Rethinking the Perpetual Nature of Conservation Easements

Part Two

by

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Originally published in HARVARD ENVIRONMENTAL LAW REVIEW
29 HARV. ENVTL. L. REV. 421 (2005)

the donor of a conservation easement is eligible for a federal charitable income tax deduction.

Under § 170(h), the donor of a conservation easement will be eligible for a federal charitable income tax deduction only if, *inter alia*, the easement is donated for one or more of the following "conservation purposes":

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public [the "public recreation or education" conservation purposes test],
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> (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem [the "wildlife habitat" conservation purposes test],
>
> (iii) the preservation of an historically important land area or a certified historic structure [the "historic preservation" conservation purposes test], or
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> (iv) the preservation of "open space" (including farmland and forest land) where such preservation is: (I) for the scenic enjoyment of the general public and will yield a significant public benefit or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy and will yield a significant public benefit [the "open space" conservation purposes test].[164]

The conservation purposes tests under § 170(h) were carefully crafted by Congress to ensure that only easements that can be expected to provide a certain threshold level of benefit to the public would be eligible for the federal charitable income tax deduction. Those tests have been the gold standard by which the public benefit to be derived from a conservation easement has been measured for twenty-five years and can therefore be described as widely accepted.[165] In addition, the Treasury Regulations inter-

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[164] I.R.C. § 170(h)(4)(A) (2004).

[165] *See* LAND TRUST ALLIANCE, THE STANDARDS AND PRACTICES GUIDEBOOK: AN OPERATING MANUAL FOR LAND TRUSTS 8-16 to 8-17 (on file with the Harvard Environmental Law Review):

> The IRS's . . . criteria for determining the deductibility of conservation easements can be used by land trusts as a guide to test the public benefit of easements . . . tax-deductible or not. In effect, these rules define conservation values that are considered to be in the national interest (and thus their protection is worthy of federal tax benefits) . . . . If a property does not meet the criteria . . . it should be a warning signal to the land trust—the land trust needs to scrutinize the transaction to be sure it has sufficient public benefit to proceed.

See also CONSERVATION EASEMENT HANDBOOK, *supra* note 6, at 12 (noting that the requirements for a charitable income tax deduction under § 170(h) and the Treasury Regulations interpreting that section provide a useful and logical starting point for the develop-

preting § 170(h) provide substantial, detailed guidance regarding the types of easements that satisfy each of the four conservation purposes tests.[166] Accordingly, while those tests necessarily contain subjective elements,[167] they provide a more objective standard for assessing the public benefit to be derived from an easement than do the state easement enabling statutes, which generally describe the conservation purposes for which an easement may be created in very broad terms.[168] The § 170(h) conservation purposes tests also give weight to local, state, and national conservation interests, and are designed to evolve as conservation priorities evolve.[169] Accordingly, unless and until equally or more suitable tests of the public benefit to be derived from a conservation easement are developed, it is recommended that, in determining whether the charitable purpose of *any* easement (even one for which a charitable income tax deduction was not claimed) has become "impossible or impracticable," a court should give

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ment of an agency's or organization's easement selection criteria, even where a tax deduction is not a factor, because both the IRS and easement program administrators invested many months of effort to develop such requirements, and those who have worked with such requirements generally consider them workable); LAND TRUST ALLIANCE, BACKGROUND TO THE 2004 REVISIONS OF LAND TRUST STANDARD AND PRACTICES 14 (2005) ("All land conservation transactions must provide some public benefit . . . . In order to ensure that projects have a public benefit, land trusts may want to start by incorporating the IRC's conservation purposes tests into their criteria to help ensure that any transactions involving a federal or state income tax deduction (or credit) meet these tests.").

[166] *See* Treas. Reg. § 1.170A-14 (2004) (providing numerous examples of the types of conservation easements that would satisfy each of the four conservation purposes tests). For a detailed description of the four "conservation purposes tests" and the types of easements that would satisfy such tests, see generally STEPHEN J. SMALL, FEDERAL TAX LAW OF CONSERVATION EASEMENTS (1997).

[167] *See* McLaughlin, *supra* note 3, at 52–55 (noting that, because of the breadth of the land protection objectives of § 170(h), the tremendous diversity of land in the United States, and the inherently subjective nature of the concept of "public benefit," a significant number of the standards are unavoidably subjective, particularly those that permit the donor of an easement to retain rights to subdivide and develop the encumbered land).

[168] *See, e.g.*, UCEA, *supra* note 15, § 1(1) (providing that a conservation easement may be created for the purpose of retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property—but providing no further guidance with regard to the meaning of any of those terms).

[169] For example, conservation easements encumbering land "pursuant to a clearly delineated Federal, state, or local governmental conservation policy"—which means that the land has been identified as worthy of preservation by representatives of the general public at the national, state, or local level—will generally satisfy the "open space" conservation purposes test. *See* Treas. Reg. § 1.170A-14(d)(4)(iii)(A). Examples of conservation easements that would satisfy the "open space" conservation purposes test include those that protect land located within a state or local landmark district or farmland pursuant to a state program for flood prevention and control. *See* Treas. Reg. § 1.170A-14(d)(4)(iii)(A), 14(d)(4)(iv)(B). In addition, conservation easements encumbering lands that provide habitat for rare, threatened, or endangered species (classifications which clearly change over time), or that are included within or buffer land that is protected for conservation purposes at the local, state, or national level (such as local, state, or national parks, nature preserves, wildlife refuges, or wilderness areas) will satisfy the "wildlife habitat" conservation purposes test. *See* Treas. Reg. § 1.170A-14(d)(3)(ii).

considerable weight to whether the easement would satisfy the applicable conservation purposes test or tests under § 170(h) if offered for donation at the time of the *cy pres* proceeding.[170]

To illustrate how the § 170(h) conservation purposes tests could be used to determine whether a conservation easement has ceased to provide the requisite level of benefit to the public, assume that the court is evaluating an easement donated for the stated purpose of protecting the historic, agricultural, and wildlife habitat characteristics of the encumbered land.[171] The court would consider whether, if donated at the time of the *cy pres* proceeding, the easement would satisfy any of the "historic preservation," "wildlife habitat," or "open space" conservation purposes tests of § 170(h). The "public recreation or education" conservation purposes test would not be relevant to the court's determination because the landowner did not donate the easement to preserve the land for use by the general public for outdoor recreation or education purposes. Continuing to enforce the easement for that conservation purpose would constitute a change in the charitable purpose of the easement, and should be permissible only through the application of the full, three-step *cy pres* process.[172]

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[170] Because of reports of abuses in the conservation easement donation area, the Joint Committee on Taxation recommended that § 170(h) be revised to severely limit the types of conservation easements that would qualify for the federal charitable income tax deduction. *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES, JCS-2-05 296 (2005), *available at* http://www.house.gov/jct/s-2-05.pdf. If changes are made to the conservation purposes tests under § 170(h), the courts would have to consider whether it is appropriate to apply the new, more stringent tests in determining whether an easement provides public benefit sufficient to justify its continued enforcement for purposes of the *cy pres* analysis. Given the difficulty associated with accurately measuring the public benefit being produced by a conservation easement, and the fact that the extinguishment of an easement generally will result in the development and more intensive use of the underlying land (and, thus, the substantially irreversible destruction of its remaining conservation values), it is recommended that the courts evaluate any changes made to the conservation purposes tests under § 170(h) with a bias against extinguishment. In other words, the courts should adopt legislative changes making the tests more stringent for purposes of the *cy pres* analysis only if such changes are supported by compelling evidence that they reflect real shifts in society's understanding and priorities with respect to private land conservation (as opposed to, for example, political reaction to perceived abuses of the federal tax incentives offered to easement donors).

[171] Donors of conservation easements often state in their easement deeds that the land encumbered by the easement is being protected for a variety of conservation purposes. *See Model Conservation Easement*, *supra* note 66, at 34–36 (discussing the issues associated with multipurpose easements). In such cases, the donor is signaling that he or she intends that the easement will continue to be enforced for as long as the protection of the encumbered land for any of the specified conservation purposes is possible or practicable.

[172] If the court determined that the easement would not satisfy any of the "historic preservation," "wildlife habitat," or "open space" conservation purposes tests of § 170(h) at the time of the *cy pres* proceeding, and that the donor had a general charitable intent, the court should then proceed to the third and final step in the *cy pres* process—formulating a substitute plan. It is in the third and final step of the *cy pres* process that the court should endeavor to ascertain from the terms of the easement and the circumstances attending its donation whether the donor of the easement, if presented with the "impossibility or impracticability" of the continued protection of the encumbered land for the conservation purposes specified in the easement deed, would have preferred: (i) that the easement be modified

If the easement would not satisfy any of the "historic preservation," "wildlife habitat," or "open space" conservation purposes tests at the time of the *cy pres* proceeding, that would be a factor indicating that the easement perhaps does not continue to provide a level of public benefit sufficient to justify its enforcement. Alternatively, if the easement would satisfy one or more of the "historic preservation," "wildlife habitat," or "open space" conservation purposes tests at the time of the *cy pres* proceeding, that would be a factor indicating that the easement does continue to provide a level of public benefit sufficient to justify its enforcement and, thus, that the doctrine of *cy pres* should not apply.

An additional factor that a court should consider in assessing whether an easement continues to provide a level of public benefit sufficient to justify its enforcement is the extent to which there is public support for continuing to enforce the easement.[173] The willingness of a government agency or charitable organization to invest its limited resources in the ongoing monitoring and enforcement of the easement would be evidence of such public support.[174] Evidence of such public support could also come from the state attorney general, other representatives of the public (such as com-

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and the 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, the unencumbered land sold, and the proceeds attributable to the easement be used to protect land with historic, agricultural and/or wildlife habitat characteristics in another location. Absent a clear indication in the easement deed that the donor intended that the land would continue to be protected for public recreation or educational purposes, simply assuming that all easement donors would prefer the first option would give inappropriate deference to right of easement donors to control the disposition of their property. In some cases the evidence may indicate that the donor would have preferred the second option. *See infra* note 233 and accompanying text.

[173] In some circumstances, an easement that does not satisfy the applicable conservation purposes test or tests under § 170(h) may nonetheless provide significant benefits to the public. For example, one can imagine a circumstance where a rural, agricultural area has been targeted for landscape protection by a land trust, but the county or state in which the area is located has failed to develop a comprehensive land use plan and, thus, easements encumbering land in such area would not satisfy the "open space" conservation purposes test under § 170(h) because protection of the land would not be "pursuant to a clearly delineated governmental conservation policy." *See supra* note 169 (discussing the "open space" conservation purposes test as it relates to land protected pursuant to a "clearly delineated governmental conservation policy"); RALPH E. HEIMLICH & WILLIAM D. ANDERSON, DEVELOPMENT AT THE URBAN FRINGE AND BEYOND: IMPACTS ON AGRICULTURAL AND RURAL LAND, USDA AGRICULTURAL ECONOMIC REPORT NO. AE803 55 (2001), *available at* http://www.ers.usda.gov/publications/aer803/ (noting the difficulties facing states and localities in developing and implementing appropriate land use plans and that local land-use planning efforts are in desperate need of updating because "in some localities land-use plans have not been updated since the 1920's; in others, such plans are nonexistent"). The public benefit from preserving such lands may well be sufficient to justify the continued enforcement of the easements, despite the failure of the locality or state to enact "clearly delineated governmental conservation policies," and the failure of the easements to satisfy any of the other conservation purposes tests under § 170(h).

[174] *See* McLaughlin, *supra* note 3, at 60–63 (describing the public accountability and financial incentives that motivate government agencies and land trusts to accept easements that best advance their land protection goals, including the fact that every easement represents a liability to the accepting agency or organization in the form of ongoing monitoring and enforcement costs).

munity groups, citizen committees, and planning commissions), as well as individual members of the general public, such as residents of the community in which the encumbered land is located.[175] If, however, there is public support for continuing to enforce the easement for a conservation purpose that was not specified by the donor (such as to use the encumbered land as a public park), as discussed above, the court should work through the full, three-step *cy pres* process to ensure that appropriate deference is accorded to the intent of the donor.

The economic and conservation benefits to be gained by the public from extinguishment of the easement, development of the land, and use of the value attributable to the easement to protect land for similar conservation purposes in another location should be irrelevant to the determination of whether the charitable purpose of the easement has become "impossible or impracticable." *Cy pres* entails a balancing of the donor's intent and society's interest in ensuring that assets devoted to charitable purposes continue to provide benefits to the public, but considerable deference is accorded to the donor's intent under the doctrine because we have a deeply rooted tradition in our culture of respecting an individual's right to control the use and disposition of his or her property, and there is significant concern that failing to honor the wishes of charitable donors would chill future charitable donations. Accordingly, conservation easement donors should be permitted to exercise dead hand control over the use of the encumbered land for as long as their specified use continues to provide some generally agreed-upon threshold level of benefit to the public, and not just until the encumbered land and the value attributable to the easement could, in the opinion of some (such as the holder of the easement or the state attorney general, who by definition will be more concerned with local and state versus national interests), be devoted to more desirable or efficient economic and conservation uses. Donors of restricted charitable gifts are not required to devote their property to the most desirable or efficient charitable purpose, but simply one that is beneficial to the community.[176]

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[175] *See, e.g., In re* Village of Mount Prospect, 167 Ill. App. 3d 1031 (1988) (in which a court refused to apply the doctrine of *cy pres* to permit the sale of part of a parcel of land that had been dedicated to the city "for public purposes" in part because the court had before it a petition signed by fifty-six nearby residents objecting to the sale of the land).

[176] *See supra* note 39 (discussing the expansive "catchall" category of valid charitable purposes under state law); *supra* note 150 (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)), in which the California Superior Court argued that the *cy pres* doctrine should not be distorted by subjective, relative, and nebulous standards such as "inefficiency" or "ineffective philanthropy"); First National Bank & Trust Co. of Wyoming v. Brimmer, 504 P.2d 1367, 1370–71 (Wyo. 1973) (refusing to apply the doctrine of *cy pres* to create a new class of beneficiaries of a charitable trust, and noting that "a settlor must have assurance that his . . . instructions will not be subject to the whim or suggested expediency of others after his death").

At the same time, society needs some means of either modifying the conservation purposes of or extinguishing easements that have ceased to provide a level of public benefit sufficient to justify their continued enforcement (or have even become detrimental to the public). The two factors suggested above provide a relatively low threshold test of public benefit that should protect most conservation easements from modification or extinguishment under the doctrine of *cy pres*. The rare easement that fails to satisfy any of the applicable conservation purposes tests under § 170(h), and for which there is no evidence of public support for continuing to enforce the easement (either from a government agency, a land trust, the state attorney general, or other representatives or individual members of the general public), *should* be suspect. Those two factors should not be the only evidence a court examines when assessing whether a conservation easement continues to provide public benefit. However, if the court is presented with no other compelling evidence that the continued protection of the land for the conservation purpose or purposes specified in the easement is providing some respectable level of benefit to the public (or, indeed, if the court finds that the easement is arguably detrimental to the public, because, for example, it prevents appropriate infill development and thereby increases the pressure to develop more environmentally significant land), the court should determine that the charitable purpose of the easement has become impossible or impracticable and proceed to the second step in the *cy pres* process.

Determining whether the charitable purpose of a conservation easement has become "impossible or impracticable" based on the factors suggested above would also yield more predictable results in *cy pres* proceedings involving easements. Changing the charitable purposes of or extinguishing easements under a standard that yields predictable results, coupled with greater candor to easement donors about the *cy pres* bargain they strike with the public upon the donation of their easements, might actually inspire easement donors to take measures to ensure that their easements will continue to provide sufficient levels of public benefit. For example, easement donors might retain fewer development and use rights in their easements, or participate in efforts to encourage the preservation of the landscapes of which their encumbered lands are a part.[177] Greater candor about the *cy pres* bargain would also eliminate the justifiable surprise and indignation of some easement donors (or their heirs) when government agencies and land trusts, in fulfillment of their fiduciary duties to the public, seek or consent to the extinguishment of easements that no longer provide the requisite level of public benefit, and the application of the proceeds attributable thereto to similar conservation purposes in other locations.[178]

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[177] Landowners who understand that the long-term preservation of the conservation values of their land depends, in large part, on what happens to the land surrounding their land are more likely to become actively involved in landscape preservation efforts by contacting and educating their neighbors.

