article.

¹²⁵ See Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1112 (1993) (de-

laws of this country accord significant deference to the right of individuals to dispose of their property as they see fit, such laws also place limits on that right. In the private trust context, the states limit the exercise of dead hand control over trust assets through the Rule Against Perpetuities, which generally permits a settlor to exercise control over trust property for a period of time equal to the lives of persons known to the settlor plus twenty-one years.¹²⁶ The Rule Against Perpetuities strikes a balance between respect for an individual's right to control the disposition of his property and society's interest in having the use of resources determined by the living.¹²⁷

In the case of a restricted charitable gift or a charitable trust, "the state strikes a more generous bargain with the donor"—the donor is allowed to exercise dead hand control over the use of his property indefinitely, provided such property is devoted to charitable purposes and is therefore beneficial to the public.¹²⁸ An implicit condition of allowing donors to exercise dead hand control over the use of charitable assets indefinitely is that such use must continue to provide benefits to the public.¹²⁹ If at some point in time the donor's prescribed use of the property ceases to be charitable because it no longer provides the requisite level of benefit to the public, a court can apply the doctrine of *cy pres* to restore the appropriate balance between the donor's desire to exercise dead hand control and society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public.¹³⁰

scribing the bargain).

¹²⁶ See Uniform Law Commissioners, *A Few Facts About the Rule Against Perpetuities*, at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-usrap.asp (last visited Feb. 17, 2005) (on file with the Harvard Environmental Law Review) (noting that The Uniform Statutory Rule Against Perpetuities, which has been adopted in twenty-eight states, modifies the Rule Against Perpetuities by adopting a "wait and see" approach and invalidating future interests only if they do not vest within ninety years after their creation); DUKEMINIER & JOHANSON, *supra* note 38, at 854 (noting that a few states have abolished the Rule Against Perpetuities and allow a trust to endure forever if the trustee has the power to sell the trust assets, while others have abolished the Rule's application to trusts of personal (as opposed to real) property).

¹²⁷ See Atkinson, *supra* note 125, at 1114.

¹²⁸ See *id.*

¹²⁹ See *id.* at 1114–15 ("The reason for this relative generosity in the case of charitable gifts is an implicit quid pro quo: In exchange for perpetual donor control, society gets wealth devoted to recognizably 'public' purposes. Wealth that donors would otherwise pass to individuals for 'private' purposes is in a sense devoted to the public domain. Thus the restraints the law allows to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial."). See also *supra* note 39 (discussing the purposes that are considered to be "charitable" under state law).

¹³⁰ See Atkinson, *supra* note 125, at 1114–15. See also SCOTT & FRATCHER, *supra* note 25, § 399.4, at 535–36 ("Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. He is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity that by the lapse of time ceases to be useful."); RESTATEMENT

Accordingly, when a landowner donates a conservation easement to a government agency or land trust, the landowner should be viewed as striking the following “*cy pres* bargain” with the public: the landowner should be permitted to exercise dead hand control over the use of the property encumbered by the easement, but only so long as the easement continues to provide benefits to the public sufficient to justify its enforcement. If, due to changed conditions, the charitable purpose of the easement becomes “impossible or impracticable,” the doctrine of *cy pres* should be applied to restore the appropriate balance between the landowner’s desire to exercise dead hand control over the use of the property and society’s interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public.¹³¹

B. Applying Cy Pres to a Donated Conservation Easement

To date, there have been no reported cases in which a court has applied the doctrine of *cy pres* to modify or terminate a conservation easement.¹³² It is inevitable, however, that the charitable purpose of some conservation easements will become “impossible or impracticable” due to changed conditions. Accordingly, the following Sections of this Part describe the operation of the doctrine of *cy pres* in the conservation easement context.

Section 1 first explains how a *cy pres* proceeding involving a conservation easement could be initiated. Section 2 then discusses how the courts work through each of the three steps in the *cy pres* process, and offers suggestions as to how the courts might work through each of those steps in the conservation easement context.

1. Initiation of the Cy Pres Proceeding

The owner of the land encumbered by the easement, the holder of the easement, and the state attorney general (as representative of the public) should each be granted standing as a matter of right to initiate or intervene in any *cy pres* proceeding involving a conservation easement.¹³³

OF TRUSTS, *supra* note 39, § 67, cmt. a (noting that the modern rationale for the doctrine of *cy pres* is based primarily on the perpetual duration of charitable trusts and the resulting risk that the charitable purposes designated by the donor may become obsolete as the needs and circumstances of society evolve over time).

