

**INTERNAL REVENUE CODE SECTION 170(h):  
NATIONAL PERPETUITY STANDARDS FOR  
FEDERALLY SUBSIDIZED CONSERVATION  
EASEMENTS**

**PART 2: COMPARISON TO STATE LAW**

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*Editors' Synopsis: This article is the second of two companion articles. The first article, Internal Revenue Code section 170(h): National Standards for Federally Subsidized Conservation Easements, Part 1: The Standards, analyzes the requirements in Internal Revenue Code section 170(h) that a deductible conservation easement be "granted in perpetuity" and its conservation purpose be "protected in perpetuity." That Article concludes that section 170(h) and the Treasury Regulations should be interpreted as establishing uniform national perpetuity standards for tax-deductible conservation easement donations. This second article surveys the over one hundred statutes extant in the fifty states and the District of Columbia that authorize the creation or acquisition of conservation easements and explains the manner in which the federal perpetuity requirements should be satisfied in light of the many differences in state law. It also recommends that the IRS issue guidance regarding satisfaction of the federal perpetuity requirements to promote more efficient and equitable review, interpretation, and enforcement of federally subsidized easements.*

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## I. INTRODUCTION

This article is the second of two companion articles. The first article, *Internal Revenue Code section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part I: The Standards (National Perpetuity Standards)*, analyzes the requirements in Internal Revenue Code section 170(h) that a deductible conservation easement be “granted in perpetuity” and the conservation purpose of the contribution be “protected in perpetuity.”<sup>1</sup> That article concludes that section 170(h) and the Treasury Regulations interpreting that section (Treasury Regulations) should be interpreted as establishing uniform national perpetuity standards for tax-deductible conservation easement donations—standards that may be supplemented, but not supplanted, by conservation easement transfer, modification, and termination policies and procedures that may be crafted by states, localities, or individual holders.

This second article surveys the over one hundred statutes extant in the fifty states and the District of Columbia that authorize the creation or acquisition of conservation easements and explains the manner in which the federal perpetuity requirements should be satisfied in light of the many differences in state law. The state statutes (the “enabling statutes”) are listed in Appendices A and B.

To provide the necessary background, this article begins in Part II with a brief review of the federal perpetuity requirements and a discussion of the three cases addressing those requirements that were decided after the publication of *National Perpetuity Standards: Kaufman v. Commissioner, 1982 East v. Commissioner, and Commissioner v. Simmons*.<sup>2</sup>

Part III.A then sets the stage for the discussion of the state enabling statutes by examining the interaction between federal and state law. Parts III.B & C then discuss the varied state enabling statutes in light of the federal perpetuity requirements. Along the way, controversies that have arisen regarding the modification and termination of easements in a number of states are discussed because they shed significant light on the manner in which federal and state law should interact in this context.

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<sup>1</sup> Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part I: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010) [hereinafter *National Perpetuity Standards*].

<sup>2</sup> *Kaufman v. Comm’r*, 136 T.C. No. 13, 2011 WL 1235307 (U.S. Tax Ct., April 4, 2011); *1982 East v. Comm’r*, T.C. Memo 2011-84, 2011 WL 1398804 (U.S. Tax Ct., April 12, 2011); *Comm’r v. Simmons*, No. 10-1063, 2011 WL 2451012 (D.C. Cir. June 21, 2011).

Parts III.B & C conclude that to be eligible for the federal subsidy under section 170(h), conservation easement donors should be required to satisfy both federal tax law and any state enabling statute requirements. This should entail, among other things, inclusion in the conservation easement deed of provisions that comply with the various federal perpetuity requirements, enforcement of those provisions under state law, and no qualification of those provisions by separate agreement or otherwise. Any conditions or restrictions on the release, transfer, modification, or termination of easements imposed by the applicable state enabling statute should also apply and provide an added layer of protection of the public interest and investment in such gifts. And if state law precludes compliance with the federal requirements, easement donations in the state or pursuant to the particular enabling statute should not be eligible for the federal deduction.

Part IV explains that donors should not be permitted to invoke the “so remote as to be negligible” rule or the substantial compliance doctrine to validate deductions for the donation of conservation easements that can be transferred, released, modified, or terminated pursuant to state statutory processes and standards that differ from those prescribed under section 170(h) and the Treasury Regulations.

Part V explains that, had Congress considered it, Congress surely would have rejected the idea of subsidizing the acquisition of perpetual conservation easements that could be transferred, released, modified, or terminated pursuant to the provisions of the over one hundred state enabling statutes, which vary widely from jurisdiction to jurisdiction (and program to program) and are subject to legislative revision or repeal. To be efficient, effective, and equitable, the federal tax incentive program embodied in section 170(h) must employ uniform national standards that dictate not only the type of easements that are donated, but also the manner and circumstances under which such easements can be subsequently transferred or terminated.

Part VI recommends that the Internal Revenue Service (IRS) issue guidance regarding satisfaction of the federal perpetuity requirements and that such guidance take the form of safe harbor provisions to be included in conservation easement deeds and a statement of the agency’s expectation that such provisions will be enforceable under state law.

Part VII briefly concludes.

This article does not address the question of when it may be appropriate to use land protection tools that are more flexible and less permanent than perpetual conservation easements, or when it may be appropriate to promote the use of such tools through federal subsidies, whether in the form of closely supervised direct payments or indirect tax expenditures. That subject lends itself to a separate (equally lengthy) article. This article is confined to

demonstrating that section 170(h) was neither intended nor designed to subsidize the acquisition of conservation easements that are fungible or liquid assets in the hands of their holders, or that can be modified or terminated pursuant to the varied processes and procedures provided in the state enabling statutes.

## II. REVIEW OF FEDERAL TAX LAW REQUIREMENTS

The requirements in section 170(h) and the Treasury Regulations relating to the perpetual nature of a tax-deductible conservation easement are numerous, detailed, and interconnected. Accordingly a brief review of those requirements—and of three recent cases addressing those requirements<sup>3</sup>—is warranted. For a detailed discussion of the federal perpetuity requirements, the legislative history of such requirements, and the history of the deduction for conservation easement donations in general, see *National Perpetuity Standards*.

### A. Internal Revenue Code Section 170(h)

Pursuant to section 170(h), a landowner conveying a conservation easement, in whole or in part, as a charitable gift will be eligible for a federal charitable income tax deduction only if the easement is

- granted in perpetuity,
- to a qualified organization (defined as a governmental unit or a publicly-supported charity or satellite of such charity),
- exclusively for conservation purposes.<sup>4</sup>

The four qualifying conservation purposes are outdoor recreation or education of the public, habitat protection, the preservation of open space, and historic preservation.<sup>5</sup> The donation of a conservation easement will be treated as “exclusively for conservation purposes” only if the conservation purpose of the contribution is protected in perpetuity.<sup>6</sup> The “protected in perpetuity” requirement will be satisfied only if, in addition to satisfying various requirements set forth in the Treasury Regulations, surface mining on the subject land is prohibited or, in the case of an easement donated with respect to land where the mineral estate has been severed from the surface

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<sup>3</sup> See *supra* note 2.

<sup>4</sup> See I.R.C. § 170(h)(1), (2)(C), (3).

<sup>5</sup> See I.R.C. § 170(h)(4).

<sup>6</sup> See I.R.C. § 170(h)(5)(A).

estate, the probability of surface mining occurring on the land is so remote as to be negligible.<sup>7</sup>

## B. Treasury Regulations

The Treasury Regulations contain numerous detailed requirements intended to ensure that the conservation purpose of the contribution of a conservation easement will be protected in perpetuity.

### 1. Eligible Donee Requirement

The Treasury Regulations provide that, to be tax-deductible, a conservation easement must be donated to an “eligible donee,” which is defined as a government entity or charitable organization that has a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions.<sup>8</sup>

### 2. Restriction on Transfer Requirement

The Treasury Regulations provide that the instrument of conveyance must include a provision prohibiting the donee and its successors or assigns from transferring the easement, whether or not for consideration, unless the transfer is to another eligible donee that agrees that the conservation purposes the contribution was originally intended to advance will continue to be carried out.<sup>9</sup> As explained in *National Perpetuity Standards*, this “restriction on transfer” requirement should operate to prohibit the donee and its successors or assigns from, for example, selling, releasing, or otherwise transferring the easement back to the donor or to a subsequent owner of the land in exchange for cash or some other form of compensation.<sup>10</sup> The Treasury Regulations clarify, however, that this requirement will not be violated if the easement is extinguished and thereby transferred back to the donor or a subsequent owner of the land in accordance with the “extinguishment” and “division of proceeds” provisions of the Treasury Regulations.<sup>11</sup>

Although not at issue and, thus, not ruled on in the case, in *Kaufman v. Commissioner* the Tax Court noted that the restriction on transfer requirement suggests that a tax-deductible easement “must incorporate provisions

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<sup>7</sup> See I.R.C. § 170(h)(5)(B); *see also* Treas. Reg. § 1.170A-14(g)(4).

<sup>8</sup> See Treas. Reg. § 1.170A-14(c)(1).

<sup>9</sup> Treas. Reg. § 1.170A-14(c)(2).

<sup>10</sup> See *National Perpetuity Standards*, *supra* note 1, at 481-482 (discussing the legislative history of the restriction on transfer requirement); *id.* at 488-490 (discussing the Treasury Regulations’ restriction on transfer requirement).

<sup>11</sup> See Treas. Reg. § 1.170A-14(c)(2); *National Perpetuity Standards*, *supra* note 1, at 489-90.

requiring judicial extinguishment (and compensation) in all cases in which an unexpected change in surrounding conditions frustrates the conservation purposes of the restriction.”<sup>12</sup> Such an interpretation is warranted. The drafters of the Treasury Regulations recognized that the extinguishment of a conservation easement involves the *transfer* of the easement to the owner of the burdened land (who, after extinguishment, can engage in previously prohibited uses of the land), and they detailed the circumstances in which such a transfer would be permissible—in a judicial proceeding, upon a finding of impossibility or impracticality, and with a payment of at least a minimum percentage share of proceeds to the holder to be used to replace lost conservation values.<sup>13</sup> Specifying in the conservation easement deed that this is the only manner in which the holder may permissibly extinguish the easement and thereby transfer the restrictions to the owner of the burdened land would prevent any possible confusion on this point.<sup>14</sup>

### 3. *No Inconsistent Use Requirement*

The Treasury Regulations provide that the conservation easement must not permit uses that are destructive of any significant conservation interests (“inconsistent uses”), unless such uses are necessary for the protection of the conservation interests that are the subject of the contribution.<sup>15</sup>

### 4. *General Enforceable in Perpetuity Requirement*

The Treasury Regulations provide that the interest in the property retained by the donor must be subject to legally enforceable restrictions that will prevent any uses of the property that are inconsistent with the conservation purposes of the donation.<sup>16</sup>

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<sup>12</sup> Kaufman v. Comm’r, 136 T.C. No. 13, 2011 WL 1235307, at \*9 n.7 (U.S. Tax Ct., April 4, 2011).

<sup>13</sup> See *National Perpetuity Standards*, *supra* note 1, at 489-90; see also *infra* Part II.B.7 (discussing the “extinguishment” and “division of proceeds” requirements).

<sup>14</sup> In fact, including such an extinguishment provision in tax-deductible conservation easements has been a longstanding practice. See, e.g., CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 155, 160 (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION EASEMENT HANDBOOK] (providing a checklist of “Provisions Relating to IRS Requirements” and a model “extinguishment” provision for inclusion in conservation easement deeds).

<sup>15</sup> See Treas. Reg. § 1.170A-14(e)(2), (3).

<sup>16</sup> See Treas. Reg. § 1.170A-14(g)(1).

### 5. *Mortgage Subordination Requirement*

The Treasury Regulations provide that, if the donation is made after February 13, 1986, and the property to be encumbered by the conservation easement is subject to a mortgage, the lender must subordinate its rights in the property to the right of the qualified organization “to enforce the conservation purposes of the gift in perpetuity.”<sup>17</sup>

### 6. *Baseline Documentation, Donee Notice, Donee Access, and Donee Enforcement Requirements*

The Treasury Regulations provide that, if the donation is made after February 13, 1986, and the donor reserves rights, the exercise of which may impair the conservation interests associated with the property—as will typically be the case<sup>18</sup>—the donor must make available to the donee, before the donation, documentation sufficient to establish the condition of the property at the time of the gift (baseline documentation).<sup>19</sup> In addition, with respect to any donation involving such reserved rights: (i) the donor must agree to notify the donee, in writing, before exercising any reserved right, (ii) the terms of the donation must grant the donee the right to enter the property at reasonable times to ensure compliance with the easement, and (iii) the terms of the donation must grant the donee the right to enforce the easement by appropriate legal proceedings.<sup>20</sup>

### 7. *Extinguishment and Division of Proceeds Requirements*

As explained in *National Perpetuity Standards*, Congress sought, through section 170(h), to subsidize the acquisition of conservation easements that would *permanently* protect the conservation values of unique or otherwise significant properties.<sup>21</sup> Thus, among other things, it instructed that tax-deductible easements must not be transferable by their government or nonprofit holders except to other qualified organizations that agree to

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<sup>17</sup> Treas. Reg. § 1.170A-14(g)(2). In *Kaufman v. Comm’r*, the Tax Court declined to rule on whether the limited subordination agreement obtained by the donor, which granted the lender priority rights to insurance and condemnation proceeds received as a result of extinguishment of the easement, failed to satisfy the subordination requirement. See *Kaufman*, 2011 WL 1235307, at \*11. For the reasons discussed in *National Perpetuity Standards*, such a limited subordination agreement should be deemed to fail to satisfy the subordination requirement. See *National Perpetuity Standards*, *supra* note 1, at 492-495.

<sup>18</sup> In the typical case, the donor will reserve at least some use rights that “may” impair the conservation interests associated with the property.

<sup>19</sup> See Treas. Reg. § 1.170A-14(g)(5)(i).

<sup>20</sup> See Treas. Reg. § 1.170A-14(g)(5)(ii).

<sup>21</sup> See *National Perpetuity Standards*, *supra* note 1, at 480-86.



continue to enforce the easements.<sup>22</sup> Congress and the Treasury recognized, however, that even expressly perpetual conservation easements are subject to extinguishment by state courts if the purposes of such easements become impossible or impractical due to changed conditions.<sup>23</sup> Accordingly, the extinguishment and division of proceeds provisions of the Treasury Regulations acknowledge this possibility and require that, in the unlikely event an easement is so extinguished, the holder must be entitled to at least a minimum percentage share of proceeds from a subsequent sale, exchange, or involuntary conversion of the property and must use such proceeds “in a manner consistent with the conservation purposes of the original contribution” (that is, to replace lost conservation values).<sup>24</sup>

*National Perpetuity Standards* also explains that the extinguishment and division of proceeds provisions mirror the state law doctrine of *cypres* and that this is not surprising given that Congress, the Treasury, and the charitable conservation organizations testifying in support of section 170(h) before its enactment were aware of the status of tax-deductible conservation easements as charitable gifts and at least passingly familiar with state laws governing the administration and enforcement of such gifts.<sup>25</sup> Moreover, the congressional mandate in section 170(h) that the conservation purpose of a contribution be “protected in perpetuity” can be complied with only if, upon extinguishment, the holder receives proceeds attributable to the easement and uses those proceeds to replace the lost conservation values, as would be the case pursuant to the doctrine of *cy pres*.<sup>26</sup>

The Tax Court recognized this in *Kaufman v. Commissioner*, in which it explained:

The drafters of . . . [the Treasury Regulations interpreting section 170(h)] undoubtedly understood the difficulties (if not impossibility) under State common or statutory law of making a conservation restriction perpetual. They required legally enforceable restrictions preventing inconsistent use by the donor and his successors in interest. . . . They understood that forever is a long time and provided what

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<sup>22</sup> *Id.* at 482.

<sup>23</sup> *See id.* at 484-86.

<sup>24</sup> *See id.* The Treasury Regulations provide an exception to the division of proceeds requirement if “state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior [conservation easement].” *See id.* at 510. For a discussion of this limited exception, see *id.* at 510 n. 145.

<sup>25</sup> *See id.* at 517-18.

<sup>26</sup> *Id.* at 518.

appears to be a regulatory version of cy pres to deal with unexpected changes that make the continued use of the property for conservation purposes impossible or impractical.”<sup>27</sup>

With regard to the proceeds payable to the holder upon extinguishment, *National Perpetuity Standards* explains that the minimum (or floor) percentage share of proceeds to which the holder must be entitled in the event of extinguishment is established at the time of an easement’s donation, and the holder must be entitled to receive *at least* that minimum percentage share regardless of any depreciation in the value of the easement relative to the value of the property as a whole after the donation.<sup>28</sup> In other words, the holder must be entitled to at least the minimum percentage share of proceeds even if that share exceeds the value of the easement at the time of its extinguishment.<sup>29</sup>

In *Kaufman*, the Tax Court also confirmed that the holder’s right to receive at least a minimum percentage share of proceeds in the event of extinguishment cannot be qualified by an agreement granting a lender priority rights to such proceeds, regardless of how remote the possibility that the holder would not actually receive its minimum percentage share.<sup>30</sup> The court explained “the donee must ab initio have an absolute right to compensation from the postextinguishment proceeds for the restrictions judicially extinguished.”<sup>31</sup> In *1982 East*, the Tax Court further held that the “unconditional requirement” that the holder be entitled to its minimum percentage share of proceeds in the event of extinguishment cannot be avoided by showing that, pursuant to the state enabling statute, a state court “may” adjudge the easement unenforceable and “may” award the holder damages.<sup>32</sup> Thus, the provision in an easement deed granting the holder the right to at least its mandated minimum percentage share of proceeds in the event of extinguishment cannot be qualified by a separate agreement granting priority rights to a lender, nor will a state enabling statute that does not guarantee

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<sup>27</sup> *Kaufman v. Comm’r*, 136 T.C. No. 13, 2011 WL 1235307, at \*9 (U.S. Tax Ct., April 4, 2011).

<sup>28</sup> See *National Perpetuity Standards*, *supra* note 1, at 512–13.

<sup>29</sup> See *id.*

<sup>30</sup> See *Kaufman*, 2011 WL 1235307 at \*9-\*13.

<sup>31</sup> *Id.* at \*13 (holding that the division of proceeds requirement “is not conditional: ‘Petitioners cannot avoid th[at] strict requirement . . . simply by showing that they would most likely be able to satisfy both their mortgage and their obligation to . . . [the holder].’”).

<sup>32</sup> *1982 East v. Comm’r*, T.C. Memo 2011-84, 2011 WL 1398804, at \*10 (U.S. Tax Ct., April 12, 2011).

the holder at least its minimum percentage share be deemed to cure such a qualification.<sup>33</sup>

### C. Commissioner v. Simmons

In *Commissioner v. Simmons*, the D.C. Circuit affirmed a Tax Court Memorandum opinion holding that a taxpayer was entitled to deductions claimed with respect to two façade easement donations.<sup>34</sup> Of particular relevance is the court's holding that the conservation purposes of the contributions were "protected in perpetuity" as required by section 170(h)(5)(A) even though each easement deed provided, in part, that the holder had the right to consent to changes to the façade and to abandon some or all of its rights under the easement.<sup>35</sup>

The D.C. Circuit provided a number of justifications for its holding. It determined that "the clauses permitting consent and abandonment . . . have no discrete effect upon the perpetuity of the easements" because a tax-exempt organization would fail to enforce a conservation easement "at its peril."<sup>36</sup> Quoting the historic preservation organizations that filed an amicus brief in the case—the National Trust for Historic Preservation, the L'Enfant Trust (the donee of the easements at issue in *Simmons*), and the Foundation for the Preservation of Historic Georgetown—the court stated that "this type of clause is needed to allow a charitable organization that holds a conservation easement to accommodate such change as may become necessary 'to make a building livable or usable for future generations' while still ensuring the change is consistent with the conservation purpose of the easement."<sup>37</sup> The court found that the Commissioner had failed to show that the possibility of L'Enfant's abandonment was more than negligible, and, citing to *Stotler v. Commissioner*,<sup>38</sup> noted that the deductions could not be disallowed based on the remote possibility that L'Enfant would abandon the easements.<sup>39</sup> The court also pointed out that any changes in the façades to which L'Enfant might consent would have to comply with all applicable laws and

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<sup>33</sup> Given that state statutes are subject to revision and repeal, donors should not be permitted to rely on them to satisfy federal tax law requirements. Appropriate nonqualified and enforceable provisions should be included in the conservation easement deeds.

<sup>34</sup> *Comm'r v. Simmons*, No. 10-1063, 2011 WL 2451012 (D.C. Cir. June 21, 2011).

<sup>35</sup> *Id.* at \*2-\*4.

<sup>36</sup> *Id.* at \*3.

<sup>37</sup> *Id.*

<sup>38</sup> 53 T.C.M. (CCH) 973 (1987).

<sup>39</sup> *Simmons*, 2011 WL 2451012, at \*4.

regulations, including the District's historic preservation laws, in any event.<sup>40</sup> The court concluded:

because the donated easements will prevent in perpetuity any changes to the properties inconsistent with conservation purposes, we hold Simmons has made a contribution “exclusively for conservation purposes,” in accordance with [section] 170(h)(1)(C).<sup>41</sup>

The D.C. Circuit's decision in *Simmons* should not be viewed as an endorsement of an easement holder's unlimited right to consent to changes or abandon its rights. The language at issue in *Simmons* specifically provided:

Grantee covenants and agrees that it will not transfer, assign or otherwise convey its rights under this conservation easement except to another “qualified organization” described in Section 170(h)(3) of the Internal Revenue Code of 1986 and controlling Treasury Regulations, and Grantee further agrees that it will not transfer this easement unless the transferee first agrees to continue to carry out the conservation purposes for which this easement was created, *provided, however, that nothing herein contained shall be construed to limit the Grantee's right to give its consent (e.g., to changes in the Façade) or to abandon some or all of its rights hereunder.*<sup>42</sup>

A different court confronted with a similar donation in another jurisdiction might (and, indeed, should) find that such a consent and abandonment proviso is an impermissible qualification of the clauses included in the easement deed to satisfy the Treasury Regulation's restriction on transfer, extinguishment, and division of proceeds requirements—an argument the Government failed to make in *Simmons*.<sup>43</sup> In addition, the D.C. Circuit's

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Conservation Easement Deed of Gift between Dorothy Simmons, Grantor, and The L'Enfant Trust, Grantee 3 (Nov. 18, 2003) (on file with author); Conservation Easement Deed of Gift between Ms. Dorothy Simmons, Grantor, and The L'Enfant Trust, Grantee 3 (Jan. 26, 2004) (on file with author).