[178] The surprise and indignation would be justifiable in cases where the government

b. General vs. Specific Charitable Intent

i. In General

In the second step of the *cy pres* process, the court determines whether the donor had a general intent to devote the gift or trust assets to charitable purposes.[179] If the court determines that the donor had a general charitable intent, the court will proceed to the third step in the *cy pres* process—formulating a substitute plan for the use of the gift or trust assets for a charitable purpose "as near as possible" to the donor's original charitable purpose. Alternatively, if the court determines that the donor intended to devote the gift or trust assets only to the charitable purpose specified in the gift or trust instrument, the doctrine of *cy pres* will not apply, the gift or trust will "fail," and the assets will revert to the donor, if the donor is alive, or, if the donor is not alive, the assets will 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.[180]

When faced with the question of whether the donor had a general, as opposed to specific, charitable intent, courts look to the language of the gift or trust instrument, as well as the situation of the donor at the time of the gift or creation of the trust, including the donor's family, finances, background, and particular interests.[181] Notably, the mere fact that the gift or trust instrument provides that the property should be devoted "forever" to a particular charitable purpose does not preclude a finding of general charitable intent.[182] Such a statement may be construed as merely emphasizing the donor's intention that the property be applied to the particular charitable purpose for as long as it is possible and practicable do so.[183]

General charitable intent may be evidenced by a statement to that effect in the gift or trust instrument, or a provision for the use of the *cy pres* power in the gift or trust instrument.[184] Courts also have noted the following as evidence that a donor had a general charitable intent: (i) absence in the gift

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agency or land trust represented to the donor that the easement restrictions would be enforced "in perpetuity" or "forever," regardless of changed conditions. *See, e.g.*, *supra* note 72.

[179] *See, e.g.*, BOGERT & BOGERT, *supra* note 32, § 436, at 132.

[180] *See* SCOTT & FRATCHER, *supra* note 25, § 399.3, at 520–21, 526–29 (noting that when the failure of a charitable gift or trust occurs at some time subsequent to the death of the donor, it is not clear whether the property should revert to the residuary beneficiaries under the donor's will or the donor's heirs under the laws of intestate succession); *id.*, § 399.3, at 529 ("These questions would never arise if it were held that the doctrine of *cy pres* should always be applied where the trust fails at some time subsequent to [the testator's] death.").

[181] *See* Rogers v. Attorney General, 196 N.E.2d 855, 860–62 (Mass. 1964); BOGERT & BOGERT, *supra* note 32, § 437, at 142. If the donor is dead, oral evidence as to what he said was his objective is inadmissible. *Id.* § 437, at 137.

[182] SCOTT & FRATCHER, *supra* note 25, § 399.2, at 499; RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. b, at 513.

[183] RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. b, at 513.

[184] *See* BOGERT & BOGERT, *supra* note 32, § 437, at 137.

or trust instrument of a provision for a gift over or reverter upon the failure of the specified charitable purpose,[185] (ii) circumstances apart from the making of the gift or the creation of the trust indicating that the donor had a strong interest in accomplishing the charitable purpose of the gift,[186] (iii) the fact that the donor gave all or a large part of his property or estate to several charities,[187] and (iv) the fact that the donor desired to create a memorial to himself or his family (because failure of the gift or trust upon impossibility or impracticability and consequent distribution of the gift or trust assets to the donor's residuary beneficiaries or intestate heirs would result in the failure of the memorial).[188]

Most importantly, however, courts almost invariably find that the donor had a general charitable intent if the gift or trust fails after it has been in existence for some period of time. As Professors Scott and Fratcher note:

> [W]here at the time of the creation of the trust it is possible and practicable to carry out the specific directions of the testator, but in the course of time conditions change so that it becomes impossible or impracticable to carry out these directions, the *cy pres* doctrine is almost invariably applied, and it is rare indeed that the trust is held to fail altogether.[189]

The inclination of courts to favor *cy pres* once a restricted charitable gift or charitable trust has been in effect for some period of time has two theoretical underpinnings.[190] The first is the dictate of practicality, in that

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[185] *See id.* and cases cited therein.

[186] *See, e.g.*, Village of Hinsdale v. Chicago City Missionary Society, 30 N.E.2d 657, 664–65 (Ill. 1940) (in applying *cy pres* to a gift of land to a village to be used as the site for a library, the court noted that the donor's general charitable intent to provide the inhabitants of the village with library facilities was evidenced not only by his gift of the land, but also by his previously demonstrated interest in and contributions to educational and charitable activities and his participation in the library association of the village from its inception); Estate of Zahn, 93 Cal. Rptr. 810, 813–14 (Cal. Dist. Ct. App. 1971) (in applying *cy pres* to bequests of land that had been made for specified charitable purposes, the court noted that the "record is replete" with evidence that the donor had a general charitable intent to provide the Salvation Army with a music home for deserving Christian students and a rest home for Christian women, including the substantial time the testatrix devoted to charitable and community work and, in particular, projects of the Salvation Army for which the testatrix had supreme respect; the testatrix's love for music, her membership in the church choir, and her support for the training of young opera stars; and the testatrix's concern about the situation of young girls who came alone to Los Angeles and needed a safe place to live while working or attending school).

[187] *See* BOGERT & BOGERT, *supra* note 32, § 437, at 137–40 and cases cited therein.

[188] *See, e.g.*, State v. Rand, 366 A.2d 183 (Me. 1976).

[189] SCOTT & FRATCHER, *supra* note 25, § 399.3, at 518. *See also* RESTATEMENT OF TRUSTS, *supra* note 39, § 67 Reporter's Notes, cmt. b (noting that much criticism of the doctrine of *cy pres* has focused on the artificial and speculative inquiry into whether a settlor had a "general" charitable intent and on the reality that, with the passage of time, courts are and rightly have been increasingly likely to find such an intent).

[190] *See* Rand, 366 A.2d at 197.

after the passage of time identifying and locating remote heirs generally will entail considerable difficulty and expense.[191] The second is that, in the absence of a gift over or reverter, applying *cy pres* and authorizing the use of the charitable assets for a charitable purpose "as near as possible" to that specified by the donor is more likely to fulfill the donor's intent than to have the gift or trust fail altogether and the assets pass to the donor's residuary beneficiaries or intestate heirs.[192]

Both the *Restatement (Third) of Trusts* and the Uniform Trust Code have modified the doctrine of *cy pres* by presuming that the donor had a general charitable intent when his or her specified charitable purpose becomes "impossible or impracticable."[193] The drafters of the *Restatement* noted that "trust law . . . favors an interpretation that would sustain a charitable trust and avoid the return of the trust property to the settlor or successors in interest,"[194] and the drafters of the Uniform Trust Code noted that "[i]n the great majority of cases the settlor would prefer that the property be used for other charitable purposes rather than have the trust fail."[195]

At least seven states now apply a presumption of general charitable intent in *cy pres* proceedings,[196] and two—Delaware and Pennsylvania—have eliminated the requirement entirely.[197]

ii. In the Conservation Easement Context

In states other than Delaware and Pennsylvania, it is very likely that a court would find that an easement donor had a general charitable intent because: (i) the charitable purpose of an easement is likely to become "impossible or impracticable" only after some (often considerable) passage of time, and courts are loath to allow ongoing charitable gifts or trusts to fail altogether, and (ii) easements do not typically contain a provision for a

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[191] *See id.*; SCOTT & FRATCHER, *supra* note 25, § 399.3, at 518 (noting that "[i]f many years and perhaps centuries have elapsed since the creation of the trust, it is frequently impossible and always expensive to ascertain the persons who would be entitled to the property" and that, thus, "there is a stronger reason . . . to apply the *cy pres* doctrine where the particular purpose of the testator fails at a subsequent time than there is where the purpose fails at the outset").

[192] *See* Rand, 366 A.2d at 197; SCOTT & FRATCHER, *supra* note 25, § 399, at 476 (noting that where property is given in trust for a particular charitable purpose, the trust will not ordinarily fail even though it is impossible to carry out the charitable purpose, and the court will ordinarily direct that the property be applied to a similar charitable purpose, the theory being that the settlor presumably would have desired that the property be applied to purposes as near as possible to his stated purposes rather than that the trust should fail altogether).

[193] *See* RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. b; Uniform Trust Code § 414, cmt. (2000) [hereinafter Uniform Trust Code].

[194] RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. b.

[195] Uniform Trust Code, *supra* note 193, § 413 cmt.

[196] *See* FREMONT-SMITH, *supra* note 26, at 177 (stating that Georgia, Massachusetts, Virginia, Arizona, Nebraska, New Mexico, and Wyoming apply the presumption).

[197] *See id.*

gift over or reverter in the event their purpose becomes impossible or impracticable. In addition, in many cases the evidence is likely to indicate that the easement donor had a general interest in conservation and preservation issues, and in seven states a presumption of general charitable intent is applied.

The fact that easement donors often have a particularly strong personal attachment to the encumbered land and a desire to see it preserved[198] should not preclude the finding of general charitable intent. Gifts made by donors of their beloved homesteads to be used as the site of a particular charitable activity (such as the construction and operation of a church, hospital, or home for indigent individuals) are instructive in this regard.[199] In some "gift of homestead" cases, when the use of the homestead for the charitable purpose specified by the donor proved "impossible or impracticable," the courts refused to apply the doctrine of *cy pres*, the gift failed, and the homestead (or the proceeds from the sale thereof) passed by resulting trust to the donor's residuary beneficiaries or intestate heirs. Those cases, however, are rare and typically involve a charitable gift or trust that fails at the outset rather than after some passage of time.[200] It is far more common in the "gift of homestead" cases for the courts to find that the donor had a general charitable intent and apply the doctrine of *cy pres*.[201] Indeed, *cy pres* is typically applied in such cases even if the evidence indicates that the donor had a particularly strong personal attachment to the homestead and a desire to see it preserved, and application of the doctrine will necessitate a sale of the homestead and the use of the proceeds therefrom to accomplish the donor's specified charitable purpose in another location.[202]

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

[199] A gift of the donor's homestead is analogous to the gift of a conservation easement encumbering the donor's homestead or other beloved land because in each case the donor is making a gift of an interest in the property for the purpose of ensuring that the property will be used as the site of a specified charitable activity (with the "charitable activity" in the case of an easement donation being, for example, the protection of wildlife habitat, open space, or agricultural land).

[200] *See* SCOTT & FRATCHER, *supra* note 25, § 399.2, at 511; BOGERT & BOGERT, *supra* note 32, § 437, at 143 (noting that "[w]here a charity is to be located on real estate which had constituted the home of the testator and so he had a personal and sentimental interest on that account, some courts have held that his intent was particular and special, but in other cases a finding of general intent has been made," and citing to cases in which the court found the intent of the testator was particular and special, but the trusts were impossible or impractical of fulfillment at the outset rather than after some passage of time).

[201] *See, e.g.*, Wilkey's Estate, 10 A.2d 425 (Pa. 1940); Rogers v. Attorney General, 196 N.E.2d 855 (Mass. 1964); Estate of Zahn, 93 Cal. Rptr. 810 (Cal. Dist. Ct. App. 1971); *In re* St. John's Church, 261 N.Y.S. 428 (N.Y. App. Div. 1933); *In re* Neher, 18 N.E.2d 625 (N.Y. 1939); *In re* Du Pont, 663 A.2d 470 (1994).

[202] *See, e.g.*, *Wilkey's Estate*, 10 A.2d at 425 (involving a testatrix who devised her family homestead, which had been owned by her family since the days of William Penn, to the Presbyterian Church to be used as the site for the construction of a new church as a memorial to her family and shortly before the testatrix's death the homestead was taken by eminent

In the case of some easements for which a federal charitable income tax deduction was claimed, the donor may be found to have had a general charitable intent only with respect to a percentage of the value attributable to the easement. Since 1986, the Treasury Regulations interpreting § 170(h) have generally required the donor of a tax-deductible easement to include a provision in the deed conveying the easement stating that: (i) the donation of the easement gives rise to a property right immediately vested in the donee, (ii) in the event a subsequent unexpected change in conditions makes the continued use of the property for conservation purposes impossible or impractical and the easement is extinguished, the donee must be entitled to a percentage of the proceeds from a subsequent sale or exchange of the unencumbered land *at least* equal to the percentage that the easement represented of the value of the unencumbered land at the time of the easement's donation (referred to hereinafter as the "Donation Percentage"), and (iii) the donee must use its percentage of the proceeds in a manner consistent with the conservation purposes of the original contribution.[203] In other words, since 1986 the Treasury Regulations have generally required the donor of a tax-deductible easement to state in the deed of conveyance that, in the event the easement is extinguished, the value attributable to the easement will continue to be used by the donee for charitable conservation purposes (and, by implication, the donor does not intend that such value will revert to the donor or the donor's residuary beneficiaries under his will or intestate heirs). The Treasury presumably included this requirement in the regulations interpreting § 170(h) to ensure that the full value of the property right conveyed to the public in an easement donation transaction would remain in public hands upon extinguishment of the easement (rather than pass as a windfall to the owner of the land).

It has, however, been the practice of some easement drafters to fix the percentage of proceeds from the sale of the unencumbered land to which

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domain; rather than allowing the gift to fail, in which case the condemnation proceeds would pass to the testatrix's residuary beneficiaries or intestate heirs, the court found that the testatrix had a general charitable intent and authorized the sale of the homestead and the use of the proceeds therefrom to construct the church in a nearby location, despite acknowledging that the testatrix wanted the church to be built on the homestead "which to her was hallowed because it had been in the possession of her forefathers for upwards of two and a half centuries"); *Rogers*, 196 N.E.2d at 855 (involving a testatrix who left a sum of money and her family homestead to certain trustees to establish a home for aged women as a memorial to her family; the trustees never established the home, and forty-four years after the testatrix's death the homestead was found to be in nearly total disrepair and it was conceded to be "impossible or impracticable" to use it as a home for aged women due to insufficient funds; rather than allowing the trust to fail, in which case the trust assets would pass to the testatrix's residuary beneficiaries or intestate heirs, the court determined that the testatrix had a general charitable intent and authorized the sale of the homestead and the use of the proceeds for similar charitable purposes at another location, despite the court's express recognition that the testatrix "had a strong attachment to the family homestead and . . . desired its preservation").

[203] *See* Treas. Reg. § 1.170A-24 (as amended by T.D. 8069, 51 Fed. Reg. 1496 (Jan. 14, 1986)); Treas. Reg. § 1.170A-14(g)(6) (2004).

the donee is entitled upon extinguishment at the Donation Percentage (rather than providing that the donee is entitled to *at least* that percentage as set forth in the Regulations).[204] Such a limiting provision, although technically permissible under the Treasury Regulations, is inconsistent with the characterization of the donation of an easement as the conveyance of a property right to the donee because it may not allocate the full appreciation in the value of that right to the donee if and when the easement is extinguished.[205] Such a provision also leaves open the question of who should be entitled to the remaining value attributable to the easement upon its extinguishment. In such a circumstance, because the donor made a charitable gift of the easement to the donee, but provided that the donee is entitled to only a fixed percentage of the value of the unencumbered land if and when the easement is extinguished, the remaining value attributable to the easement arguably should pass by resulting trust to the donor, if alive, or, if the donor is not alive, to the donor's residuary beneficiaries or intestate heirs. In other words, the donor should be deemed to have had a general charitable intent with regard to the fixed percentage of the value of the unencumbered land that the donor directed be paid to the donee, and a specific charitable intent with regard to the remaining value attributable to the easement.[206]

Of course, some easement donors might prefer that the full value attributable to their easements continue to be used by the holder for conservation purposes in the event their easements are extinguished, particularly given that having some percentage of that value pass to their residuary beneficiaries or intestate heirs could create powerful perverse incentives for such beneficiaries and heirs to act in ways contrary to the public interest.[207] Moreover, despite technical compliance with the Treasury Regulations, the drafting practice of fixing the value of the donee's property right at the Donation Percentage of the value of the unencumbered land is arguably inconsistent with the intent of the Regulations, which expressly characterize the donation of an easement as the conveyance of a "property right," and

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[204] *See Model Conservation Easement*, *supra* note 66, at 18, 74–75.

[205] Such a limiting provision technically satisfies the Treasury Regulations because the regulations require that the donor "agree that the donation of the [easement] gives rise to a property right, immediately vested in the donee organization, with a fair market value that is *at least* equal to the proportionate value that the [easement] at the time of the gift bears to the value of the property as a whole at that time," and that the donee be entitled to "*at least*" that value in the event the easement is extinguished. *See* Treas. Reg. § 1.170A-14(g)(6)(ii) (2004) (emphasis added).