¹³¹ See *infra* Part III.B.2.a (discussing the *cy pres* standard of “impossibility or impracticability”).

¹³² See *supra* note 2 (defining the term “conservation easement” for purposes of this Article to mean easements encumbering land (as opposed to historic structures)).

¹³³ See, e.g., UCEA, *supra* note 15, § 3(a)(1) and (2) (providing that any action affecting a conservation easement may be brought by the owner of the land and the holder of the easement). Most conservation easement enabling statutes contain similar provisions. See also *supra* note 84 and accompanying text (noting that twenty-two states and the District of Columbia have adopted the UCEA provision granting standing to bring an action affect-

Accordingly, a *cy pres* proceeding involving a conservation easement could be initiated in myriad ways. First, and perhaps most obviously, the owner of the encumbered land could initiate the proceeding seeking to free the land from the easement restrictions.¹³⁴

Second, and perhaps less obviously, the holder of the easement could initiate the proceeding, arguing that the charitable purpose of the easement has become "impossible or impracticable," and that it is fulfilling its fiduciary obligation to the beneficiary of the easement—the public—in seeking authorization to either (i) modify the easement to change the conservation purpose for which the land is protected, or (ii) extinguish the easement, participate in a sale of the unencumbered land, and use its share of the proceeds to accomplish the donor's specified conservation purposes in some other manner or location.¹³⁵ While holders of easements are obliged to honor and enforce the terms of the easements they accept, they also arguably have a duty to seek the application of *cy pres* if they believe it has become impossible or impracticable to carry out the charitable purpose of an easement.¹³⁶ Of course, given the financial benefits the holder of a conservation easement can expect to receive if an easement is extinguished,¹³⁷ the courts and the public are likely to view holders seeking to extinguish easements with great skepticism unless the holders have clearly articulated written policies and procedures regarding when they will seek extinguishment, and assiduously follow those policies and procedures.¹³⁸

ing a conservation easement to any "person authorized by other law"); *supra* notes 36–37 and accompanying text (noting that the state attorney general, as the representative of the public is given the power to bring a proceeding to enforce the terms of a charitable gift or trust and is also a necessary party and entitled to be heard in any proceeding involving the application of the *cy pres* doctrine).

¹³⁴ The rule proposed in Part III.B.2.c.ii(2), *infra*, regarding the division of proceeds upon the extinguishment of an easement and sale of the unencumbered land would eliminate the ability of owners of easement-encumbered land to realize a windfall upon the extinguishment of their easements and likely reduce the incentive for such owners to seek extinguishment.

¹³⁵ See SCOTT & FRATCHER, *supra* note 25, § 379, at 316–18 (discussing the duties of the trustee of a charitable trust, including the duty to exercise due diligence in the administration of the trust and the duty of loyalty, which requires the trustee to administer the trust solely with a view to the accomplishment of the purposes of the trust).

¹³⁶ See *supra* notes 34–35 and accompanying text (noting that the holder of a restricted charitable gift or trustee of a charitable trust serves two masters—the donor of the gift or trust assets and the public (as the beneficiary of the gift or trust)—and has the obligation to seek the application of administrative deviation or *cy pres* if circumstances justify such action).

¹³⁷ See *infra* Part III.B.2.c.ii(2) (discussing the division of proceeds upon the extinguishment of an easement and the value that should be attributable to the property interest embodied in the easement).

¹³⁸ Such policies and procedures should address, *inter alia*, the standard the holder will apply in determining when the charitable purpose of a conservation easement has become "impossible or impracticable." In developing such policies and procedures, holders of conservation easements could learn a great deal from the experience of museums with the controversial practice of deaccessioning, which involves the sale of artwork that was once accessioned into a museum's collection. See, e.g., MALARO, MUSEUM GOVERNANCE, *supra* note 30, at 57 (noting that in the museum context, a museum with carefully conceived written policies and procedures regarding deaccessioning is likely to make sound decisions

If the charitable purpose of a conservation easement becomes impossible or impracticable and the holder of the easement fails to file suit for the application of *cy pres* (perhaps out of fear of chilling future easement donations), the state attorney general presumably could do so, arguing that the holder is negligent in: (i) continuing to expend public resources on monitoring and enforcing an easement that has ceased to provide benefits to the public or has arguably become detrimental to the public; and (ii) failing to seek the application of the doctrine of *cy pres* so that the easement (or the value attributable thereto) can be applied to charitable conservation purposes that do provide benefits to the public.¹³⁹

