

RETHINKING THE PERPETUAL NATURE OF CONSERVATION EASEMENTS

Nancy A. McLaughlin*

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

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

—John Stuart Mill¹

* Professor of Law, University of Utah S.J. Quinney College of Law; J.D., University of Virginia. The author would like to thank the following individuals for their helpful comments and suggestions: James McLaughlin, Manuel Utset, Jeff Pidot, Jym St. Pierre, Federico Cheever, Darby Bradley, John Bernstein, Andrew Dana, Paul Edmondson, William Hutton, Stephen Small, and Gerald Korngold. While the foregoing individuals were extremely helpful and generous with their time, some disagree with the conclusions reached herein, and the views expressed herein are the author’s alone.

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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. APPLICATION OF CHARITABLE TRUST RULES TO DONATED EASEMENTS

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

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

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

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

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

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

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

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

²⁸ See *id.*

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

³⁰ See, e.g., *Lewis v. Bd. of County Comm'rs*, 128 N.E.2d 818 (Ohio Ct. App. 1954) (holding that devise of testator's residence and residue of estate to county “for the purpose of being kept, maintained and operated as a home for old ladies” created a charitable trust); *Town of Cody v. Buffalo Bill Memorial Ass'n*, 196 P.2d 369 (Wyo. 1948) (holding that charitable trust rules applied to a gift of land to a charitable association to be used to memorialize the memory of William F. Cody, commonly known as Buffalo Bill, and an attempted transfer of the land to the Town of Cody without authorization of a court of equity was void); *City of Salem v. Attorney Gen.*, 183 N.E.2d 859 (Mass. 1962) (holding that a gift of land to city to be used “forever as public grounds” established a trust restricting the use of the land to public park purposes, and the city could not use three acres of the land for a public school building); *Am. Inst. of Architects v. Attorney Gen.*, 127 N.E.2d 161 (Mass. 1955) (stating that a gift of the residue of a testatrix's estate to the American Institute of Architects to maintain “scholarships for advanced study by deserving architects,

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

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

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

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

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

³³ See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 348 (1959) (“A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.”); SCOTT & FRATCHER, *supra* note 25, § 348, at 8 (“The trustees of a charitable trust are under a duty ‘to deal with the property for a charitable purpose.’ In the case of a private trust it is the duty of the trustees to deal with the property for the benefit of the designated beneficiary or beneficiaries In the case of a charitable trust, property is devoted to the accomplishment of purposes that are beneficial or may be supposed to be beneficial to the community.”).

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

or trustee of a charitable trust effectively serves two masters: (i) the donor of the gift or trust assets and (ii) the public, as the beneficiary of such gift or trust.³⁵

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

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

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

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

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

³⁷ See *id.* § 391, at 360–61.

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

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

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

tive deviation and *cy pres*. See SCOTT & FRATCHER, *supra* note 25, § 399, at 479 (“The *cy pres* doctrine is applicable only to dispositions for charitable purposes . . .”); FREMONT-SMITH, *supra* note 26, at 48, 173 (noting that while some commentators have questioned the importance of the state law definition of a “charitable” purpose in light of the overriding consideration of tax exemption and consequent deference to the definition of charitable purposes in the Internal Revenue Code, the state law definition of a charitable purpose is probably of greatest continuing importance in connection with the application of the doctrines of administrative deviation and *cy pres*). State courts and legislators have specifically declined to frame a precise definition of the term “charitable” because ideas regarding social benefit and public good change from time to time, and the concept of charity must be able to adjust and expand to take into account the changing needs of society, new discoveries, and the varying conditions, characters, and needs of different communities. See SCOTT & FRATCHER, *supra* note 25, § 368, at 133–34. See also, e.g., BOGERT & BOGERT, *supra* note 32, § 369, at 82, 83 (noting that it is inadvisable to bind courts to any set formula, as they need latitude to include new purposes as society develops and public opinion changes). Thus, while the courts have held that certain purposes are clearly charitable—namely the relief of poverty, the advancement of knowledge or education, the advancement of religion, the promotion of health, and governmental or municipal purposes (such as the erection of public buildings, bridges, and the like)—there also exists a very expansive general or “catchall” category of charitable purposes, into which falls a vast number of miscellaneous purposes that have been deemed beneficial to the community. See SCOTT & FRATCHER, *supra* note 25, § 368, at 130; RESTATEMENT (THIRD) OF TRUSTS § 28(f) (2001) [hereinafter RESTATEMENT OF TRUSTS]. The donation of conservation easements, which is facilitated in forty-nine states and the District of Columbia through the enactment of easement enabling legislation and heavily subsidized through federal, state, and local tax incentives, is precisely the type of new and unanticipated “charitable” activity that should be deemed to fall within the broad reach of that term. In addition, the fact that an easement donor may be primarily or solely motivated by selfish factors (such as the desire to create a permanent monument to himself or the desire to convert some of the equity in his land to cash in the form of tax savings) should be immaterial to the question of whether the donation is considered to be charitable. All the courts should (and generally do) ask is whether the net result of the gift is to advance the public interest in some substantial way. See BOGERT & BOGERT, *supra* note 32, § 366, at 61. See also SCOTT & FRATCHER, *supra* note 25, § 348, at 6 (“It is the purpose to which the property is to be devoted that determines whether the trust is charitable, not the motives of the testator in giving it.”).