[206] For the reasons discussed in Part III.B.2.c.ii(2), *infra*, absent countervailing equitable considerations, the owner of the easement-encumbered land should be entitled only to the fair market value of his or her interest that land—that is, the fair market value of the land subject to the perpetual easement.

[207] *See infra* Part III.B.2.c.ii(2) (discussing the perverse incentives that would be created if the value attributable to a conservation easement could be captured by parties other than the government agency or charitable organization holding the easement on behalf of the public).

require that, upon extinguishment, the donee must be entitled to *at least* the Donation Percentage of the proceeds from the sale of the unencumbered land (rather than *only* the Donation Percentage of such proceeds).[208]

To appropriately protect the public's interest and investment in the property interest embodied in a conservation easement, upon extinguishment of an easement, the donee should be entitled to a percentage of the proceeds from the sale of the unencumbered land equal to the greater of: (i) the Donation Percentage, and (ii) the percentage that the easement represents of the value of the unencumbered land *at the time of the* cy pres *proceeding* (in other words, the Extinguishment Percentage)—and the Treasury Regulations should be amended to require that a statement to that effect be included in the deed conveying any tax-deductible easement.[209] If such a statement were included in an easement deed, it would provide conclusive evidence that the donor had a general charitable intent with respect to the entire value attributable to the easement.[210]

c. Formulating a Substitute Plan

i. In General

Once a court has determined that the charitable purpose of a gift or trust has become "impossible or impracticable" due to changed conditions, and that the donor had a general charitable intent, the third and final step in the *cy pres* process is the formulation of a substitute plan for the use of the gift or trust assets for a charitable purpose "as near as possible" to that specified by the donor.[211] Professor Bogert notes that it is impossible to give general rules regarding the framing of substitute plans under the doctrine of *cy pres* because each case presents different facts as to the wording of the gift or trust instrument, the tastes and interests of the donor, the occasion for the use of *cy pres*, and the opportunities open by way of

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[208] Although the regulations provide that the Donation Percentage "shall remain constant," for the reasons noted in the text, that provision should be interpreted to mean that the regulations require the setting of a *minimum* (or floor) percentage value for the donee's property right—not that the percentage value of such right must be fixed. *See* Treas. Reg. § 1.170A-14(g)(6)(ii) (2004).

[209] This would be consistent with the rule proposed for the valuation of the donee's interest upon the extinguishment of an easement in Part III.B.2.c.ii(2), *infra*. There is no explanation in the Treasury Regulations for the requirement that the donor set a minimum (or floor) percentage value for the donee's property right upon extinguishment. *See supra* note 208 and accompanying text. That requirement was presumably included in the Treasury Regulations to protect the public from the downside risk of a decline in the value of the property interest embodied in the easement.

[210] *See supra* note 184 and accompanying text (noting that general charitable intent may be evidenced by a statement to that effect in the gift or trust instrument).

[211] *See, e.g.*, BOGERT & BOGERT, *supra* note 32, § 442, at 208; *id.* § 431, at 95 (noting that the words "*cy pres*" are Norman French for "as near," and the phrase, when expanded to its full implication, was "*cy pres comme possible*," which meant "as near as possible").

substitution.[212] Accordingly, all that can be done is to indicate some trends and examine court decisions in various types of situations.[213]

In formulating a substitute plan, courts consider evidence suggesting what the donor would have wished had the donor anticipated that changed conditions would render his or her original charitable purpose "impossible or impracticable."[214] The courts examine the language of the gift or trust instrument, the circumstances surrounding the making of the gift or creation of the trust, and the donor's tastes, interests, social and religious affiliations, personal background, and charitable giving history—in other words, the same type of evidence the courts examine in determining whether the donor had a general, as opposed to specific, charitable intent.[215]

Courts increasingly have recognized that the substitute charitable purpose need not be the one that is "as near as possible" to the donor's original purpose, but simply one that is "reasonably similar or close to" the donor's original purpose, or falls within the donor's general charitable purpose.[216] Courts also are inclined to be more liberal in formulating a substitute plan when the donor's original purpose has become impossible or impracticable after some considerable passage of time, or if one substitute purpose appears to have "distinctly greater usefulness than the others that have been identified."[217] The *Restatement (Third) of Trusts* notes that the more liberal approach to the formulation of a substitute plan "is appropriate both because the donors' probable preferences are almost inevitably a matter of speculation," and "because it is reasonable to suppose that among relatively similar charitable purposes charitably inclined [donors] would tend to prefer those most beneficial to their communities."[218]

Notice of the pendency of a *cy pres* proceeding is customarily given to the general public, and the suggestions of the trustee, the state attorney general, and other interested parties are generally received and considered by the court.[219] The final decision regarding the substitute plan, however, is the court's alone.[220] If the donor's intent is clear, and the formulation of

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[212] *See id.* § 442, at 206.

[213] *See id.*

[214] RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. d.

[215] *See* BOGERT & BOGERT, *supra* note 32, § 442, at 206–07 (noting that if the settlor is alive at the time of the *cy pres* proceeding "he should be consulted and his wishes should be given consideration by the court, although they are not binding upon it"); RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. d.

[216] *See* RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. d; FREMONT-SMITH, *supra* note 26, at 49 (noting that the trend in the case law has been to move away from strict adherence to the original intent of the donor in the framing of schemes).

[217] *See* RESTATEMENT OF TRUSTS, *supra* note 39, § 67 cmt. d.

[218] *Id.*

[219] *See* BOGERT & BOGERT, *supra* note 32, § 441, at 201 and 207.

[220] *Id.* § 441, at 200 (noting that the courts of equity have sole power to frame substitute plans themselves, or to approve of new plans drawn up by others); SCOTT & FRATCHER, *supra* note 25, § 399, at 481 (noting that, while the attorney general is generally a necessary party in a proceeding for the application of *cy pres*, "[t]he determination of the proper scheme is for the court, . . . and the Attorney General has no power to control the disposi-

a substitute plan is relatively easy, the court generally will formulate a substitute plan itself or adopt the plan proposed by the trustees.[221] Where it is necessary to review a large amount of evidence and consider various proposed plans, the court may refer the matter to a master, referee, or auditor, who will examine the evidence and recommend a substitute plan to the court, which the court may then accept, reject, or modify.[222]

ii. In the Conservation Easement Context

In the third and final step of the *cy pres* process involving a conservation easement, the court would formulate a substitute plan for the use of the easement (or the value attributable thereto) for a charitable purpose "as near as possible" to that specified by the donor.

The "gift of homestead" cases offer some guidance as to how a court should approach the formulation of a substitute plan in the conservation easement context.[223] In "gift of homestead" cases where the continued use of the homestead for a charitable purpose related to the donor's original charitable purpose is feasible (because there are sufficient funds to underwrite the conversion of the homestead to a related charitable use, or the donee desires to use the homestead for a related charitable purpose), the courts have mandated or permitted the continued use of the homestead for such related charitable purpose.[224] In such cases the courts have determined

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tion" of the trust assets).

[221] *See* SCOTT & FRATCHER, *supra* note 25, § 399, at 480; BOGERT & BOGERT, *supra* note 32, § 441, at 200–01.

[222] *See* BOGERT & BOGERT, *supra* note 32, § 441, at 200; SCOTT & FRATCHER, *supra* note 25, § 399, at 480. *See also* Ashbridge's Estate, 61 Pa. D. & C. 279 (Pa. Orphans' Ct. 1948) (describing the activities of a court appointed master in developing a substitute plan for proposal to the court).

[223] *See supra* note 199 and accompanying text (discussing the analogy between the gift of a homestead and the gift of a conservation easement).

[224] *See In re* Du Pont, 663 A.2d 470 (1994) (involving a donor who gave the site of his "ancestral home" and considerable funds to a hospital association to be used for the construction of a convalescent care hospital as a monument to his family; forty-two years after the hospital was constructed and operated on the site, advances in medicine made the convalescent care hospital obsolete, and the association moved its convalescent care facility to a more modern facility in a different location; in applying the doctrine of *cy pres* the court insisted that the remaining endowment funds—which were considerable—be used to underwrite related alternative charitable uses of the "monumental" facility on the site of the donor's ancestral home); *In re* Neher, 18 N.E.2d 625 (N.Y. 1939) (involving a testatrix who devised her homestead to the village in which it was located as a memorial to her husband and with the direction that the property be used as a hospital; seven years after accepting the gift the village petitioned the court for the application of *cy pres*, asserting that it did not have the resources necessary to establish and maintain a hospital on the property and that a modern hospital adequate to serve the needs of the village had recently been established nearby, and requesting permission to erect a building on the property to be used by the village for administrative purposes; the Court of Appeals of New York reversed the appellate court and the trial court, which had denied the application of *cy pres*, and remitted the matter to the trial court with instructions to frame a scheme for carrying out the testatrix's intent, which was to give the homestead to the village for general charitable purposes in memory of her husband).

that the donor's "central" or "paramount" intention was the use of the homestead for charitable purposes, and that the precise nature of the charitable activity conducted on the site was of secondary importance.[225]

Alternatively, in "gift of homestead" cases where the continued use of the homestead for a related charitable purpose is either impossible (because the homestead was taken by eminent domain) or not feasible (because the homestead has fallen into disrepair and the funds needed to renovate it are not available, or the use of the homestead for the original or a related charitable purpose is inconsistent with local land use plans), the courts have authorized the sale of the homestead and the use of the proceeds therefrom to accomplish the donor's specified charitable purpose in some other location.[226] In these cases, even if the evidence indicates that the donor had a particularly strong personal attachment to the homestead and a desire to see it preserved, the courts have determined that the specified charitable activity (for example, the establishment of a family memorial church or home for aged women) was the donor's "paramount" purpose, and the precise location of the charitable activity was of secondary importance.[227] In these cases the courts assume, either expressly or implicitly, that the donor would have wished that his or her specified charitable activity be conducted somewhere else rather than not at all (the alternative in these cases being, of course, a finding of specific rather than general charitable intent, failure of the gift or trust, and distribution of the gift or trust assets to the donor's residuary beneficiaries or intestate heirs).[228] If, however, the evidence indicates that the donor intended to confer charitable benefits on the residents of a particular city, town, or other district, the court will usually direct that the proceeds from the sale of the homestead be applied to charitable purposes somewhere in that district.[229]

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[225] *See In re* Du Pont, 663 A.2d at 479 (determining that the donor's "central intention" was to create a living charitable monument to his family on the site of his ancestral home, and that the rendering of convalescent care on the site was not the core motivation for the gift); *In re* Neher, 18 N.E.2d at 626 (determining that the testatrix's "paramount intention" was to give her homestead to the village in memory of her husband for general charitable purposes, and the direction that the homestead be used as a hospital could be ignored when compliance became altogether impracticable).

[226] *See, e.g.*, Wilkey's Estate, 10 A.2d 425 (Pa. 1940) (homestead was taken by eminent domain); Rogers v. Attorney General, 196 N.E.2d 855 (Mass. 1964) (homestead could not be renovated due to insufficient funds); *In re* St. John's Church, 261 N.Y.S. 428 (N.Y. App. Div. 1933) (same); Estate of Zahn, 93 Cal. Rptr. 810 (Cal. Dist. Ct. App. 1971) (use of homestead for the specified charitable purpose was inconsistent with local land use plans).

[227] *See, e.g.*, *Wilkey's Estate*, 10 A.2d at 428 (determining that building and endowing a family memorial church was the testatrix's "paramount" purpose); *In re St. John's Church*, 261 N.Y.S. at 434 (determining that "the supreme and paramount idea" in the mind of the decedent was to establish a home for aged women in memory of his mother, and the location of the home was a "secondary matter").

[228] *See, e.g.*, *Wilkey's Estate*, 10 A.2d at 428 ("[I]t is reasonable to believe that [the testatrix] would have desired, in all events, that a [memorial church] should be erected and maintained, and if, for any reason, it could not be built on the site of her ancestral home, that it should be erected somewhere in the vicinity rather than not at all.").

[229] *See* BOGERT & BOGERT, *supra* note 32, § 442, at 211–12; *Wilkey's Estate*, 10 A.2d

In *cy pres* cases involving gifts of land to be used as the site of a specified charitable activity where the land was not the donor's homestead, and the donor did not otherwise appear to have any personal attachment to the land, the courts are even more readily inclined to authorize the sale of the land and the use of the proceeds therefrom to engage in the specified charitable activity elsewhere. In such cases, if the land is or becomes impossible or simply "unsuitable" as the site of the specified charitable activity, the courts will apply the doctrine of *cy pres* and authorize the sale of the land.[230]

The "gift of homestead" and other gift of land cases suggest the following approach to the formulation of a substitute plan for the use of a conservation easement in the event the charitable purpose of the easement—that is, the protection of the encumbered land for the conservation purposes specified in the easement—is determined to have become "impossible or impracticable":

(i) If protection of the encumbered land for a new conservation purpose is feasible,[231] the court should endeavor to ascertain from the terms of the easement and the circumstances surrounding its donation whether the donor would have preferred that: (a) the easement be modified and the encumbered land continue to be protected for such new conservation purpose, or (b) the easement be extinguished, the unencumbered land sold, and the proceeds attributable to the easement used to accomplish the conservation purposes specified in the easement in another location. If the donor is determined to have had a particularly strong personal attachment to the encumbered land, the court should be inclined toward the continued enforcement of the easement to accomplish the new conservation purpose.[232]

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at 425 (applying *cy pres*, the court authorized the sale of the testatrix's homestead and the use of the proceeds to construct the memorial church seven city blocks from the original site). *See also* State v. Rand, 366 A.2d 183 (Me. 1976) (applying *cy pres*, the court allowed the use of condemnation proceeds to create a new family memorial park one mile away from the original site but within the same neighborhood).

[230] *See* SCOTT & FRATCHER, *supra* note 25, § 399.2, at 509; Village of Hinsdale v. Chicago City Missionary Society, 30 N.E.2d 657 (Ill. 1940) (applying the doctrine of *cy pres* when the donor gave a parcel of land to the village in which he resided to be used as the site for a library; conditions arose that rendered erection of the library on the parcel "inexpedient and wasteful," and the court allowed the village to permanently abandon the use of the parcel as the site for the library).

[231] Protection of the encumbered land for a new conservation purpose would obviously have to provide sufficient public benefit to be considered a valid charitable purpose.

[232] *See, e.g.*, *supra* Part III.C.3.c.i (discussing the continued enforcement of the easement in the case study to protect the land for use as a public park). Given that the stakes involved in an easement extinguishment are quite high, the court should err on the side of continuing to enforce the easement for a different conservation purpose. Unlike, for example, the deaccessioning of an object of art, such as a Monet, from a museum's collection, which would, at worst, result in the removal of the object from the public domain if it is sold to a private collector, extinguishment of an easement generally will result in the development and more intensive use of the underlying land and, thus, the destruction of its remaining conservation values. Thus, extinguishment of an easement would be more akin to burning the Monet or, more accurately, selling the Monet to a deranged private collector known for

Alternatively, if the donor is determined not to have had a particularly strong personal attachment to the encumbered land (because, for example, the land was not the homestead of the donor and was encumbered as part of a "conservation buyer" deal), the court might find that extinguishment of the easement, sale of the unencumbered land, and use of the proceeds attributable to the easement to accomplish the conservation purposes specified in the easement in another location is more consistent with the donor's charitable intent.[233]

(ii) If the protection of the land for a new conservation purpose is not feasible (because, for example, the land has been taken by eminent domain, or there is no public support for the continued enforcement of the easement for the new conservation purpose), the court should formulate a substitute plan involving the extinguishment of the easement, the sale of the unencumbered land, and the use of the proceeds attributable to the easement to accomplish the donor's specified conservation purposes in another location.[234]

In determining which of the foregoing options is most appropriate, the court should consider the suggestions of the holder of the easement, the state attorney general, and other interested parties (such as members and representatives of the general public, other conservation organizations, the donor of the easement or the donor's heirs, and the owner of the land). If it is necessary to review a large amount of evidence and consider various proposed plans, the court should consider referring the matter to a master, referee, or auditor who would examine the evidence and recommend a substitute plan that the court could either accept, reject, or modify.[235]

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destroying artwork. Accordingly, easement extinguishment decisions should be approached with the utmost caution and with a set of clearly defined standards that will appropriately and consistently balance the interests of the donors with the changing needs of the public.