In addition, if the holder of an easement failed to comprehend its status as trustee or quasi-trustee and simply agreed to a proposal by the owner of the encumbered land to substantially modify (as in the Myrtle Grove controversy) or extinguish the easement, the attorney general could file suit as the enforcer of charitable trusts, arguing that the easement can be modified or extinguished only in the context of a judicially supervised *cy pres* proceeding. Even if the attorney general failed to file suit in such circumstance (due to lack of notice, lack of resources, or simple lack of interest), the *cy pres* issue could nonetheless arise if the holder of the easement and the owner of the land attempted to sell the unencumbered land and the purchaser refused to comply with the purchase contract on the grounds that the parties do not have the authority to extinguish the easement and sell the land in the absence of court approval.¹⁴⁰

and maintain public confidence); WEIL, *supra* note 46, at 116–17 (recommending tightly written deaccessioning procedures that are intended to assure that deaccessioning decisions will be subject to scrupulous review and consultation, and noting that a deaccessioning process that is “murky, secretive, and seemingly arbitrary” may appear to the public as “at least questionable and quite possibly unethical”). It also is advisable for the holder of a conservation easement to seek the approval of the state attorney general and other interested parties (such as other conservation organizations operating in the area and the donor or the donor’s heirs) before initiating a *cy pres* proceeding. Cf. DUKEMINIER & JOHANSON, *supra* note 38, at 875 (discussing *In re Estate of Buck*, No. 23259 (Cal. Super. Ct. Aug. 15, 1986) (unreported but reprinted in 21 U.S.F. L. REV. 691 (1987)), wherein a testator left the residue of her estate to the San Francisco Community Foundation to be used for charitable purposes in the affluent county of Marin, California. After the assets increased significantly in value, the Foundation petitioned the court for the application of the doctrine of *cy pres* to expand the geographic scope of the trust to include other counties in the San Francisco Bay area. The court refused to apply the doctrine of *cy pres*, and the attorney general of California, as supervisor of charitable trusts, intervened in the proceeding arguing against the application of the doctrine and asking whether the trustee was in violation of its fiduciary duties for bringing such a suit and ought to be removed as trustee.). See also *infra* note 249 (discussing why easement donees are unlikely to acquire and administer easements with the intent to extinguish such easements and obtain the cash value attributable thereto).

¹³⁹ See, e.g., *Crow v. Clay County*, 95 S.W. 369 (Mo. 1906) (considering but ultimately rejecting the attorney general’s argument that a trust fund’s limitations should be modified pursuant to the doctrine of *cy pres* because the charitable purpose of the fund had failed due to changed conditions and the trustee was committing continuous breaches of trust in its use of the fund for purposes contrary to the intent of the testator).

¹⁴⁰ See BOGERT & BOGERT, *supra* note 32, § 441, at 200.

Whether additional parties (such as the donor of the easement, the donor's heirs, neighboring landowners, other members or representatives of the general public, and other conservation organizations) would be granted standing as a matter of right to intervene in any such proceeding would depend, *inter alia*, on the terms of the easement, the terms of the applicable easement enabling statute, and state law interpretation of the rule that parties with a "special interest" are granted standing as a matter of right in a *cy pres* action.¹⁴¹ If such parties are not granted standing to intervene as a matter of right, it is within the discretion of the court to permit such intervention.¹⁴²

2. The Three-Step *Cy Pres* Process

Applying the doctrine of *cy pres* to a conservation easement would involve a three-step process. First the court would determine whether the charitable purpose of the easement (that is, the protection of the encumbered land for the conservation purpose or purposes specified by the donor) had become "impossible or impracticable" due to changed conditions. If "impossibility or impracticability" were established, the court would then determine whether the donor had a general charitable intent in donating the easement. If the court determined that the donor had a general charitable intent, the court would then proceed to the third and final step in the *cy pres* process—formulating a substitute plan for the use of the easement (or the value attributable thereto¹⁴³) for a charitable purpose "as near as possible" to that specified by the donor.¹⁴⁴