<sup>43</sup> For a discussion of the restriction on transfer, extinguishment, and division of proceeds requirements, see *supra* Parts II.B.2 and B.7 The restriction on transfer provision included in the Simmons deeds also failed to state that the transferee, at the time of the transfer, must qualify as an “eligible donee” as defined in Treasury Regulation section 1.170A-14(c)(1). See Treas. Reg. § 1.170A-14(c)(2).

holding was based on the particular facts of the case, including the specific terms of the deeds at issue; the status of the holder as a tax-exempt organization (many tax-deductible conservation easements are donated to government entities, which are not concerned about the loss of tax-exempt status); the Government's failure to provide evidence that the possibility of the holder's abandonment was more than negligible; and the fact that any changes to which the holder might consent had to comply with applicable laws and regulations, including D.C.'s historic preservation laws, in any event.<sup>44</sup> Moreover, the D.C. Circuit made clear that the consent and abandonment rights are not, in fact, unlimited, because a tax-exempt organization that fails to enforce a conservation easement would do so "at its peril."<sup>45</sup>

The amici curiae also failed to inform the court that it is fairly standard practice within the land trust community and consistent with the Land Trust Alliance's recommended best practices to address the need to be able to respond to changing conditions—and at the same time comply with the perpetuity requirements in section 170(h)—by including an "amendment clause" in a perpetual easement deed.<sup>46</sup> The typical amendment clause grants the holder the express right to agree to amendments, *but only if the amendments are, among other things, consistent with the purpose of the easement.*<sup>47</sup> The D.C. Circuit appeared to interpret the consent and abandonment proviso in the Simmons deeds as the effective equivalent of a typical amendment clause given the language of the deeds as a whole, the obligations of the holder as a charitable and tax-exempt organization, the District's historic preservation laws, and the parties purported intent to comply with federal tax law requirements.<sup>48</sup> It obviously would be preferable to simply use an appropriately qualified amendment clause to grant the holder the power to amend an easement to respond to changing circum-

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<sup>44</sup> Simmons, 2011 WL 2451012, at \*2-\*4.

<sup>45</sup> *Id.* at \*3.

<sup>46</sup> LAND TR. ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 17 (2007) [hereinafter LTA AMENDMENT REPORT] ("Easement holders should include an amendment clause to allow amendments consistent with the easement's overall purposes, subject to applicable laws."). See also *National Perpetuity Standards*, *supra* note 1, at 523-527 (discussing amendments).

<sup>47</sup> See *National Perpetuity Standards*, *supra* note 1, at 525 n. 184 (setting forth a model amendment provision from the Conservation Easement Handbook).

<sup>48</sup> See *supra* notes 37 and 41 and accompanying text.

stances.<sup>49</sup> If that is done, the donor would avoid the possibility of a different interpretation of the consent and abandonment proviso and denial of the deduction in a different jurisdiction or on a different set of facts. The holder would not appear to have rights that could be exercised only “at its peril.” The IRS could more efficiently and effectively review conservation easement deeds for compliance. And litigation, with its accompanying use of judicial and government resources, could be reduced.

The D.C. Circuit’s reliance on *Stotler* (also suggested by the amici curiae)<sup>50</sup> was misplaced. As discussed in *National Perpetuity Standards*, the holding in *Stotler* should carry no persuasive weight in interpreting the perpetuity requirements in section 170(h) and the Treasury Regulations.<sup>51</sup> The *Stotler* court was interpreting the deduction provision in effect in 1979, and Congress made significant changes to the deduction provision when it enacted section 170(h) in 1980.<sup>52</sup> In particular, Congress added section 170(h)(5)(A), which provides: “A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.”<sup>53</sup> Congress also provided extensive guidance as to the meaning of that new “protected in perpetuity” requirement in the legislative history of section 170(h), much of which was incorporated into the Treasury Regulations, which were published in 1986.<sup>54</sup> Accordingly, relying on *Stotler* to interpret sections of the Internal Revenue Code and accompanying Treasury Regulations that were not at issue in that case is simply inappropriate. The Tax Court recognized this in *Kaufman v. Commissioner*, in which it noted:

petitioners cite [*Stotler*] for the proposition that the enforceability-in-perpetuity requirement is per se satisfied if the possibility of a defeasing event is so remote as to be negligible. The case stands for no such thing, addressing neither [Treasury Regulation] section 1.170A-14(g) . . . ,

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<sup>49</sup> See *infra* Part VI (recommending the Internal Revenue Service (IRS) issue guidance regarding the provisions to be included in conservation easement deeds to satisfy federal tax law requirements).

<sup>50</sup> Brief for the National Trust for Historic Preservation et al. as Amici Curiae Supporting Appellee at \*17-\*18, *Comm’r v. Simmons*, No. 10-1063, 2011 WL 2451012 (D.C. Cir. June 21, 2011) 2010 WL 6511476 (C.A.D.C.) [hereinafter Amici Brief].

<sup>51</sup> See *National Perpetuity Standards*, *supra* note 1, at 502-503.

<sup>52</sup> See *id.* at 476-480 (discussing the history of the deduction for conservation easement donations).

<sup>53</sup> *Id.* at 479.

<sup>54</sup> See *id.* Parts II.B and C (discussing the legislative history of section 170(h) and the Treasury Regulations interpreting section 170(h), respectively).

in general, nor paragraph (g)(6) thereof in particular, since the contribution in the case occurred before the effective date of that regulation.<sup>55</sup>

Moreover, for the reasons discussed in *Kaufman* and *National Perpetuity Standards*, taxpayers should not be permitted to cure their failures to comply with the specific requirements of section 170(h) and the Treasury Regulations by invoking the so remote as to be negligible standard.<sup>56</sup> That standard was not intended to give donors a “second bite at the apple” when it comes to satisfying the specific requirements of section 170(h) and the Treasury Regulations.

The D.C. Circuit did, however, implicitly—and appropriately—reject the argument of the amici curiae that holders of tax-deductible perpetual conservation easements should be permitted to engage in “swaps”—that is, that they should be permitted to agree with developers (and other property owners) to abandon, release, or otherwise extinguish perpetual easements for which tax benefits were provided in exchange for easements on other properties.<sup>57</sup> As explained in *National Perpetuity Standards*, allowing swaps

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<sup>55</sup> *Kaufman v. Comm’r*, 136 T.C. No. 13, 2011 WL 1235307, at \*12 (U.S. Tax Ct., April 4, 2011).

<sup>56</sup> *See id.* at \*12-\*13; *National Perpetuity Standards*, *supra* note 1, at 505-507.

<sup>57</sup> In the brief they filed in *Simmons*, the amici curiae argued:

Affording a conservation easement-holding organization the right to abandon an easement also is sound policy, if the circumstances of the abandonment would result in a significantly greater public benefit. For example, the organization might decide to enter an agreement with a developer that releases a single easement (e.g., on a single, modest building next to a Metro stop) in exchange for easements on significant additional properties (e.g., an entire block of nearby buildings). The right to say yes or no in such a circumstance . . . allows a responsible easement-holding organization to fulfill its mission and to ensure that historic preservation can co-exist with changing times.”

Amici Brief, *supra* note 50, at \*17. That argument is directly contrary to the position taken in the Land Trust Alliance’s 2007 report on conservation easement amendments, which instructs:

If the conservation easement was the subject of a federal income tax deduction, then Internal Revenue Code Section 170(h) and the Treasury Regulations Section 1.170A-14 apply. Such an easement must be “granted in perpetuity” and “the conservation purpose [of the contribution must be] protected in perpetuity.” The easement must be transferable only to another government entity or qualified charitable organization that agrees to continue to enforce the easement. The easement can only be extinguished by the holder through a judicial proceeding, upon a finding

would violate a number of the perpetuity requirements in the Treasury Regulations.<sup>58</sup> It also would render satisfaction of the elaborate threshold conservation purposes tests and other requirements in section 170(h) and the Treasury Regulations a meaningless exercise because, on the day following a donation or any time thereafter, the holder would be free to summarily abandon, release, or otherwise extinguish the easement in exchange for cash that could be used to purchase an easement encumbering some other property, and, it being a purchase transaction, neither the new property nor the provisions governing its protection would have to meet the threshold conservation purposes tests or other requirements in section 170(h) and the Treasury Regulations.<sup>59</sup> As explained in the section on the legislative history of section 170(h) in *National Perpetuity Standards*:

Congress did not intend to subsidize the acquisition of conservation easements that would be fungible or liquid assets in the hands of their government or nonprofit holders. Congress refused to delegate to government and nonprofit holders the decision regarding the conservation easements that are worthy of the federal subsidy under section 170(h). Instead, Congress crafted the threshold conservation purposes tests and other requirements of section 170(h) and provided detailed explanations of those requirements in the legislative history. It is therefore unsurprising that Congress also refused to delegate to government and nonprofit holders the discretion to sell, trade, release, or otherwise transfer such easements, except for transfers made to other qualified holders that agree to continue to enforce the easements.<sup>60</sup>

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that continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and with the payment to the holder of a share of proceeds from a subsequent sale or development of the land to be used for similar conservation purposes. To the extent an amendment amounts to an extinguishment, the land trust must satisfy these requirements.

LTA AMENDMENT REPORT, *supra* note 46, at 24. The Land Trust Alliance is the umbrella organization for the nation’s over 1,700 land trusts. *See* Land Trust Alliance, Leadership In Land Conservation, at <http://www.landtrustalliance.org/about>.

<sup>58</sup> *See National Perpetuity Standards, supra* note 1, at 520.

<sup>59</sup> *See id.* at 520-521.

<sup>60</sup> *Id.* at 475-476.



The argument of the amici curiae that section 170(h) authorizes swaps is also contrary to the representations those organizations make to policy-makers, the public, and prospective donors. For example, on its website, the National Trust for Historic Preservation (National Trust) states:

Owners of historic properties devote considerable time, effort, and expense to restoring and maintaining the architectural details and historic character of their properties. Preservation-minded owners often worry that their properties will not be properly protected and maintained in the future by subsequent owners.

For property owners looking to *permanently* protect their historic properties, one of the most effective legal tools available is the **preservation easement**—a private legal interest conveyed by a property owner to a preservation organization or to a government entity. The decision to donate a preservation easement is almost always voluntary, but, once made, it binds both the current owner *and future owners* to protect the historic character of the property subject to the easement.<sup>61</sup>

...  
[E]asements must meet a number of requirements imposed by federal tax law. For example, the easement must be maintained in perpetuity . . . . *Under the IRS regulations, extinguishment must be accomplished by judicial action. Easements may only be assigned or transferred to an organization that also meets the requirements of a qualified organization under the tax code, and the conservation purposes must continue to be carried out.*<sup>62</sup>

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<sup>61</sup> National Trust Easement Resources, Frequently Asked Questions About Preservation Easements, <http://www.preservationnation.org/resources/legal-resources/easements/> (emphasis in original).

<sup>62</sup> National Trust for Historic Preservation, What are the federal tax benefits for an easement donation?, <http://www.preservationnation.org/resources/legal-resources/easements/easements-faq/federal-tax-benefits-easements.html> (emphasis added). See also The L'Enfant Trust, Common Questions and Answers, Q: How Long Does an Easement Last?, [http://www.lenfant.org/NewDonors\\_CommonQuestionsAnswers.html](http://www.lenfant.org/NewDonors_CommonQuestionsAnswers.html) ("Because the main purpose of a conservation easement is to guarantee the protection of the property, the tax code requires that in order to qualify for tax benefits, the easement must be granted in perpetuity. The easement is recorded with local land records, and 'runs with the land,' that is, it binds

Given the foregoing representations, the perpetual terms of preservation deeds, and the requirements in section 170(h) that a tax-deductible easement be “granted in perpetuity” and its conservation purpose “protected in perpetuity,” policymakers, the public, and past and prospective donors would no doubt be surprised to learn that the National Trust (and the other amici curiae) are now taking the position that they are free to agree with developers to extinguish perpetual easements when, in their opinion, ostensibly “better” preservation opportunities come along. Indeed, such a position is particularly remarkable coming from the National Trust, which, as noted above, represents on its website that “extinguishment must be accomplished by judicial action” and, in the late 1990s, enlisted the assistance of the Maryland Attorney General in defending a tax-deductible perpetual conservation easement on the ground that the easement could not be amended to allow development of the subject historic property without court approval in a *cy pres* proceeding. That case (known as the Myrtle Grove controversy), which was eventually settled with the conservation easement remaining intact, is discussed in Part III.B.1.a below.

In the end, the fact that the D.C. Circuit found that Dorothy Jean Simmons had complied with the requirements of section 170(h) is perhaps unsurprising. The IRS has only recently turned its attention to the interpretation of section 170(h) and, in particular, the perpetuity requirements therein, and it seems harsh to penalize individual taxpayers who appear to have made an effort to comply with such requirements. L’Enfant, however, might well have spared Ms. Simmons the legal battle over the perpetuity issue. Since its first publication in 1988, the Conservation Easement Handbook has contained model “restriction on transfer” provisions that are not qualified as in *Simmons*, as well as model “amendment clauses” that specifically limit amendments to those that are consistent with the purpose of the easement.<sup>63</sup> Such provisions are all that is needed to “allow a charitable organization that holds a conservation easement to accommodate such change as

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future owners of the property as well.”); Foundation for the Preservation of Historic Georgetown, Conservation Easement Program, <http://preservegeorgetown.org/about.htm> (“The Conservation Easement is legally binding and granted in perpetuity. Once it is recorded, the Conservation Easement becomes part of the chain of title running with the land and binds future, as well as current, property owners. Thus, a Conservation Easement helps preserve the character of Historic Georgetown for future generations to enjoy.”).

<sup>63</sup> See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 14, at 161, 221 (providing model restriction on transfer provisions) and 164, 226 (providing model amendment provisions). Although conservation easement donors should be and often are represented by their own legal counsel, as a practical matter many rely in large part on the donee because the donee is a repeat player.

may become necessary ‘to make a building livable or usable for future generations’ while still ensuring the change is consistent with the conservation purpose of the easement.”<sup>64</sup>

### III. COMPARING FEDERAL TAX LAW REQUIREMENTS AND STATE STATUTORY PROVISIONS

The following subparts compare the federal tax law perpetuity requirements to the release, transfer, modification, or termination provisions of the over one hundred state enabling statutes set forth in Appendices A and B. Some of the enabling statutes are silent regarding the manner in which the easements can be released, transferred, modified, or terminated. Others contain widely divergent release, transfer, modification, or termination provisions that were not, for the most part, crafted with an eye toward complying with federal tax law requirements. This is not surprising given that the vast majority of the state enabling statutes were designed to validate conservation easements created in a variety of contexts and containing a variety of terms; they were not intended or designed to validate only tax-deductible conservation easements.<sup>65</sup>

Although the categorization is somewhat arbitrary, subpart B of this Part addresses what are commonly considered to be the “general” conservation easement enabling statutes, approximately half of which were based on

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<sup>64</sup> See *supra* note 37 and accompanying text. Historic preservation organizations have taken similar risks in the mortgage subordination context. See *Kaufman*, 136 T.C. No. 13, 2011 WL 1235307 (U.S. Tax Ct., April 4, 2011) (holding that a subordination agreement granting lender priority rights to proceeds upon extinguishment violates the division of proceeds requirement); *National Perpetuity Standards*, *supra* note 1, at 492-495 (discussing the risks associated with “limited” subordination agreements and the general awareness of such risks). See also Janet Novack, *Feds Sue Trust Over Historic Easement Tax Breaks*, *Taxing Matters*, *Forbes* (June 16, 2011) (discussing a lawsuit in which the government alleged the Trust for Architectural Easements (TAE), among other things, “made ‘false and fraudulent’ statements to prospective donors about the tax benefits available for donating [façade easements]; steered donors to appraisers who had been ‘coached’ by it to go along with its questionable practices; helped donors to claim deductions before donations were final; and allowed donors to terminate easements they had already granted;” the article indicates that the parties have settled, with TAE denying all allegations, but agreeing to no longer engage in the objectionable activities).

<sup>65</sup> Many of the enabling statutes authorize the creation or acquisition of conservation easements conveyed, not only in whole or in part as charitable gifts, but also in purchase, exaction, mitigation, or other regulatory contexts. Many also validate not only perpetual conservation easements, but also easements that last for a specified term of years, or that are terminable in the discretion of the holder or upon satisfaction of certain conditions, such as the holding of a public hearing or approval of a public official or officials.

the Uniform Conservation Easement Act (UCEA), which was adopted by the Uniform Law Commission in 1981.<sup>66</sup> Appendix A sets forth the transfer, release, modification, or termination provisions, if any, of the general enabling statutes.

Subpart C discusses additional state statutes that authorize the creation or acquisition of conservation easements, of which there are many. Appendix B sets forth the transfer, release, modification, or termination provisions, if any, of these “additional” enabling statutes.

#### A. Federal and State Law Interaction

Before turning to a discussion of the state statutes, however, some background regarding the interaction between federal and state law in this context is necessary. To be eligible for federal tax benefits, a conservation easement should contain provisions intended to comply with the various requirements in section 170(h) and the Treasury Regulations.<sup>67</sup> It is not sufficient, however, merely to include such provisions in the easement deed. Such provisions must not be qualified, such as by an agreement granting the lender priority rights to proceeds upon extinguishment as was the case in *Kaufman*.<sup>68</sup> Such provisions should also be required to be legally binding on the parties to the easement under state law. That is, the parties to the easement should not be free to amend away or otherwise ignore such provisions (for example, the provisions of a more permissive state enabling statute must not “trump” the provisions included in the easement deed). Absent enforceability under state law, the provisions included in a conservation easement deed to satisfy the various federal tax law requirements would constitute mere window dressing, and the conservation purposes of the contributions would not be “protected in perpetuity” as mandated by Congress.

For example, assume a conservation easement is donated as a charitable gift to an eligible donee. The easement provides that it is granted in perpetuity and it is recorded in the land records of the appropriate jurisdiction. The easement restricts the development and use of the subject property to pre-

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<sup>66</sup> UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 165 (2008) [hereinafter UCEA]. The comments to the UCEA were amended in 2007 and the UCEA, as amended, is available at [http://www.law.upenn.edu/bll/archives/ulc/ucea/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm).

<sup>67</sup> The need to include provisions in a conservation easement to comply with federal tax law requirements has been long recognized. For example, since its first publication in 1988, the Conservation Easement Handbook has provided model provisions to be included in conservation easement deeds to satisfy the various federal tax law requirements. See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 14, at 155 (providing a checklist of “Provisions Relating to IRS Requirements”).

<sup>68</sup> See *supra* notes 30-31 and accompanying text.

serve the property's significant conservation or historic values and, therefore, facially satisfies one or more of the conservation purposes tests of section 170(h). The easement also contains an overarching restriction prohibiting all uses of the property that are either inconsistent with the conservation purpose of the donation or destructive of any significant conservation interests.

The lender holding an outstanding mortgage on the subject property agrees to subordinate its rights to all rights of the holder of the easement, including the holder's right to enforce the easement and receive at least a minimum percentage of proceeds if the easement is extinguished. The easement prohibits all mining on the property, surface or otherwise. The donor provides baseline documentation to the donee sufficient to establish the condition of the property at the time of the gift. The donor agrees in the easement deed to notify the donee, in writing, before exercising any reserved right that may impair the conservation interests associated with the property. The easement deed also grants the donee the right both to enter the property at reasonable times to ensure compliance with the easement and to enforce the easement by appropriate legal proceedings. The easement further provides that it is transferable in whole or in part, whether or not for consideration, only to another eligible donee that agrees to continue to enforce the easement, and is extinguishable, whether in whole or in part, only in a judicial proceeding, upon a finding that continuing to use the land for conservation purposes has become impossible or impracticable, and with a payment of at least the Treasury Regulation's mandated minimum percentage of proceeds to the holder to be used by the holder "in a manner consistent with the conservation purposes of the original contribution."

The foregoing conservation easement would appear to satisfy the requirements of section 170(h) and the Treasury Regulations. If, however, the provisions included in the easement deed to satisfy federal tax law requirements are not legally binding on the holder and the owner of the burdened property under state law, or are qualified by other provisions in the deed or by separate agreement, the easement should not be tax-deductible. Including a panoply of provisions in a conservation easement deed intended to ensure the permanent protection of the conservation or historic values of the subject property would be a meaningless exercise if such provisions could be amended, released, or otherwise ignored by the holder of the easement and the owner of the burdened property. Protection of the public interest and investment in federally-subsidized conservation easements as intended by Congress requires not only that the easements include provisions expressly satisfying federal tax law requirements, but also that such provisions will be legally binding on the parties to the easement.

Some of the state enabling statutes expressly contemplate that provisions included in an easement deed addressing the release, transfer, modification, or termination of the easement will be enforceable under state law.<sup>69</sup> Others, such as the UCEA, do so implicitly.<sup>70</sup> Even state statutes that impose their own conditions on the transfer, release, modification, or termination of conservation easements and are silent with regard to the imposition of additional conditions may not prevent the creation of conservation easements that satisfy federal tax law requirements.<sup>71</sup> Only a few state statutes appear to preclude the creation of a conservation easement that satisfies

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<sup>69</sup> For example, the New Jersey general enabling statute provides that a conservation easement may be released in whole or in part by its holder subject to, among other things, “such conditions as may have been imposed at the time of creation of the restriction;” the New York general enabling statute provides that conservation easements may be modified or extinguished “as provided in the instrument creating the easement;” the Montana general enabling statute provides that a conservation easement can be converted or diverted if the conversion or diversion is, among other things, “permitted by the conditions imposed at the time of the creation of the conservation easement;” and the Utah general enabling statute provides that a conservation easement may be terminated, in whole or in part, by “conditions set forth in the instrument creating the conservation easement.” *See infra* Appendix A. Similarly, a statute in Ohio provides that agricultural easements may be drafted to include terms necessary or appropriate to preserve favorable federal tax consequences on behalf of the grantor; Delaware legislation authorizes a foundation to acquire forestland preservation easements that are granted in perpetuity and include such terms and conditions as specified by the foundation; conservation easements acquired pursuant to the Alabama Constitution may be released in whole or in part by the holder subject to such conditions as may have been imposed at the time of creation; California agricultural conservation easements may, at the request of the landowner, contain provisions that are more restrictive than the provisions prescribed by the statute; and a statute in Utah provides that historic preservation easements “may be deemed a charitable contribution for tax purposes in accordance with the laws, rules, and regulations pertaining to charitable contributions of interests in real property.” *See infra* Appendix B.

<sup>70</sup> *See infra* Part III.B.3, discussing enabling statutes based on the UCEA; *see also infra* Part III.B.1.b, discussing *Bjork v. Draper*, 886 N.E.2d 563, 574 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008), in which the court invalidated amendments to a tax-deductible conservation easement that conflicted with the provisions of the easement deed.