[233] In a "conservation buyer" deal, a conservation buyer may: (i) purchase land identified by a land trust as having particularly high conservation value (such as land that provides habitat for rare, threatened, or endangered migratory songbirds), (ii) donate a conservation easement to the land trust encumbering such land for the purpose of protecting the habitat of such songbirds (the conservation buyer would generally receive tax savings for such donation), and (iii) sell the easement-encumbered land. In such a case, the conservation buyer might have no strong personal attachment to the encumbered land beyond the desire to see that the land is protected for the purpose of providing habitat to the migratory songbirds. If, due to changed conditions, the land ceased to serve as habitat for the migratory songbirds, the court should ascertain from the terms of the easement and the circumstances surrounding its donation whether the conservation buyer would have preferred that: (i) the easement be modified and the land continue to be protected for some other conservation purpose, such as the preservation of "open space," or (ii) the easement be extinguished, the unencumbered land sold, and the proceeds attributable to the easement used to protect migratory songbird habitat in another location. In such a case, the evidence might indicate that the donor's paramount intent was to provide habitat for migratory songbirds and, thus, that the second option would be more consistent with the donor's intent.

[234] *See infra* Part III.C.3.c.ii (discussing the extinguishment of the easement in the case study in the event that no entity is willing to undertake the financial and other responsibilities associated with the operation and management of the encumbered land as a public park).

[235] *See supra* note 222 and accompanying text.

In implementing a substitute plan involving the "extinguishment" of a conservation easement, the court would be forced to address the following issues, each of which is discussed in turn below: (1) the nature of the property interest that is held by the government agency or charitable organization on behalf of the public both before and during the *cy pres* proceeding, (2) the appropriate value to be attributed to that property interest for purposes of dividing the proceeds from the sale of the unencumbered land between the holder of the easement and the owner of the land (or establishing a price at which the holder of the easement could sell such interest to the owner of the land or a third party), and (3) the appropriate use by the holder of the easement of the proceeds it receives as a result of the extinguishment of the easement.

(1) *The Nature of the Property Interest Held by an Easement Donee.* When a donor conveys a conservation easement to a government agency or charitable organization, the donor should be treated as having made a charitable gift of a partial interest in the encumbered land to the agency or organization for the benefit of the public. In other words, the agency or organization should be treated as holding legal title to that partial interest on behalf of the beneficial owner of the interest—the public.

The donation of a perpetual conservation easement could be conceptualized in at least two useful ways. The donor could be viewed as having made a charitable gift to the donee of the right to restrict the development and use of the land as specified in the easement, coupled with an obligation to enforce the restrictions in perpetuity on behalf of the public.[236] Alternatively, the donor could be viewed as having made a charitable gift to the donee of the actual development and use rights restricted by the easement, coupled with an obligation to hold those rights in abeyance (and take such action as may be necessary to defend those rights) in perpetuity, again on behalf of the public.[237]

Thus, to "extinguish" a perpetual conservation easement in the context of a *cy pres* proceeding, the court would both: (i) release the holder

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[236] Conceptualizing the donation of a conservation easement as the gift of a "right to restrict" the development and use of land is consistent with the common law understanding of a servitude, which is defined, in part, as a legal device that creates a right (referred to as a "benefit") that runs with the adjacent land (referred to as the "benefited" or "dominant" estate). *See* RESTATEMENT OF SERVITUDES, *supra* note 12, § 1.1, at 8. While conservation easements typically are held in gross (in that they do not "benefit" an appurtenant parcel), and benefits held in gross were of questionable validity under the common law, the easement enabling statutes expressly validate such benefits in gross. *See id.*; UCEA, *supra* note 15, § 4 cmt.

[237] *See* Arpad, *supra* note 15, at 114, 116 (noting that, while some may view a conservation easement as "extinguishing" the development and use rights restricted therein, the notion of a property right being completely extinguished has no basis in the common law, and to say that a property right, such as the right to cut timber, is simply extinguished offers no reliable guidance to the courts in determining the difficult questions about who may have a claim to those rights if conditions change).

from its obligation—but not its right—to enforce the restrictions on the development and use of the land specified in the easement in perpetuity (or release the holder from its obligation—but not its right—to hold the development and use rights conveyed in the easement in abeyance in perpetuity); and (ii) supervise the reunification of that "right to restrict" (or those development and use rights) with the fee title to the land.

The existence of a perpetual conservation easement suppresses the development and use value of the encumbered land, and that value lies dormant and inaccessible until the easement is extinguished in a *cy pres* proceeding. One of the many difficult questions facing a court in a *cy pres* extinguishment proceeding will be how much of that suppressed value should be allocated to the holder of the easement (on behalf of the public), and how much of that suppressed value should be allocated to the owner of the encumbered land. No court has yet addressed this issue, and the allocation (or valuation) rule adopted by the courts in *cy pres* extinguishment proceedings will help to define the nature of the property interest embodied in a perpetual conservation easement and determine the extent to which perpetual conservation easements actually suppress the value of the encumbered land.[238]

(2) *Valuing the Easement Holder's Property Interest.* No real market exists in which perpetual conservation easements are bought and sold.[239] Accordingly, on the front end of easement conveyance transactions, a special valuation method, referred to as the "before and after" method, is generally used to value the property interest embodied in an easement for purposes of determining the donor's federal charitable income tax deduction (and other federal tax benefits) or the purchase price paid for the easement in an easement purchase or bargain purchase program.[240] Under the "before and after" method, the value of a conservation easement is equal to the difference between: (i) the fair market value of the land immediately before it is encumbered by the easement, and (ii) the fair market value of the land immediately after it is encumbered by the easement, assuming

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[238] If the courts adopt a rule that allocates a significant portion of the previously suppressed development and use value to owners of easement-encumbered land in *cy pres* proceedings, the real estate market can be expected to respond, and the value of easement-encumbered land can be expected to rise as extinguishment of the easement in a *cy pres* proceeding becomes more likely.

[239] *See* McLaughlin, *supra* note 3, at 70 ("[B]ecause there is little excludable private benefit inherent in [a perpetual conservation] easement that might make it attractive to any buyer except a representative of the public, easements are not susceptible to direct valuation in real markets.").

[240] *See id.* at 70–71 (noting that most if not all donated easements are valued using the "before and after" method for the reasons noted in note 239, *supra*, and accompanying text; the method is a well-established appraisal technique for valuing partial interests in land; and the federal government frequently uses the method in the context of government acquisitions and eminent domain cases).

the easement will be enforced in perpetuity.[241] The "before and after" method values an easement as a *proportion* of the fair market value of the unencumbered land, and such value is often referred to in percentage terms (for example, an easement might reduce the value of the land it encumbers by 30%).[242] The "before and after" method estimates the amount the public would have to pay to acquire the easement from an economically rational landowner planning to sell his land in the near term or, in other words, the landowner's economic sacrifice as a result of the conveyance of the easement.[243] In easement purchase programs, bargain purchase programs, and easement donation programs, the price paid or the tax benefits provided are based on the amount of the landowner's economic sacrifice.

A similar valuation method—the "after and before" method—could be used to estimate the value of the property interest embodied in an easement on the back end of an easement conveyance transaction, when the court "extinguishes" the easement in a *cy pres* proceeding. Under the "after and before" method, the value of the easement holder's property interest would be equal to the difference between: (i) the fair market value of the land immediately after the restrictions on the holder's use and disposition of the property interest embodied in the easement have been released, assuming such property interest is reunited (or merged) with the fee title to the land, and (ii) the fair market value of the land immediately before the restrictions on the holder's use and disposition of the property interest embodied in the easement are released, assuming such restrictions will not be released and the easement will continue to be enforced in perpetuity. The "after and before" method would value the interest of the holder

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[241] *See, e.g.*, Treas. Reg. § 1.170A-14(h)(3)(i) (2004). *See also id.* § 1.170A-7(c) (defining "fair market value" for these purposes as the price at which the land would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts). For purposes of the "before and after" method, the easement is deemed to be truly perpetual, and the fair market value of the land immediately after it is encumbered by the easement is estimated without considering the possibility of extinguishment of the easement or the nature of the valuation rule that might be implemented in a *cy pres* extinguishment proceeding.

[242] *See* McLaughlin, *supra* note 3, at 25 (noting that the easement valuation cases "reveal that easements have reduced the value of the land they encumber by as little as 2 percent and as much as 91 percent, with an average diminution of approximately 43 percent").

[243] The "before and after" method estimates the price that the landowner would accept for the easement and be indifferent as between: (i) selling the easement and then selling the encumbered land for its fair market value, and (ii) selling the unencumbered land for its fair market value. The "before and after" method does not purport to measure the "public interest" value of an easement, which can be described as the guaranteed future stream of public benefits flowing from the undeveloped land. *See supra* note 155 (discussing ecosystem services). The "public interest" value of an easement is conceptually unrelated to the extent by which the easement diminishes the fair market value of the land it encumbers. In the context of a *cy pres* proceeding, the "public interest" value of an easement is assessed in the first step of the *cy pres* process, when the court determines whether the charitable purpose of the easement has become "impossible or impracticable."

of the easement as a *proportion* of the fair market value of the land unencumbered by the easement at the time of the *cy pres* proceeding.

The "after and before" method estimates the price the landowner would have to pay to have the property interest embodied in the easement conveyed to him in a *cy pres* proceeding and be indifferent as between: (i) purchasing the property interest in that manner, and (ii) selling the encumbered land (assuming the land is still subject to the perpetual easement) and purchasing an identical *unencumbered* parcel for its fair market value. Strict application of the "after and before" method would thus allocate all of the encumbered land's previously suppressed development and use value to the holder of the easement (to be held for the benefit of the public and applied to conservation purposes "as near as possible" to those specified by the donor). Conceptually, the "after and before" method would value the easement as if the removal of the restrictions on the holder's use and disposition of the property interest embodied in the easement and the actual extinguishment of the easement through reunification (or merger) of that interest with the encumbered fee were accomplished in a single step, thereby valuing the easement (as it was valued on the front end of the transaction) as a perpetual restriction on the land.

Alternatively, the court could choose to value the easement in the middle of the extinguishment process: after the removal of the restrictions on the holder's use and disposition of the property interest embodied in the easement, but before the actual extinguishment of the easement through reunification (or merger) of that interest with the encumbered fee. The price at which a government agency or land trust could sell its newly unrestricted "rights to restrict" the development and use of the encumbered land (or the actual development and use rights relating to such land) on the open market inevitably would be much lower than the value of those rights as established under the "after and before" method because of the difficulties associated with negotiating with the owner of the encumbered land to reunite those rights with the fee title to the land.

The following policy and other arguments support: (i) the use of the "after and before" method to determine the value of the respective interests of the holder of a conservation easement and the owner of the encumbered land in a *cy pres* extinguishment proceeding, and (ii) the division of the proceeds from the sale of the unencumbered land between the parties based on those values (or the use of those values to establish the price at which the holder of the easement can sell its property interest to the owner of the encumbered land or a third party). The following arguments also caution against deviating significantly from those values although, as discussed below, there may be countervailing equitable considerations that warrant such deviation.

Avoidance of windfall benefits. It would be difficult for the owner of land encumbered by a perpetual easement to make a convincing fairness claim to any more than the fair market value of the land subject to the per-

petual easement. Any owner of land encumbered by a perpetual easement (other than the easement donor) will have purchased or otherwise acquired such land with at least constructive notice of the easement, and, in the case of a purchaser, will have paid a price that reflects the diminution in the value of the land resulting from the existence of the easement.[244] Up until the moment the court authorizes the extinguishment of the easement in the context of the *cy pres* proceeding, the landowner owns land subject to a perpetual easement, and should be entitled to receive only the value of that interest upon extinguishment of the easement.[245] Allocating any of the development and use value that is suppressed and inaccessible until the *cy pres* proceeding to the owner of the easement-encumbered land would confer an undue windfall benefit on such owner at the expense of the public.[246]

Avoidance of perverse incentives. Allocating any of the development and use value that is suppressed and inaccessible until a *cy pres* proceeding to the owner of the easement-encumbered land would give the owners of such land a significant incentive to challenge the continued existence of the easements encumbering their land, and to engage in activities designed to make the continued use of their land for conservation purposes "impossible or impracticable."[247] Easements valued in the hundreds of thousands and even multiple millions of dollars are increasingly common,[248] and

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[244] Recordation of a conservation easement is required by many state easement enabling statutes and, for all practical purposes, by the Treasury Regulations interpreting § 170(h). *See* CONSERVATION EASEMENT HANDBOOK, *supra* note 6, at 202; Satullo v. Commissioner, 66 T.C.M. (CCH) 1697 (1993), *aff'd*, 67 F.3d 314 (11th Cir. 1995).

[245] Given that no court has yet applied the doctrine of *cy pres* to a conservation easement, any prediction regarding the valuation rule a court will adopt in such an equitable proceeding would be purely speculative. Accordingly, any purchaser of easement-encumbered land who pays a premium due to speculation on the outcome of a *cy pres* proceeding would have no fairness claim to an outcome rewarding his speculation. In addition, if the donor of the easement is still the owner of land when the easement is extinguished, the donor also would have no fairness claim to any more than the fair market value of the land subject to the perpetual easement, having voluntarily made a gift of the perpetual easement to the public and, in many cases, having been rewarded by the public for his generosity with significant tax savings that were based on the proportional value of the easement as established under the "before and after" method.

[246] In the *Hicks v. Dowd* litigation, discussed in note 119, *supra*, the Plaintiffs' Memorandum indicates that the new owners of the easement-encumbered land purchased the land for a price that "no doubt reflected the easement's burden on the property value," and that, if the easement is extinguished as proposed (with no payment to the holder of the easement), such owners would own much more valuable property than they originally purchased and receive a "huge windfall." *See* Plaintiffs' Memorandum, *supra* note 119, at 23.

[247] To provide an extreme example, one can imagine the owner of land subject to an easement, the conservation purpose of which is the protection of habitat for some rare species of plant or animal, "paving the way" for the extinguishment of the easement by extirpating such species from the land or making alterations to the land intended to make it uninhabitable by such species. Many such activities would either not be expressly prohibited by the terms of the easement or impossible for the holder of the easement to detect.

[248] *See* McLaughlin, *supra* note 3, at 25–26 n.90 (noting that case law reveals court-approved easement values with a low of $20,800 and a high of $4,970,000, and that there is anecdotal evidence that easements valued in the millions of dollars are becoming more

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.[249] A landowner's trigger point for initiating a *cy pres* extinguishment action could be expected to be quite low, resulting in a rash of easement extinguishment actions and the expenditure of considerable public resources by holders in defending the easements.

Avoidance of chilling easement donations. Allocating any of the development and use value that is suppressed and inaccessible until a *cy pres* proceeding to the owner of the easement-encumbered land would be contrary to the intent of the typical easement donor. The donor of a perpetual easement presumably intends to remove the suppressed development and use value from the real estate market in perpetuity. Such a donor presumably does not intend that such value will ever pass as a windfall to a subsequent owner of the land, particularly one who purchased the land (often from the donor's heirs) for a reduced price that reflected the diminution in the value of the land resulting from the easement.[250] Accordingly, allocating any of the development and use value that is suppressed and inaccessible until a *cy pres* proceeding to the owner of the easement-encumbered land could be expected to have a chilling effect on easement donations.

Analogy to tenancies in common. The "rights to restrict" the development and use of the encumbered land (or the actual development and use rights relating to such land) that would be held by a government agency

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common).

[249] One could argue that a division of proceeds according to the values determined under the "after and before" method might give easement holders an incentive to solicit and accept easements they believe will fail the "impossibility or impracticability" standard in the near term (or purposefully allow the conservation values of certain encumbered lands to decline to a point where the easements would likely fail such standard) so that they can obtain the cash value attributable to the easements. That concern is somewhat far-fetched for at least two important reasons. First, an easement holder—as a charitable organization or government agency—is necessarily a repeat player in its world, and has little incentive to engage in activities that are likely to impair its ability to continue to pursue its mission. Compare the easement holder's imperative with the speculator's ability to get in, make a killing, and move on (by buying encumbered land, breaking the easement through antisocial but not strictly illegal behavior and aggressive litigation, and never returning to that particular location). An easement holder would likely get away with the schemes mentioned above only once before public outcry would shut down the holder's institutional ability to obtain easements. Second, the court in the *cy pres* proceeding presumably would recognize what the easement holder has done, and appoint a new trustee to administer the public's share of the proceeds from the sale of the unencumbered land. *See* SCOTT & FRATCHER, *supra* note 25, § 387 (discussing the removal of a charitable trustee for serious breaches of trust, unfitness, and where the trustee's views are hostile to the purposes of the trust).