¹⁴¹ See, e.g., UCEA, *supra* note 15, §§ 1(3), 3(a)(3) (providing that an action affecting a conservation easement may be brought by any government agency or charitable organization eligible to be a holder of the easement that is expressly granted a third-party right of enforcement in the easement deed); *Tenn. Env'tl. Council v. Bright Par Assoc.*, 2004 Tenn. App. LEXIS 155 (Tenn. App. Ct. Mar. 8, 2004) (holding that under the Tennessee easement enabling statute, which provides that a conservation easement may be enforced by the "beneficiaries of the easement," any resident of Tennessee has standing to enforce a conservation easement); *Burgess v. Breakell*, 1995 Conn. Super. LEXIS 2290 (Conn. Super. Ct. Aug. 7, 1995) (holding that the owner of land adjoining land encumbered by a conservation easement did not have standing to bring an action to enforce the terms of the easement prohibiting commercial logging on the grounds that the state easement enabling statute limited standing to enforce an easement to the holder or owner of the easement); SCOTT & FRATCHER, *supra* note 25, § 391, at 366 (noting that "a person who has a special interest in the performance of a charitable trust can maintain a suit for its enforcement," but he "must show that he is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled").

¹⁴² See SCOTT & FRATCHER, *supra* note 25, § 391, at 379.

¹⁴³ See *infra* Parts III.B.2.c.ii(1)–(2) (arguing that the donation of a conservation easement involves the conveyance of a property right to the donee, and discussing the way in which the donee's property right could be valued upon extinguishment of the easement).

¹⁴⁴ See *supra* note 32 and accompanying text (describing the doctrine of *cy pres*). See also *In re Estate of Du Pont*, 663 A.2d 470, 478 (Del. Ch. 1994) (describing the three step *cy pres* process). If in the second step of the *cy pres* process the court determined that the donor had a specific (rather than general) charitable intent in donating the easement, the doctrine of *cy pres* would not apply, the charitable gift of the easement would "fail," and

Determining that the charitable purpose of an easement has become “impossible or impracticable” due to changed conditions and that the donor had a general charitable intent would not necessarily mean that the easement would be extinguished. In the third step of the *cy pres* process—formulating a substitute plan—the court should endeavor to ascertain from the terms of the easement and the circumstances attending its donation whether the donor, if presented with the “impossibility or impracticability” of the continued protection of the encumbered land for the conservation purpose or purposes specified by the donor (for example, to provide grizzly bear habitat or preserve part of a rural, agricultural landscape), would have preferred: (i) that the easement be modified and the encumbered land continue to be protected for a different conservation purpose (such as for use as a public park), or (ii) that the easement be extinguished and the value attributable thereto be used to accomplish the donor’s specified conservation purpose or purposes in some other manner or location.¹⁴⁵

a. The “Impossibility or Impracticability” Standard

i. In General

In the first step of the *cy pres* process, the court determines whether the charitable purpose of the gift or trust has become “impossible or impracticable” due to changed conditions. In other words, the court determines whether the donor’s prescribed use of the property has ceased to be “charitable” because it no longer provides the requisite level of benefit to the public.¹⁴⁶ In their famous treatise on trusts, Professors Scott and Fratcher note that “[i]t is difficult, of course, to draw any exact line between the situations where it would be impracticable to carry out the specific directions of the testator and situations where it would merely be undesirable to do so. The distinction is one of degree rather than one of kind.”¹⁴⁷

Decisions regarding whether the charitable purpose of a gift or trust has become “impossible or impracticable” are based on the particular facts of each case, and no precise definition of the standard exists.¹⁴⁸ In a 1973

the easement (or the value attributable thereto) would revert to the donor, if the donor is alive, or, if the donor is not alive, pass by resulting trust to either the residuary beneficiaries under the donor’s will or the donor’s heirs under the law of intestate succession. See *infra* note 180 and accompanying text. As discussed in Part III.B.2.b.ii, *infra*, however, for a variety of reasons courts are very likely to find that an easement donor had a general charitable intent and, thus, to proceed to the third and final step in the *cy pres* process.

¹⁴⁵ If the doctrine of *cy pres* is applied to modify or extinguish a conservation easement as described in this Part, either the easement or the value attributable thereto would remain in public hands and continue to be devoted to charitable conservation purposes. Accordingly, there should be no adverse tax consequences to the donor of an easement as a result of the application of the doctrine of *cy pres*.

¹⁴⁶ See *supra* Part III.A (discussing the *cy pres* bargain).

¹⁴⁷ SCOTT & FRATCHER, *supra* note 25, § 399.4, at 530.