<sup>71</sup> *See, e.g., Bennett v. Comm’r of Food & Agric.*, 576 N.E.2d 1365, 1367 (Mass. 1991) (holding that a restriction in a conservation easement that did not conform precisely to the definition of a conservation easement in the enabling statute was nonetheless valid; the court explained, “Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force.”). *See also* RESTATEMENT (THIRD) OF PROP.: SERVIDUTES § 4.1 (2000) [hereinafter RESTATEMENT OF PROPERTY] (expressly rejecting the rule that land use restrictions, including those held in gross, be narrowly construed in favor of the free use of land).

federal tax law requirements, and those statutes appear to do so by mandating that the easements permit certain activities on the subject property that arguably make it impossible to satisfy the “no inconsistent use” or “mining restrictions” requirements.<sup>72</sup>

Conservation easements eligible for federal charitable income tax deductions are also, by definition, charitable gifts made for a specific purpose—the protection of the particular property encumbered by the easement for one or more of the conservation purposes enumerated in section 170(h) in perpetuity. Under state law, the donee of a charitable gift made for a specific purpose must administer the gift consistent with its stated terms and charitable purpose.<sup>73</sup> Absent provisions in the instrument of conveyance addressing the issue, the donee is permitted to deviate from the gift’s charitable purpose only with court approval obtained in a *cy pres* or similar equitable proceeding.<sup>74</sup> And if the donee uses or threatens to use the gift in a manner contrary to its stated terms or purpose, state law generally empowers the state attorney general, a party with a “special interest” in the enforcement of the gift, a co-trustee or co-director, and, in a few jurisdictions, the donor of the gift, to sue the donee for a breach of its fiduciary duties.<sup>75</sup> The drafters of the UCEA and the Uniform Trust Code acknowledged the application of these principles to conservation easements, as did the Ameri-

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<sup>72</sup> See, e.g., *infra* notes 182-185 and accompanying text (discussing such provisions in a Maryland enabling statute).

<sup>73</sup> See, e.g., *St. Joseph’s Hosp. v. Bennett*, 22 N.E.2d 305, 308 (N.Y. 1939) (holding that a charitable corporation “may not . . . receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands.”); see also, e.g., Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation’s Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 701–02 (2005) (“[T]he law imposes more restrictions on a charitable corporation’s use of restricted gifts (i.e., gifts that expressly limit their use to specific purposes) than unrestricted gifts (i.e., outright gifts with no express restrictions on their use). A restricted gift creates a charitable trust or its functional equivalent, and the donee is obliged to honor these restrictions. . . . By contrast, an unrestricted gift does not create a formal ‘trust’ within the meaning of trust law, and the donee can use it for any charitable purpose set forth in its articles of incorporation.”); John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 698, 708–09 (2007) (explaining that restricted charitable gifts give rise to trust or trust-like duties, in particular the duty to abide by the terms of the gift).

<sup>74</sup> See *supra* note 73; see also *supra* note 27 and accompanying text, explaining that the Tax Court in *Kaufman* stated that the Treasury Regulations’ extinguishment and division of proceeds provisions appear to be a regulatory version of *cy pres*.

<sup>75</sup> See Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 62-67 (2009) (describing the standing rules in the charitable gift context).

can Law Institute in its drafting of the Re-statement (Third) of Property: Servitudes.<sup>76</sup>

Accordingly, if the donee of a tax-deductible easement attempts to re-release, abandon, modify, terminate, or otherwise transfer the easement in a manner contrary to the provisions that were included in the deed to satisfy federal tax law requirements, the state attorney general, a co-trustee or co-director, a party deemed to have a special interest, and, in few jurisdictions, the donor, should be permitted to sue the donee for a breach of its fiduciary duties. As discussed below, state attorneys general have, on a number of occasions, invoked state law governing charitable gifts to prevent a holder's improper amendment or termination of a perpetual conservation easement.<sup>77</sup>

In *Kaufman*, the Tax Court cited to POWELL ON REAL PROPERTY (M. Wolf ed. 2010) for the proposition that conservation easements may be modifiable or terminable by a variety of means, including “[c]ondemnation (eminent domain), the foreclosure of pre-existing liens, foreclosure for unpaid taxes, Marketable Title Acts, merger or abandonment, the doctrine of

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<sup>76</sup> See UCEA *supra* note 66, § 3 cmt. (“The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts” and “independently of the Act, the Attorney General could have standing [to sue bring an action affecting a conservation easement] in his capacity as supervisor of charitable trusts.”) (emphasis added); UNIF. TRUST CODE, 7C U.L.A. 512, § 414 cmt. (2006) (“Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust.”); RESTATEMENT OF PROPERTY, *supra* note 71, § 7.11 (providing that the substantial modification or termination of conservation easements held by governmental bodies or charitable organizations should be governed, not by the real property law doctrine of changed conditions, but by a special set of rules based on the charitable trust doctrine of *cy pres*); see also LTA AMENDMENT REPORT, *supra* note 46, at 23 (listing “[s]tate and federal laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts” and “[s]tate laws on fraudulent solicitation, misrepresentation to donors, consumer protection and the like” as potential legal constraints on conservation easement amendments); William P. O’Connor, *Amending Conservation Easements: Legal and Policy Considerations*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 1999, at 8-10 (describing the donation of a conservation easement by Alice, “a knowledgeable and committed conservationist” who “had seen the transformation of farms to suburbs and . . . had no intention of having her prized preserve platted as another Nature View Estates,” and for whom, like many easement donors, permanent protection of her land was the “transcendent goal,” and listing charitable trust law as one of four potential legal constraints on conservation easement amendments). For a discussion of a holder’s right to agree to amendments that are consistent with the conservation purpose of an easement, see *supra* note 46 and accompanying text; *National Perpetuity Standards*, *supra* note 1, at 523-27.

<sup>77</sup> See *infra* Part III.B.1.a (discussing the Myrtle Grove controversy); Part III.B.3.a (discussing *Salzburg v. Dowd*).



changed conditions, and release by the holder.”<sup>78</sup> Such means of modifying and terminating conservation easements cannot, however, be viewed in a vacuum. Rather, they must be analyzed in the context of a conservation easement donation that satisfies the requirements of section 170(h) and the Treasury Regulations; that is, a conservation easement that is conveyed to a government entity or charitable organization as a charitable gift for a specific purpose and includes “restriction on transfer,” “extinguishment,” “divisions of proceeds,” and other provisions to comply with the federal requirements.

For the reasons discussed above, government and nonprofit holders should not be permitted to simply abandon or release and, thereby, extinguish tax-deductible easements. Rather, they should be deemed to have a fiduciary obligation under state law to administer and enforce such charitable gifts consistent with their stated terms and purposes.

The condemnation of a tax-deductible easement would “make impossible or impractical the continued use of the property for conservation purposes,” and should therefore trigger the extinguishment and division of proceeds provisions, including the requirement of judicial approval.<sup>79</sup>

The foreclosure of pre-existing liens should not result in extinguishment of a tax-deductible easement because the lenders’ rights should be subordinated to the right of the holder “to enforce the conservation purposes of the gift in perpetuity.”<sup>80</sup>

A foreclosure for unpaid taxes might extinguish a tax-deductible easement, but its donation should nonetheless be deductible provided that, on the date of the gift, the probability of such event is so remote as to be negligible.<sup>81</sup> In fact, the holder of the easement may have a fiduciary obligation to take steps to avoid such a forfeiture on behalf of the public, as benefi-

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<sup>78</sup> Kaufman v. Comm’r, 136 T.C. No. 13, 2011 WL 1235307, at \*7 (U.S. Tax Ct., April 4, 2011).

<sup>79</sup> See Treas. Reg. § 1.170A-14(g)(6). This would not mean that holders would be required to contest every threatened condemnation. But it would mean that holders would be required to obtain judicial approval of settlements in lieu of condemnation (or, perhaps, with the IRS’s blessing, settlements in lieu that involve more than a *de minimis* amount of the subject property). The requirement of judicial approval of settlements in lieu of condemnation involving more than a *de minimis* amount of the subject property would protect the public interest and investment in conservation easements by discouraging condemning authorities from proposing, and holders from agreeing to, inappropriate takings or insufficient condemnation awards.

<sup>80</sup> See Treas. Reg. § 1.170A-14(g)(2).

<sup>81</sup> See Treas. Reg. § 1.170A-14(g)(3).

ciary of the easement, making the probability of defeat of the gift by this means even more remote.

The Treasury Regulations specifically provide that a state's marketable title act will not, by itself, render a tax-deductible conservation easement nonperpetual.<sup>82</sup> As explained in *National Perpetuity Standards*, the Treasury presumably assumed that holders of tax-deductible easements would take the simple steps of tracking and rerecording the easements to avoid forfeiture of such valuable charitable assets under such acts.<sup>83</sup>

A tax-deductible conservation easement also generally should not be extinguished pursuant to the doctrine of merger if the holder of the easement obtains title to the encumbered land because there typically would be no unity of ownership as is required for the doctrine to apply.<sup>84</sup> The two estates (the easement and the encumbered property) would be "in the same person at the same time," but they would not be held "in the same right."<sup>85</sup>

Finally, given the status of a tax-deductible conservation easement as a charitable gift made for a specific purpose and the provisions included in the easement deed to comply with federal tax law requirements, the real property law doctrine of changed conditions should not apply. Rather, if changed conditions "make impossible or impractical the continued use of the property for conservation purposes," the regulatory version of *cy pres* embodied in the extinguishment and division of proceeds provisions should apply.<sup>86</sup>

With this background regarding the interaction between federal and state law, we turn now to a discussion of the state enabling statutes and controversies addressing the modification and termination of conservation easements.

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<sup>82</sup> See *id.*

<sup>83</sup> See *National Perpetuity Standards*, *supra* note 1, at 498.

<sup>84</sup> See Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, DUKE J.L. & CONTEMP. PROBS. (forthcoming 2011).

<sup>85</sup> See *id.* Part III (explaining that a tax-deductible conservation easement should be held subject to an obligation that it be administered in accordance with its terms and charitable conservation purpose, while the easement-encumbered land typically will be conveyed to the holder as a general asset that the holder can sell or otherwise dispose of in its discretion).

<sup>86</sup> See Treas. Reg. § 1.170A-14(g)(6); see also *supra* note 27 and accompanying text (discussing the Tax Court's analysis of the extinguishment and division of proceeds provisions in *Kaufman*).

## B. General Enabling Statutes

Government entities and land trusts typically hold conservation easements “in gross,” meaning they do not hold the easements in connection with, or appurtenant to, parcels that are benefited by the easements.<sup>87</sup> Traditional servitude doctrines raised potential difficulties for both the creation and long-term validity of land use restrictions held in gross.<sup>88</sup> Accordingly, to facilitate the use of conservation easements as a land protection tool, all fifty states and the District of Columbia have enacted some form of legislation that removes the potential common law impediments to the creation and long-term validity of conservation easements held in gross, and these statutes are referred to herein as the “general” enabling statutes.<sup>89</sup>

### 1. *Statutes Providing for Release, Modification or Termination in the Same Manner as Other Easements*

In three states, Florida, Iowa, and Illinois, the general enabling statute provides that the holder can release a conservation easement.<sup>90</sup> In four states, Colorado, Louisiana, Maryland, and Utah, the general enabling statute provides that a conservation easement can be released, modified, or terminated in the same manner as other easements.<sup>91</sup>

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<sup>87</sup> See GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES § 801 at 292-93 (2d ed. 2004) (describing covenants held in gross generally); *id.* § 9.15 at 377-78 (noting that “[o]ne use of in gross covenants is conservation ‘easements.’”).

<sup>88</sup> See RESTATEMENT OF PROPERTY, *supra* note 71, § 1.6 cmt. a. (noting the rule prohibiting equitable enforcement of restrictive-covenant benefits held in gross and doubt regarding whether negative easements for previously unrecognized purposes were valid or transferrable). *But see supra* note 71, discussing validation of in gross land use restrictions.

<sup>89</sup> See *infra* Appendix A. The conservation easement enabling statute in North Dakota, which authorizes the creation of “historic easements” to protect historic sites or historic structures, is not included in Appendix A or B or otherwise discussed herein because North Dakota does not appear to permit easements to be “granted in perpetuity” as is required under section 170(h). See N.D. CENT. CODE § 55-10-08 (1999) (authorizing the creation of historic easements); N.D. CENT. CODE § 47-05-02.1(2) (1999) (“The duration of the easement, servitude, or nonappurtenant restriction on the use of real property must be specifically set out, and in no case may the duration . . . exceed ninety-nine years.”).

<sup>90</sup> See *infra* Appendix A; see also RESTATEMENT OF PROPERTY, *supra* note 71, § 7.3 cmt. a (explaining that a release is the method ordinarily used to effectuate the extinguishment of an easement).

<sup>91</sup> See *infra* Appendix A; see also *National Perpetuity Standards*, *supra* note 1, at 483 n. 43 (noting the variety of means by which easements can generally be extinguished, such as by release, abandonment, or agreement with the owner of the land, but explaining that holders of tax-deductible conservation easements should not have such rights because of the

As discussed below, two land trusts seeking to justify their agreement to “amend” tax-deductible perpetual conservation easements in manners contrary to the easements’ terms and conservation purposes have argued, unsuccessfully, that the general enabling statutes in Maryland and Illinois authorized them to do so. In both cases, the land trusts agreed to the amendments at the request of new owners of the land. In a third case, involving the Colorado enabling statute, a trial court failed to recognize the status of two conservation easements as charitable gifts held for the benefit of the public and failed to properly enforce provisions included in the easement deeds to satisfy federal tax law requirements, raising questions regarding the binding nature of the court’s holding authorizing the termination of the easements and illustrating the acute need for guidance from the IRS.

a. *The Myrtle Grove Controversy (Maryland)*<sup>92</sup>

In 1994, the National Trust for Historic Preservation took the position that the Maryland general enabling statute, which provides that a conservation easement “may be extinguished or released, in whole or in part, in the same manner as other easements,” authorized it to agree to amend a perpetual conservation easement encumbering a 160-acre historic tobacco plantation on the Maryland Eastern Shore to permit a seven-lot upscale subdivision on the property, known as “Myrtle Grove.”<sup>93</sup> The conservation easement had been conveyed to the National Trust as a tax-deductible charitable gift in 1975. After the donor’s heirs, other conservation and historic preservation groups, and the media expressed outrage, the National Trust withdrew its agreement to amend the easement, explaining that it had not considered its “fiduciary responsibility with respect to the easement” or “the intent of the donor” in approving the amendments.<sup>94</sup> The new landowner (a prominent Washington D.C. developer) then sued the National Trust for breach of contract, and the National Trust defended its action in part on the

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provisions that should be included in a conservation easement deed to satisfy the federal tax law requirements and a holder’s fiduciary obligation under state law to administer the easement in accordance with its stated terms and charitable conservation purpose).

<sup>92</sup> The description of this controversy in the text is drawn from Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) [hereinafter *A Case Study of the Myrtle Grove Controversy*].

<sup>93</sup> See MD. CODE ANN., REAL PROP. § 2-118(d) (LexisNexis 2010) (“A restriction provided for by this section may be extinguished or released, in whole or in part, in the same manner as other easements.”).

<sup>94</sup> See *A Case Study of the Myrtle Grove Controversy*, supra note 92, at 1055.

ground that the amendment would constitute a breach of its charitable trust obligation to comply with the terms of the easement.

The National Trust also enlisted the help of the Maryland Attorney General, who filed a separate collateral suit objecting to the proposed amendment on the ground that the conservation easement constituted a restricted charitable gift or charitable trust and could not be amended as proposed without court approval in a *cy pres* proceeding, where it would have to be shown that the conservation purpose of the easement had become impossible or impractical, which was not the case. The attorney general explained that

(i) in 1975, the people of Maryland received a charitable gift from Donoho in the form of a conservation easement preserving the scenic, natural, and historical characteristics of Myrtle Grove and specifically prohibiting its subdivision in perpetuity;

(ii) although, in general, an easement is an agreement that may be modified with the consent of the holder of the easement and the owner of the encumbered land, “Myrtle Grove is not a mere conservation agreement but a gift in perpetuity to a charitable corporation for the benefit of the people of Maryland” and “[a]s such, it is subject to a charitable trust”; and

(iii) even though the Maryland easement enabling statute provides that a conservation easement may be extinguished or released, in whole or in part, in the same manner as other easements, “[n]othing in [the] statute or its legislative history . . . indicates the legislature’s intent to abrogate application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation.”<sup>95</sup>

Acknowledging that rigid adherence to the terms and purposes of a conservation easement in perpetuity might, over time, prove contrary to the wishes of the donor and the interests of the public, the attorney general noted that state laws governing the administration and enforcement of charitable gifts and trusts, including the doctrines of administrative deviation and *cy pres*, provide the framework within which the National Trust could consider making changes to the easement.<sup>96</sup>

This case, known as the “Myrtle Grove controversy,” eventually settled, with the conservation easement remaining intact and the parties agreeing, *inter alia*, that subdivision of the property is prohibited, any action contrary to the express terms and stated purposes of the easement is prohibited, and

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<sup>95</sup> See *A Case Study of the Myrtle Grove Controversy*, *supra* note 92, at 1057 (quoting Memorandum of Law in Support of Attorney General’s Motion for Summary Judgment, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Oct. 20, 1998)).

<sup>96</sup> See *id.* at 1059.

amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except that prior written approval of the Attorney General is not required for actions permitted under the terms of the easement. Accordingly, the National Trust was (and is) not permitted to agree to amend, release, or extinguish the conservation easement in whole or in part, despite the seemingly permissive language of the Maryland general enabling statute.<sup>97</sup>

*b. Bjork v. Draper (Illinois)*

In *Bjork v. Draper*, which was discussed in the section on swaps in *National Perpetuity Standards*, a land trust took the position that the Illinois general enabling statute, which provides that a conservation easement “may be released by the holder of such rights to the owner of the fee,”<sup>98</sup> authorized it to agree to amend a tax-deductible conservation easement to, among other things, remove land from the protection of the easement (which constituted a partial termination of the easement) in exchange for the protection of the same amount of land on an adjacent lot.<sup>99</sup> The purpose of the “amendment” removing land from the easement was to permit the new owners to construct a driveway turnaround on a portion of the protected lawn and landscaped grounds, an action expressly prohibited by the easement.<sup>100</sup> The Illinois Appellate Court invalidated the amendments, explaining that to allow the amendments would render meaningless the provisions in the easement specifying its conservation purpose, prohibiting structures and improvements (including driveways) on the protected lawn and landscaped grounds, and prohibiting the easement’s termination or extinguishment, in whole or in part, without court approval.<sup>101</sup>

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<sup>97</sup> Because the conservation easement at issue in Myrtle Grove was donated in 1975, it was not required to satisfy the requirements of section 170(h) (enacted in 1980) or the Treasury Regulations (published in 1986). The controversy is nonetheless instructive because of the attorney general’s position that the easement, which was conveyed as a charitable gift for the purpose of protecting the conservation values of the Myrtle Grove property in perpetuity, constituted a restricted charitable gift or charitable trust that could not be amended as proposed without complying with both the state enabling statute *and* the state laws governing the administration of restricted charitable gifts and charitable trusts.

<sup>98</sup> 765 ILL. COMP. STAT. 120/1(b) (West 2001).

<sup>99</sup> *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008).

<sup>100</sup> *Id.* at 574. The amendments also sanctioned the new landowners’ landscaping changes and construction of an addition in excess of 1,900 square feet to their residence, even though both actions also violated the terms of the easement. *Id.* at 568-70.

<sup>101</sup> *Id.* at 574. The court explained:

*Bjork* illustrates that courts are willing to enforce tax-deductible perpetual conservation easements according to their terms despite the seemingly permissive language of the state enabling statute and the agreement of the holder of the easement and the owner of the land to amend or terminate the easement. *Bjork* also illustrates the importance of requiring that tax-deductible easements include provisions that comply with the requirements of section 170(h) and the Treasury Regulations. The easement at issue in *Bjork*, which had been donated in 1998 as a tax-deductible charitable gift, contained, among other things, provisions complying with the Treasury Regulations' "extinguishment" and "division of proceeds" requirements, and those provisions were important to the court's holding.<sup>102</sup>

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Here, the easement set forth in section 1 that its purpose was to assure that the property would be "retained forever predominantly in its scenic and open space condition, as lawn and landscaped grounds." Section 3 provided that this purpose would be achieved, in part, by "expressly prohibit[ing]" "[t]he placement or construction of any buildings whatsoever, or other structures or improvements of any kind." Section 15 provided that the easement could "only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction."

The trial court's construction of the easement [validating the amendments] essentially rendered the above provisions meaningless.

*Id.*

The court remanded the case, directing the trial court "to equitably consider which of the alterations to the property [the new landowners] must remove." *Id.* at 575. The court cautioned, however, that "if a landowner could avoid complying with the terms of a conservation easement by making alterations and then claiming that it would be too costly (and, thus, inequitable) to return the property to its original condition, . . . the restrictions placed in a conservation easement could be rendered meaningless." *Id.*

On remand, the new landowners were ordered to remove the driveway turnaround and certain trees and vegetation they had planted that restricted the public's view of the property, but were allowed to retain the addition to the residence. *See Bjork v. Draper*, 936 N.E.2d 763, 771-73, (Ill. App. Ct. 2008), *appeal denied*, 943 N.E.2d 1099 (Ill. 2011). The trial court explained, and the Illinois Appellate Court concurred, that the expense associated with the removal of the addition to the residence "would be greatly disproportionate to any minimal enhancement of the easement's purpose" because the addition was not viewable from the road. *Id.* at 772.

<sup>102</sup> *See supra* note 101 and accompanying text. For a detailed discussion of why a "swap," such as was attempted in *Bjork* (that is, the removal of land from the protection of an easement in exchange for the protection of some other land), should be deemed to violate federal tax law requirements, *see National Perpetuity Standards*, *supra* note 1, at 520-23; *see also* Nancy A. McLaughlin & W. William Weeks, *Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73, 86-88 (2010) (noting that the court in *Bjork* was not presented with and, thus, did not address whether the

*c. Otero County (Colorado)*

In 2005, a Colorado trial court terminated two conservation easements at the joint request of the holder of the easements (the Otero County Land Trust, a government entity) and the owners of the burdened land.<sup>103</sup> The landowners had made charitable gifts of the easements to the land trust in 2003 in hopes of receiving state tax benefits.<sup>104</sup> Whether the landowners also attempted to obtain or obtained federal tax benefits with respect to the donations is unclear. Under Colorado law, however, to be eligible for state tax benefits the landowners had to satisfy the federal requirements under section 170(h) and the Treasury Regulations.<sup>105</sup>

When the landowners failed to receive the anticipated state tax benefits, they and the land trust jointly petitioned the trial court requesting that the court terminate the easements.<sup>106</sup> Six days after the filing of the petition, the court issued a one-and-a-half page order terminating the easements.<sup>107</sup> Unlike in the Myrtle Grove controversy or *Bjork v. Draper*, the terminations were not contested and it does not appear that anyone was provided notice of the petition or the terminations.

Rather than relying on the seemingly permissive language in the Colorado general enabling statute, which provides that conservation easements may be released, terminated, extinguished, or abandoned in whole or in part in any manner in which easements may be lawfully terminated, released, extinguished, or abandoned,<sup>108</sup> the parties represented to the court that the

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conservation easement, which had been conveyed to the land trust as a tax-deductible charitable gift, was subject to the state laws applicable to charitable gifts).

<sup>103</sup> Order, Leslie James Walter, John R. Walter, and Shirley M. Walter, Petitioners, and Otero County Land Trust, Co-Petitioner, No. 05CV96, Div. A (Otero County, Colo. Dist. Ct. June 21, 2005) (on file with author) [hereinafter Order].