[250] As discussed in notes 204–206, *supra*, and accompanying text, in situations where the donor of an easement fixed the percentage of the proceeds from the sale of the unencumbered land to which the donee is entitled upon extinguishment, the donor could be viewed as having had a general charitable intent with regard to that fixed percentage, and a specific charitable intent with regard to the remaining value attributable to the easement (which would pass by resulting trust to the donor, or, if the donor is not alive, to the donor's residuary beneficiaries or intestate heirs).

or land trust after the court has released the restrictions on the use and disposition of those rights in a *cy pres* proceeding are not affirmative rights, and their value could be realized only if they are reunited with the fee title to the underlying land. The owner of the underlying land thus wields disproportionate bargaining power in any unsupervised negotiation to reunite those rights with the fee. The bargaining power of the owner of the underlying land vis-à-vis the government agency or land trust holding such rights is similar to the power of a co-tenant over a fellow co-tenant who wants to liquidate his interest in the property: one co-tenant can hold up the other either by demanding to be paid a price in excess of the proportional value of his interest in the property, or by offering to pay only a fraction of the proportional value of the other co-tenant's interest in the property. The prospect of such a bargaining impasse between co-tenants and consequent underutilization of property led courts to offer the equitable remedy of the "suit to partition" as an escape valve for unhappy cotenants.[251]

Notable for purposes of this Article is that in a suit to partition, a court divides either the property itself (in a partition in kind) or the proceeds from the sale of the property (in a partition by sale) according to the co-tenants' respective *proportional* interests in the property.[252] Adjustments are made in equity for such items as costs incurred by one co-tenant on behalf of all the co-tenants and improvements one co-tenant might have made to the property, and a court might effect a disproportionate division of the property and require the "winning" co-tenant to pay the difference ("owelty") to the "losing" co-tenant,[253] but the fundamental yardstick for the division of the value of the property is the co-tenants' respective proportional

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[251] *See* 59A AM. JUR. 2D *Partition* § 6 (2004) ("The original purpose of partition was to permit cotenants to avoid the inconvenience and dissension arising from sharing joint possession of land. An additional reason to favor partition is the policy of facilitating transmission of title, thereby avoiding unreasonable restraints on the use and enjoyment of property."); Thomas J. Miceli & C. F. Sirmans, *Partition of Real Estate; or, Breaking Up is (Not) Hard to Do*, 29 J. LEGAL STUD. 783, 783 (2000) ("[W]hat was once a productive union may become an inharmonious association, thus creating a threat of inefficient land use due to the 'anticommons' problem . . . [and] [i]n this case, the law offers each owner an escape route in the form of the right to partition."); Miller v. Miller, 564 P.2d 524, 527 (Kan. 1977) ("'The right of partition . . . is based on the equitable doctrine that it is better to have the control [of property] in one person than in several who may entertain divergent views with respect to its proper control and management.'") (citation omitted).

[252] *See* 59A AM. JUR. 2D *Partition* § 148 (2004). *See also id.* § 115 ("If each tenant has an undivided half interest, the court should only assign the half interest in the property to each tenant and should not grant a greater share to either."); POWELL, *supra* note 13, § 50.07 ("[P]artition means the division of the land held in co-tenancy into the co-tenants' respective fractional shares."); Jonathan I. Charney, Note, *Partition in the Modern Context*, 1967 WIS. L. REV. 988, 992 n.13 (1967) (in a partition by sale, the proceeds are "brought into court and . . . divided by order of the court among the parties in proportion to their respective rights"); J. D. EATON, REAL ESTATE VALUATION IN LITIGATION 514–16 (2d ed. 1995) (discussing the appraiser's assignment in connection with partition litigation as consisting of a valuation of the entire property and then—in a partition in kind—dividing the property into parcels that correspond in value to the co-tenants' respective proportional interests).

[253] *See* 59A AM. JUR. 2D *Partition* § 3 (2004).

interests in the property. The court does *not* base its award in a suit to partition on the price the petitioning co-tenant would receive on the open market for his fractional interest in the property, which necessarily would be discounted to reflect the difficulties associated with bargaining with the other co-tenants and the costs associated with a suit to partition. In a suit to partition, the court bases its award on the co-tenants' respective *proportional* interests because "[t]he fundamental objective in a partition action is to divide the property so as to be fair and equitable and confer no unfair advantage on any cotenant."[254]

Cy pres proceedings are also equitable proceedings, and in a *cy pres* proceeding involving the extinguishment of a conservation easement the court should be similarly interested in determining the value of the parties' respective interests so as to be "fair and equitable" and "confer no unfair advantage" on any party. For the reasons discussed above, determining the value of the interest held by a government agency or land trust (on behalf of the public) in a *cy pres* extinguishment proceeding based on the price at which such agency or organization could sell the interest on the open market would be neither fair nor equitable, and would confer a significant unfair advantage on the owner of the easement-encumbered land. Alternatively, employment of the "after and before" method to determine the proportional value of the parties' respective partial interests in the land would be fair and equitable and would confer no unfair advantage on any party, provided such valuation rule is consistently applied by the courts and, thus, purchasers of easement-encumbered land are not paying premiums based on the expected proceeds to be reaped in an extinguishment proceeding.

Prevention of bargaining breakdown. Finally, providing an institutional framework for the division of proceeds upon the sale of the unencumbered land in a *cy pres* easement extinguishment proceeding would prevent a bargaining breakdown, in which the parties to the easement adopt irreconcilable entrenched positions and perpetuate the now-defunct easement indefinitely. In particular, such a framework would avoid the "hold-out" problem, in which one party decides it is in its best interest to hold out for more of the proceeds than the other party is willing to agree to. In the easement context, the owner of the encumbered land might "hold out" for a much greater percentage of the proceeds from the sale of the unencumbered land than would be dictated under the "after and before" method, while the holder of the easement might refuse to comply for fear that it would be violating its fiduciary duty to the public.[255] Direct court supervision of the extinguishment of the easement, the sale of the unen-

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[254] Blonquist v. Frandsen, 694 P.2d 595, 596 (Utah 1984). *See also* 59A AM. JUR. 2D *Partition* § 6 (2004) (same).

[255] A charitable organization holding a conservation easement must also be careful to not run afoul of the private inurement and private benefit doctrines, which would jeopardize its tax exempt status. *See supra* note 25 (discussing those doctrines).

cumbered land, and the division of proceeds between the owner of the encumbered land and the holder of the easement based, in large part, on the value of their respective interests as established under the "after and before" method would effectively restrict bargaining and act as a salutary non-contractual, externally imposed commitment device that would prevent the parties from engaging in inefficient holdout behavior.[256] Once the court has mandated the division of proceeds between the parties in a *cy pres* proceeding, it would be irrational for the owner of the encumbered land to hold out for a greater percentage of the proceeds because the holder of the easement would have no power to deviate from the court-mandated division.[257]

Equitable and other considerations. *Cy pres* proceedings are equity proceedings, and in dividing the proceeds from the sale of the unencumbered land when an easement is extinguished (or in establishing the price at which the holder of the easement can sell its newly unrestricted property interest to the owner of the land or a third party), the court would consider all relevant facts. While it is recommended that the baseline values for the respective interests of the holder of the easement and the owner of the land be established under the "after and before" method, a variety of factors may warrant some degree of deviation from that value.[258]

Of course, it is possible that the owner of the land encumbered by the easement will not agree to the sale of the land in the context of the *cy pres* proceeding (perhaps because the owner resides on the land and is content to live with the easement restrictions). In such a case, completion of the

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[256] *See, e.g.*, PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION & MANAGEMENT 136–39 (1992) (discussing commitment in the context of contracting parties seeking to avoid "hold-up" of one by another and noting that "[i]t is too risky to rely on others to act consistently contrary to their own selfish interests unless there is something that commits them to that behavior").

[257] Another potential cause of bargaining breakdown is the "retaliation" problem. If the owner of the easement-encumbered land views a proposed division of proceeds as unfair, she may refuse to cooperate in the extinguishment of the easement and sale of the unencumbered land to punish or retaliate against the holder of the easement. The potential for retaliation, however, would be greatly reduced by the fact that the court, rather than the holder of the easement, would determine how the proceeds from the sale of the unencumbered land would be divided, and the holder of the easement would have no power to change that decision. A party to the division of proceeds is less likely to retaliate against the other party if the other party has no control over the division. Moreover, a division of proceeds based, in large part, on the values determined under the "after and before" method would not be arbitrary, and it would be difficult for the owner of the encumbered land to argue that such division is unfair. *See, e.g.*, Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 119–28.

[258] *See, e.g.*, Part III.C.3.c.ii(1), *infra* (discussing the possible deviation from the values established under the "after and before" method where the owner of the land encumbered by the easement is a charitable foundation established by the easement donor). *See also supra* notes 204–206 and accompanying text (discussing the possible consequence if the donor of the easement fixed the percentage of the proceeds from the sale of the unencumbered land payable to the holder in the deed of conveyance). In any case, the amounts allocated to the parties should be reduced proportionately by transaction costs.

cy pres proceeding presumably would have to be put on hold until the current or a subsequent owner of the land agreed to a court-supervised extinguishment of the easement, sale of the unencumbered land, and division of the proceeds. In some limited circumstances, the public interest in developing the easement-encumbered land might be compelling enough to allow a court to force a sale of the land pursuant to the law of eminent domain.[259]

(3) *Appropriate Use of Proceeds.* Once a court determines that the appropriate substitute plan involves extinguishment of the easement, sale of the unencumbered land, and use of the proceeds attributable to the easement to accomplish the donor's specified conservation purposes in another location, the question of precisely how those proceeds should be used would necessarily arise. In answering that question the court again should consider the suggestions of the holder of the easement, the state attorney general, and other interested parties.[260]

Use of the proceeds attributable to the extinguished easement to protect land in another location that has the same conservation characteristics the donor sought to protect with the easement (such as wildlife habitat or agricultural land) should be fairly uncontroversial. If, however, the evidence indicates that the donor intended to confer charitable benefits on the residents of a particular city, town, or other district, the court should consider directing that the proceeds attributable to the easement be used to protect appropriate land in that district.[261]

Given that the proceeds attributable to an extinguished conservation easement are likely to be substantial,[262] the court should require that the recipient government agency or land trust[263] use the proceeds in accordance with a detailed strategic plan.[264] It is recommended that such a plan place particular emphasis on achieving long-term protection of land with the same

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[259] *See generally* POWELL, *supra* note 13, § 79F. In some limited circumstances the public interest in developing the encumbered land might be considered compelling enough to convince a court to interpret state law to permit the holder of the easement to sue for partition. Such a suit could result in either an actual partition of the land based on the values of the parties' respective interests as established by the court, or the sale of the unencumbered land and a division of the proceeds according to such values. Under current law, however, it appears that a party seeking to partition property must have a possessory interest in the property. *See generally id.* § 21.05.

[260] *See supra* note 219 and accompanying text.

[261] *See supra* note 229 and accompanying text.

[262] *See supra* Part III.B.2.c.ii(2) (discussing the division of proceeds upon the extinguishment of an easement and the value that could be attributable to the property interest embodied in the easement).

[263] The government agency or land trust that was the holder of the extinguished easement normally would be the recipient of the proceeds attributable thereto (on behalf of the public). If, however, the court determines that the holder breached its fiduciary duties (perhaps by failing to monitor or enforce the easement) or is otherwise unfit, the court could appoint a new trustee to administer the proceeds. *See supra* note 249.

[264] Such a plan might be developed by the recipient government agency or land trust. *See supra* note 221 and accompanying text. Such a plan might also be developed by a master, referee, or auditor appointed by the court. *See supra* note 222 and accompanying text.

conservation characteristics the donor sought to protect with the easement. For example, if the intent of the donor of the extinguished easement was to protect the encumbered land as a part of a rural, agricultural landscape, the strategic plan might involve the protection of multiple, contiguous parcels of agricultural land, thereby helping to ensure that the infrastructure necessary to support agricultural practices will remain in place, and the rural, agricultural lifestyle the donor presumably sought to protect will be perpetuated. Similarly, if the intent of the donor of the extinguished easement was to protect the encumbered land to provide habitat for one or more species (such as the grizzly bear or migratory songbirds), the strategic plan might involve not only the protection of land that harbors such species, but also land that buffers and connects such lands.[265] The court might also require that the land protected with the proceeds from the sale of the extinguished easement be posted with signs indicating that it was protected, in whole or in part, due to the donor's generosity.[266]

The question of whether any of the proceeds attributable to an extinguished easement should be added to the stewardship or operating funds of the recipient government agency or land trust raises a number of interesting and potentially controversial issues. Setting aside sufficient funds with which to steward land or easements that are acquired, in whole or in part, with such proceeds arguably would be consistent with the donor's intent, because without proper stewardship, the long-term preservation of the conservation characteristics of the targeted lands would be seriously jeopardized.[267] Accordingly, the court should authorize the use of a portion of the

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[265] *See generally* REED F. NOSS & ALLEN Y. COOPERRIDER, DEFENDERS OF WILDLIFE, SAVING NATURE'S LEGACY: RESTORING AND PROTECTING BIODIVERSITY 129–77 (1994) (discussing buffers and linkages to core reserve areas).

[266] *See, e.g.*, Rogers v. Attorney General, 196 N.E.2d 855, 862 (Mass. 1964) (in authorizing the sale of the family homestead and the use of the proceeds to accomplish the donor's charitable purpose elsewhere, the court mandated that "some formal recognition be given to the [donor's] family").

[267] *See, e.g.*, CONSERVATION EASEMENT HANDBOOK, *supra* note 6, at 87–107 (stressing the importance of proper monitoring and enforcement of conservation easements); DARLA GUENZLER & THE BAY AREA OPEN SPACE COUNCIL, CREATING COLLECTIVE EASEMENT DEFENSE RESOURCES: OPTIONS AND RECOMMENDATIONS v (2002) [hereinafter COLLECTIVE EASEMENT DEFENSE], *available at* http://www.openspacecouncil.org/Easements/defense.html ("[T]he conservation community anticipates a wave of litigation as successor landowners assume control of easement-protected properties."). *See also* Reed v. Eagleton, 384 S.W.2d 578 (Mo. 1964). In that case, the testator bequeathed the residue of his estate in trust to the City of St. Joseph, Missouri, to be used to acquire park and other recreational lands within the city that would then be transferred to and improved and maintained by the city; when the trust funds far exceeded the amount needed to purchase land to serve the recreational needs of the citizens of the city, and the city presented compelling evidence that it did not have sufficient funds with which to improve or maintain the recreational lands to be transferred to it by the trust, the Supreme Court of Missouri authorized the use of some of the trust funds for the improvement and maintenance of such lands, noting that the limitation that the trust funds be used only for the purchase of land should be subordinated to the accomplishment of the testator's primary object—to benefit the citizens of St. Joseph.

proceeds attributable to an extinguished easement to endow a stewardship fund for any land or easements acquired with such proceeds.[268]

Authorizing the use of the proceeds attributable to an extinguished easement to steward other land or easements held by the recipient government agency or land trust, or to fund the day-to-day operations of such agency or organization (such as the purchase of paper clips) is likely to be far more controversial. Such use of the proceeds would not appear to be consistent with the donor's intent and would run the risk of discouraging future easement donors, who could lose all confidence in the bargain that is struck with the public upon the donation of an easement.[269] Authorizing such use of the proceeds might also cause the government agencies and land trusts acquiring land and easements for conservation purposes to neglect their responsibility to raise general stewardship and operating funds.[270]

Alternatively, given the difficulties associated with raising general stewardship and operating funds, and that proper stewardship of the land and easements already held by government agencies and land trusts may provide as much public benefit as newly acquired land and easements, a court should consider allocating at least some portion of the proceeds attributable to an extinguished easement to general stewardship and operating funds.[271] Allocating some portion of the proceeds attributable to an extinguished easement to operating funds may be particularly appropriate where

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[268] *See, e.g.*, Lesley Ratley-Beach et al., *Easement Stewardship: Building Relationships for the Long Run*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 2002, at 6, 6–10 (describing the sophisticated system used by the Vermont Land Trust to evaluate stewardship funding needs for its easements).

[269] *See supra* Part III.A (describing the "*cy pres* bargain").