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

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

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

⁴¹ See *supra* note 37 and accompanying text.

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

⁴³ See *infra* note 80 and accompanying text.

⁴⁴ See *infra* Part II.A.2.

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

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

1. *When Is a Charitable Gift Restricted?*

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

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

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

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

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

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

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

⁴⁹ *Id.* at 697-98.

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

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

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

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

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

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

⁵³ *Id.* at 914.

⁵⁴ *Id.*

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

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

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

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

⁵⁶ *See id.* at 915.

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

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.* at 917.

⁶¹ *See id.* at 918-19.

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

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

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

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

⁶² See *id.* at 919.

⁶³ See *id.* at 917–19.

⁶⁴ See *id.*

⁶⁵ See *id.* at 921.

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

⁶⁷ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁶ See *supra* note 23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁵ UCEA, *supra* note 15, § 3, cmt.

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

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

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

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

⁸⁸ See, e.g., MASS. GEN. LAWS ch. 184, § 32 (Law. Co-op. 2005); N.J. STAT. ANN. § 13:8B-5 (West 2005). See also VA. CODE ANN. § 10.1-1704 (Michie 2004) (providing that land encumbered by certain "open space" conservation easements held by public bodies may not be "converted or diverted" from open space land use unless, inter alia, the conversion or diversion is determined by the public body to be "essential to the orderly development and growth of the locality.").

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

⁹⁰ See, e.g., *supra* note 30 and cases cited therein; *infra* note 201 and cases cited therein. See also Kevin A. Bowman, *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. CIN. L. REV. 595, 608 (1997) (noting that "[m]any courts, following a modern trend, have viewed a dedication of land to a municipality for park purposes as an expression of intent to create a [charitable] trust [where] the municipality act[s] as trustee . . . and the general public as beneficiary," and that other courts have applied charitable trust principles to accomplish the same ends without directly finding that a charitable trust existed because trust principles provide the best means of enforcing the intent of the grantor).

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

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

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

entrusted with charitable assets to help prevent negligence, maladministration, and diversion of charitable funds to purposes contrary to those specified by the donor). Applying the property law doctrines of changed conditions, frustration of purpose, or relative hardship in their current form to modify or terminate conservation easements conveyed to government agencies and charitable organizations would be inappropriate because those doctrines were developed in the context of private transactions entered into by private parties for private benefit and, thus, would not adequately protect the public's interest or investment in conservation easements. *See, e.g.,* Korngold, *supra* note 11, at 484–89 (arguing that the doctrine of changed conditions might not allow courts to terminate conservation easements even if it were in the public interest, and that the doctrine of relative hardship, which focuses on the conflict between individual landowners, is too narrow to encompass the public interest). *See* RESTATEMENT OF SERVICITUDES, *supra* note 12, § 7.11, cmts. a, b (recommending that the modification or termination of conservation easements conveyed to government agencies and charitable organizations be governed by a special set of rules based, in part, on the doctrine of *cy pres*, and noting that these servitudes should be afforded more stringent protection than privately held conservation servitudes because of the public interest involved). Accordingly, if the property law doctrines of changed conditions, frustration of purpose, or relative hardship are invoked to modify or terminate conservation easements conveyed to government agencies and charitable organizations, they should be applied in a manner consistent with the equitable rules governing a donee's use and disposition of charitable assets.

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

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

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

C. In Re Preservation Alliance for Greater Philadelphia

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

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

⁹⁴ See *supra* note 71 and accompanying text.