<sup>104</sup> See Land Trust Alliance, *Walter v. Otero County Land Trust* Facts, [http://198.66.224.63/newsroom/npr\\_031108\\_WalterOtero.htm](http://198.66.224.63/newsroom/npr_031108_WalterOtero.htm) (last visited May 23, 2011) (noting that “The donors hoped to receive and sell state income tax credits for their donation.”).

<sup>105</sup> COLO. REV. STAT. ANN. § 39-22-522(2) (2010) (“The credit shall only be allowed for a donation that is eligible to qualify as a qualified conservation contribution pursuant to section 170(h) of the internal revenue code, as amended, and any federal regulations promulgated in connection with such section.”).

<sup>106</sup> Joint Petition for Declaratory Judgment and Order, Leslie James Walter, John R. Walter, and Shirley M. Walter, Petitioners, and Otero County Land Trust, Co-Petitioner, No. 05CV96, Div. A (Otero County, Colo. Dist. Ct. June 16, 2005) (on file with author) [hereinafter Joint Petition]; see also Land Trust Alliance, *Walter v. Otero County Land Trust* Facts, *supra* note 104 (explaining that the easements were reappraised at much lower values after the original appraisals came under scrutiny by a state funding agency).

<sup>107</sup> See Order, *supra* note 103.

<sup>108</sup> See COLO. REV. STAT. ANN. §§ 38-30.5-107 (2010).



terminations were authorized by the express terms of the easements.<sup>109</sup> To comply with the federal tax law “extinguishment” requirement, each deed provided that a court could terminate the easement “[i]f it is determined that conditions on or surrounding the Property change so much that it becomes impossible to fulfill [the easement’s] conservation purposes.”<sup>110</sup> Each deed also provided that the grantor “intends to make a charitable gift of the [easement] for the exclusive purpose of assuring that, under Grantee’s perpetual stewardship, the agricultural productivity, and any open space character, wildlife habitat, and scenic qualities of the Property will be conserved and maintained forever. . . .”<sup>111</sup>

In terminating the easements, the trial judge misread the standard for extinguishment included in the easement deeds. The parties offered no evidence that conditions on or surrounding *the properties* had changed so much that it had become impossible to fulfill the easements’ conservation purposes. Rather, they represented that “conditions surrounding *the grant* of the conservation easements” had changed—presumably that the landowners had failed to receive anticipated tax benefits—and that those changed conditions rendered the landowners “unable to fulfill the conservation purposes they had for the property.”<sup>112</sup> Accordingly, the standard for extinguishment provided in the easement deeds had not been satisfied and, thus, the court’s termination of the easements was improper.

To further comply with the federal tax law “extinguishment” and “division of proceeds” requirements, each easement deed also provided:

If the easement is terminated in whole or in part and all or part of the Property is [either] sold or taken for public use, then, as required by Treasury Regulation § 1.170A-14(g)(6), Grantee shall be entitled to [a specified

<sup>109</sup> See Joint Petition, *supra* note 106, at 3.

<sup>110</sup> See Correction Deed of Conservation Easement for the Leslie James Walter Farm, by Leslie James Walter, Grantor, and the Otero County Land Trust, Grantee, 7 (Apr. 12, 2004) (on file with author) [hereinafter the April 2004 Easement]; Correction Deed of Conservation Easement for the John R. Walter and Shirley M. Walter Farm, by John R. Walter and Shirley M. Walter, Grantor, and the Otero County Land Trust, Grantee, 7 (June 21, 2004) (on file with author) [hereinafter the June 2004 Easement]. Both easements were corrected to change the percentage of the gross sales proceeds or condemnation award to which the holder was entitled upon extinguishment as required by Treasury Regulation section 1.170A-14(g)(6). See Resolution #2004-13, Bd. County Comm’rs, Otero County, Colo. (Apr. 12, 2004); Resolution #2004-18, Bd. County Comm’rs, Otero County, Colo. (June 21, 2004).

<sup>111</sup> April 2004 Easement, *supra* note 110, at 1; June 2004 Easement, *supra* note 110, at 1.

<sup>112</sup> Joint Petition, *supra* note 106, at 3.

percentage] of the gross sales proceeds or condemnation award representing an amount equal to the ratio of the appraised value of this easement to the unrestricted fair market value of the Property, as these values are determined on the date of this Deed. Grantee shall use the proceeds consistent with the conservation purposes of this Deed.<sup>113</sup>

In his order terminating the easements, the trial judge failed to address the grantee's right, consistent with Treasury Regulation § 1.170A-14(g)(6), to a specified percentage of proceeds upon the sale or condemnation of the land to be used by the grantee consistent with the conservation purposes of the easement—that is, to replace lost conservation values.<sup>114</sup> Thus, it appears, that such right was inappropriately terminated along with the remainder of the easement. That, too, was contrary to the terms of the easement deeds and improper.<sup>115</sup>

Finally, the trial judge also failed to recognize the status of the conservation easements as charitable gifts made for specific purposes, and it appears that the Colorado attorney general was not notified of the proceeding and given an opportunity to participate to represent the interests of the public. If the attorney general was not so notified, then, absent a statute of limitations on the enforcement of charitable gifts in Colorado, the trial judge's order may not be binding.<sup>116</sup> If that is the case, the Colorado attorney gener-

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<sup>113</sup> See April 2004 Easement, *supra* note 110, at 7 (specifying payment to the grantee of 26 percent of such proceeds); June 2004 Easement, *supra* note 110, at 7 (specifying payment to the grantee of 72 percent of such proceeds).

<sup>114</sup> The order could have placed a lien on each property in favor of the holder for such proceeds and directed that the holder use any such proceeds “consistent with the conservation purposes of [the applicable deed].”

<sup>115</sup> It may also have been contrary to state law for the holder, a government entity, to agree to convey public assets (the easements or the holder's right to a specified percentage of proceeds following their termination) to private individuals (the landowners).

<sup>116</sup> See, e.g., *Brown v. Mem'l Nat'l Home Found.*, 329 P.2d 118, 131 (Cal. Dist. App. 1958), *cert. denied*, 358 U.S. 943 (1959) (quoting *William Buchanan Found. v. Shepperd*, 283 S.W.2d 325, 336 (Tex. Civ. App. 1955)) (“No length of diversion from the plain provisions of a charitable trust will prevent restoration to its true purpose.”); *Tauber v. Commonwealth*, 499 S.E.2d 839, 845 (Va. 1998) (laches may not be pled successfully as a defense in an equitable proceeding to bar the state attorney general from asserting a claim on behalf of the public to insure that charitable assets are distributed in accord with the charitable purposes to which they should have been devoted); *Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Acad. in Andover*, 148 N.E. 900, 918 (Mass. 1925) (“Generally it is true that no length of time of diversion from the plain provisions of a charitable foundation will prevent its restoration to its true purpose”).

al should consider seeking reinstatement of the conservation easements, or, alternatively, a court order requiring payment to the land trust (or other appropriate recipient) of the specified percentage of proceeds from a subsequent sale or condemnation of the properties to be used consistent with the conservation purpose of the easements.

As noted above, it is not clear if the easement donors in this case claimed federal tax benefits with regard to their donations. They did, however, draft their easements to include provisions intended to comply with federal tax law requirements and the trial court did not enforce those provisions. The court's failure to enforce those provisions and the Colorado attorney general's absence from the proceeding highlight two important issues. First, if the law develops in a state such that the provisions included in a conservation easement to satisfy federal tax law requirements are not enforceable (whether because the state enabling statute is deemed to "trump" such provisions or otherwise), then landowners donating conservation easements in the state should not be eligible for federal tax benefits. The various requirements in section 170(h) and the Treasury Regulations cannot be satisfied if the terms included in an easement deed to comply with those requirements can be released by the holder, removed through amendment, or otherwise ignored under state law.

Second, the IRS could greatly assist the states in ensuring that conservation easement donations remain eligible for federal tax benefits by issuing guidance indicating the agency's expectation that the restriction on transfer, extinguishment, division of proceeds, and other provisions included in the deeds to satisfy federal tax law requirements will be enforceable under state law, and, if the law in a state develops such that those provisions are not enforceable, easement donations in the state will no longer be eligible for federal tax benefits. Such guidance would put all relevant parties, including state legislatures, state judges, and state attorneys general, on notice of what is required if a state wishes to benefit from the federal subsidy.<sup>117</sup>

## 2. *Statutes Silent Regarding Modification or Termination*

In eleven states—California, Connecticut, Hawaii, Michigan, Missouri, New Hampshire, North Carolina, Ohio, Tennessee, Vermont, and Washington—the general enabling statute is silent regarding the manner in which an easement can be released, transferred, modified, or terminated.<sup>118</sup> These

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<sup>117</sup> See *infra* Part VI (discussing the need for IRS guidance).

<sup>118</sup> See *infra* Appendix A. The New Hampshire statute provides that "[a]ny doctrine of law which might otherwise cause the termination of such a restriction shall not be affected by the provisions of this subdivision." N.H. REV. STAT. ANN. § 477:46 (2003). The Tennessee

statutes implicitly leave such issues to the terms of the conservation easement instrument and the state's other applicable law, including, in the case of conservation easements conveyed in whole or in part as charitable gifts, the laws applicable to such gifts.

A settlement of a suit involving a conservation easement created pursuant to the Tennessee general enabling statute illustrates that state laws governing the enforcement of charitable gifts can protect the public interest and investment in conservation easements conveyed as charitable gifts.

*a. The Wal-Mart Controversy (Tennessee)*<sup>119</sup>

In 1996, a development corporation donated a perpetual conservation easement to the City of Chattanooga for the purpose of assuring "that the Property will be retained forever in its scenic, recreational and open space condition and to prevent any use of the Property that will significantly impair or interfere with the Conservation Values of the Property." The development corporation later sold land adjacent to the protected property to Wal-Mart for the construction of a Wal-Mart SuperCenter. A four-lane road was then constructed across the easement-protected parcel to provide access to the Wal-Mart SuperCenter, and two nonprofit organizations and a private citizen sued the owner of the encumbered land—the development corporation—and the holder of the easement—the city of Chattanooga, which had ignored the violation of the easement's terms.

In 2006, a trial court in Tennessee approved settlement of the suit. In the settlement, the development corporation agreed to convey a replacement parcel of land and \$500,000 to the plaintiffs to be used for similar conservation purposes and pay the plaintiffs' not insubstantial legal fees. In approving the settlement, the trial court noted that the easement was both a conservation easement within the meaning of the Tennessee general enabling statute *and* a charitable gift within the meaning of Tennessee's law governing the use and disposition of charitable gifts. The court concluded that the suit was an equitable action involving the charitable grant of a conservation easement; the purpose of the charitable grant of the easement had become, in part, "impossible or impractical" as a result of the construction of the

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statute provides that "[n]o conservation easement shall be held automatically extinguished because of violation of its terms or frustration of its purposes," but leaves the door open to a potential release or abandonment by the holder, or an agreement of the holder and current owner to modify or terminate. TENN. CODE ANN. § 66-9-306 (2004).

<sup>119</sup>The description of this controversy in the text is drawn from Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 Ecology L.Q. 673, 695-700 (2007).

road and its use by the citizens of Tennessee;<sup>120</sup> and the property and funds transferred to the plaintiffs to be used to effect the same purpose as that of the original easement constituted a reasonable and adequate substitute for any portion of the property that may have been affected or taken as a result of the road construction.

The conservation easement at issue in this case did not contain restriction on transfer, extinguishment, division of proceeds, or other provisions to comply with federal tax law requirements, and the development corporation does not appear to have claimed federal tax benefits for the donation. Nonetheless, the settlement illustrates that the status of a conservation easement as a charitable gift made for a specific purpose can operate to protect it from being released or terminated, in whole or in part, by its holder, despite the seemingly permissive language of the state enabling statute. Such status can also ensure that, if the purpose of the easement becomes impossible or impracticable due to changed conditions, substitute property that fulfills as nearly as possible the general charitable conservation purpose of the original easement will be provided.

### 3. Statutes Based on the UCEA

Twenty-three states and the District of Columbia have adopted the UCEA in whole or substantial part.<sup>121</sup> In these jurisdictions, the general enabling statute provides that a conservation easement can be modified or terminated “in the same manner as other easements,” but the statute “does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity.”<sup>122</sup>

The drafters of the UCEA explained that the act “leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts” and “independently of the Act, the Attorney General could have standing [to bring an action affecting a conservation easement] in his capacity as supervisor of charitable trusts. . . .”<sup>123</sup> In other words, the UCEA does not abrogate the well-settled principles that apply when property, such as a conser-

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<sup>120</sup> Construction of the road was completed after the court had initially dismissed the action on the ground that the plaintiffs did not have standing to sue and before the Tennessee Court of Appeals reinstated the action. At the time of the reinstated suit, the road was operational and being used by the citizens of the city and state. The court determined that, under the circumstances, it would be inequitable, impracticable, and wasteful to impair or alter the road, and it was necessary to provide an alternative remedy.

<sup>121</sup> See *infra* Appendix A.

<sup>122</sup> UCEA, *supra* note 66, § 2(a) and § 3(b).

<sup>123</sup> *Id.* § 3 cmt. (emphasis added).

vation easement, is conveyed as a charitable gift to a government entity or charitable organization to be used for a specific charitable purpose.

To address any possible lingering confusion on this point, in 2007 the National Conference of Commissioners on Uniform State Laws approved amendments to the comments to the UCEA that explain:

while Section 2(a) [of the Act] provides that a conservation easement may be modified or terminated “in the same manner as other easements,” the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.<sup>124</sup>

Moreover, the drafters of the UCEA recognized that “Federal tax statutes and regulations . . . rigorously define the circumstances under which easement donations qualify for favorable tax treatment,” and they crafted the UCEA to “enable the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code.”<sup>125</sup> In other words, the drafters specifically contemplated that landowners wishing to take advantage of federal tax benefits would be able to draft their conservation easements to comply with the federal requirements. The drafters also presumably assumed that the provisions included in conservation easements to comply with the federal requirements would be enforceable under state law.

With regard to that last point, as noted above, the UCEA leaves intact existing case and statute law of adopting states as it relates to the enforcement of charitable trusts. Part III.A above explains that such law requires the donee of a charitable gift made for a specific purpose to administer the gift consistent with its stated terms and purpose, and, if the donee uses or threatens to use the gift in a manner contrary to its stated terms or purpose, the state attorney general (among others) can sue the donee for a breach of its fiduciary duties. Tax-deductible conservation easements are, by definition, charitable gifts made for a specific purpose. Accordingly, the donee of a tax-deductible conservation easement should be required under state law to administer the easement consistent with its stated terms and charitable

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<sup>124</sup> *Id.* § 3 cmt.

<sup>125</sup> *Id.* Prefatory Note at 168 (providing further that the “parties intending to attain [tax benefits] must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable.”).

conservation purpose, and if the donee uses or threatens to use the easement in a manner contrary to its terms or purpose, the state attorney general (among others) should be empowered to sue the donee for a breach of its fiduciary duties.

*a. Salzburg v. Dowd (Wyoming)*<sup>126</sup>

Some have tried to argue—unsuccessfully—that UCEA-based general enabling statutes authorize holders to modify or terminate tax-deductible conservation easements “in the same manner as other easements” despite the status of such easements as charitable gifts made for a specific purpose and the inclusion of provisions in the easement deeds to satisfy the Treasury Regulations’ restriction on transfer, extinguishment, division of proceeds, and other requirements. Such was the case in *Salzburg v. Dowd*.

*Salzburg* involved Johnson County, Wyoming’s attempted termination of a conservation easement that had been conveyed to the County in 1993 as a tax-deductible charitable gift. The conservation easement was estimated to have reduced the value of the 1,043-acre ranch it encumbered by over \$1 million, and the donors of the easement claimed a federal income tax deduction based on that amount. Consistent with federal tax law requirements, the conservation easement expressly provided that it could be (i) transferred only to another qualified organization that agreed to continue to enforce the easement,<sup>127</sup> and (ii) extinguished, in whole or in part, only in a judicial proceeding, upon a finding of impossibility, and with a payment of a share of proceeds to the holder as provided in Treasury Regulation section 1.170A-14(g)(6)(ii).

In 2002, new owners of the ranch (the Dowds), who had purchased the ranch subject to the perpetual conservation easement (and, presumably, for a much reduced price as a result), requested that the County terminate the easement.<sup>128</sup> The County obliged, and executed a deed transferring the

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<sup>126</sup> The discussion of this case and its eventual settlement in the text is drawn from Nancy A. McLaughlin & W. William Weeks, *Salzburg v. Dowd: Another Look*, 33 WYO. LAW. 50 (2010); McLaughlin & Weeks, *supra* note 75; McLaughlin & Weeks, *supra* note 102; Nancy A. McLaughlin, *Could Coalbed Methane be the Death of Conservation Easements?*, 29 WYO. LAW. 18 (2006).

<sup>127</sup> The Treasury Regulations technically require that transfers be made only to another “eligible donee,” which is defined as a qualified organization that has the requisite commitment and resources. *See* Treas. Reg. § 1.170A-14(c)(1).

<sup>128</sup> When the Dowds purchased the ranch, they knew that a third party owned the minerals underlying the land and had the right to reasonable access to the surface of the land to extract its minerals. When that third party later began exploratory drilling for coalbed methane on the ranch, the Dowds asked the County terminate the conservation easement,

easement to the Dowds, intending to thereby terminate the easement. The County did not obtain judicial approval of the termination, no inquiry was made as to whether continuing to protect the land for conservation purposes had become impossible or impractical, and the County neither requested nor received any proceeds with which to replace lost conservation values.

A County resident (Hicks) filed suit alleging, *inter alia*, that the easement was held in trust for the benefit of the public and could be terminated only with court approval obtained in a *cy pres* proceeding as required by state law governing charitable gifts and the terms of the easement deed. The Wyoming Attorney General (AG) was given notice of the proceeding and the opportunity to participate, but declined to become involved, explaining that “[t]he issues are squarely before the Court and the interests of the public, as the beneficiaries of the conservation easement at issue here, are being represented by arguments of counsel on all sides.” In 2007, the Wyoming Supreme Court dismissed this case on the ground that Hicks did not have standing, but invited the Wyoming AG, as supervisor of charitable trusts in the state, “to reassess his position” with regard to the case.<sup>129</sup>

In July 2008, the Wyoming AG filed suit against the County and the Dowds requesting that the deed transferring the easement to the Dowds be declared null and void. The AG’s primary argument was that the original conveyance of the easement constituted a restricted charitable gift or charitable trust and the County had violated its fiduciary duties by agreeing to terminate the easement without obtaining court approval as required under both state law applicable to charitable gifts and the express terms of the easement deed.<sup>130</sup> The Wyoming AG also warned that, if the Wyoming courts determined that tax-deductible perpetual conservation easements could be modified or terminated “in the same manner as other easements” despite their status as charitable gifts made for specific purposes and inclusion of provisions intended to comply with federal tax law requirements,

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claiming that the drilling was inconsistent with the terms of the conservation easement. As it turned out, the ranch was not a good place for coalbed methane development and the impact of the limited drilling on the conservation values of the land was minimal.

<sup>129</sup> Hicks v. Dowd, 157 P.3d 914, 921 (Wyo. 2007).

<sup>130</sup> In support of his argument, the Wyoming AG cited state law governing the administration of charitable gifts, the perpetuity requirements in section 170(h) and the Treasury Regulations, the “restriction on transfer” and “extinguishment” provisions included in the easement deed, the commentary to the UCEA and the UNIFORM TRUST CODE (both adopted in Wyoming), the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 (2000), and the RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (which provides that a charitable gift made for a specific purpose is subject to the principles governing charitable trusts, including the doctrine of *cy pres*).



conservation easement donations in Wyoming could be rendered nondeductible. The Dowds, for their part, argued that there is “nothing special” about a conservation easement when it comes to modification or termination and cited to the Wyoming UCEA for the proposition that conservation easements can be modified or terminated “in the same manner as other easements.”<sup>131</sup>

In February of 2010, the parties in *Salzburg* agreed to settle the case. Consistent with the relief sought by the Wyoming AG in the litigation, the County’s transfer of the conservation easement to the Dowds was declared null and void and the original deed of easement, with minor court-approved amendments, remains in full force and effect on the ranch. As in the Myrtle Grove controversy and *Bjork v. Draper*, the County, as holder of the easement, was not permitted to simply terminate the easement, despite the seemingly permissive language of the Wyoming general enabling statute. *Salzburg* also highlights the importance of requiring that provisions complying with the restriction on transfer, extinguishment, division of proceeds, and other requirements in section 170(h) and the Treasury Regulations be included in tax-deductible conservation easement deeds, as well as the key role that state attorneys general and state courts play in ensuring the enforcement of tax-deductible conservation easements over the long term.

Although the IRS also plays a role in regulating the activities of holders of conservation easements, its role is necessarily limited. As previously explained:

Even assuming the IRS had the resources and interest to involve itself in the enforcement of conservation

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<sup>131</sup> The Nature Conservancy, the nation’s largest land trust and one that operates in all fifty states, filed a motion to intervene in the case in support of the Wyoming AG’s position. The Nature Conservancy acknowledged that it holds the conservation easements it acquires as tax-deductible charitable gifts in trust or a trust-like relationship for the benefit of the public and it is required to administer those easements consistent with their stated terms and charitable conservation purposes. Two Wyoming land trusts—the Jackson Hole Land Trust and the Wyoming Stock Growers Agricultural Land Trust—displeased by the prospect of state oversight of their activities, also filed motions to intervene in the case. Although they argued that the attempted termination was improper, they objected to the Wyoming AG’s position and argued, like the Dowds, that government and nonprofit holders are free to agree to modify and terminate tax-deductible perpetual conservation easements “in the same manner as other easements,” regardless of the status of the easements as charitable gifts or the terms included in the easement deeds to comply with federal tax law requirements. Other land trusts in Wyoming refused to join their motion to intervene. For a critique of the arguments made by the two Wyoming land trusts, see generally McLaughlin & Weeks, *supra* note 102.

easements, the IRS does not have the power to declare an improper easement amendment or termination null and void or to enjoin a holder from future wrongdoing; those key remedies are the province of state courts. The IRS is charged with enforcing federal tax laws; state attorneys general and state courts are charged with ensuring that charitable gifts are administered in accordance with their stated terms and purposes. It is therefore no surprise that the IRS was not involved in *Salzburg* or any of the other cases to date that involved the improper modification or termination of conservation easements.<sup>132</sup>

#### 4. *Statutes with Unique Provisions*

The general enabling statutes in the remaining nine states (Maine, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, New York, Rhode Island, and Virginia) contain unique transfer, release, modification, or termination provisions. Rather than describing the manner in which the provisions of each such statute differ from federal tax law requirements, an analysis of two of the statutes is set forth below. The same or a similar analysis can be applied to the other unique statutes.