¹⁴⁸ See, e.g., *In re Thorne*, 102 N.Y.S.2d 386, 387, 389 (N.Y. Sur. Ct. 1951) (involving

American Bar Association report on the doctrine of *cy pres*, the authors noted that there is a "significant variance in the degree of impossibility or impracticability required" by courts to trigger the application of *cy pres*,¹⁴⁹ and this state of affairs does not appear to have changed in the ensuing years. A quick perusal of the more recent cases involving the doctrine reveals some in which the courts have declined to give an expansive reading to the concept of "impossibility or impracticability,"¹⁵⁰ and others in

devises in 1916 and 1919 of an eighteen acre parcel of land to a city for use as a public park, subject to the restriction that "said park not . . . be used as a recreational park . . . for picnics or bathing, but simply for driving [in horse-drawn vehicles] and walking" (emphasis omitted); in refusing to apply the doctrine of *cy pres* to permit the park to be used for "picnicking, fishing, and general park purposes," the court noted that, although it was presently "impracticable" to use the property for driving in the sense employed in the wills, such a change of circumstances did not justify disregard for the plain mandate in the wills prohibiting the use of the land for picnicking and bathing, particularly given that the testatrices had stated in each of their wills that it was their intention that the park "beautify" the area and "not in any way be conducted or managed so as to create a nuisance and be objectionable to the property owners" in the area, which was largely residential); *St. James Church v. Wilson*, 89 A. 519, 520 (N.J. Ch. 1913) (involving a 1908 bequest of a remainder interest in \$14,000 to St. James Church for the purpose of erecting an Episcopal church on a certain tract of land conveyed to St. James Church by the testator during his lifetime; the court applied the doctrine of *cy pres* to allow St. James Church to use the fund for the general benefit of the Episcopal church in the neighborhood in which the tract of land was located, noting that changed circumstances had caused the population of the area to stagnate if not decline, no new parish could be created in such a location under the canons and laws of the Episcopal church for lack of assurance that sufficient money could be raised to pay the annual salary of a priest and lack of a sufficient number of male communicants to compose a lawful vestry and, that "the general charitable intent of a testator may be carried out [if] it should be undesirable, impracticable or against public policy, although not impossible under altered circumstances to carry out the [testator's] special intent"); *Village of Hinsdale v. Chicago City Missionary Society*, 30 N.E.2d 657, 665 (Ill. 1940) (involving a gift of six lots to a village in which the donor resided with instructions that one lot be used as the site of a public library and the proceeds from the sale of the other lots be used for the construction and maintenance of the library; after the village attempted unsuccessfully to raise sufficient funds for the construction of a library on the designated lot, and another building (which contained adequate and appropriate space for present needs and the means for appropriate expansion) was leased and used as the library, the court determined that the doctrine of *cy pres* could be applied to permanently abandon the use of the designated lot as a site for the library, noting that, while continued use of the lot as a site for the library was not impossible, conditions had arisen that may render "inexpedient and wasteful" the erection of a library on the lot); *Towne Estate*, 75 Pa. D. & C 215, 217 (Pa. Orphans' Ct. 1950) (involving a 1912 bequest of funds to a private trust company to be used for the purpose of maintaining and providing an ample supply of water to a drinking fountain for horses and dogs erected by the testator; the court applied the doctrine of *cy pres* and authorized the payment of the funds remaining in the trust account to a local branch of the Society for the Prevention of Cruelty to Animals based on the fact that the income from the fund was insufficient to maintain the fountain and "the fountain . . . actually serves no one, because there are no horses using the highways . . . and dogs are prohibited from wandering at large").

¹⁴⁹ Report of Committee on Charitable Trusts and Foundations, *supra* note 40, at 391-92 (1973).

¹⁵⁰ See, e.g., *In re Estate of Buck*, No. 23259 (Cal. Super. Ct. Aug. 15, 1986) (unreported but reprinted in 21 U.S.F. L. REV. 691 (1987)) (refusing to apply the doctrine of *cy pres* as described in note 138, *supra*, the court noted that "[t]he *cy pres* doctrine should not be so distorted by the adoption of subjective, relative, and nebulous standards such as 'inefficiency' or 'ineffective philanthropy' to the extent that it becomes a facile vehicle for charitable trustees to vary the terms of the trust simply because they believe that they can

which the courts have been willing to do so.¹⁵¹ Although some commentators have noted a “prevailing conservative mood” in the approach of the courts to this first step in the *cy pres* process,¹⁵² others have noted that the trend in the case law has been to broaden the circumstances in which *cy pres* can be applied.¹⁵³

ii. *In the Conservation Easement Context*

Articulating the standard in the easement context. In the first step of a *cy pres* process involving a conservation easement, the court would determine whether the charitable purpose of the easement (that is, the protection of the encumbered land for the conservation purpose or purposes specified in the easement) had become “impossible or impracticable” due to changed conditions. In other words, the court would determine whether the protection of the encumbered land for the conservation purpose or purposes specified in the easement had ceased to be charitable because it no longer provides the requisite level of benefit to the public.¹⁵⁴