[270] *See, e.g.*, COLLECTIVE EASEMENT DEFENSE, *supra* note 267, at v ("[T]raditionally, the land conservation community has focused on acquisition, not on securing funds for stewardship or defense costs."). *Cf.* LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES, Standard 11.A (Revised 2004) (requiring land trusts to secure the dedicated or operating funds to cover current and future stewardship expenses associated with each of their easement transactions). The same concern is evident in the museum context, where current codes of ethics promulgated by various museum professional organizations require that the proceeds obtained from the sale of even unrestricted gifts of artwork be used solely to acquire other works of art. *See, e.g.*, MALARO, LEGAL PRIMER, *supra* note 45, at 151 (noting that "[s]uch a practice usually serves the best interests of the public because it lessens the temptation to drain collections in order to meet support expenses"); WEIL, *supra* note 46, at 115 (noting that "many regard such a restriction as essential to preventing governing boards or other ruling authorities from looking to a museum's collections as a potential source of operating funds").

[271] Commentators have argued for a relaxation of the restriction on the use of deaccessioning proceeds in the museum context for the same reasons. *See, e.g.*, Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041 (1996) (arguing that the courts should approve a museum director's use of proceeds from the sale of deaccessioned art to meet operating expenses if the director's conduct comports with the strict duties imposed upon a trustee under the law of trusts); Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 230 n.82 (1997) (recommending a more liberal use of museum deaccessioning as a means of raising the funds necessary for the care and maintenance of the museum's collection, programs, and physical plant).

the proceeds are significant, and the government agency or land trust receiving such proceeds will need to develop the institutional capacity to appropriately select, monitor, and enforce the additional land and easements to be acquired.[272]

C. Case Study

This Section uses a hypothetical case study to walk the reader through the application of the doctrine of *cy pres* to modify or extinguish 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. The facts of the case study are loosely based on a potential challenge to an easement reported in the media.[273]

Subsection 1 describes the facts of the case study. Subsection 2 discusses how the *cy pres* proceeding might be initiated and the positions that might be asserted by each of the interested parties. Subsection 3 explains how a court might address each of the three steps in the *cy pres* process in the context of this hypothetical situation.

1. The Aubry Farm Easement

Hazel Aubry Weston ("Weston") was a wealthy philanthropist who inherited substantial assets upon the death of her father in 1954, including a number of family real estate holdings in both a western state and an eastern state. One such real estate holding was an eighty-one-acre farm

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[272] Many land trusts are all-volunteer operations and would not have the existing staff or resources to deal responsibly or efficiently with a large infusion of cash from the extinguishment of a conservation easement. *See, e.g.*, Martha Nudel, *Land Trusts Grow Stronger With More Staff, Larger Budgets*, EXCHANGE: J. LAND TRUST ALLIANCE, Winter 2002, at 5, 5 (noting that the 2000 Census found that approximately half of the nation's local, state, and regional land trusts were run entirely by volunteers).

[273] The facts of the case study are loosely based on the conservation easement discussed in the following reports. To facilitate the discussion of the doctrine of *cy pres*, many of the facts have been altered. *See* Rex Springston & Meredith Fischer, *Old Moody Farm; Protected Property?/ Group Wants to Sell Land for Development*, RICHMOND TIMES DISPATCH, Jan. 24, 2003, at A1; Meredith Fischer & Rex Springston, *"No Reason" To Develop Property, Some Say; Opposition Surfaces to Plans for Old Moody Family Farm*, RICHMOND TIMES DISPATCH, Feb. 8, 2003, at B1; Rex Springston & Meredith Fischer, *Trade Land Here for Some There?/ Shifting Protections From Moody Property Would Permit Growth*, RICHMOND TIMES DISPATCH, Nov. 29, 2003, at A1; Rex Springston, *Shift State Protections on Land?/ Agency Suggests Opening the Chesterfield Property to the Public as a Park Instead*, RICHMOND TIMES DISPATCH, Dec. 4, 2003, at A1. Some facts about the donor were also drawn from TEXAS STATE HISTORICAL ASS'N, *Mary Moody Northen, Incorporated, in* THE HANDBOOK OF TEXAS ONLINE, *at* http://www.tsha.utexas.edu/handbook/online/articles/view/MM/vrmmn.html (last visited Apr. 23, 2005) (on file with the Harvard Environmental Law Review). The Myrtle Grove easement is not used as the case study in this Section because the charitable purpose of the Myrtle Grove easement has not become "impossible or impracticable" under any reasonable interpretation of that standard. *See supra* note 119 and accompanying text.

located in County *X* of the eastern state ("Aubry Farm"), which was the original home site of Weston's paternal ancestors (the Aubrys). There is a family graveyard on Aubry Farm where among the dead lies Weston's grandfather, a Confederate officer who became a wealthy banking and cotton tycoon in the western state after the Civil War. When Weston inherited the farm, it was located in a largely agricultural, sparsely populated area approximately 100 miles from a burgeoning metropolitan area.

By the mid-1970s, although the area surrounding Aubry Farm was still largely agricultural and sparsely populated, the metropolitan area had begun to expand rapidly, and Weston became concerned that the farm might be developed after her death. She began searching for some means of permanently protecting the farm from development, and after consulting with a number of local conservation groups and her attorney, in 1976 Weston donated a conservation easement encumbering Aubry Farm to a private, nonprofit land trust that accepts easements encumbering land located in County *X* and surrounding counties (the "Land Trust"). The stated purpose of the easement is "to conserve and forever maintain the rural, agricultural, historic, open space, and wildlife habitat character of the eighty-one-acre farm for the benefit of the citizens of County *X* and the eastern state." The easement prohibits the subdivision and development of the farm in perpetuity, but permits the owner of the land to maintain or replace the early nineteenth-century farmhouse that was located on the land at the time of the donation, and to construct and maintain barns and other outbuildings necessary and appropriate to farming operations on the land, provided, in each case, that such structures are not inconsistent with the conservation purposes of the easement.

Weston claimed a charitable income tax deduction for the donation of the easement equal to 20% of the value of the unencumbered land. Because the pressure to develop the land was not acute in 1976, the restrictions on the development and use of the land in the easement reduced the value of the land by only 20% at the time the easement was donated.

Soon after Weston's donation of the easement, the early nineteenth-century farmhouse was destroyed by fire, and Weston, who resided in the western state, never replaced it. After the fire Weston leased the farm to a series of local farmers who paid her a nominal annual rent. At the present time, there are no structures on the farm.

Weston died in 1986 a childless widow and, after making several small bequests in her will, she left the residue of her sizable estate, including Aubry Farm (subject to the perpetual easement), to a private foundation she had created in 1964 to support education, environmental protection, and historic preservation in both the eastern state and the western state (the "Foundation"). As part of her bequest of the residue of her estate to the Foundation, Weston stipulated that the Foundation trustees restore the Aubry family home in the western state for use as an historical house museum. The seven-year, $10 million restoration resulted in the Aubry Mansion and

Museum, which contains the original furnishings and memorabilia of the Aubry family.

It is now the year 2005, and in the almost three decades since the donation of the easement, the metropolitan area has continued to grow and has engulfed much of County *X*. The farm today is an eighty-one-acre island of green amid a suburban sea of homes, strip malls, and gas stations. The Foundation has been unable to lease the farm to a farmer since the mid-1990s, when the last of the infrastructure necessary to support farming operations disappeared from the area. The land sits empty, has become a collection point for trash, and is increasingly subject to trespass. Both the Foundation and the Land Trust have been called upon to respond to vandalism of the headstones in the family graveyard, and to violations of the easement by adjacent landowners, who have repeatedly encroached upon the easement-encumbered land with their yards and fences. The Foundation explored the possibility of selling the land subject to the easement, but few offers were made, and those that were made were for a price that the Foundation considered too low. According to realtors in the area, buyers of large "estate" lots such as Aubry Farm prefer to purchase in more upscale areas of the state, where their land will be surrounded by other large estate lots.

In 2000, the Foundation began exploring the possibility of extinguishing the easement and selling Aubry Farm for development. According to an appraisal obtained by the Foundation, the value of the land subject to the easement restrictions is only $700,000, but if the easement restrictions were extinguished and the land could be sold for residential and commercial development, the value of the land would jump to $7 million. After receiving the appraisal and engaging in preliminary discussions with developers, the Foundation made the following proposal to the Land Trust: if the Land Trust agrees to extinguish the easement and permit the sale of the unencumbered land, the Foundation will give the Land Trust 20% of the proceeds from the sale (or $1.4 million), which is the percentage that the easement represented of the value of unencumbered land at the time of its donation.

The Foundation also pointed out that the Land Trust's promotional materials expressly tout the benefits of "landscape preservation" (as opposed to the protection of isolated parcels), and that the Land Trust has targeted County *X*'s remaining rural, agricultural, and historic area for protection in its strategic plan. The targeted area consists of approximately 3000 acres of privately owned farmland. A large river that provides habitat for several rare and threatened species of waterfowl bisects the area. The area also surrounds a forty-four-acre historic plantation on which an eighteenth-century two-story plantation home sits (the "Plantation"). The Plantation, which once stretched across more than 4000 acres, was owned by Thomas Jefferson's brother-in-law and is the most significant historic landmark in County *X*.

The Plantation and surrounding farmlands are identified as the "Rural Historic District" in County *X*'s Comprehensive Plan, and as such are subject to relatively restrictive subdivision and zoning regulations designed to protect the rural, agricultural, and historic character of the area. The Plantation and surrounding farmlands are also registered as an historic district at both the state and Federal levels, and the eighteenth-century plantation home is listed in the National Register of Historic Places. The Foundation asserted that the Land Trust could use the $1.4 million from the sale of Aubry Farm to purchase easements protecting multiple, contiguous parcels of farmland surrounding the Plantation, and that such easements would be far more valuable to the public from an agricultural, historic, open-space, and wildlife habitat perspective than the easement encumbering isolated Aubry Farm.

The Foundation's proposal to the Land Trust received a fair amount of attention from the media as well as local and state politicians. The County *X* Planning Commission spoke out in favor of extinguishment of the easement, citing the fact that land use in the Aubry Farm area had changed dramatically since the year the easement was donated, and that Aubry Farm now lies within a designated growth area of County *X*. The Planning Commission noted that the inability to develop the eighty-one-acre farm is increasing the pressure to relax subdivision and zoning restrictions in the Rural Historic District.

Local health authorities also have an interest in the fate of Aubry Farm. For the past two years, County *X* has had one of the highest number of reported Lyme disease cases of any county in the nation, and many attribute the problem to the white-tailed deer herd that has been allowed to proliferate on the Aubry Farm property.[274] Hunting on the farm is prohibited under state law because of the proximity of nearby residences, a grade school, and commercial establishments, and the Foundation's campaign to poison some of the herd a few years ago met with loud public protest and was abandoned. The deer herd has also altered the growth of the forest on the property by overbrowsing on young trees and shrubs. The overbrowsing has inhibited the growth of the understory, making the forested areas of the farm park-like, but ecologically unstable.

Relatives of Weston have criticized the proposed extinguishment of the Aubry Farm easement, arguing that Weston donated the easement precisely to ward off the type of development now being contemplated by

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[274] *See* Field Trial Magazine, *Lyme Disease*, *at* http://www.fielddog.com/ftm/lyme.htm (last visited Feb. 17, 2005) (noting that the national rate for Lyme disease is 3.9 cases per 100,000 people, but there are hot spots where the chance of contracting the disease is extremely high, and providing two examples of such "hot spots": (i) Ipswich, Massachusetts, near the Crane Beach Reservation, which has a severe overpopulation of white-tailed deer and three out of four households have at least one family member who has contracted Lyme disease, and (ii) the island of Nantucket, off Massachusetts, where the deer herd has been allowed to proliferate and the incidence of Lyme disease is 449.1 per 100,000 people) (on file with the Harvard Environmental Law Review).

the Foundation. They note that Weston would "roll over in her grave" if she knew that her Foundation was trying to extinguish the easement and sell the land for development.

2. *Initiation of the* Cy Pres *Proceeding*

The Foundation, which has been exploring ways to extinguish the easement, initiates the *cy pres* proceeding. In its petition to the court, the Foundation makes the following alternative arguments. It first argues that the charitable purpose of the easement has become impossible or impracticable, that Weston had only a specific rather than a general charitable intent in donating the easement, that the charitable gift of the easement has failed altogether, and that the value attributable to the easement should pass by resulting trust to the Foundation as Weston's residuary beneficiary under her will.[275] In the alternative, the Foundation argues that the charitable purpose of the easement has become impossible or impracticable, that Weston had a general charitable intent, and that the appropriate substitute plan should involve an extinguishment of the easement, the sale of the encumbered land, and the Land Trust's use of the proceeds attributable to the easement to protect land in the Rural Historic Area of County *X*. The Foundation asserts, however, that if its second argument is adopted by the court, the Land Trust should be entitled to only 20% of the $7 million proceeds from the sale of the unencumbered land (or $1.4 million) because 20% represents the percentage that the easement represented of the value of land at the time of the easement's donation.[276]

The Land Trust, as holder of the easement, is named as a party to the *cy pres* proceeding. Weary of expending its limited resources to monitor and enforce the Aubry Farm easement and believing that the easement no longer provides much benefit to the public, the Land Trust also argues for the application of *cy pres*. The Land Trust agrees with the Foundation's second argument—that the charitable purpose of the easement has become impossible or impracticable, that Weston had a general charitable intent, and that the appropriate substitute plan should involve an extinguishment of the easement, the sale of the encumbered land, and the Land Trust's use of the proceeds attributable to the easement to protect land in the Rural Historic Area of County *X*. The Land Trust, however, argues that it should be entitled to proceeds from the sale of the unencumbered land equal to the value of the easement at the time of the *cy pres* proceeding as es-

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[275] Whether the Foundation, as residuary devisee, or Weston's intestate heirs would be entitled to the proceeds attributable to the easement in such circumstances is unclear. *See supra* note 180 and accompanying text. The Foundation would, however, receive the remaining proceeds from the sale, as the owner of the underlying land.

[276] It is assumed for purposes of this Article that the appraisal obtained by the Foundation accurately reflects the price at which the land encumbered by the easement and the land unencumbered by the easement could be sold at the time of the *cy pres* proceeding.

tablished under the "after and before" method (or $6.3 million).[277] The Land Trust also requests permission to allocate some portion of such proceeds to its general stewardship and operating funds.

The attorney general for the eastern state, as representative of the public, is also named as a party to the *cy pres* proceeding. The attorney general agrees with the Land Trust, but argues that the Land Trust should be required to use the proceeds attributable to the easement in accordance with a detailed strategic plan designed to ensure the long-term protection of the Rural Historic District.

Weston's intestate heirs intervene in the action, arguing that the charitable purpose of the easement has become impossible or impracticable due to changed conditions, that Weston had only a specific rather than a general charitable intent in donating the easement, that the charitable gift of the easement has failed altogether, and that the value attributable to the easement should pass by resulting trust to them.[278]

Several conservation organizations that solicit and accept easement donations in County *X* and the surrounding area were granted permission to file an *amicus curiae* brief with the court.[279] In the brief, the organizations object to the application of the doctrine of *cy pres*, arguing that the continued use of Aubry Farm for conservation purposes has not become impossible or impracticable. They point out that the farm harbors big oaks, pines, and hollies, as well as deer, squirrels, and songbirds, and provides clean air, a refuge for animals, and a pleasant view for neighbors. They argue that the deer herd could be reduced and maintained at a size that would drastically reduce the incidence of Lyme disease through the implementation of a birth control dart program.[280] They recommend that the Foundation make a gift of the land subject to the easement to County *X* or the eastern state for use as a public park, arguing that such use of the land would be consistent with Weston's intent to protect Aubry Farm from development in perpetuity as a memorial to her paternal ancestors. The organizations also caution that failure to respect Weston's wishes that Aubry Farm

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[277] *See supra* note 276. *See also supra* Part III.B.2.c.ii(2) (discussing the "after and before" method and the recommended division of proceeds in a *cy pres* extinguishment proceeding).

[278] *See* SCOTT & FRATCHER, *supra* note 25, § 391, at 376–77 ("Where on the termination or failure of a charitable trust the settlor or his heirs . . . are entitled to receive the property, they can maintain a suit to recover the property. In such a case they are enforcing rights adverse to the trust and are not attempting to enforce it.") Whether the Foundation, as residuary devisee, or Weston's intestate heirs would be entitled to the proceeds attributable to the easement in such circumstance is unclear. *See supra* note 180 and accompanying text.

[279] *See supra* note 142 and accompanying text (noting that it is within the court's discretion to permit such intervention). *See also supra* note 141 and accompanying text (discussing the extent to which parties other than the owner of the encumbered land, the holder of the easement, and the state attorney general might have standing as a matter of right to intervene in a *cy pres* proceeding involving a conservation easement).