##### a. *Maine*

Maine's general enabling statute was amended in 2007 to provide, *inter alia*, that, a conservation easement may be terminated or amended only as set forth in the statute.<sup>133</sup> The statute mandates that conservation easements executed on or after its effective date include a statement of the holder's power to agree to amendments that do not materially detract from the conservation values intended for protection.<sup>134</sup> The statute then provides that a conservation easement "may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party" and, in making that determination, "the court shall consider, among other relevant factors, the purposes expressed by the parties in the easement and the public interest."<sup>135</sup> If the value of a landowner's estate is increased by reason of an amendment or termination,

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<sup>132</sup> Nancy A. McLaughlin & W. William Weeks, *Salzburg v. Dowd: Another Look*, 33 WYO. LAW. 50, 52 (2010). For a more detailed discussion of this point, see McLaughlin & Weeks, *supra* note 102, at 97-99.

<sup>133</sup> ME. REV. STAT. tit. 33, § 477 (1) (Supp. 2010).

<sup>134</sup> *Id.* § 477-A(2)(A).

<sup>135</sup> *Id.* § 477-A(2)(B).

the statute requires that the increase be paid over to the holder or to such nonprofit or governmental entity as the court may designate, “to be used for the protection of conservation lands consistent, as nearly as possible, with the stated publicly beneficial conservation purposes of the easement.”<sup>136</sup> The statute also provides that “[n]o comparative economic test may be used to determine . . . if a conservation easement is in the public interest or serves a publicly beneficial conservation purpose.”<sup>137</sup>

Of all the general enabling statutes, the provisions of Maine’s amended statute come closest to mirroring the perpetuity requirements of section 170(h) and the Treasury Regulations.<sup>138</sup> The statute requires court approval for extinguishment. The statute permits a holder to agree to only those amendments that do not “materially detract from the conservation values intended for protection”<sup>139</sup> (in other words, to amendments that are consistent with the conservation purpose of the easement). And the statute mandates that the holder be paid compensation upon either the amendment or extinguishment of an easement and use such compensation in a manner consistent with the conservation purposes of the original contribution.<sup>140</sup>

Like all the other general enabling statutes, however, Maine’s amended statute does not, on its own, ensure that an easement donation will satisfy all of the perpetuity requirements in section 170(h) and the Treasury Regulations. It does not require that a conservation easement be granted in perpetuity or contain restrictions on surface mining. It does not require that a conservation easement be conveyed to an eligible donee that has a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions. It does not require that the instrument of conveyance prohibit the donee from transferring the easement, whether or not

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § 478(4).

<sup>138</sup> In June of 2011, Rhode Island’s general enabling statute was amended to include amendment and termination provisions modeled on (but not identical to) those in Maine’s revised statute. *See* Appendix A. The Rhode Island statute also includes provisions authorizing a holder to release easements and it is not clear how the release provisions are intended to interact with the amendment and termination provisions. *See id.*

<sup>139</sup> *Id.* § 477-A(2)(B).

<sup>140</sup> *Id.* Although section 170(h) and the Treasury Regulations do not expressly address the payment of proceeds to the holder upon amendment (as opposed to extinguishment) of a conservation easement, the federal tax law private benefit and private inurement prohibitions, as well as state law prohibitions on the use of charitable or public assets for private purposes, should operate to require that the holder be paid appropriate compensation upon the amendment of a conservation easement. State laws governing the administration of charitable gifts should also require that any such compensation be used in a manner consistent with the purpose of the easement.

for consideration, except to another eligible donee that agrees to continue to carry out the conservation purposes of the easement. It does not mandate that the easement not permit destruction of other significant conservation interests. It does not require that a lender subordinate its rights in the property to the right of the holder to enforce the conservation purposes of the gift in perpetuity. And it does not require that the donee be given baseline documentation, notice of the exercise of potentially harmful reserved rights, reasonable access to the encumbered land for inspection purposes, or specific enforcement rights.

In addition, the Maine statute's standard for extinguishment—the court is instructed to consider, “among other relevant factors, the purposes expressed by the parties in the easement and the public interest”<sup>141</sup>—could be interpreted to be more lenient than the Treasury Regulations' “impossibility or impracticality” standard. Pursuant to the Treasury Regulations, a tax-deductible conservation easement can be extinguished if “a subsequent unexpected change in the conditions surrounding the property. . . [has made] impossible or impractical the continued use of the property for conservation purposes. . . .”<sup>142</sup> If continued use of the property for conservation purposes has *not* become impossible or impractical, a tax-deductible easement should not be extinguished, even if some might argue that it would be “in the public interest” to do so (unless it is condemned through the normal process).<sup>143</sup>

Under the Maine statute, the court is not similarly required to give deference to the continued use of the property for conservation purposes. Rather, the court could give equal or greater weight to the “public interest” or other undefined “relevant factors.” Accordingly, a conservation easement could presumably be terminated under Maine's statutory standard if, for example, “the public interest” and “other relevant factors” indicated that the land would be better used as the site of a highway or a commercial development, despite the fact that the easement continued to protect unique or otherwise significant conservation values (and without the normal process required for a condemnation).

Finally, the Maine statute does not require that the holder be paid at least the Treasury Regulation's mandated minimum percentage share of proceeds following extinguishment. Rather, it mandates that the holder of

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<sup>141</sup> *Id.*

<sup>142</sup> Treas. Reg. § 1.170A-14(g)(6)(i).

<sup>143</sup> See *supra* Part II.B.2 (discussing the restriction on transfer requirement). Condemnation of the subject property for a highway, a commercial development, or a similarly conservation-incompatible purpose would make impossible or impractical the continued use of the property for conservation purposes.

an easement be paid the increase in the value of the land due to easement's extinguishment (in other words, the value of the easement at the time of its extinguishment as established using the before and after method). Thus, if an easement has depreciated in value relative to the value of the property as a whole since its donation, the amount required to be paid to the holder pursuant to the Maine statute will be less than the Treasury Regulation's mandated minimum percentage share.<sup>144</sup>

*b. Virginia*

The Virginia Open Space Land Act authorizes the creation and enforcement of open space easements held by public bodies in Virginia.<sup>145</sup> Although Virginia also has a general enabling statute based on the UCEA,<sup>146</sup> a large percentage of the conservation easements conveyed in the state are open space easements conveyed under the Open Space Land Act to the Virginia Outdoors Foundation (VOF), a quasi-state agency governed by a seven-member board of trustees appointed by the Governor from the Commonwealth at large.<sup>147</sup> Other public bodies authorized to accept open space easements under the act include other state agencies, counties, municipalities, park authorities, soil and water conservation districts, and community development authorities.<sup>148</sup>

The Open Space Land Act authorizes the "conversion" or "diversion" of an open space easement if the public body holding the easement determines that such conversion or diversion is (i) essential to the orderly development and growth of the locality and (ii) in accordance with the locality's official comprehensive plan.<sup>149</sup> The Act also requires that, upon conversion or diversion (i) there must be substituted other real property that is of at least equal fair market value, of greater value as permanent open space, and

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<sup>144</sup> On the other hand, if an easement has appreciated in value relative to the value of the property as a whole since its donation, the Maine statute ensures that the holder will receive that appreciated value, while the Treasury Regulations permit the donor to limit the holder's share to the percentage the easement represented of the value of the property at the time of its donation. See *National Perpetuity Standards*, *supra* note 1, at 510-12 (discussing this aspect of the Treasury Regulations and noting that some holders of conservation easements require that the easements they accept include a provision entitling them, upon extinguishment, to the greater of the Treasury Regulation's mandated minimum percentage or the appreciated value of the easement).

<sup>145</sup> VA. CODE ANN. §§ 10.1-1700 -1705 (2006).

<sup>146</sup> *Id.* §§ 10.1-1009 -1016.

<sup>147</sup> *Id.* §§ 10.1-1800 -1804 (2006 & Supp. 2010).

<sup>148</sup> *Id.* § 10.1-1700.

<sup>149</sup> *Id.* § 10.1-1704(A).

of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as the land converted or diverted, and (ii) such substitute property must be subject to the provisions of the Act.<sup>150</sup>

The term “conversion” apparently refers to a change in the permitted uses of the subject property while retaining the overall protection of the easement.<sup>151</sup> The term “diversion” apparently refers to the removal of all easement protections from the “diverted” land (or a portion thereof) in exchange for replacement land becoming protected open space land.<sup>152</sup> In other words, a diversion involves the extinguishment of the conservation easement encumbering the original protected parcel (or a portion thereof) in exchange for the protection of some other open space land; that is, a “swap.”<sup>153</sup>

Like Maine’s general enabling statute, Virginia’s Open Space Land Act does not, on its own, ensure that an easement donation will satisfy all of the perpetuity requirements in section 170(h) and the Treasury Regulations. The Act does not require that an open space easement be granted in perpetuity or contain restrictions on surface mining. The Act does not require that an easement be conveyed to an eligible donee that has a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions. The Act does not require that the instrument of conveyance prohibit the donee from transferring the easement, whether or not for consideration, except to another eligible donee that agrees to continue to carry out the conservation purposes of the easement. The Act does not mandate that an easement not permit destruction of other significant conservation interests. The Act does not require that a lender subordinate its rights in the property to the right of the holder to enforce the conservation purposes of the gift in perpetuity. And the Act does not require that the donee be given baseline documentation, notice of the exercise of potentially harmful reserved rights, reasonable access to the encumbered land for inspection purposes, or specific enforcement rights.

The Open Space Land Act also does not require court approval or a finding that continued protection of the land for conservation purposes has become impossible or impractical to extinguish an easement. Rather, the statute permits the VOF’s seven-member board of trustees (or those in control of the other public bodies authorized to hold open space easements, in-

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<sup>150</sup> *Id.*

<sup>151</sup> See Frederick S. Fisher, *Condemning Protected Open Space Land: Perspective of the Virginia Outdoors Foundation*, 26 VA. ENVTL. L.J. 437, 438 (2008).

<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

cluding counties, municipalities, and community development authorities),<sup>154</sup> to extinguish the easements when they deem it to be “essential to the orderly development and growth of the locality” and “in accordance with the locality’s official comprehensive plan.”<sup>155</sup> Thus, the statute permits a seven-member politically-appointed board (and counties, municipalities, and community development authorities) to extinguish open space easements to make way for “orderly development and growth,” regardless of whether the easements continue to protect unique or otherwise significant conservation or historic values.

Moreover, although the Open Space Land Act requires that, upon extinguishment of an easement, there must be substituted other real property that is of greater value and nearly as feasible equivalent usefulness and location as permanent open-space (and such substitute property must be subject to the provisions of the Act), such substitute property and its protection need not satisfy the threshold conservation purposes test or any of the other requirements under section 170(h) and the Treasury Regulations. Accordingly, permitting swaps of tax-deductible easements under the Open Space Land Act would render satisfaction of the federal tax law requirements upon the donation of such easements a meaningless exercise. On the day following a donation or anytime thereafter (subject only to a finding that it is “essential to the orderly development and growth of the locality” and “in accordance with the locality’s official comprehensive plan”), the public body could agree to extinguish the tax-deductible easement in exchange for the protection of some other land, and such other land and its protection would need to satisfy only the requirements in the state statute.<sup>156</sup>

Finally, the Open Space Land Act does not require that the holder be paid at least the Treasury Regulation’s minimum percentage share of proceeds (whether in cash or in kind) following extinguishment in all events; it requires only that the substitute property be “of at least equal fair market value” to the extinguished easement. Thus, as with Maine’s statute, the Open Space Land Act does not ensure that the holder will receive the Treasury Regulation’s mandated minimum percentage share following ex-

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<sup>154</sup> See *supra* note 148 and accompanying text.

<sup>155</sup> VA. CODE ANN. § 10.1-1704(A) (2006).

<sup>156</sup> The requirements that must be met to satisfy the open space conservation purposes test of section 170(h) are particularly extensive and detailed because of the potential for abuse, and those federal requirements are not the same as the requirements for “substitute property” under the Virginia Open Space Land Act. See also *National Perpetuity Standards*, *supra* note 1, at 520-23 (discussing swaps).

tinguishment in the event the easement depreciates in value relative to the value of the property as a whole over time.<sup>157</sup>

### 5. Conclusion

As the foregoing discussion indicates, Maine's amended statute and Virginia's Open Space Land Act do not, on their own, ensure that an easement donation will satisfy all of the requirements in section 170(h) and the Treasury Regulations. Indeed, none of the general enabling statutes does so.<sup>158</sup> This does not mean the statutes are flawed or deficient in some way. To the contrary, the statutes were designed to validate conservation easements created in a variety of contexts (purchase, bargain purchase, donation, mitigation, exaction, etc.) and containing a variety of terms. The flexibility is not, however, unlimited. In a few states, including Maine and Virginia, the state legislature has provided minimum requirements for the modification or termination of conservation easements that must be satisfied in all events.

Section 170(h), of course, imposes its own set of requirements. Accordingly, to be eligible for the federal subsidy under section 170(h), conservation easement donors should be required to satisfy both federal tax law and any state enabling statute requirements. This should entail, among other things, inclusion in the conservation easement deed of provisions that comply with the various federal requirements, enforcement of those provisions under state law, and no qualification of those provisions by separate agreement or otherwise.<sup>159</sup> Any conditions or restrictions on the release,

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<sup>157</sup> The Montana general enabling statute is similar to the Virginia Open Space Land Act, except that the Montana statute, if it were the only applicable law, would permit nonprofits as well as governmental holders to decide whether and when to "divert" conservation easements; the standard for diversion is arguably even more lenient and vague (the statute provides for diversion when it is deemed "necessary to the public interest" and "not in conflict with the program of comprehensive planning for the area."); and, in addition to not ensuring that the holder receives the Treasury Regulation's required minimum percentage share on diversion, the substitute property would not need to be "of greater value as open space land." See *infra* Appendix A.

<sup>158</sup> Even if a state were to enact an enabling statute, the provisions of which precisely mirrored federal tax law requirements, a conservation easement donated pursuant to such statute should not be eligible for federal tax benefits absent inclusion in the easement deed of either (i) provisions expressly complying with the federal requirements or (ii) a statement that the provisions in the state enabling statute *in effect at the time of the donation* apply to the easement. State enabling statutes are subject to revision and repeal, and the rules regarding retroactive application of changes to such statutes are unclear.

<sup>159</sup> Satisfaction of the federal requirements also entails, for example, conveyance of the easement to an "eligible donee," receipt of an appropriate subordination agreement from any



transfer, modification, or termination of easements imposed by the general enabling statute should, of course, also apply and provide an added layer of protection of the public interest and investment in such gifts. And if state law precludes compliance with the federal requirements (because, for example, the general enabling statute's minimum requirements are deemed to trump the provisions included in a conservation easement deed to satisfy the federal requirements), easement donations in the state or pursuant to the particular enabling statute should not be eligible for the federal deduction.

### C. Additional Enabling Statutes

The states have enacted numerous statutes authorizing the creation or acquisition of conservation easements in addition to the general enabling statutes. These "additional" enabling statutes, sixty-seven of which were found, authorize the creation or acquisition of conservation easements for a diverse set of purposes, including the protection of scenic views from highways, drinking water resources, river shorelands, historic resources, wildlife habitat, and productive agricultural lands. These statutes are listed in Appendix B, along with their transfer, release, modification, or termination provisions, if any.

Two easement acquisition programs that are embedded in the state's general enabling statute are separately referenced in Appendix B because they relate to particular types of conservation easements and have their own set of transfer, release, modification, or termination provisions (that is, they represent a separate additional easement acquisition programs embedded within the general enabling statute).<sup>160</sup> Appendix B does not include statutes that authorize the creation or acquisition of, for example, "interests in land" or "interests in real property," unless there is a readily available source indicating that the statute is being utilized to acquire conservation easements. In addition, although every effort was made to capture as many statutes that authorize the creation or acquisition of conservation easements as possible, the terminology used in the states to refer to conservation easements varies.<sup>161</sup> Accordingly, Appendix B is likely under-inclusive. Nonetheless,

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lender holding an outstanding mortgage on the property, and provision to the donee of baseline documentation establishing the condition of the property at the time of the donation. See *supra* Part II.B.1, 5, and 6.

<sup>160</sup> See ARK. CODE ANN. § 15-20-410 (2009) (historic preservation easements); OHIO REV. CODE ANN. § 5301.691 (LexisNexis 2004) (agricultural conservation easements).

<sup>161</sup> Conservation easements are referred to in the statutes included in Appendix B as, for example, "agricultural preservation restrictions," "conservation futures," "farmland preservation agreements," "development rights," and "development easements."

Appendix B and the following discussion illustrate that there are a large number of additional enabling statutes with widely divergent terms.

*1. Statutes Silent With Regard to Modification or Termination*

Twenty-two of the additional enabling statutes are silent regarding the manner in which the easements created or acquired thereunder can be transferred, released, modified, or terminated.<sup>162</sup> These statutes implicitly leave such issues to the terms of the conservation easement instrument and the state's other applicable law, which may include the state's general conservation easement enabling statute and, in the case of conservation easements conveyed in whole or in part as charitable gifts, the laws applicable to such gifts. To be eligible for federal tax benefits, conservation easements created or acquired in accordance with these statutes should be drafted to expressly comply with the requirements in section 170(h) and the Treasury Regulations, and the provisions included in the easement deeds should be both enforceable under state law and not qualified.

Some entities administering easement acquisition programs established by these "silent" statutes acknowledge the need to include appropriate provisions in conservation easement deeds to satisfy federal tax law requirements. For example, a statute in New Jersey authorizes municipalities to establish Environmental Commissions that are empowered to, among other things, acquire conservation easements in the name of the establishing municipality.<sup>163</sup> The statute does not address the manner in which such easements may be transferred, released, modified, or terminated. However, the Association of New Jersey Environmental Commissions provides the following information on its website:

Under Section 170(h) of the Internal Revenue Code, a conservation easement must state that it cannot be terminated except through a judicial proceeding, and then only if the court determines it is impossible to accomplish the conservation purposes of the easement. . . .

Bear in mind that the New Jersey [general enabling statute] imposes *additional* newspaper notice, public hearing and Department of Environmental Protection

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<sup>162</sup> See *infra* Appendix B.

<sup>163</sup> N.J. STAT. ANN. § 40:56A-3 (West 1992).

approval requirements as a precondition to the “release” of all or any portion of a conservation restriction.<sup>164</sup>

### 2. *Statutes that Refer to the General Enabling Statutes*

Six of the additional enabling statutes expressly refer to the state’s general enabling statute in some manner.<sup>165</sup> It thus appears that the provisions of the general enabling statute addressing transfer, release, modification, or termination would be applicable to easements acquired pursuant to such statutes. As explained in Part III.B above, however, none of the general enabling statutes ensures satisfaction of the requirements of section 170(h) and the Treasury Regulations. Accordingly, to be eligible for federal tax benefits, conservation easements created or acquired in accordance with the statutes addressed in this subpart should be drafted to expressly comply with the requirements in section 170(h) and the Treasury Regulations, the provisions included in the easement deeds should be both enforceable under state law and not qualified, and any conditions or restrictions on the release, transfer, modification, or termination imposed by the general enabling statute should also apply and provide an added layer of protection of the public interest and investment in such gifts.

### 3. *Statutes with Unique Provisions*

The remaining thirty-nine additional enabling statutes contain unique and widely divergent provisions regarding the transfer, release, modification, or termination of the conservation easements created or acquired thereunder. Not surprisingly, none mirror the requirements of section 170(h) and the Treasury Regulations. For convenience purposes, the discussion below of these additional statutes has been divided into two categories—miscellaneous statutes authorizing the creation or acquisition of conservation easements for a variety of different purposes, and those statutes that authorize the creation or acquisition of agricultural conservation easements.

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<sup>164</sup> JAMES WYSE, INTRODUCTION TO CONSERVATION EASEMENTS FOR THE NON-LAWYER, EASEMENT PROVISIONS IN BRIEF, 7 (2007), available at <http://www.anjec.org/pdfs/EasementCD-EasementProvisionsinBrief.pdf> (Association of New Jersey Environmental Commissions) (emphasis added) (last visited May 23, 2011). In the case of the additional enabling statutes that are silent regarding transfer, release, modification, and termination, it is not clear from the statute that the provisions of the state’s general enabling statute would apply. In New Jersey, they apparently would.

<sup>165</sup> See *infra* Appendix B.

*a. Miscellaneous Statutes*

Numerous states have statutes that permit the holders of conservation easements, in some cases unilaterally and in others with the approval of a state or local government entity, to transfer, release, or otherwise extinguish the easements. For example, in Illinois, statutes authorize each of the Illinois Department of Agriculture and the Illinois Department of Natural Resources to acquire conservation easements and provide that such easements can be released at any time by “mutual consent of the parties.”<sup>166</sup> In Alabama, the state constitution authorizes the state, through a Forever Wild Land Trust, to acquire conservation easements and release such easements, in whole or in part, for such consideration, if any, as the state may determine, in the same manner as the state can dispose of other interests in land.<sup>167</sup> And in Hawaii, a statute authorizes the Board of the Department of Land and Natural Resources to make grants to state agencies, counties, and nonprofit organizations so they can acquire conservation easements, and such entities are permitted to sell or otherwise dispose of such easements with prior written approval of the Board and provided a portion of the net sales proceeds is paid to the state.<sup>168</sup>

Numerous states also have statutes that authorize the creation or acquisition of conservation easements and permit holders of the easements, sometimes after consultation with certain state agencies or the approval of the local government, to transfer, release, or otherwise extinguish the easements if a specific standard is deemed satisfied. Thus, for example, in Minnesota, a statute permits the Board of Water and Soil Resources, after consulting with the state’s Commissioner of Agriculture and Commissioner of Natural Resources, to alter, release, or terminate conservation easements it has acquired if the Board determines that “the public interest and general welfare are better served by the alteration, release, or termination.”<sup>169</sup> In Pennsylvania, a statute permits the state and counties to terminate or sell conservation easements they have acquired if they determine it to be “essential for the orderly development of an area.”<sup>170</sup> In Arkansas, a statute permits the Old State House Commission (a statewide board of nine citizens

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<sup>166</sup> 505 ILL. COMP. STAT. ANN. 35/1-3(b) (West 2004); 525 ILL. COMP. STAT. ANN. 33/10 (West 2004 & Supp. 2011).

<sup>167</sup> ALA. CONST. art. XI, § 219.07.

<sup>168</sup> HAW. REV. STAT. ANN. §§ 173A-9, -10 (LexisNexis 2008 & Supp. 2010).

<sup>169</sup> MINN. STAT. § 103F.535, Subd. 5 (2009).