Landowners donate conservation easements to protect their land for a variety of difficult to define “conservation purposes,” including, for exam-

spend the trust income better or more wisely elsewhere”); *In re Estes Estate*, 523 N.W.2d 863 (Mich. Ct. App. 1994) (refusing to remove a restriction when a testator left a bequest to a church to be used “solely for the purpose of helping to build a new church and shall not be used for repair or additions to present church or for any other purposes,” and the church, which had no plans for or interest in a new building, petitioned for release from the restriction under the Uniform Management of Institutional Funds Act (“UMIFA”), which authorizes release from “obsolete, inappropriate, or impracticable” restrictions; reversing the trial court, the appellate court held that (i) building a new church was not “obsolete, inappropriate, or impracticable” and, therefore, the church could not be released from the restriction, and (ii) contrary to the commentary to the UMIFA, the UMIFA standards for release from restrictions were not significantly distinguishable from those governing *cy pres*).

¹⁵¹ See, e.g., *In re Rothrock*, 452 N.W.2d 403 (Iowa 1990) (applying the doctrine of *cy pres* to permit a church to use funds bequeathed to it “solely for building new church” to defray the expenses of remodeling the existing church and parsonage, stating that the doctrine of *cy pres* is “a liberal rule of construction used to carry out, not defeat, the testator’s intent”); *In re Estate of Vallery*, 883 P.2d 24 (Colo. Ct. App. 1993) (affirming the trial court’s application of the doctrine of *cy pres* to permit a foundation to use income from a fund that the testator directed be used for the “hospitalization costs” of needy Knights Templar to defray the costs of other health care services provided to such Knights Templar, concluding that changes in the methods of financing health care since the time of the testator’s death had rendered the restriction on the use of the fund an “impracticable” limitation).

¹⁵² See Roger G. Sisson, *Relaxing the Dead Hand’s Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 644 (1988); Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 HAWAII L. REV. 353, 371 (1999) (noting that while “a few courts have shown increased willingness to apply *cy pres* by construing its requirements liberally, the majority continue to construe the doctrine narrowly”).

¹⁵³ See FREMONT-SMITH, *supra* note 26, at 49; SCOTT & FRATCHER, *supra* note 25, § 399.4, at 537 (noting that “it is believed that there is a tendency in more recent cases to permit a *cy pres* application even though it is difficult to say that it is impracticable to carry out the specific purpose, but where it would be so unwise to do so that the donor presumably would not have desired to insist on it”).

¹⁵⁴ See *supra* Part III.A (discussing the *cy pres* bargain).

ple, the protection of wildlife habitat, a scenic vista, open space, or rural, agricultural land (or some combination thereof). The inherently subjective nature of the conservation purposes for which land is protected, coupled with the lack of any precise definition of the "impossibility or impracticability" standard under the doctrine of *cy pres* could lead to unfortunate results in the conservation easement context.

The dangers of a vague standard. Too liberal an interpretation of the "impossibility or impracticability" standard might lead to the extinguishment of easements on the grounds of mere economic or conservation inefficiency. If a standard based on economic inefficiency were applied, easements might be extinguished simply because the easy-to-quantify economic benefits to the public from the development of the encumbered land might appear to far outweigh the more difficult-to-quantify intangible benefits to the public that flow from the land in its undeveloped state, thus rendering the accomplishment of the charitable purpose of the easement—such as the protection of the land as open space—"impracticable" from a purely economic standpoint.¹⁵⁵ If such a standard were applied, one might expect the local courts applying *cy pres* to give greater weight to state and local economic interests than to the interests of the nation as a whole in protecting certain land from development and other intensive uses,¹⁵⁶

¹⁵⁵ The difficult-to-value benefits to the public that flow from land in its undeveloped state include the purification of air and water, the mitigation of floods and droughts, the detoxification and decomposition of wastes, the generation and renewal of soil and soil fertility, the pollination of crops and natural vegetation, and the dispersal of seeds and translocation of nutrients. See Gretchen C. Daily, *Introduction: What Are Ecosystem Services?*, in *NATURE'S SERVICES, SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 3–4 (Gretchen C. Daily ed., 1997) (defining such "ecosystem services" as the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life). See also John Harte, *Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System*, 27 *ECOLOGY* L.Q. 929, 961–63 (2001):