[280] *See* Matthew Schuerman, *Birth Control for Deer?*, AUDUBON MAG. (2002), *at* http://magazine.audubon.org/webstories/deer_birth_control.html (describing such a vaccination program) (last visited Sept. 26, 2004) (on file with the Harvard Environmental Law Review).

be permanently protected from development will have a significant adverse effect on the ability of conservation organizations nationwide to solicit contributions of cash and conservation easements and, more generally, on the use of conservation easements as a land protection tool.

A few residents who own homes adjacent to or near Aubry Farm object to both the proposed development of the land and the proposed use of the land as a public park. They maintain that they purchased their properties precisely because they were adjacent to or near permanently protected, privately owned open space, and that they paid a premium for their properties as a result of the existence of that open space. They assert that whether the land is developed or used as a public park, it would adversely and unfairly affect the value of their properties.[281]

3. The Three-Step Cy Pres *Process*

a. The Impossibility or Impracticability Standard

In the first step of the *cy pres* process the court would determine whether the charitable purpose of the Aubry Farm easement—the preservation of the rural, agricultural, historic, open space, and wildlife habitat character of the eighty-one-acre farm for the benefit of the citizens of County *X* and the eastern state—had become "impossible or impracticable." In making this determination, the court should consider, and give primary weight to, whether the easement would satisfy the applicable "conservation purposes" test or tests under § 170(h) if offered for donation at the time of the *cy pres* proceeding.

Of the four conservation purposes tests under § 170(h), only three would be relevant: (i) the "historic preservation" conservation purposes test, (ii) "open space" conservation purposes test, and (iii) the "wildlife habitat" conservation purposes test. The remaining conservation purposes test under § 170(h)—the "public recreation or education" conservation purposes test—would not be relevant because Weston did not donate the Aubry Farm easement to preserve the land for use by the general public for outdoor recreation or educational purposes. Continuing to enforce the easement to accomplish that purpose would constitute a change in the charitable

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[281] It does not appear that the residents would have any formal legal claim with regard to the diminution in the value of their property as a result of a modification or extinguishment of the easement. *See generally* Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1 (2003) (noting that owners of property adjacent to land preserved as a public park, such as Central Park in Manhattan, possess de facto quasi-property interests of considerable value, but absent legislation formally recognizing such interests, the property owners have no formal legal claim to the continued preservation of the land as a park, and their quasi-property interests can be enforced only through extrajudicial enforcement mechanisms such as politics).

purpose of the easement, and should be permissible only through the application of the full, three-step *cy pres* process.[282]

With regard to the three conservation purposes tests under § 170(h) that are relevant, we begin with the "historic preservation" conservation purposes test. Despite the family graveyard, the Aubry Farm easement would not satisfy that conservation purposes test because the farm is not listed in (or adjacent to land listed in) the National Register of Historic Places, the farm is not located within a registered historic district, and the family graveyard does not have independent national historic significance.[283]

The Aubry Farm easement also would not satisfy the "open space" conservation purposes test because the farm is not particularly scenic,[284] and the continued preservation of the farm would not be "pursuant to a clearly delineated Federal, State, or local governmental conservation policy."[285] The preservation of land is considered to be "pursuant to a clearly delineated governmental conservation policy" only if the land has been

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[282] The full three-step *cy pres* process would require: (i) a determination that Weston's specified charitable purpose (as set forth in the deed of conveyance) had become "impossible or impracticable," (ii) a determination that Weston had a general charitable intent when she donated the easement, and (iii) the formulation of a substitute plan for the use of the easement (or the value attributable thereto) for a charitable purpose "as near as possible" to Weston's original charitable purpose. It is in the third and final step of the *cy pres* process that the court would endeavor to ascertain from the terms of the easement and the circumstances attending its donation whether Weston, if presented with the "impossibility or impracticability" of the continued protection of the farm for the conservation purposes specified in the easement, would have preferred: (i) that the easement be modified and the land continue to be protected for a different charitable purpose—such as for use as a public park, or (ii) that the easement be extinguished, the unencumbered land sold, and the proceeds attributable to the easement used to protect land with rural, agricultural, historic, open space, and wildlife habitat characteristics in another location.

[283] *See* Treas. Reg. § 1.170A-14(d)(5) (2004). The "historic preservation" conservation purposes test under § 170(h) applies to land areas that are of national historic interest, such as Civil War battlefields or land located within a registered historic district. The donation of an easement that protects land areas of local or state (rather than national) historic interest can satisfy the "open space" conservation purposes test of § 170(h) if the state or locality has identified such land as worthy of preservation pursuant to a "clearly delineated governmental conservation policy." *See infra* notes 285–287. Despite the existence of the family graveyard, however, neither the eastern state nor County *X* has identified Aubry Farm as worthy of preservation pursuant to a clearly delineated governmental conservation policy.

[284] *See* WILLIAM T. HUTTON, *supra* note 163 at 3-11 and 3-12, noting that "there are probably few situations where an easement should be presumed to satisfy the 'scenic' requirement," and those situations will involve, for example, national park in-holdings, riparian properties in scenic river corridors, and properties abutting and entirely viewable from well-traveled mountain valley roads in the vast expanses of the northern Rockies).

[285] Section 170(h)(4)(A)(iii) of the Internal Revenue Code provides that an easement will satisfy the "open space" conservation purposes test if the preservation of the land encumbered by the easement is: (i) for the scenic enjoyment of the general public, or (ii) pursuant to a clearly delineated governmental conservation policy and, in each case, will yield a significant public benefit. Thus, even if Aubry Farm was particularly scenic, or its preservation was "pursuant to a clearly delineated governmental conservation policy," to satisfy the "open space" conservation purposes test, the court would also have to find that continued enforcement of the easement would "yield . . . a significant public benefit." *See* Treas. Reg. § 1.170A-14(d)(4)(iv) (2004) (providing a list of eleven non-exclusive factors germane to the determination of whether an easement "yields a significant public benefit").

identified as worthy of preservation by the Federal or a state or local government.[286] For example, an easement that preserves land located within a state or local landmark district that is locally recognized as being significant to the district (such as the Rural Historic District in County *X*), or an easement that preserves farmland pursuant to a state program for flood prevention and control, would be considered to preserve land "pursuant to a clearly delineated governmental conservation policy."[287]

Aubry Farm, which now sits within an area designated as a growth area in County *X*'s Comprehensive Plan, has not been identified as worthy of preservation by the Federal or a state or local government, and, thus, its preservation is not "pursuant to a clearly delineated governmental conservation policy." In fact, the continued preservation of Aubry Farm is arguably inconsistent with Federal, state, and local "clearly delineated governmental conservation policies" because it prevents infill development in a designated growth area, and thereby increases the pressure to relax subdivision and zoning restrictions in an area that has been identified as worthy of preservation by the Federal government and the state and local governments—the Rural Historic District.[288]

The Aubry Farm easement also would not satisfy the "wildlife habitat" conservation purposes test because the easement does not protect: (i) habitat for a rare, endangered, or threatened species; (ii) an undeveloped or not intensely developed island where the coastal ecosystem is relatively intact; or (iii) a natural area that is included in, or adjoins and provides a natural buffer to an existing conservation area, such as a local, state, or national park, a wilderness area, or a nature preserve.[289] Protection of the

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[286] *See* Treas. Reg. § 1.170A-14(d)(4)(iii)(A) (2004).

[287] *See id.* To qualify as preserving property pursuant to a "clearly delineated governmental conservation policy," an easement must further a specific, identified conservation project. *See id.*

[288] As noted in Part III.C.1, *supra*, the Plantation and surrounding farmlands have been identified as worthy of preservation as a Rural Historic District in County *X*'s Comprehensive Plan, and as worthy of preservation as a registered historic district at both the state and Federal levels. Open space easements donated before the enactment of § 170(h), or to land trusts with lenient (or nonexistent) easement selection criteria, may not satisfy the "open space" conservation purposes test under § 170(h). In addition, as local comprehensive plans are revised to reflect changing land use patterns and demographics, some open space easements that once qualified for a deduction under § 170(h) as preserving property "pursuant to a clearly delineated governmental policy" may no longer qualify. The charitable purpose of such an easement should nonetheless be found to be "possible or practicable," if the easement satisfies one of the other conservation purposes tests under § 170(h) or there is continuing public support for the enforcement of the easement. In assessing the "impossibility or impracticability" of the charitable purpose of such easements, the court should be mindful of the fact that some localities might rezone an area as a growth area in an effort to extinguish easements encumbering land in the area and permit development, even though the easements continue to provide significant benefits to the public.

[289] *See* Treas. Reg. § 1.170A-14(d)(3) (2004). *See also id.* § 1.170A-14(f), Example (2) (providing that the donation of an easement prohibiting further development on a farm that is contiguous with, and will provide a compatible buffer to, a nature preserve qualifies for a deduction under § 170(h)).

charismatic meso- and minifauna that typically is found in suburban areas, such as deer, common songbirds, and squirrels, arguably should not be viewed as satisfying the "habitat or ecosystems" conservation purpose under § 170(h).[290]

Having determined that the Aubry Farm easement does not satisfy the applicable conservation purposes tests under § 170(h), the court should assess whether there is continuing public support for the enforcement of the easement *for its specified conservation purposes*.[291] Both the Land Trust and the state attorney general have recommended that the easement be extinguished and the proceeds from the sale of the unencumbered land be used to protect land in the Rural Historic District. Whether some other land trust or a government agency would be willing to accept and enforce the easement for its stated conservation purposes is a question of fact. For a number of reasons, however, it appears unlikely that government agencies or land trusts committed to protecting land with rural, agricultural, historic, open space, and wildlife habitat characteristics in County *X* would be willing to accept the easement. First, the farm is no longer located in a rural, agricultural area of the county and, instead, is located in a designated growth area.[292] Second, the easement encumbers an isolated parcel of undeveloped land, and many agencies and organizations accepting easements are focusing their limited resources on protecting entire landscapes or ecosystems.[293] Third, because the farm is surrounded by developed land, it is increasingly subject to trespass and vandalism, and the easement has become burdensome to monitor and enforce. Fourth, the public benefits flowing from the easement appear to be minimal, and continuing to enforce

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[290] *See* S. REP. NO. 96-1007, at 9–11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6736, 6744–46 (stating that "provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas" and that the committee intended that contributions for the "preservation of habitat" conservation purpose protect and preserve "significant" natural habitats and ecosystems). If Aubry Farm provided habitat for a rare, threatened, or endangered species, or acted as a buffer for an adjoining natural area, the easement would satisfy the "wildlife habitat" conservation purposes test of § 170(h), and should continue to be enforced for that purpose.

[291] *See supra* note 282 and accompanying text (explaining that continuing to enforce the easement for a new conservation purpose, such as for use as a public park, would constitute a change in the charitable purpose of the easement, and should be permissible only through the application of the full three-step *cy pres* process).

[292] At least one state easement enabling statute requires that the grant of a conservation easement be consistent with local land use plans. *See* VA. CODE ANN. § 10.1–1010.E (1998) ("No conservation easement shall be valid and enforceable unless the limitations or obligations created thereby conform in all respects to the comprehensive plan at the time the easement is granted for the area in which the real property is located."). *See also* MONT. CODE ANN. §76-6-206 (2004) (providing that "[i]n order to minimize conflict with local comprehensive planning, all conservation easements shall be subject to review prior to recording by the appropriate local planning authority . . ." although the planning authority's comments are not binding on the grantor or grantee and are merely "advisory in nature"). In Massachusetts, a designated public official must approve conservation easements. *See* MASS. GEN. LAWS ch. 184, § 32 (Law. Co-op. 2005).

[293] *See* McLaughlin, *supra* note 3, at 109 (discussing the increasing focus of land trusts on protecting entire landscapes).

the easement may actually result in a net detriment to the public by jeopardizing the protection of the remaining rural, agricultural, and historically important area of County *X* and contributing to (or perhaps causing) the Lyme disease epidemic in the county.

The assumption that no government agency or land trust would accept the Aubry Farm easement for the conservation purposes stated therein at the time of the *cy pres* proceeding is also tacitly supported by the position taken by the conservation organizations who signed the *amicus brief.* Those organizations are not offering to assume the obligation of monitoring and enforcing the easement for the conservation purposes stated therein. Instead, they are recommending that the Foundation convey the farm subject to the easement to County *X* or the eastern state for use as a public park, and, presumably, that the Land Trust continue to monitor and enforce the easement.[294]

Finally, with the exception of a few self-interested residents who own homes adjacent to or near Aubry Farm, there does not appear to be any public support for the continued enforcement of the easement for the conservation purposes specified therein.

Given that (i) the Aubry Farm easement would not satisfy the applicable conservation purposes test or tests under § 170(h) if offered for donation for the conservation purposes specified therein at the time of the *cy pres* proceeding, (ii) there is minimal public support for the continued enforcement of the easement for the conservation purposes specified therein (and that minimal support comes from a few self-interested adjacent landowners), and (iii) the court is presented with no other evidence that continued enforcement of the easement for the conservation purposes specified therein would provide benefits to the public (and, indeed, the evidence indicates that continuing to enforce the easement may actually result in a net detriment to the public by jeopardizing the protection of the remaining rural, agricultural, and historically important area of County *X* and contributing to, or perhaps causing, the Lyme disease epidemic in the county), a court might well deem the charitable purpose of the easement to have become "impossible or impracticable" and proceed to the next step in the *cy pres* process—determining whether Weston had a general charitable intent in donating the easement.

b. General vs. Specific Charitable Intent

For the following reasons it is very likely that a court would find that Weston had a general charitable intent in donating the Aubry Farm ease-

[294] *See supra* note 282 and accompanying text (explaining that continuing to enforce the easement for a new conservation purpose, such as for use as a public park, would constitute a change in the charitable purpose of the easement and should be permissible only through the application of the full three-step *cy pres* process).

ment: (i) the charitable purpose of the easement became "impossible or impracticable" after the passage of time (twenty-nine years), and courts are loath to allow ongoing charitable gifts or trusts to fail altogether, (ii) the easement does not contain a provision for a gift over or reverter in the event its purpose becomes impossible or impracticable, (iii) the stated mission of Weston's Foundation indicates that she had a general interest in historic and environmental preservation in the eastern state, and (iv) Weston was a well-known philanthropist and left the bulk of her assets at her death to the Foundation.

c. Formulating a Substitute Plan

If the court determines that the charitable purpose of the Aubry Farm easement has become "impossible or impracticable," and that Weston had a general charitable intent, the court would 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 thereto) for a charitable purpose "as near as possible" to that specified by Weston.

The fact that Aubry Farm is the original homesite of Weston's paternal ancestors, the location of the family graveyard on the farm, and Weston's desire to protect the farm from encroaching development through the donation of the easement all indicate that Weston had a strong personal attachment to the farm and a desire to see that particular property preserved. On the other hand, the terms of the easement state that Weston donated the easement to conserve and forever maintain the rural, agricultural, historic, open space, and wildlife habitat character of the eighty-one-acre farm *for the benefit of the citizens of County* X *and the eastern state*, and her charitable giving history indicates that she had a more general interest in environmental and historic preservation in the eastern state. Accordingly Weston also apparently intended to benefit the citizens of County *X* and the eastern state by contributing to the preservation of land in that county and state with rural, agricultural, historic, open space and wildlife habitat characteristics, and, presumably, the rural, agricultural lifestyle that such land supports.