<sup>170</sup> 32 PA. CONS. STAT. § 5010 (1997). Other local governments are also authorized to so sell or terminate conservation easements provided they receive the approval of a majority of the local electorate.

appointed by the Governor) to modify or terminate conservation easements it has acquired if, after holding a public hearing and considering national, state, regional, and local land use and development plans, the Commission determines that “continuance of the easement is [not] in the public interest.”<sup>171</sup> Other state statutory extinguishment standards include “the source of drinking water that the conservation easement is intended to protect is not and will not be viable . . . ,”<sup>172</sup> “the land [has] cease[d] to be used in the [State Scenic Streams Stewardship Program],”<sup>173</sup> “the open space is not needed . . . and . . . the public interest would be better served by the cancellation” and “there exists no overriding state concern to maintain such open space.”<sup>174</sup>

None of the foregoing statutes, on its own, ensures that an easement donation will satisfy the requirements in section 170(h) and the Treasury Regulations. For example, none requires that the instrument of conveyance prohibit the donee from subsequently transferring the easement, whether or not for consideration, except to another eligible donee that agrees to continue to carry out the conservation purposes of the easement. None requires court approval or a finding that continued use of the property for conservation purposes has become impossible or impractical for extinguishment. And none requires that the holder be paid the Treasury Regulation’s minimum percentage share of proceeds following extinguishment, or that the holder use such proceeds “in a manner consistent with the conservation purposes of the original contribution.”<sup>175</sup>

Accordingly, as with all of the other state enabling statutes, to be eligible for federal tax benefits, conservation easements created or acquired in accordance with these miscellaneous statutes should be drafted to expressly comply with the requirements in section 170(h) and the Treasury Regulations, the provisions included in the easement deeds should be both enforceable under state law and not qualified, and any conditions or restrictions on the release, transfer, modification, or termination of easements imposed by the state statute should also apply. Some of the miscellaneous statutes specifically contemplate that terms included in a conservation easement deed governing its modification or termination will be binding on the parties to the easement. For example, the Alabama Constitution permits the state to re-

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<sup>171</sup> ARK. CODE ANN. § 15-20-410(b) (2009).

<sup>172</sup> N.H. REV. STAT. ANN. § 486-A:13 III(a) (LexisNexis 2003).

<sup>173</sup> MISS. CODE ANN. § 51-4-11 (2003).

<sup>174</sup> TENN. CODE ANN. § 11-15-108(b) (1999 & Supp. 2010).

<sup>175</sup> Although some of the statutes provide for compensation to be paid to the holder upon extinguishment, none complies with the Treasury Regulation’s minimum percentage share and use requirements.

lease conservation easements in the same manner as the state may dispose of other interests in land, “subject to such conditions as may have been imposed at the time of creation of the restriction.”<sup>176</sup>

*b. Agricultural Easement Statutes*

A number of states have statutes that specifically authorize the creation or acquisition of agricultural conservation easements, and some of these statutes contain detailed provisions addressing the transfer, release, modification, or termination of the easements. These statutes also do not ensure, on their own, that an easement donation will satisfy all of the requirements in section 170(h) and the Treasury Regulations. Only two of these statutes are discussed below, but the same type of analysis can be applied to the agricultural conservation easement statutes in other states.

*(i) Maryland*

Maryland legislation establishes the Maryland Agricultural Land Preservation Foundation (MALPF) in the Maryland Department of Agriculture.<sup>177</sup> MALPF is governed by a thirteen-member board of trustees consisting of the State Treasurer, the Comptroller, the Secretary of Planning, and the Secretary of Agriculture (all serving *ex officio*), and nine members from the state at-large appointed by the Governor, at least six of whom must be actively engaged in or retired from active farming and from different areas of the state.<sup>178</sup> A person may serve on the board as an at-large member even if the person has conveyed an easement to MALPF.<sup>179</sup>

MALPF has the authority to acquire conservation easements by gift or bargain purchase for the purpose of maintaining the character of land as agricultural land or woodland.<sup>180</sup> MALPF is directed to adopt guidelines to identify easements for purchase that further the goals of the program and entail consideration of, *inter alia*, the contribution of the land to the agricultural economy and whether the land is located in an area that contains productive agricultural or forest soils or is capable of supporting profitable agricultural and forestry enterprises.<sup>181</sup>

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<sup>176</sup> ALA. CONST. art. XI, § 219.07, section 10(a).

<sup>177</sup> MD. CODE ANN., AGRIC. §§ 2-501 to -519 (LexisNexis 2007 & Supp. 2010).

<sup>178</sup> *Id.* § 2-503(a).

<sup>179</sup> *Id.* § 2-503(a)(4).

<sup>180</sup> *Id.* § 2-504(3).

<sup>181</sup> *Id.* § 2-510(e)(3)(i)–(ii).

### Mandated Uses and Natural Gas Rights

Easements acquired pursuant to the MALPF program must permit (i) “any farm use of land,” (ii) “operation at any time of any machinery used in farm production or the primary processing of agricultural products,” and (iii) “all normal agricultural operations performed in accordance with good husbandry practices which do not cause bodily injury or directly endanger human health.”<sup>182</sup> In certain counties, MALPF may not require that natural gas rights be subordinated to an easement if MALPF determines that exercise of such rights “will not interfere with an agricultural operation conducted on the land.”<sup>183</sup>

Because easements acquired pursuant to the MALPF program must permit farm uses and agricultural operations that may result in the “destruction of other significant conservation interests” (such as wildlife habitat and scenic resources), such easements may not be able to satisfy the Treasury Regulations’ no inconsistent use requirement.<sup>184</sup> In addition, if natural gas rights cannot be subordinated to an easement, the easement may not be able to satisfy section 170(h)’s mining restrictions requirement.<sup>185</sup>

### Corrective Easements or “Swaps”

Once MALPF has acquired an easement, it has the authority to enter into “corrective easements” with the owners of the subject land to adjust boundary lines, resolve easement violations, or “accommodate a plan that [MALPF] has determined will benefit the agricultural operations.”<sup>186</sup> These corrective easements “may be accomplished by the exchange and release of farmland subject to easement restrictions with other farmland that meets the requirements of this subtitle.”<sup>187</sup> In other words, MALPF can agree to terminate an easement with regard to a portion of the originally protected land in exchange for the placement of some other land that meets the requirements of the program under easement. These “swaps” are specifically excepted from the provisions of state law that require independent property appraisals when the state acquires or sells real property interests.<sup>188</sup> There also appears to be no limit on the amount of land that can be removed from the protection of an easement through such a swap.<sup>189</sup>

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<sup>182</sup> *Id.* § 2-513(a).

<sup>183</sup> *Id.* § 2-509(c).

<sup>184</sup> *See supra* Part II.B.3.

<sup>185</sup> *See supra* Part II.A.

<sup>186</sup> MD. CODE ANN., AGRIC. § 2-513(b)(9)(i) (LexisNexis 2007 & Supp. 2010).

<sup>187</sup> *Id.* § 2-513(b)(9)(ii).

<sup>188</sup> *Id.* § 2-513(b)(9)(iii).

<sup>189</sup> *See id.* § 2-513(b)(9).

Corrective easements or swaps involve the extinguishment of an easement as to the land removed without a judicial proceeding, a finding that continued use of the removed land for conservation purposes has become impossible or impractical,<sup>190</sup> or the holder's entitlement to at least a minimum percentage share of proceeds, whether in cash or in kind. Corrective easements also involve the prohibited transfer of restrictions by MALPF to the owner of the subject land, who after the swap can engage in previously prohibited uses on the newly unencumbered land. The ability to extinguish an easement with respect to a portion of the originally protected land also "permit[s] destruction of significant conservation interests" on the removed land,<sup>191</sup> and allows "uses of the [donor's] retained interest inconsistent with the conservation purposes of the donation."<sup>192</sup> Accordingly, easements acquired by MALPF that are subject to partial termination through corrective easements should not be deemed to satisfy the extinguishment, division of proceeds, restriction on transfer, no inconsistent use, or general enforceable in perpetuity requirements of the Treasury Regulations.

There also is no assurance, in the case of corrective easements, that the newly burdened land or the document governing its protection would meet the threshold conservation purposes tests or any of the other requirements of section 170(h) and the Treasury Regulations. Although the state statute requires that swaps be made only for easements protecting other land that meets the requirements of the MALPF program, that program's requirements, which are focused on the preservation of economically productive agricultural and forest lands, are not the same as the requirements under section 170(h) and the Treasury Regulations. Accordingly, if corrective easements were permitted with respect to tax-deductible easements, it would render satisfaction of the requirements in section 170(h) and the Treasury Regulations upon the donation of the easements a meaningless exercise, as the original land and easements could later be "swapped out" for some other land and easements that do not satisfy the federal requirements.

#### Wholesale Extinguishment of Easements

The MALPF legislation contains two sets of rules regarding the wholesale extinguishment of conservation easements acquired thereunder. With

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<sup>190</sup> Pursuant to the statute, an easement could be extinguished in part to adjust a boundary line, resolve a violation, or accommodate agricultural operations even though the land removed from the easement's protections contains unique or otherwise significant scenic, open space, habitat, or historic values.

<sup>191</sup> See Treas. Reg. § 1.170A-14(e)(2) (no inconsistent use requirement).

<sup>192</sup> See Treas. Reg. § 1.170A-14(g)(1) (general enforceable in perpetuity requirement).



regard to any conservation easement approved on or before September 30, 2004, the statute permits MALPF, beginning twenty-five years after the conveyance of the easement and upon the request of the landowner, to extinguish the easement if (i) following an on-site inspection of the land and a public hearing, a majority of MALPF's nine members-at-large appointed by the Governor (including those who have donated easements themselves) determines that profitable farming is no longer feasible, and (ii) the governing body of the county in which the property is located approves, as does the Secretary of Agriculture and the State Treasurer.<sup>193</sup> If a landowner's request to extinguish a conservation easement is denied, the landowner can appeal the decision directly to the circuit court of the county where the land is located.<sup>194</sup> The statute does not provide for an appeal if a landowner's request to extinguish an easement is approved.

If a request for extinguishment is approved, the landowner can repurchase the easement by paying MALPF the difference between the fair market value and the agricultural value of the subject land at the time of the repurchase, as determined by an appraisal.<sup>195</sup> If the easement was originally purchased with the help of funds contributed by a county, the repurchase payment is divided between MALPF and the county according to the percentage of the original easement purchase price each contributed.<sup>196</sup> MALPF's portion is deposited into the Maryland Agricultural Land Preservation Fund, which may be used for both MALPF's general operating costs and to purchase agricultural easements. The county must deposit an amount that is at least equal to the percentage of the original easement purchase price that was paid out of its special agricultural land preservation program account into that account, and the balance is deposited into the county's general fund.<sup>197</sup>

In 2004, the Maryland statute was amended to remove the "buy back option" just described and provide, instead, that easements whose purchase is approved on or after October 1, 2004, "shall be held by [MALPF] in perpetuity."<sup>198</sup>

MALPF acknowledges that some of the standards prescribed by Maryland law are incompatible with federal tax law requirements.<sup>199</sup> It also en-

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<sup>193</sup> MD. CODE ANN., AGRIC. § 2-514(a)-(d) (LexisNexis 2007).

<sup>194</sup> *Id.* § 2-514(h)(i)(3).

<sup>195</sup> *Id.* § 2-514(f)(1)-(2)(ii).

<sup>196</sup> *Id.* § 2-514(f)(2)(iii)(1).

<sup>197</sup> *Id.* § 2-514(f)(2)(iii)(2)-(3).

<sup>198</sup> *Id.* § 2-514.1.

<sup>199</sup> See MARYLAND AGRICULTURAL LAND PRESERVATION FOUNDATION, FACT SHEET 15, TAX CONSIDERATIONS IN SELLING OR DONATING YOUR EASEMENT 2 (Mar. 4, 2009), *available*

courages landowners interested in donating (rather than selling) conservation easements to contact the Maryland Environmental Trust, which uses a standard form easement that includes provisions complying with the restriction on transfer, extinguishment, division of proceeds, and other requirements under section 170(h) and the Treasury Regulations.<sup>200</sup> MALPF also notes that if a landowner has a strong preference for donating an easement to MALPF, MALPF will accept the donation only if the landowner is willing to accept MALPF's standard form easement, which does not include provisions expressly complying with federal tax law requirements.<sup>201</sup> That said, it appears that MALPF does permit landowners interested in claiming federal tax benefits to include provisions in their easement deeds to comply with federal tax law requirements.<sup>202</sup>

#### Comparison to Federal Tax Law Requirements

The MALPF legislation applicable to easements approved on or before September 30, 2004, did not ensure satisfaction of the requirements in section 170(h) and the Treasury Regulations. The legislation did not require that the easements be granted in perpetuity or contain restrictions on mining. It did not require that the easements be conveyed to eligible donees that have a commitment to protect the conservation purposes of the donations and the resources to enforce the restrictions. It did not require that the instruments of conveyance prohibit MALPF from transferring the easements, whether or not for consideration, except to other eligible donees that agree to continue to carry out the conservation purposes of the easements. It did not mandate that the easements not permit destruction of other significant conservation interests. It did not require that a lender subordinate its rights

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at <http://www.malpf.info/facts.html> (last visited May 24, 2011) [hereinafter Fact Sheet] (“[MALPF’s] method of easement valuation is determined by Maryland law and is incompatible with the requirements of the Internal Revenue Service (IRS). MALPF’s calculation of an easement value cannot be used to establish a charitable contribution for tax purposes.”).

<sup>200</sup> See *id.* at 3; see also MET Model Easement form, Article X, available at [http://dnr.maryland.gov/met/pdfs/met\\_model%20easement\\_final\\_for%20website.pdf](http://dnr.maryland.gov/met/pdfs/met_model%20easement_final_for%20website.pdf) (last visited May 24, 2011).

<sup>201</sup> See Fact Sheet, *supra* note 199, at 3; see also Maryland Agricultural Land Preservation Foundation, Legal Documents Related to MALPF, Deeds of Easement, available at <http://www.malpf.info/laws.html> [hereinafter Legal Documents] (last visited May 21, 2011).

<sup>202</sup> See Legal Documents, *supra* note 201 (“some easements include additional restrictions at the request of the landowner, county, or Board of Trustees, for example, eliminating the termination clause to meet IRS standards for the deduction of any charitable element of the easement transaction or eliminating additional development rights.”).

in the property to the right of MALPF to enforce the conservation purposes of the gift in perpetuity. And it did not require that MALPF be given baseline documentation, notice of the exercise of potentially harmful reserved rights, reasonable access to the encumbered land for inspection purposes, or specific enforcement rights.

Such legislation also does not require court approval or a finding that continued protection of the land for conservation purposes has become impossible or impractical to extinguish an easement. Rather, it permits MALPF to engage in swaps (or partially extinguish easements) to adjust boundary lines, sanction easement violations, or benefit agricultural operations.<sup>203</sup> It also permits MALPF to sell the easements to the landowners (thereby completely extinguishing the easements) after twenty-five years if it is determined that “profitable farming is no longer feasible” and approvals are obtained from certain public officials, even if the easements continue to protect unique or otherwise significant conservation values.<sup>204</sup>

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<sup>203</sup> See *supra* note 186 and accompanying text, discussing “corrective easements.”

<sup>204</sup> See *supra* note 193 and accompanying text. In a recent five-year annual report, MALPF explained that the “buy-back option” was eliminated from the statute in 2004, and easements acquired by MALPF after that date must be held “in perpetuity,” in part to “eliminate misunderstandings and misperceptions about the program in the future and . . . reduce the anticipated administrative and legal burden of processing termination requests and defending the integrity of easements.” See Maryland Agricultural Preservation Foundation, Five-Year Annual Report, Fiscal Years 2003-2007, 47 (on file with author) [hereinafter “Annual Report”]. MALPF further explained “the termination clause was originally included to make the easement more acceptable because few landowners knew or understood the program in 1977 at its creation.” *Id.* MALPF claims that “[t]he legislative intent of the MALPF program has always been to purchase perpetual easements” and “[t]he chance to get out of an easement has always been intended to be ‘slim to none.’” *Id.* at 47. However, a court reviewing MALPF’s denial of a request to terminate a conservation easement containing a buy-back provision might well be sympathetic to the plight of a landowner who agreed to convey the easement with the understanding that the landowner or the landowner’s heirs could seek termination after twenty-five years if profitable farming on the land were no longer feasible. Given the express buy-back language included in both the statute and the easement deed, a court likely would be unsympathetic to MALPF’s assertions that the legislative intent of the program was always, nonetheless, to acquire perpetual easements, and the chance for landowners to “get out” of such easements was always intended to be ‘slim to none.’” *Id.* Accordingly, despite MALPF’s current interpretation of the buy-back option (which could change over time as development pressures increase and priorities change), easements approved on or before September 30, 2004, should not be treated as “granted in perpetuity” or their conservation purposes “protected in perpetuity” as required by section 170(h) and the Treasury Regulations unless they were specifically drafted to satisfy federal tax law requirements and the provisions included in such easements to satisfy those requirements are enforceable under state law.

Moreover, although the legislation provides that MALPF is to receive compensation upon the sale and consequent extinguishment of an easement, it does not guarantee that MALPF will receive at least the Treasury Regulation's mandated minimum percentage share.<sup>205</sup> The legislation also does not require that MALPF or the applicable county use the compensation received "in a manner consistent with the conservation purposes of the original contribution."<sup>206</sup>

In addition, although the MALPF legislation was revised in 2004 to provide that the easements approved on or after October 1, 2004, "shall be held by [MALPF] in perpetuity," that provision alone does not ensure satisfaction of the various federal tax law requirements. Accordingly, MALPF easements, whether granted pursuant to the original or revised legislation, should not be eligible for a federal charitable income tax deduction unless they were specifically drafted to comply with the requirements in section 170(h) and the Treasury Regulations (which should include negating MALPF's ability to execute "corrective easements"), and the provisions included in such easements to satisfy such requirements are enforceable under state law and not qualified.<sup>207</sup> Also, as discussed above, there may be some question as to whether a MALPF easement can be drafted to satisfy the Treasury Regulations' no inconsistent use requirement and section 170(h)'s mining restrictions.

(ii) *Ohio*

Statutes in Ohio authorize the Director of Agriculture, municipal corporations, boards of county commissioners, boards of township trustees, boards of supervisors of soil and water conservation districts, and charitable organizations to acquire agricultural easements by gift, devise, or be-

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<sup>205</sup> The legislation provides that MALPF is to be paid the difference between the fair market value and the agricultural value of the subject land at the time of extinguishment of the easement. *See supra* note 195 and accompanying text. If the easement has depreciated in value relative to the value of the property as a whole since its donation, that amount may be less than the Treasury Regulation's mandated minimum percentage share.

<sup>206</sup> *See supra* note 197 and accompanying text (providing that such proceeds may be used for general operating costs as well as land protection purposes).

<sup>207</sup> *See* IRS Information Letter, reproduced in Tax Notes Today 193-21 (Oct. 6, 2010) (advising that the IRS believes an agricultural conservation easement contributed in a bargain sale pursuant to the MALPF legislation as amended in 2004 is eligible for a federal charitable income tax deduction "to the extent it meets the requirements of section 170 of the Internal Revenue Code . . . , including requirements for a qualified conservation contribution [under section 170(h)] and for a bargain sale.") (emphasis added).

quest.<sup>208</sup> Such easements (i) may include terms necessary or appropriate to preserve on behalf of the grantor the favorable federal tax consequences of the gift, devise, or bequest, and (ii) may be extinguished in accordance with the terms and conditions set forth in the instrument of conveyance.<sup>209</sup> The statutes thus expressly contemplate that agricultural easements can be drafted to comply with the requirements of section 170(h) and the Treasury Regulations and that the provisions included in such easements to satisfy such requirements will be enforceable under state law. The guidelines published by the Ohio Department of Agriculture (ODA) regarding this program explain: “[i]f the donor landowner took advantage of donation-related federal tax benefits, only a court may extinguish the easement” and “[i]n the rare event that an agricultural easement is extinguished, IRS regulations and ODA policy requires that ODA be entitled to a share of the proceeds.”<sup>210</sup>

#### 4. Conclusion

As with the general enabling statutes, none of the additional statutes, on its own, ensures that an easement donation will comply with the requirements in section 170(h) and the Treasury Regulations. Again, this does not mean the statutes are flawed or deficient. Many of the additional statutes are designed primarily as easement purchase programs and to promote the protection of particular resources of importance to the state, such as productive agricultural lands, scenic views from the highway, or drinking water resources. In addition, because of the state investment in the easements, many of the statutes specify the conditions under which the purchased easements may be subsequently modified or terminated.

If property owners conveying easements pursuant to the additional statutes wish to be eligible for a federal subsidy under section 170(h) with respect to the donation portion of their transactions, they should be required to satisfy both federal tax law and any state enabling statute requirements. And if state law precludes compliance with the federal requirements, easement conveyances pursuant to the statute should not be eligible for the federal deduction.

State legislatures wishing to supplement the funding of their easement acquisition programs with the federal subsidy provided pursuant to section

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<sup>208</sup> OHIO REV. CODE ANN. §§ 901.21(B), 5301.69 (LexisNexis 2004 & Supp. 2011). Ohio’s acquisition of agricultural easements program is included, in part, in the state’s general conservation easement enabling statute. *See id.* §§ 5301.67–.70.

<sup>209</sup> *Id.* § 901.21(B), (D)(2).

<sup>210</sup> *See* OHIO AGRICULTURAL EASEMENT DONATION PROGRAM, GUIDELINES, OHIO DEPARTMENT OF AGRICULTURE OFFICE OF FARMLAND PRESERVATION 9 (February 2011), available at [http://www.agri.ohio.gov/divs/farmland/docs/Farm\\_AEDP\\_Guidelines.pdf](http://www.agri.ohio.gov/divs/farmland/docs/Farm_AEDP_Guidelines.pdf).

170(h) can, of course, structure those programs to enable compliance with federal tax law requirements. The Maryland legislature did this in 2004 when it revised the MALPF legislation to remove the “buy-back option” and replace it with a requirement that easements be held by MALPF in perpetuity.<sup>211</sup>

#### IV. NONCOMPLIANCE WITH FEDERAL REQUIREMENTS

Property owners sometimes donate conservation easements that provide for transfer or termination in accordance with the terms of the applicable state enabling statute rather than the provisions of section 170(h) and the Treasury Regulations. These donations often occur as part of a “bargain sale” transaction pursuant to a state or local easement purchase program. A question may arise in such cases as to whether the property owner should nonetheless be eligible for a federal charitable income tax deduction under section 170(h) because either (i) the possibility of defeat of the easement under the terms of the applicable state statute is “so remote as to be negligible” or (ii) the transaction “substantially complies” with federal tax law requirements. The following subparts explain why neither of those arguments should be successful.

##### A. “So Remote as to be Negligible” Rule

The Treasury Regulations provide that a deduction for a conservation easement donation will not be disallowed merely because the interest that passes to or is vested in the donee may be defeated as a result of the performance of some act or the happening of some event if, on the date of the gift, it appears that the possibility that such act or event will occur is so remote as to be negligible.<sup>212</sup> A property owner who donates a conservation easement that can be transferred or terminated in accordance with the terms of the applicable enabling statute rather than the provisions of section 170(h) and the Treasury Regulations might argue that he should nonetheless be eligible for a federal charitable income tax deduction because the possibility of defeat of the easement under the terms of the state statute is so remote as to be negligible. There are a number of reasons why that argument should not be successful.

First, as discussed in *National Perpetuity Standards*, there is no hint in either section 170(h) or the legislative history of an intention on the part of

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<sup>211</sup> *But see supra* Part III.C.3.b.(i), noting that there are additional provisions in the MALPF statute that may also need to be modified to enable compliance with federal tax law requirements.