As a result of our increasing numbers and affluence, huge areas of once ecologically healthy private land in the United States, far more land than is now or ever could be in public protected status, are gradually being converted to land with little ecological value The most obvious examples of this stem from the trends across the nation toward increasing suburbanization and exurbanization (extremely low density residential development in rural areas). . . . This trend is creating patchworks of ecologically incoherent micro-landscapes that, as a whole, cannot support the diversity of species and the ecological functions of the habitats that previously existed on the land . . . [s]uccess or failure in reversing this trend is critical to the future of ecosystem integrity in the United States.

Id. at 961–63.

¹⁵⁶ One has only to read about the controversies surrounding the designation of National Monuments to understand that state and local economic interests are often at odds with national conservation interests, particularly in western states. See ROBERT B. KEITER, *KEEPING FAITH WITH NATURE* 184 (2003) (noting that President Clinton's use of his executive power under the Antiquities Act to establish the 1.7 million-acre Grand Staircase–Escalante National Monument in southern Utah predictably provoked angry responses from the state's Republican political leaders, as well as its rural communities where both the president and his secretary of the interior were hung in effigy on the day of the announce-

which would be particularly inappropriate where the nation as a whole had invested in the easement through the provision of federal tax benefits to the easement donor and the organization holding the easement. In addition, given that easement donors appear to be primarily concerned about the long-term protection of the particular land encumbered by their easements, extinguishment of easements on the grounds of mere economic inefficiency could be expected to have a significant chilling effect on future easement donations.¹⁵⁷

If a standard based on conservation inefficiency were applied, easements might be extinguished simply because the value attributable thereto could, in the opinion of some (such as the holder of the easement or the state attorney general), be put to more desirable or efficient conservation uses in other locations.¹⁵⁸ Extinguishment of a conservation easement on the grounds of mere conservation inefficiency would do violence to the intent of the typical easement donor (who does not intend to make a gift of a fungible asset to the donee), and could also be expected to have a significant chilling effect on future easement donations.

On the other hand, too conservative an interpretation of the "impossibility or impracticability" standard could result in the perpetuation of easements that have ceased to provide significant benefits to the public or have even arguably become detrimental to the public. If "impracticable" is interpreted to mean that the charitable purpose of an easement must become virtually impossible before *cy pres* will be applied, it will be difficult to modify or extinguish *any* conservation easements under the doctrine of *cy pres*. Most conservation easements are donated, at least in part, to protect the encumbered land as "open space," and it would be very difficult to argue that an easement encumbering even the most environmentally degraded parcel of undeveloped land (such as a vacant lot in an industrial area) no longer protects "open space."¹⁵⁹

An inability to modify or extinguish conservation easements could have severe consequences. As noted in the introduction, the number of acres being encumbered by conservation easements on an annual basis has been increasing dramatically, particularly since the late 1990s. If that number continues to grow, the impact and influence easements will have on land use

ment).

¹⁵⁷ See *supra* note 71 and accompanying text.

¹⁵⁸ See *infra* Part III.B.2.c.ii (arguing that a conservation easement held by a government agency or charitable organization is an asset that is owned by the public, and upon the extinguishment of the easement in the context of a *cy pres* proceeding, the value attributable thereto should remain an asset owned by the public that should be devoted to charitable purposes "as near as possible" to those specified by the donor).

¹⁵⁹ "Open space" is an inherently nebulous concept, the meaning of which will vary depending upon the location and characteristics of the encumbered land and the subjective judgment of the person called upon to define it. Indeed, as illustrated by the case study discussed in Part III.C, *infra*, one person's "open space" can be another's collection point for trash and Lyme disease.

planning is likely to become pervasive, and the need to make modifications and adjustments to account for changed conditions and societal needs may become acute. Moreover, despite the best intentions of most members of the land trust community, mistakes are being made, and easements are being acquired that with the passage of time may provide very little public benefit, or even become detrimental to the public.¹⁶⁰ At some point in time, society simply may not have the luxury of continuing to enforce easements that provide only marginal levels of public benefit. Rather, we may find ourselves in need of engaging in a form of "conservation triage," where easements that no longer provide sufficient levels of public benefit as measured under contemporary standards are extinguished, and the value attributable to such easements is used to protect increasingly scarce land with far greater conservation value.