Mindful that courts are increasingly choosing substitute charitable purposes that are not necessarily "as near as possible" to the donor's original purpose, but are reasonably similar or close thereto or fall within the donors' general charitable purpose (particularly if one substitute charitable purpose has distinctly greater usefulness than others that have been identified), and that the court's choice of a substitute purpose will be largely dictated by what is feasible, the court would turn to an assessment of the possible substitute plans for the use of the Aubry Farm easement: (i) the continued enforcement of the easement, but for a conservation purpose different from those specified by Weston—namely, the preservation of the farm for use as a public park or some other public recreational or educational area, or (ii) the

extinguishment of the easement, the sale of the unencumbered land, and the Land Trust's use of the proceeds attributable to the easement to accomplish Weston's specified conservation purposes in another location.[295]

i. Enforcement of Easement for a New Conservation Purpose

The court would likely first explore the option of continuing to enforce the easement for the purpose of preserving the land as a public park or some other public recreational or educational area because of: (i) Weston's strong personal attachment to Aubry Farm and desire to see that particular property preserved, and (ii) a concern that a lack of deference to Weston's attachment to the farm and desire to see it preserved might well chill future easement donations. The court could very reasonably determine that Weston's "central" or "paramount" intention in donating the easement was to preserve the Aubry Farm property from development for the benefit of the citizens of County *X* and the eastern state, and that the precise nature of the charitable activity conducted on the site was of secondary importance. Weston's obvious interest in memorializing the Aubry family and its history (as evidenced by her direction that the Aubry family home in the western state be transformed into an historical house museum at her death) lends credence to the idea that, had she anticipated that the specific conservation purposes of the Aubry Farm easement would become "impossible or impracticable," she would have preferred the continued preservation of the land as a public park memorializing the Aubry family's presence in the eastern state to extinguishment of the easement, sale of the unencumbered land, and the Land Trust's use of the proceeds attributable to the easement to accomplish her specified conservation purposes in another location. Accordingly, the court could authorize the modification of the easement to accommodate the use of the land as a public park, to provide for the permanent protection of the family graveyard, and to provide for the placement of an appropriate tablet or monument memorializing the Aubry family within the bounds of the park.[296]

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[295] In formulating a substitute plan, the court likely would consider the suggestions of all interested parties, including the Land Trust, the state attorney general, the Foundation, members and representatives of the general public, other conservation organizations, and the Weston heirs. *See supra* note 219 and accompanying text. Given the complexity involved in formulating a substitute plan for the use of a failed easement (or the value attributable thereto), the court might refer the matter to a master, referee, or auditor. *See supra* note 222 and accompanying text.

[296] In determining the modifications that would be made to the easement to permit the use of the land as a public park, the court would likely consider the original conservation purposes for which Weston donated the easement—to conserve and forever maintain the rural, agricultural, historic, open space, and wildlife habitat character of the land. *See, e.g.*, *In re* Thorne, 102 N.Y.S.2d 386 (N.Y. Sur. Ct. 1951) (refusing to apply the doctrine of *cy pres* to permit a public park to be used for "picnicking, fishing, and general park purposes" when the will devising the land to the city for use as a public park stated that it was "*not* to be used as a *recreational park* . . . for *picnics* or *bathing*, but simply for *driving* [in horse-

The "Aubry Park" plan is not, however, without its potential problems. The Foundation is unlikely to be willing to assume responsibility for the ongoing management of a public park, its board of trustees may not deem a gift of the land subject to the easement to County *X* or the eastern state to be consistent with its charitable mission, and County *X* and the eastern state may not have the funds with which to purchase the land subject to the easement from the Foundation for its fair market value ($700,000). Moreover, the county and the state may be reluctant to assume responsibility for the ongoing management of the public park for a number of reasons, including: the existence of an adequate number of public parks in other, perhaps more suitable areas of the county or state; limited county or state funding for public park maintenance purposes; security and liability concerns; the pressing need, expressed by the County Planning Commission, for infill development; and the potentially high costs associated with the protection and maintenance of the family graveyard and the management of the deer herd.[297] Courts have, however, been very creative in crafting substitute plans for the use of charitable assets, and it is possible that the court would modify the easement to permit the sale of a portion of the land for residential or commercial development to create an endowment for the operation and maintenance of "Aubry Park."[298]

ii. Extinguishment of the Easement

If it were determined that the use of Aubry Farm as a public park would not be feasible (because, for example, no entity is willing to undertake the financial and other responsibilities associated with the operation and management of the land as a public park), the court could determine that Weston's "paramount" purpose in donating the easement was to benefit the citizens of County *X* and the eastern state by contributing to the preservation of land within the county that has rural, agricultural, historic, open space,

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drawn vehicles] and *walking*" (internal quotations omitted)).

[297] For similar reasons the Land Trust and other conservation groups operating in the area also may be unwilling to purchase or accept title to the land and thereby assume responsibility for the ongoing operation and maintenance of the land as a public park. Moreover, even if the land subject to the easement is conveyed to County *X* or the eastern state for use as a public park, the Land Trust and the other conservation organizations operating in the area may be disinclined to accept responsibility for monitoring and enforcing the easement as modified because of the liability issues associated with easements that encumber land to which the public is granted access. *See* Bill Silberstein & Ellis Rosenzweig, *Minimizing Liability for Public Access on Private Lands*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 2002, at 24 (describing the added risks and responsibilities associated with conservation easements encumbering land to which the public is granted access).

[298] *See* Report of Committee on Charitable Trusts and Foundations, *supra* note 40, at 393–94 ("[T]he courts have shown considerable ingenuity in the approaches they have taken to framing appropriate schemes, and this comment applies to the methodology applied in reaching solutions as well as to the solutions themselves."). The court should, of course, choose a location for the lot or lots to be sold that would have a minimal adverse impact on the use of the remaining land as a public park.

and wildlife habitat characteristics, and that the precise location of that charitable activity was of secondary importance. In this situation, the court could reasonably infer that Weston would have wanted her specified charitable activity to be conducted somewhere in the county rather than not at all (the alternative being a finding of specific rather than general charitable intent, failure of the easement, and distribution of the easement or the value attributable thereto to Weston's residuary beneficiary or intestate heirs).[299] To carry out Weston's "paramount" charitable purpose, the court could authorize the extinguishment of the easement, the sale of the unencumbered land, and the Land Trust's use of the proceeds attributable to the easement to protect other land in County *X* that has rural, agricultural, historic, open space, and wildlife habitat characteristics—namely land located in the Rural Historic District.[300]

(1) *Appropriate Division of Proceeds.* For the reasons discussed in Part III.B.2.c.ii(2), *supra*, the court should employ the "after and before" method to establish the baseline values for the interests of the Land Trust and the Foundation in the land. Pursuant to the "after and before" method, the baseline value for the Land Trust's interest would be $6.3 million, and the baseline value for the Foundation's interest would be $700,000. For the policy reasons discussed in Part III.B.2.c.ii(2), *supra*, in the absence of countervailing equitable considerations, it would be appropriate for the court to mandate a division of proceeds according to those baseline values. In this situation, however, a number of factors weigh in favor of allocating to the Foundation a greater portion of the proceeds from the sale of the unencumbered land than is dictated under the "after and before" method. Those factors are: the owner of the land encumbered by the easement is a charitable foundation established by the donor of the easement (rather than a subsequent purchaser of the land who paid a price that reflected the diminution in the value of the land as a result of the existence of the easement); allocating a portion of the proceeds attributable to the easement to the Foundation would not confer an undue windfall benefit on a private individual at the expense of the public because the Foundation is a charitable organization and is obligated to use its assets

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[299] *See supra* notes 226–228 and accompanying text (noting that, in *cy pres* "gift of homestead" cases where the continued use of the homestead for a related charitable purpose is either impossible or not feasible, the courts authorize the sale of the homestead and the use of the proceeds therefrom to accomplish the donor's specified charitable purpose in some other location—even if the evidence indicates that the donor had a particularly strong personal attachment to the homestead and a desire to see it preserved—to avoid the failure of the charitable gift or trust).

[300] *See supra* note 229 and accompanying text (noting that, in "gift of homestead" cases, if the evidence indicates that the donor intended to confer charitable benefits on the residents of a particular city, town, or other district, the court will usually direct that the proceeds from the sale of the homestead be applied to charitable purposes somewhere in that district).

for charitable purposes; and, given that Weston left the bulk of her large estate to the Foundation, it would not be unreasonable to assume that had she foreseen the extinguishment of the easement and the sale of the unencumbered land, she would have wished that some of the $6.3 million of value attributable to the easement be allocated to the Foundation.[301]

Direct court supervision of the extinguishment of the easement, the sale of the unencumbered land, and the division of the proceeds between the Land Trust and the Foundation would prevent inefficient holdout behavior. Once the court has mandated the division of proceeds between the parties in the *cy pres* proceeding, it would be irrational for the Foundation to "hold out" for a greater portion of the proceeds because the Land Trust would have no power to deviate from the court-mandated division. Faced with the choice of receiving a certain amount on the sale of the unencumbered land ($700,000), or retaining ownership of the land subject to the easement, the Foundation is likely to agree to the sale. The Foundation, as a charitable organization, has an obligation to administer its assets for the benefit of the public. Continuing to hold property that has produced a net loss for many years (because the Foundation is required to pay property taxes and maintenance expenses with respect to the unproductive land), and is becoming increasingly expensive to maintain, would arguably be inconsistent with the Foundation's fiduciary duties to the public, particularly given the futility of holding out for a greater portion of the proceeds.

(2) *Appropriate Use of Proceeds. Rural historic district acquisitions.* Having determined that Weston's "paramount" purpose in donating the easement was to benefit the citizens of County *X* and the eastern state by contributing to the preservation of land within County *X* that has rural, agricultural, historic, open space, and wildlife habitat characteristics, the court would likely agree to a detailed strategic plan that requires the Land Trust to use its portion of the proceeds from the sale of the unencumbered land to protect land in the Rural Historic District. Such a plan should entail the protection of multiple, contiguous parcels of land so as to ensure that the infrastructure necessary to support agricultural practices will remain in place in the district, and the rural, agricultural lifestyle Weston presumably sought to protect will be perpetuated. The court might also mandate that land protected with proceeds attributable to the easement be posted with a sign indicating that it was protected, in whole or in part, through Weston's generosity and in memory of the Aubry Family.

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[301] The amounts allocated to the Land Trust and the Foundation by the court should be reduced proportionately by transaction costs. Also, the Aubry Farm easement was donated in 1976—ten years before the Treasury Regulations interpreting § 170(h) were promulgated. Accordingly, the easement does not contain the provisions addressing extinguishment and the division of proceeds required by those regulations. *See supra* note 203 and accompanying text (discussing those provisions).

The evidence indicates that, as the area surrounding Aubry Farm has been developed for commercial and residential use, the family graveyard has been subject to repeated vandalism. The sale of the unencumbered land in the context of the *cy pres* proceeding and its consequent development would likely increase the incidence of such desecrations. Accordingly, the court might consider authorizing the Land Trust to use some of the proceeds attributable to the easement to purchase fee title to land in the Rural Historic District to which the family graveyard can be relocated.

Authorizing the relocation of a graveyard in the context of a *cy pres* proceeding is not unprecedented,[302] and the relocation of old graveyards is becoming increasingly commonplace as development surrounding such sites makes their use as graveyards unsuitable.[303] To ensure that the graveyard serves as a permanent living memorial to the Aubry family, the court could mandate that the graveyard be suitably landscaped, that a suitable monument be erected in the graveyard in memory of the Aubry family, and that the Land Trust set aside a portion of the proceeds attributable to the easement as an endowment fund for the perpetual care and maintenance of the graveyard.[304]

Stewardship and operating funds. Setting aside sufficient funds with which to steward land or easements acquired by the Land Trust with the proceeds attributable to the Aubry Farm easement would appear to be consistent with Weston's "paramount" purpose—to benefit the citizens of County *X* and the eastern state by contributing to the preservation of land within County *X* that has rural, agricultural, historic, open space, and wildlife habitat characteristics—because, without proper stewardship, the long-term preservation of the conservation characteristics of the targeted lands would be seriously jeopardized. Accordingly, the court should authorize the Land Trust to use a portion of the proceeds attributable to the easement to endow a stewardship fund for any land or easements acquired with such proceeds.

Authorizing the use of some of the proceeds attributable to the easement to steward land or easements encumbering land in other areas of

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[302] *See* Slade v. Gammill, 289 S.W.2d 176 (Ark. 1956) (involving trustees of a charitable trust, established to maintain a small cemetery, who conveyed a portion of the cemetery to a church in exchange for the church's agreement to, *inter alia*, move all bodies interred in the conveyed portion of the cemetery to the other portion of the cemetery, erect a suitable monument in the cemetery in memory of the settlor, and provide for the continuous care of the cemetery; the court approved the sale by the trustees in a *cy pres* proceeding, noting that the trustee's solution to the lack of funds for the maintenance of the cemetery was "very fine and sensible" and carried out the purpose of the settlor—the permanent maintenance of the burial places of those whose bodies are interred in the cemetery).

[303] *See* Marianna Macri, Associated Press, *Church relocating to avoid sprawl; takes deceased along*, PITTSBURGH POST-GAZETTE, July 26, 2004, at B4 (describing the relocation of a cemetery by a small church in Montgomeryville, Pennsylvania, due to sprawl development, and noting that "[c]emetery moves are relatively commonplace, especially in areas undergoing rapid development").

[304] *See Slade*, 289 S.W.2d at 176.

County X[305] or in different counties, or to fund the day-to-day operations of the Land Trust is likely to be far more controversial. Such use of the proceeds would not appear to be consistent with Weston's paramount purpose in donating the easement and, thus, might discourage future easement donors. Such use of the proceeds might also cause the Land Trust to neglect its responsibility to raise general stewardship and operating funds.

Nevertheless, because of the difficulties nonprofits face in raising stewardship and operating funds, and the fact that proper stewardship of land and easements already held by the Land Trust may provide as much public benefit as newly acquired land and easements, the court should consider allocating at least some portion of the proceeds attributable to the easement to the Land Trust's general stewardship and operating funds. Given that the proceeds allocated to the Land Trust are likely to be significant, the court should also consider that the Land Trust may need increased operating funds to develop the institutional capacity to appropriately select, monitor, and enforce the additional land and easements to be acquired.

IV. Conclusion

This Article posits that the current state of confusion and uncertainty regarding whether, when, and how ostensibly perpetual conservation easements may be modified or terminated should be resolved in favor of treating conservation easements donated to government agencies or charitable organizations as restricted charitable gifts or charitable trusts, and subjecting the holders of such easements to the equitable rules governing a donee's use and disposition of charitable assets. Those equitable rules are recommended as the framework within which to make conservation easement modification and termination decisions 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) 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.

If the doctrine of *cy pres* is applied to conservation easements as recommended in this Article, considerable deference would be accorded to the right of easement donors to control the use and disposition of their property. Under the proposed standard of "impossibility or impracticability," the donor of a conservation easement would be permitted to exercise dead hand control over the use of the encumbered land as long as such prescribed use continues to provide some generally agreed-upon, threshold level of benefit to the public—and not just until the encumbered land and the value

[305] Recall that the Rural Historic District is the only remaining area of the county that contains land with characteristics similar to those Weston sought to protect with her easement.

attributable to the easement could, in the opinion of some (such as the holder of the easement or the state attorney general), be devoted to more desirable or efficient economic and conservation uses. In the rare circumstance where the charitable purpose of a conservation easement is deemed to have become "impossible or impracticable," considerable deference would again be accorded to the donor's intent in formulating a substitute plan for the use of the easement or the value attributable thereto.

Applying the doctrine of *cy pres* to conservation easements as recommended in this Article would also take into account society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public. Interpreting "impossibility or impracticability" to allow the modification or termination of easements that fail to satisfy a generally agreed-upon, threshold test of public benefit, where that test is designed to evolve as society's conservation priorities evolve, would give society the flexibility 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. In addition, in the rare circumstance where an easement is extinguished and the unencumbered land sold, the division of proceeds between the owner of the land and the holder of the easement as recommended herein would ensure that the public is appropriately compensated for the value of the property interest embodied in the easement. Such division of proceeds would also ensure that the owner of the land does not receive an undue windfall benefit upon the extinguishment of the easement, which could have the unfortunate effect of inducing owners of easement-encumbered land (as well as speculators) to try their hand at "breaking" easements.

Although there is likely to be considerable concern that the extinguishment of conservation easements pursuant to the doctrine of *cy pres* will discourage future easement donations, that concern is arguably misplaced for a number of reasons. First, the extinguishment of easements pursuant to the doctrine of *cy pres* as suggested in this Article should be relatively rare—occurring only when an easement fails to meet a generally agreed-upon, threshold test of public benefit.

Second, greater candor to easement donors regarding the *cy pres* bargain they strike with the public upon the donation of their easements, coupled with the application of the doctrine of *cy pres* in a manner that yields predictable results, might actually inspire easement donors to take measures to ensure that their easements will continue to provide benefits to the public over the long term. Greater candor to easement donors regarding the *cy pres* bargain would also eliminate the justifiable surprise and indignation of easement donors (or their heirs) when government agencies and land trusts, in fulfillment of their fiduciary obligations to the public, seek or consent to the modification or extinguishment of easements that no longer provide sufficient levels of benefit to the public.

Finally, the extinguishment of at least some perpetual easements is inevitable, and in the absence of a rational framework for decision-making that appropriately balances the interests of the donor and those of the public, some easements that are providing significant levels of public benefit may be extinguished; others that are providing little, no, or even negative public benefit may continue to be enforced; and prospective easement donors (as well as the courts, legislators, and the public) may begin to take a dim view of the use of the conservation easement as a land protection tool. 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.