<sup>212</sup> *See* Treas. Reg. § 1.170A-14(g)(3).

Congress to defer to individual state and local policies and procedures with regard to the extinguishment of tax-deductible conservation easements.<sup>213</sup> Rather, Congress sought, through section 170(h), to subsidize the acquisition of conservation easements that would *permanently* protect the conservation or historic values of unique or otherwise significant properties, and to restrict the ability of government and nonprofit holders to sell, release, or otherwise dispose of such easements. Congress also opted to leave it to the Treasury to craft rules to ensure that the conservation purpose of the contribution of an easement would be protected in perpetuity in the unlikely event the easement is extinguished in a state court proceeding due to impossibility or impracticality. The Treasury did this, and the rules it crafted—including the restriction on transfer, extinguishment, and division of proceeds provisions—should be treated as imposing minimum threshold requirements for the extinguishment of tax-deductible easements, requirements that can be supplemented, but not replaced, by extinguishment policies and procedures crafted by states, localities, or individual holders.

Second, and also explained in *National Perpetuity Standards*, taxpayers should not be permitted to invoke the so remote as to be negligible rule to cure their failures to comply with the specific requirements in section 170(h) and the Treasury Regulations.<sup>214</sup> Allowing the so remote as to be negligible rule to be applied in that fashion would require the IRS and the courts to engage in an almost endless series of factual inquiries with regard to each individual conservation easement donation, and the intended benefit of the bright-line rules—efficient and equitable administration of the federal tax incentive program—would be lost.<sup>215</sup> Moreover, as illustrated by the

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<sup>213</sup> See *National Perpetuity Standards*, *supra* note 1, at 480-486, 513-520.

<sup>214</sup> See *id.* at 505-07. See also *supra* note 51 and accompanying text (discussing the inapplicability of the analysis in *Stotler*).

<sup>215</sup> See *National Perpetuity Standards*, *supra* note 1, at 506 n.132 (noting the myriad factual inquiries that would have to be made if donors were permitted to fail to comply with the specific requirements of section 170(h) and the Treasury Regulations and then invoke the so remote as to be negligible rule to cure such failures). An extraordinary administrative burden would be imposed on the IRS and the courts if section 170(h) and the Treasury Regulations were interpreted to authorize deductions for the donation of conservation easements that could be extinguished under state and local policies and procedures provided it could be shown that the probability of such extinguishment (or of the holder's failure to receive at least the Treasury Regulation's mandated minimum percentage share of proceeds upon extinguishment and use such proceeds for similar conservation purposes) was so remote as to be negligible. The over one hundred state statutes authorizing the creation or acquisition of conservation easements contain widely divergent extinguishment and proceeds provisions and those provisions are subject to revision and repeal. In addition, because the probability of defeat of a gift for purposes of the so remote as to be negligible rule is

special exception to the surface mining prohibition for severed estate lands, when Congress desires to soften a specific requirement in section 170(h) by the application of the so remote as to be negligible rule, it does so expressly.<sup>216</sup> Similar so remote as to be negligible exceptions are not provided with respect to the restriction on transfer, extinguishment, division of proceeds, or other requirements in section 170(h) or the Treasury Regulations.

Finally, many of the state statutes described in Appendices A and B do not technically permit “defeat” of the gift of a conservation easement (that is, removal of the gift, or the proceeds attributable thereto, from the charitable sector). Rather, in many cases, upon extinguishment of an easement, the statute requires that the owner of the subject land pay some form of compensation to the holder to be used by the holder for public or charitable purposes.<sup>217</sup> In other words, although the easement may be extinguished in accordance with the process set forth in the statute, the value attributable to the easement—the charitable gift—will remain in the public or charitable sector. Since the charitable gift technically will not be “defeated” under such a statute, assessing the probability of its defeat under the so remote as to be negligible rule arguably makes little sense. The issue is more properly framed as whether the process under the state statute for extinguishment of the easement, payment of proceeds to the holder, and the holder’s use of

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measured on the date of the gift and on a case-by-case basis, each individual donation of a conservation easement would arguably have to be separately evaluated in light of the applicable statute as of the date of the easement’s donation. In other words, the IRS and the courts would be required to separately assess the possibility of defeat of hundreds, if not thousands of individual conservation easement gifts made in fifty-one jurisdictions under the intensely fact specific so remote as to be negligible rule. For example, in *Stotler*, the court determined that the probability of defeat of the easement gift at issue in that case under a California statute was so remote as to be negligible because the subject land had important conservation values and the holder of the easement had a sparse history of abandonment. 53 T.C.M. (CCH) 973, 980-81 (1987). Faced with a different set of facts—land with less significant conservation values or a holder with more of a history of abandonment—the court might have held differently. *Stotler*, of course, involved a conservation easement that had been donated under the 1979 deduction provision. See *National Perpetuity Standards*, *supra* note 1, at 499-503. With the enactment of section 170(h) in 1980, including its new “protected in perpetuity” requirement, and the issuance of Treasury Regulations interpreting that requirement in 1986, the need to engage in such an intensely factual case-by-case inquiry with regard to each easement donation should have been eliminated. See *id.*

<sup>216</sup> See *National Perpetuity Standards*, *supra* note 1, at 506.

<sup>217</sup> See, e.g., *supra* notes 196-197 and accompanying text (providing that the proceeds paid to MALPF upon the extinguishment of an agricultural easement are deposited into an agricultural land preservation fund where they may be used for general operating costs as well as land protection purposes).



such proceeds could be deemed to substantially comply with the transfer, extinguishment, and division of proceeds requirements of section 170(h) and the Treasury Regulations.

#### B. Substantial Compliance Doctrine

The substantial compliance doctrine allows taxpayers in certain situations to benefit from claimed deductions or credits even though they do not strictly comply with every detail of the applicable Internal Revenue Code or Treasury Regulation requirements. This judicially-created doctrine generally permits courts to allow deductions that would otherwise be disallowed due to minor or insignificant taxpayer errors.

Although it is impossible to precisely define the substantial compliance doctrine, as a general rule the Tax Court is willing to apply the doctrine only when the requirements at issue are “procedural or directory,” such as the qualified appraisal requirements relating to charitable income tax deductions under section 170 generally.<sup>218</sup> The doctrine is not applied if the provisions relate to the “substance or essence” of the legislation.<sup>219</sup> In the latter case, strict adherence to the Internal Revenue Code and Treasury Regulation provisions is required.<sup>220</sup>

The restriction on transfer, no inconsistent use, general enforceable in perpetuity, mortgage subordination, mining restrictions, extinguishment, division of proceeds, baseline documentation, and other requirements in the Treasury Regulations intended to ensure that the conservation purpose of the contribution will be protected in perpetuity as required under section 170(h)(5)(A) arguably relate to the “substance or essence” of the deduction provision, and are not merely procedural or directory.<sup>221</sup> After all, those re-

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<sup>218</sup> See, e.g., *Lord v. Comm’r*, 100 T.C.M. (CCH) 201 (2010) (holding that taxpayers did not substantially comply with the “qualified appraisal” requirement of Treas. Reg. § 1.170A-13(c) because the appraisal did not include the contribution date, the date the appraisal was performed, or the appraised fair market value of the easement on the contribution date; the court stated that the doctrine of substantial compliance is not applicable if significant information is omitted); *Scheideleman v. Comm’r*, 100 T.C.M. (CCH) 24, 30 (2010) (holding that taxpayers did not substantially comply with the “qualified appraisal” requirement because the appraisal did not provide the method and specific basis for valuing the easement). But see *Bruzewicz v. United States*, 604 F. Supp. 2d 1197 (N.D. Ill. 2009), discussed *infra* note 222, in which the District Court refused to apply the substantial compliance doctrine to the contemporaneous written acknowledgment and certain qualified appraisal requirements.

<sup>219</sup> See *Scheideleman*, 100 T.C.M. (CCH) 24, 30.

<sup>220</sup> See *id.*

<sup>221</sup> See *Sperapani v. Comm’r*, 42 T.C. 308, 330 (1964) (quoting *Vaughn v. John C. Winston Co.*, 83 F.2d 370, 372 (10th Cir. 1936)) (“If a requirement is so essential a part of

quirements are intended to ensure that a conservation easement for which a federal subsidy was provided will remain in the charitable sector providing the intended conservation or historic benefits to the public “in perpetuity,” and in the unlikely event that continued protection of the property for conservation or historic purposes becomes impossible or impractical, a court will supervise extinguishment of the easement and payment to the holder of a specified portion of proceeds to be used to replace lost conservation or historic values. Accordingly, the Tax Court might well require strict rather than substantial compliance with such requirements.

Other courts tend to be even less forgiving than the Tax Court when it comes to substantial compliance. Most notably, the Seventh Circuit found the Tax Court’s decisions on the subject of substantial compliance “enough to make one’s head swim” and stated that “the doctrine should be applied narrowly . . . [and] should not be allowed to spread beyond cases in which the taxpayer had a good excuse (though not a legal justification) for failing to comply with either an unimportant requirement or one unclear or confusingly stated in the regulations or the statute.”<sup>222</sup> The perpetuity requirements are not unimportant and may not be considered unclear or confusingly stated.<sup>223</sup> Accordingly, courts applying the Seventh Circuit’s or a similar standard might also require strict rather than substantial compliance with such requirements.

In addition, even if a court were to determine that the doctrine of substantial compliance could be applied to the perpetuity requirements, it is questionable whether the provisions of the state statutes described in Appendices A and B would be deemed to substantially comply with such requirements. For example, does a statute that permits a conservation ease-

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the plan that the legislative intent would be frustrated by a noncompliance, then it is mandatory. But if the requirement is a detail of procedure which does not go to the substance of the thing done, then it is directory, and noncompliance does not invalidate the act.”)

<sup>222</sup> Prussner v. United States, 896 F.2d 218, 224 (7th Cir. 1990). In *Bruzewicz v. United States*, a District Court applied the Prussner standard in a case involving claimed deductions for the donation of a façade easement. 604 F. Supp. 2d at 1203. The court held that the contemporaneous written acknowledgment requirement of section 170(f)(8) and the requirement in Treasury Regulation section 1.170A-13(c)(3)(ii)(F) that an appraiser include his or her qualifications in a qualified appraisal are neither unimportant nor unclear or confusingly stated and, thus, the taxpayer’s failure to strictly comply with such requirements could not be excused under the substantial compliance doctrine. *Id.* at 1204-05.

<sup>223</sup> See Hanna M. Chouest, Note, *Dot all ‘P’s and Cross all ‘T’s: Estate of Tamulis v. Commissioner and the Narrowing of the Substantial Compliance Doctrine to the Technical Compliance Doctrine*, 62 TAX LAW. 259, 263 (2008) (noting that “Since Judge Posner’s 1990 decision [in Prussner], very few courts have found in favor of a taxpayer under the [substantial compliance] doctrine; none have done so since 1993.”).

ment to be terminated when “profitable farming is no longer feasible,”<sup>224</sup> or when termination is deemed “essential to orderly development of the locality,”<sup>225</sup> or by “mutual consent of the parties”<sup>226</sup> substantially comply with the Treasury Regulation’s requirement that tax-deductible easements not permit the destruction of significant conservation interests?<sup>227</sup> Do such statutes substantially comply with the requirement that a tax-deductible easement be transferable only to another eligible donee that agrees to continue to carry out the purpose of the easement or in the context of judicially-approved extinguishment upon a finding that continued use of the property for conservation purposes has become impossible or impractical? Does a statute that provides for payment to the holder of the value of an easement determined at the time of its extinguishment substantially comply with the requirement that the holder receive *at least* the Treasury Regulation’s mandated minimum percentage of proceeds? Does a statute that allows such proceeds to be used for the holder’s administrative or general public or charitable purposes substantially comply with the Treasury Regulation’s requirement that such proceeds be used “in a manner consistent with the conservation purposes of the original contribution”?

In such cases, a court finding substantial compliance would not be excusing minor or insignificant failures to comply with reporting or substantiation requirements. Rather, it would be sanctioning a different process for the transfer and extinguishment of tax-deductible conservation easements than is contemplated by section 170(h) and the Treasury Regulations.<sup>228</sup>

## V. NECESSITY OF UNIFORM NATIONAL PERPETUITY STANDARDS

Had Congress considered it, Congress surely would have rejected the idea of subsidizing the acquisition of perpetual conservation easements that could be transferred, released, modified, or terminated pursuant to the provisions of the over one hundred state enabling statutes, which vary widely

<sup>224</sup> See, e.g., DEL. CODE ANN. tit. 3, § 917(a), (c) (2002).

<sup>225</sup> See, e.g., 32 PA. CONS. STAT. § 5010(a), (b) (West 1997).

<sup>226</sup> See, e.g., 505 ILL. COMP. STAT. ANN. 35/1-3(b) (West 2004).

<sup>227</sup> Pursuant to such standards, a conservation easement could be terminated despite the fact that doing so would result in the destruction of unique or otherwise significant habitat, scenic, open space, or historic interests.

<sup>228</sup> See, e.g., *Hendrix v. United States*, 106 AFTR 2d 2010-5373 (S.D. Ohio 2010) (“The substantial compliance doctrine is not a substitute for missing entire categories of content; rather, it is at most a means of accepting a nearly complete effort that has simply fallen short in regard to minor procedural errors or relatively unimportant clerical oversights”). On challenges to the validity of Treasury Regulations, see *National Perpetuity Standards*, *supra* note 1, at 487 n. 51.

from jurisdiction to jurisdiction (and program to program) and are subject to legislative revision or repeal when development pressures increase or priorities change. There would be little protection of the federal investment in the conservation easements in such a regime, and satisfaction of the conservation purposes tests and the other threshold requirements of section 170(h) and the Treasury Regulations upon the donation of the easements would be rendered a largely meaningless exercise.

The inequity among taxpayers would also be unacceptable. Taxpayers in some jurisdictions would receive sizable federal charitable income tax deductions for the donation of ostensibly perpetual conservation easements that could be summarily transferred, sold, exchanged, released, or otherwise modified or terminated, in whole or in part, by their government or non-profit holders, while taxpayers making similar gifts in other jurisdictions or pursuant to different programs would be bound by the easements' restrictions until, for example, the passage of a significant period of time, the satisfaction of a certain standard, the holding of a public hearing, the receipt of approval from a certain public official or officials or a court, or some combination thereof.

An efficient, effective, and equitable federal tax incentive program for the acquisition of conservation easements intended to permanently protect unique or otherwise significant properties requires uniform national standards that dictate not only the type of easements that are donated, but also the manner and circumstances under which such easements can be subsequently transferred or extinguished. This was recognized by Congress and the Treasury, and is reflected in the restriction on transfer, extinguishment, division of proceeds, and other perpetuity provisions of section 170(h) and the Treasury Regulations. Indeed, it would make no sense to impose elaborate conservation purposes, baseline documentation, and other threshold requirements at the time of the donation of tax-deductible conservation easements, but leave the subsequent transfer and extinguishment of such easements to the vagaries of the state enabling statutes.

## **VI. NEED FOR IRS GUIDANCE**

Conservation easement instruments are drafted by many different individuals and organizations, some of which are motivated to ensure that the conservation purposes of such easements are "protected in perpetuity" as Congress intended, while others are motivated to attempt to retain as much flexibility as possible to later modify, swap, transfer, release, sell, abandon, terminate, or otherwise dispose of the easements without constraint or oversight. There also is little official guidance regarding the manner in which the various perpetuity requirements in section 170(h) and the Treasury Reg-

ulations can be satisfied. As a result, the terms of tax-deductible conservation easements tend to vary widely from holder to holder and even donation to donation, and this variability has led to a difficult interpretive task for both the IRS and state and federal courts.

To achieve a measure of standardization with respect to tax-deductible conservation easements, and thereby promote more efficient and equitable review, interpretation, and enforcement of such easements, it is recommended that the IRS issue guidance regarding the manner in which the various perpetuity requirements in section 170(h) and the Treasury Regulations can be satisfied. This guidance could include certain safe harbor provisions, which, if they are incorporated into a conservation easement deed, enforceable under state law, and not qualified by other terms of the easement or by separate agreement, would ensure satisfaction of the restriction on transfer, extinguishment, division of proceeds, and other perpetuity requirements.<sup>229</sup>

Such safe harbor provisions would greatly facilitate taxpayer compliance with the requirements of section 170(h) and the Treasury Regulations as well as IRS review of conservation easement donation transactions. Such provisions would also promote consistency in the interpretation and enforcement of tax-deductible easements by state courts. Federally subsidized perpetual conservation easements should be no more easily transferable or terminable in Montana or Michigan than in Maine or Minnesota.

Of course, including standardized terms in conservation easements would ensure that the conservation purposes of the contributions are actually “protected in perpetuity” as Congress intended only if such terms are legally binding on the parties to the easement under state law. Accordingly, the IRS should also issue guidance explaining that tax-deductible conservation easements are, by definition, charitable gifts made for a specific charitable purpose, and stating the agency’s expectation that the terms of such easements (like the terms of similar charitable gifts) will be enforceable under state law. The ability of the IRS to police the administration and enforcement of conservation easements over the long term is limited, and the task of ensuring that the easements are administered in accordance with their stated terms and purposes will fall primarily to state attorneys general and state courts.<sup>230</sup> Guidance from the IRS regarding the expected enforce-

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<sup>229</sup> It would, of course, be impossible to standardize conservation easement instruments completely, as each easement, like the property it protects, will be unique in certain respects and each state has its own rules governing the formalities associated with real estate conveyances. Standardization of the provisions relating to the perpetuity requirements in §170(h) and the Treasury Regulations, however, is possible and desirable.

<sup>230</sup> See *supra* note 132 and accompanying text.

ment of the terms of tax-deductible conservation easements under state law would greatly assist state attorneys general and state judges, who, as illustrated by the Myrtle Grove controversy, the Wal-Mart controversy, *Bjork v Draper*, and *Salzburg v. Dowd*, are on the front lines enforcing such gifts on behalf of the public. Such guidance would also put other relevant parties, including state legislatures, on notice of what is required if a state wishes to benefit from the federal subsidy.

## VII. CONCLUSION

Property owners wishing to take advantage of the federal tax incentives offered for charitable gifts of conservation easements should be required to draft their easements and otherwise structure their donations to satisfy federal tax law requirements. It should not be sufficient, however, merely to include appropriate provisions in the easement deed. Such provisions must not be qualified, whether by other provisions of the deed or by separate agreement (as in *Kaufman*). Such provisions should also be legally binding on the parties to the easement under state law. That is, the parties must not be free to amend away or otherwise ignore such provisions (for example, the provisions of the state enabling statute must not “trump” the provisions included in the easement deed). Absent enforceability under state law, the provisions included in a conservation easement deed to satisfy the various federal tax law requirements would constitute mere window dressing and the conservation purposes of the contributions would not be “protected in perpetuity” as mandated by Congress.

Some uncertainty remains regarding the manner in which the various perpetuity requirements in section 170(h) and the Treasury Regulations may be satisfied. There also is a level of gamesmanship involved in the drafting of conservation easements, with the goal of some to maintain maximum flexibility for the holder and landowner to later modify or terminate the easement, in whole or in part, while still appearing to satisfy federal tax law requirements and not triggering an IRS audit. To reduce such gamesmanship and help ensure that the conservation purposes of federally subsidized conservation easements are truly “protected in perpetuity” as Congress intended, the IRS should issue guidance in the form of standardized provisions to be included in conservation easement deeds to address the restriction on transfer, extinguishment, division of proceeds and other federal perpetuity requirements, as well as a statement noting that such provisions may not be qualified and must be enforceable under state law.

**APPENDIX A**

**General Enabling Statutes<sup>1</sup>**

<b>Statutes that Provide for Release by Holder</b>
<b>FL,<sup>2</sup> IL,<sup>3</sup> IA<sup>4</sup></b>
<b>Statutes that Provide for Release, Modification, or Termination in the Same Manner as Other Easements</b>
<b>CO,<sup>5</sup> LA,<sup>6</sup> MD,<sup>7</sup> UT<sup>8</sup></b>
<b>Statutes Silent With Regard to Modification or Termination</b>
<b>CA,<sup>9</sup> CT,<sup>10</sup> HI,<sup>11</sup> MI,<sup>12</sup> MO,<sup>13</sup> NH,<sup>14</sup> NC,<sup>15</sup> OH,<sup>16</sup> TN,<sup>17</sup> VT,<sup>18</sup> WA<sup>19</sup></b>
<b>UCEA Statutes</b>
<p><b>Generally provide that:</b></p> <p><b>Except as otherwise provided, a conservation easement can be released, modified, or terminated in the same manner as other easements;</b></p> <p><b>and</b></p> <p><b>The statute does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity.</b></p>
<b>AL,<sup>20</sup> AK,<sup>21</sup> AZ,<sup>22</sup> AR,<sup>23</sup> DE,<sup>24</sup> DC,<sup>25</sup> GA,<sup>26</sup> ID,<sup>27</sup> IN,<sup>28</sup> KS,<sup>29</sup> KY,<sup>30</sup> MN,<sup>31</sup> NV,<sup>32</sup> NM,<sup>33</sup> OK,<sup>34</sup> OR,<sup>35</sup> PA,<sup>36</sup> SC,<sup>37</sup> SD,<sup>38</sup> TX,<sup>39</sup> VA,<sup>40</sup> WV,<sup>41</sup> WI,<sup>42</sup> WY<sup>43</sup></b>
<b>Statutes with Unique Provisions</b>
<b>ME<sup>44</sup></b>
<p>Provides that, except as otherwise provided, a conservation easement may be created, conveyed, recorded, assigned or partially released in the same manner as other easements created by written instrument. A conservation easement may be terminated or amended by the parties only as provided below.</p> <p>(a) A conservation easement executed on or after the effective date of this section must include a statement of the holder’s power to agree to amendments to the terms of the conservation easement in a manner consistent with the limitations of paragraph (b).</p>

(b) A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party. In making this determination, the court shall consider, among other relevant factors, the purposes expressed by the parties in the easement and the public interest.

If the value of the landowner's estate is increased by reason of the amendment or termination of a conservation easement, that increase must be paid over to the holder or to such nonprofit or governmental entity as the court may designate, to be used for the protection of conservation lands consistent, as nearly as possible, with the stated publicly beneficial conservation purposes of the easement.

A court may deny equitable enforcement of a conservation easement only when it finds that change of circumstances has rendered that easement no longer in the public interest or no longer serving the publicly beneficial conservation purposes identified in the easement. If the court so finds, the court may allow damages as the only remedy in an action to enforce the easement.

No comparative economic test may be used to determine if a conservation easement is in the public interest or serves a publicly beneficial conservation purpose.