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

Preservation Alliance for Greater Philadelphia involved a façade easement encumbering an historic building located in Philadelphia's Germantown neighborhood (known as "Mayfair House"). The easement had been donated to the Preservation Alliance for Greater Philadelphia (the "Preservation Alliance") in 1981. At the time of the donation of the easement Mayfair House was occupied and in good condition, but over the course of time the building became dilapidated and eventually was determined to have no economic use. In 1999, the Preservation Alliance petitioned the court requesting that the court apply the doctrine of *cy pres* to authorize: (i) extinguishment of the façade easement and demolition of Mayfair House, and (ii) replacement of the easement with a Declaration of Continuing and Additional Covenants designed to permanently preserve the site of the house as park land and prevent construction on the site of any buildings incompatible with the historic architectural character of Germantown.⁹⁶ Both the attorney general for Pennsylvania and the attorney for the City of Philadelphia were notified of and consented to the Preservation Alliance's petition; as did at least one neighborhood civic group.⁹⁷ The court determined that due to changed circumstances there was no reasonable contemplation of restoring Mayfair House to any proper use; the purpose of the façade easement, insofar as it attempted to preserve Mayfair House, had been frustrated; the charitable intent of the donor had been to preserve the historic fabric of the Germantown neighborhood in addition to the specific historic structure; and the donor's intent would be best served by authorizing the extinguishment and replacement of the façade easement as requested by the Preservation Alliance.⁹⁸

D. *The Myrtle Grove Controversy*

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

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

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

⁹⁷ *See id.* at 26, 4-5.

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

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

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

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

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

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

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

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

¹⁰² *Id.* at 2.

velopment and use in the deed include: (i) a prohibition on subdivision of the land, except for one tract of not less than five acres that may be selected by a descendant of Donoho for the erection and maintenance of a single private dwelling (referred to hereinafter as the "Heirs' Lot"), and (ii) a prohibition on the construction or maintenance of buildings or structures on the land other than: the main dwelling (the early eighteenth-century farmhouse) and outbuildings adjacent thereto; the historic law office that was located on the property at the time of the donation of the easement; and outbuildings commonly or appropriately incidental to a farming operation, including a caretaker's house.¹⁰³

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

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

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

¹⁰³ *Id.* at 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹² See Consent Judgment, *supra* note 111.

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

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

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

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

This was the position asserted by the attorney general for the State of Maryland. In the Memorandum of Law in Support of Attorney General's Motion for Summary Judgment, the attorney general argued that while, in general, an easement is an agreement that may be modified with the consent of the holder of the easement and the owner of the land, "Myrtle Grove is not a mere conservation agreement but a gift in perpetuity to a charitable corporation for the benefit of the people of Maryland" and "[a]s such, it is subject to a charitable trust."¹¹⁵ The attorney general acknowl-

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

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

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

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

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

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

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

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

¹¹⁸ *Id.* at 31.

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

E. Conclusion

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

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

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

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

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

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

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

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

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

A. *The Cy Pres Bargain*

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

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

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

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

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

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

scribing the bargain).

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

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

¹²⁸ See *id.*

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

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

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

B. Applying Cy Pres to a Donated Conservation Easement

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

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

1. Initiation of the Cy Pres Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *The Three-Step Cy Pres Process*

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

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

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

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

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

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

a. The “Impossibility or Impracticability” Standard

i. In General

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

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

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

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

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

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

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

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

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

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

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

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

ii. *In the Conservation Easement Context*

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

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

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

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

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

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

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

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

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

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

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

Id. at 961–63.

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

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

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

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

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

ment).

¹⁵⁷ See *supra* note 71 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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],
- (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
- (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-

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

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

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-

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

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

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

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

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

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 preserved¹⁹⁸ 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

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

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

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

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

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

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

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

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

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

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

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

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

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; Sattullo 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

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 anti-social 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 cotenants' 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 ("ow-ely") 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

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-

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

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 trust²⁶³ 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

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

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

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

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, non-profit 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

²⁷⁴ See Field Trial Magazine, *Lyme Disease*, at <http://www.fielddog.com/fm/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-

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

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

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

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

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

²⁹⁰ See S. REP. NO. 96-1007, at 9–11 (1980), reprinted in 1980 U.S.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

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,

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

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.

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 wild-life 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

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 X³⁰⁵ 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.