Accordingly, too conservative an interpretation of the "impossibility or impracticability" standard might severely compromise the ability of society to modify land use patterns to respond to changed circumstances and societal needs, and an enormous amount of conservation capital (in the form of the value attributable to subpar easements) could be wasted. It is also possible that the continued enforcement of conservation easements that have ceased to provide significant benefits to the public or have even become detrimental to the public would give pause to prospective easement donors.¹⁶¹ Given the strong public interest in the appropriate use of land, highly publicized instances of the failure to extinguish easements that are no longer accomplishing the purposes for which they were donated would likely erode public support for the use of perpetual easements as a land protection tool.

The foregoing suggests that, in the absence of a principled standard of "impossibility or impracticability" in the easement context, some easements that are providing significant levels of public benefit may be extinguished on the grounds of mere economic or conservation inefficiency; others that are providing little, no, or negative public benefit may continue to be enforced; and the courts, legislators, and the public may begin to take a dim view of the use of conservation easements as a land protection tool.¹⁶²

¹⁶⁰ See *supra* notes 7-8 and accompanying text.

¹⁶¹ See, e.g., SCOTT & FRATCHER, *supra* note 25, § 399.4, at 536-37 ("It would seem rather that the charitable-minded would be discouraged by the sight of charitable institutions gradually ceasing to accomplish the high purposes for which they were created.")

¹⁶² Cf. Andrew C. Dana, *The Silent Partner in Conservation Easements: Drafting for the Courts*, THE BACK FORTY, Jan./Feb. 1999, at 1, 3-5 (discussing different outcomes in conservation easement enforcement cases based on the different judicial philosophies of judges).

iii. *Factors To Consider in Assessing "Impossibility or Impracticability"*

In determining whether the charitable purpose of a conservation easement has become "impossible or impracticable"—or, in other words, in determining whether the protection of the encumbered land for the conservation purpose or purposes specified in the easement has ceased to be charitable because it no longer provides the requisite level of benefit to the public—it would be useful for the courts to be able to refer to some test of "public benefit" in the easement context that is widely accepted, at least somewhat objective, takes into account local, state, and national conservation interests, and evolves as society's conservation priorities evolve.¹⁶³ A test of public benefit with those characteristics would help ensure that easements that are providing significant levels of public benefit are not extinguished on the grounds of mere economic or conservation inefficiency, and at the same time allow society the flexibility to modify or extinguish easements that are providing little, no, or negative public benefit as measured under contemporary standards. An additional measure of the public benefit being derived from a conservation easement should, of course, be the extent to which there is public support for continuing to enforce the easement.

To date, there has existed only one test of "public benefit" in the easement context that could be described as widely accepted and at least somewhat objective, and that takes into account local, state, and national conservation interests and evolves as society's conservation priorities evolve. That test is the "conservation purposes test" under § 170(h) of the Internal Revenue Code, which has been used since 1980 to determine whether

¹⁶³ The "charitable purposes" for which most conservation easements are donated—for example, the protection of privately owned land for the purpose of preserving wildlife habitat, agricultural land, or open space—are unique. See *supra* note 39 (discussing why conservation easements should be deemed to be conveyed for "charitable purposes"). Accordingly, existing case law applying the doctrine of *cy pres* is of little help in articulating a standard of "impossibility or impracticability" in the easement context. With regard to the rare conservation easement, the charitable purpose of which is the protection of privately owned land for use as a public park, existing case law may provide some guidance as to the appropriate standard of "impossibility or impracticability." See, e.g., *Cohen v. City of Lynn*, 598 N.E.2d 682, 686 (Mass. Ct. App. 1992) (determining that the charitable purpose of a gift of land to be used for "forever for park purposes" had not become impossible or impracticable, the court noted that while it could find no precise and widely accepted definition of "park" or "park purposes," an expansive interpretation of those terms was in accord with the general definition found in judicial opinions, including *Shoemaker v. U.S.*, 147 U.S. 282, 297 (1893), in which the Supreme Court stated that virtually every city and town is planning parks "as a pleasure ground for rest and exercise in the open air"). Conservation easements protecting privately owned land for use as a public park are rare because most private landowners are not willing to provide access to their land to the general public. See WILLIAM T. HUTTON, *TAX STRATEGIES IN LAND CONSERVATION TRANSACTIONS* 3–10 (2002) (on file with author) (noting that a prospective donor's agreement to public access is rarely to be expected).