#### MA<sup>45</sup>

Provides that:

(a) in the case of a restriction held by a city or town or a commission, authority or other instrumentality thereof, it must be approved by the Secretary of Environmental Affairs if a conservation restriction, the Commissioner of the Metropolitan District Commission if a watershed preservation restriction, the Commissioner of Food and Agriculture if an agricultural preservation restriction, or the Massachusetts Historical Commission if a preservation restriction, and

(b) in the case of a restriction held by a charitable corporation or trust, it must be approved by the mayor, or in cities having a city manager the city manager, and the city council of the city, or selectmen or town meeting of the town, in which the land is situated, and the Secretary of Environmental Affairs if a conservation restriction, the Commissioner of the Metropolitan District Commission if a watershed preservation restriction, the Commissioner of Food and Agriculture if an agricultural preservation restriction, the Massachusetts Historical Commission if a preservation restriction.

A restriction may be released, in whole or in part, by the holder for consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interests in land, but only after a public hearing upon reasonable public notice, by the governmental body holding the restriction or if held by a charitable corporation or trust, by the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town, whose approval shall be



<p>required, and in case of a restriction requiring approval by the Secretary of Environmental Affairs, the Massachusetts Historical Commission, the Director of the Division of Water Supply Protection of the Department of Conservation and Recreation, the Commissioner of Food and Agriculture, or the Director of Housing and Community Development, only with like approval of the release.</p> <p>Agricultural preservation restrictions can be released by the holder only if the land is no longer deemed suitable for agricultural or horticultural purposes or upon a two-thirds vote of both the Massachusetts Senate and House of Representatives that release of the restriction is “for the public good.”</p> <p>Watershed preservation restrictions shall be released by the holder only if the land is deemed by the Commissioner of the Metropolitan District Commission and the Secretary of Environmental Affairs to no longer be of any importance to the water supply or potential water supply of the commonwealth or upon a two-thirds vote of both the Massachusetts Senate and House of Representatives that release of the restriction is “for the public good.”</p> <p>In determining whether a restriction or its continuance is in the public interest, the governmental body acquiring, releasing, or approving shall take into consideration (i) the public interest in such conservation, preservation, watershed preservation, or agricultural preservation, (ii) any national, state, regional and local program in furtherance thereof, (iii) any public state, regional or local comprehensive land use or development plan affecting the land, and (iv) any known proposal by a governmental body for use of the land.</p>
<p style="text-align: center;"><b>MS<sup>46</sup></b></p> <p>Provides that, except as otherwise provided, a conservation easement may be created, conveyed, recorded, and assigned in the same method and manner as other easements; and</p> <p>The statute does not, and shall not be construed to, affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity. In such proceeding, the holder of the conservation easement shall be compensated for the value of the easement.</p>
<p style="text-align: center;"><b>MT<sup>47</sup></b></p> <p>Provides that a conservation easement can be converted or diverted if:</p> <ul style="list-style-type: none"> <li>(a) the conversion or diversion is             <ul style="list-style-type: none"> <li>(i) necessary to the public interest;</li> <li>(ii) not in conflict with the program of comprehensive planning for the area; and</li> <li>(iii) permitted by the conditions imposed at the time of the creation of the conservation easement, in the terms of the acquisition agreement, or by the governing body resolution, and</li> </ul> </li> </ul>

(b) other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land is substituted within a reasonable period not exceeding three years. Property substituted is subject to the provisions of the statute.

**NE**<sup>48</sup>

Provides that a conservation or preservation easement may be released by the holder of the easement to the owner of the servient estate, except that such release shall be approved by the governing body which approved the easement, or if the holder is the state, a state agency, or political subdivision other than a city, village, or county, the release shall be approved by the state or such state agency or political subdivision. The release of an easement may be approved upon a finding by such body that the easement no longer substantially achieves the conservation or preservation purpose for which it was created.

In order to minimize conflicts with land-use planning, each conservation or preservation easement shall be approved by the appropriate governing body. If the property is located partially or entirely within the boundaries or zoning jurisdiction of a city or village, approval of the governing body of such city or village shall be required. If such property is located entirely outside the boundaries and zoning jurisdiction of any city or village, approval of the county board shall be required. If the property is located in the Niobrara scenic river corridor and is not incorporated within the boundaries of a city or village, the Niobrara Council approval rather than city, village, or county approval shall be required.<sup>49</sup>

Unless a conservation easement is otherwise modified or terminated according to the terms of the easement or the provisions of the statute, the owner of the subject real property or the holder of the easement may petition the district court in which the greater part of the servient estate is located for modification or termination of the easement. The court may modify or terminate the easement pursuant to this section only if the petitioner establishes that it is no longer in the public interest to hold the easement or that the easement no longer substantially achieves the conservation or preservation purpose for which it was created. No comparative economic test shall be used to determine whether the public interest or the conservation or preservation purpose of the easement is still being served. No modification shall be permitted which is in excess of that reasonably necessary to remedy the deficiency of the easement.

**NJ**<sup>50</sup>

Provides that a conservation easement may be released in whole or in part, by the holder thereof, for such consideration, if any, as the holder may determine, in the same manner as the holder may dispose of other interests in land, subject to such conditions as may have been imposed at the time of creation of the restriction; provided, however, that prior to any release:

<p>(a) a public hearing shall be held and                  (b) approval of the Commissioner of Environmental Protection shall be obtained.</p> <p>In determining whether the release should be approved, the Commissioner shall take into consideration (i) the public interest in preserving these lands in their natural state and any State, regional, or local program in furtherance thereof, and (ii) any State, regional, or local comprehensive land use or development plan affecting such property.</p>
<p style="text-align: center;"><b>NY<sup>51</sup></b></p> <p>Provides that a conservation easement held by a not-for-profit conservation organization may only be modified or extinguished:</p> <p>(a) as provided in the instrument creating the easement;                  (b) in a court proceeding pursuant to section 1951 of the real property actions and proceedings law (RPAP);<sup>52</sup> or                  (c) upon the exercise of the power of eminent domain.</p> <p>A conservation easement held by a public body outside the Adirondack park or Catskill park may only be modified or extinguished:</p> <p>(a) as provided in the instrument creating the easement;                  (b) in a court proceeding pursuant to section 1951 of RPAP; or                  (c) upon the exercise of the power of eminent domain or, where the land subject to the conservation easement or an interest in such land is required for a major utility transmission or major steam electric generating facility, upon the receipt of a certificate of environmental compatibility and public need.</p> <p>A conservation easement held by a public body inside the Adirondack park or the Catskill park may be modified or extinguished:</p> <p>(a) as provided in the instrument creating the easement;                  (b) upon the exercise of the power of eminent domain or, where the land subject to the conservation easement or an interest in such land is required for a major utility transmission or major steam electric generating facility, upon the receipt of a certificate of environmental compatibility and public need, provided that such certificate contains a finding that the public interest in the conservation and protection of the natural resources, open spaces and scenic beauty of the Adirondack or Catskill parks has been considered;                  (c) unless such easement is held by the state, in a court proceeding pursuant to section 1951 of RPAP; or                  (d) where such easement is held by the state, upon a determination by the Commissioner of Environmental Conservation, after a non-adjudicatory public hearing, at which the public shall be given opportunity to be heard, that the easement can no longer substantially accomplish its original purposes or any of the conservation purposes set forth in the statute.</p>

**RI**<sup>53</sup>

Provides that:

(a) Subject to the express terms of a conservation restriction:

(i) a restriction held by the state may be released in the same manner as land held by the state may be sold under chapter 7 of title 37,<sup>54</sup>

(ii) a restriction held by cities and towns may be released in the same manner as land held by cities and towns may be sold under § 45-2-5,<sup>55</sup> and

(iii) a restriction held by any other governmental body may be released in accordance with applicable statutes, regulations, and procedures.

(b) A charitable corporation, association, or other entity holding a conservation restriction may release that restriction in accordance with the express terms of a restriction, applicable bylaws, or charter provisions of the holding entity, and applicable statutes and regulations.

In June of 2011 the Rhode Island statute was revised to add a new subsection that provides that a conservation restriction may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the attorney general has been made a party.<sup>56</sup> Termination or amendment that materially detracts from the conservation or preservation values intended for protection may be approved only when it is found by the court that the conservation restriction, or the provision proposed to be amended, does not serve the public interest or publicly beneficial conservation or preservation purpose, taking into account, among other things, the purposes expressed by the parties in the restriction. No such approval may be sought except with the consent of the holder. If the value of the landowner's estate is increased by reason of the amendment or termination, the increase shall be paid over to the holder, or to such non-profit or governmental entity as the court may designate, to be used for the protection of conservation lands or historic resources consistent, as nearly as possible, with the stated publicly beneficial conservation or preservation purposes of the restriction.

**VA (Open Space Land Act)**<sup>57</sup>

Provides that an open space easement can be converted or diverted if:

(a) the public body holding the easement determines that the conversion or diversion is

(i) essential to the orderly development and growth of the locality and

(ii) in accordance with the official comprehensive plan, and

(b) there is substituted other real property that is

(i) of at least equal fair market value,

(ii) of greater value as permanent open-space land than the land converted or diverted, and

(iii) of as nearly as feasible equivalent usefulness and location for use as

permanent open-space land as is the land converted or diverted.  
The public body must assure that the property substituted will be subject to the provisions of the statute.

<sup>1</sup> See note 89 in the article text, explaining that North Dakota does not permit easements to be granted in perpetuity and, thus, its enabling statute is not included in Appendix A or B.

<sup>2</sup> FLA. STAT. ANN. § 704.06 (West 2000 & Supp. 2011). The statute specifically provides: “A conservation easement may be released by the holder of the easement to the holder of the fee even though the holder of the fee may not be a governmental body or a charitable corporation or trust.” *Id.* § 704.06(4).

<sup>3</sup> 765 ILL. COMP. STAT. ANN. 120/0.01 to /6 (West 2001). The statute specifically provides: “Conservation rights may be released by the holder of such rights to the holder of the fee even though the holder of the fee may not be an agency of the State, a unit of local government or a not-for-profit corporation or trust.” *Id.* 120/1(b).

<sup>4</sup> IOWA CODE ANN. §§ 457A.1 to .8 (West 2004). The statute specifically provides: “A conservation easement shall be perpetual unless expressly limited to a lesser term, or unless released by the holder, or unless a change of circumstances renders the easement no longer beneficial to the public.” *Id.* § 457A.2.1. The statute also provides that “each public body acquiring one or more conservation easements shall maintain a current inventory thereof” and “[u]nrecorded and uninventoried conservation easements shall be deemed abandoned.” *Id.* § 457A.3.

<sup>5</sup> COLO. REV. STAT. §§ 38-30.5-101 to -111 (2010). The statute specifically provides: “Conservation easements in gross may, in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land or water rights or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned.” *Id.* § 38-30.5-107.

<sup>6</sup> LA. REV. STAT. ANN. §§ 9:1271 to :1276 (2008). The statute specifically provides: “Except as otherwise provided in this Chapter, a conservation servitude may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other servitudes created by contract.” *Id.* § 9:1273.A.

<sup>7</sup> MD. CODE ANN., REAL PROP. § 2-118 (LexisNexis 2010). The statute specifically provides: “A restriction provided for by this section may be extinguished or released, in whole or in part, in the same manner as other easements.” *Id.* § 2-118(d).

<sup>8</sup> UTAH CODE ANN. §§ 57-18-1 to -7 (LexisNexis 2010). The statute specifically provides: “A conservation easement may be terminated, in whole or in part, by release, abandonment, merger, nonrenewal, conditions set forth in the instrument creating the conservation easement, or in any other lawful manner in which easements may be terminated.” *Id.* § 57-18-5.

<sup>9</sup> CAL. CIV. CODE §§ 815-816 (West 2007). The statute provides that “[a] conservation easement shall be perpetual in duration.” *Id.* § 815.2(b).

<sup>10</sup> CONN. GEN. STAT. ANN. §§ 47-42a to -42d (West 2009). The statute provides that “[t]he Attorney General may bring an action in the Superior Court to enforce the public interest in such restrictions.” *Id.* § 47-42c.

<sup>11</sup> HAW. REV. STAT. ANN. §§ 198-1 to -6 (LexisNexis 2008). The statute provides that “[a] conservation easement shall be perpetual in duration.” *Id.* § 198-2(b).

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<sup>12</sup> MICH. COMP. LAWS ANN. §§ 324.2140 to .2144 (West 2007).

<sup>13</sup> MO. ANN. STAT. §§ 67.870 to .910 (West 2007).

<sup>14</sup> N.H. REV. STAT. ANN. §§ 477:45 to :47 (LexisNexis 2003 & Supp. 2010). The statute provides that “[a]ny doctrine of law which might otherwise cause the termination of such a restriction shall not be affected by the provisions of this subdivision.” *Id.* § 477:46.

<sup>15</sup> N.C. GEN. STAT. §§ 121-34 to -42 (2009).

<sup>16</sup> OHIO REV. CODE ANN. §§ 5301.67 to .70 (LexisNexis 2004 & Supp. 2011). The statute also authorizes the acquisition of agricultural easements. *See id.* § 5301.691. For ease of comparison to similar programs and organizational consistency, those provisions are included in Appendix B.

<sup>17</sup> TENN. CODE ANN. §§ 66-9-301 to -309 (2004 & Supp. 2010). The statute provides that “[n]o conservation easement shall be held automatically extinguished because of violation of its terms or frustration of its purposes.” *Id.* § 66-9-306.

<sup>18</sup> VT. STAT. ANN. tit. 10, §§ 821-823 (2010).

<sup>19</sup> WASH. REV. CODE ANN. § 64.04.130 (West 2005).

<sup>20</sup> ALA. CODE §§ 35-18-1 to -6 (LexisNexis Supp. 2010). Alabama modified the second UCEA provision to read: “This chapter does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity applicable to other easements and specifically including the doctrine of changed conditions. *Id.* § 35-18-3(b).

<sup>21</sup> ALASKA STAT. §§ 34.17.010 to .060 (2008).

<sup>22</sup> ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (2007). Arizona added the following to the first UCEA provision: “Any assignment, release, modification, termination or other document altering or affecting a conservation easement need only be executed or approved in writing by the current owner of the real property which is burdened by the conservation easement, the holder of the conservation easement and any governmental body, charitable corporation or trustee of a charitable trust having a third party right of enforcement.” *Id.* § 33-272.A.

<sup>23</sup> ARK. CODE ANN. §§ 15-20-401 to -410 (2009). The statute also contains special provisions that apply only to conservation easements held by the Old State House Commission. For ease of comparison to similar programs and organizational consistency, those provisions are included in Appendix B.

<sup>24</sup> DEL. CODE ANN. tit. 7, §§ 6901-6905 (2001).

<sup>25</sup> D.C. CODE §§ 42-201 to -205 (LexisNexis 2001).

<sup>26</sup> GA. CODE ANN. §§ 44-10-1 to -8 (2010).

<sup>27</sup> IDAHO CODE ANN. §§ 55-2101 to -2109 (2007).

<sup>28</sup> IND. CODE §§ 32-23-5-1 to -23-5-8 (LexisNexis 2002). Indiana modified the second UCEA provision to read: “This chapter does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity, or the termination of a conservation easement by agreement of the grantor and grantee.” *Id.* § 32-23-5-6(b).

<sup>29</sup> KAN. STAT. ANN. §§ 58-3810 to -3817 (2005). The Kansas statute also provides: “A conservation easement may not be conveyed or assigned by a holder to any entity or person other than a city or county of this state, [a charitable organization] or the grantor thereof or such grantor’s heirs.” *Id.* § 58-3811(f).

<sup>30</sup> KY. REV. STAT. ANN. §§ 382.800 to .860 (LexisNexis 2002).

<sup>31</sup> MINN. STAT. §§ 84C.01 to .05 (West 2004).

<sup>32</sup> NEV. REV. STAT. §§ 111.390 to .440 (LexisNexis 2010).

<sup>33</sup> N.M. STAT. §§ 47-12-1 to -6 (LexisNexis 2004).

<sup>34</sup> OKLA. STAT. ANN. tit. 60, §§ 49.1 to .8 (West 2010).

<sup>35</sup> OR. REV. STAT. §§ 271.715 to .795 (2009).

<sup>36</sup> 32 PA. CONS. STAT. ANN. §§ 5051-5059 (West Supp. 2011). Pennsylvania modified the second UCEA provision to read: “This act shall 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 consistent with the public policy of this act . . . when the easement is broadly construed to effect that policy.” *See id.* § 5055(c)(1).

<sup>37</sup> S.C. CODE ANN. §§ 27-8-10 to -120 (2007).

<sup>38</sup> S.D. CODIFIED LAWS §§ 1-19B-56 to -60 (2004).

<sup>39</sup> TEX. NAT. RES. CODE ANN. §§ 183.001 to .005 (West 2011).

<sup>40</sup> VA. CODE ANN. §§ 10.1-1009 to -1016 (2006). Virginia has a second enabling statute that pertains to open space easements conveyed to public bodies. *See infra* note 57 and accompanying text.

<sup>41</sup> W. VA. CODE §§ 20-12-1 to -8 (LexisNexis 2008). West Virginia modified the second UCEA provision to read: “This article 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 consistent with the public policy of this article . . . when the easement is broadly construed to effect that policy.” *See id.* § 20-12-5(b).

<sup>42</sup> WIS. STAT. ANN. § 700.40 (West 2001 & Supp. 2010).

<sup>43</sup> WYO. STAT. ANN. §§ 34-1-201 to -207 (2009).

<sup>44</sup> ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C (Supp. 2010).

<sup>45</sup> MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West 2003 & Supp. 2011).

<sup>46</sup> MISS. CODE ANN. §§ 89-19-1 to -15 (1999).

<sup>47</sup> MONT. CODE ANN. §§ 76-6-101 to -212 (2010).

<sup>48</sup> NEB. REV. STAT. §§ 76-2,111 to -2,118 (2009).

<sup>49</sup> The mission of the Niobrara Council is to assist in all aspects of the management of the Niobrara scenic river corridor, giving consideration and respect to local and governmental input and private landowner rights, and to maintain and protect the integrity of the resources associated with the Niobrara scenic river corridor. *Id.* § 72-2008.

<sup>50</sup> N.J. STAT. ANN. §§ 13:8B-1 to :8B-9 (West 2003).

<sup>51</sup> N.Y. ENVTL. CONSERV. §§ 49-0301 to -0311 (McKinney 2008).

<sup>52</sup> Under § 1951 of RPAP, if the court finds that a restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, the purpose is not capable of accomplishment, or for any other reason, it may adjudge that the restriction is not enforceable and that the restriction shall be completely extinguished upon payment, to the person or persons who would otherwise be entitled to enforce it in the event of a breach at the time of the action, of such damages, if any, as such person or persons will sustain from the extinguishment of the restriction. N.Y. REAL PROP. ACTS. § 1951 (McKinney 2009).

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<sup>53</sup> R.I. GEN. LAWS §§ 34-39-1 to -5 (1995 & Supp. 2010). In 2010, the statute was amended to provide that “the attorney general, pursuant to his or her inherent authority, may bring an action in the superior court to enforce the public interest in such restrictions.” *Id.* § 34-39-3(d) (Supp. 2010).

<sup>54</sup> R.I. GEN. LAWS § 37-7-5 (1997 & Supp. 2010) provides that “[t]he acquiring authority, with the approval of the state properties committee, is hereby authorized and empowered to sell land or property in whole, or in part, in such manner and upon such terms and conditions as may in the judgment of the state purchasing agent be most advantageous to the public interest. . . .”

<sup>55</sup> R.I. GEN. LAWS § 45-2-5 (2009) provides that the city council of any city and the town council of any town, if it sees fit so to do, is authorized, from time to time, to sell, lease, convey, or use for any other public or municipal purpose or purposes, or for any purpose whatsoever, any lands or properties owned by the city or town, which have been purchased, acquired, used, or dedicated in any manner for municipal or other public purposes, whenever, in the opinion of the city council or town council, the lands or properties have become unsuitable or have ceased to be used for those purposes. But R.I. GEN. LAWS § 45-2-6 provides that “[n]othing in § 45-2-5 shall be construed to authorize the sale, lease, or conveyance of lands or improvements acquired by gift or devise for the public use, whether or not the gift or devise is subject to a condition subsequent or reverter; and no property held by any city or town as part of a charitable trust shall be considered to come within the provisions of § 45-2-5.”

<sup>56</sup> R.I. GEN. LAWS § 34-39-5(c) (2011).

<sup>57</sup> VA. CODE ANN. §§ 10.1-1700 to -1705 (2006). This statute could have been included in Appendix B, but was included here—as a “general” conservation easement enabling statute—because the large majority of conservation easements conveyed in Virginia are open space easements created pursuant to this act and conveyed to the Virginia Outdoors Foundation, a quasi-state agency and public body as defined by the act. Virginia also has a statute modeled on the Uniform Conservation Easement Act that authorizes charitable entities to acquire conservation easements. *See supra* note 40 and accompanying text.



**APPENDIX B**

**Additional Enabling Statutes<sup>1</sup>**

<b>Statutes Silent With Regard to Modification or Termination</b>	
<b>AR<sup>2</sup></b>	Arkansas’s Highway Beautification Act imposes a duty on the State Highway Commission to adopt reasonable regulations for the protection and enhancement of the scenic values of selected areas adjacent to the state’s highways through the acquisition of <b>scenic easements</b> . The Commission is authorized to acquire scenic easements reasonably necessary for the restoration, preservation, and enhancement of scenic beauty within and adjacent to the state highway system and the federal-aid highways of the state, and such acquisitions may be by gift, purchase, exchange, or condemnation.
<b>DE<sup>3</sup></b>	Delaware legislation establishes the Delaware Agricultural Lands Preservation Foundation (DALPF). DALPF has the authority to acquire <b>forestland preservation easements</b> by bargain purchase, provided such easements are granted in perpetuity, granted in a form acceptable to DALPF, and include certain specified restrictions and such other terms and conditions as specified by DALPF. <sup>4</sup>
<b>FL<sup>5</sup></b>	Florida legislation authorizes the creation of a land protection program within the Department of Agriculture and Consumer Services. The purpose of the program is to bring under public protection agricultural and natural areas that provide economic, open space, water, and wildlife benefits. The legislation authorizes the Department to allocate moneys to acquire perpetual less-than-fee interests in land for the purpose of protecting wildlife habitat, water resources and wetlands, open space lands with significant natural areas, and agricultural lands threatened by conversion to other uses. The Department is authorized to, <i>inter alia</i> , accept applications for project

<sup>1</sup> See note 89 in the article text, explaining that North Dakota does not permit easements to be granted in perpetuity and, thus, its enabling statute is not included in Appendix A or B.

<sup>2</sup> ARK. CODE ANN. §§ 27-74-501 to -502 (1994) (Highway Beautification Act; Scenic Easements).

<sup>3</sup> DEL. CODE ANN. tit. 3, §§ 901-941 (2001 & Supp. 2010) (Delaware Agricultural Lands Preservation Act). Subchapter V of the legislation (specifically § 936) deals with the acquisition of forestland preservation easements.

<sup>4</sup> The legislation also authorizes DALPF to acquire agricultural land preservation easements. Because the legislation relating to agricultural land preservation easements specifically addresses modification and termination, it is discussed *infra* at note 55 and accompanying text.

<sup>5</sup> FLA. STAT. §§ 570.70 to .72 (West 2003 & Supp. 2011) (Conservation Easements and Agreements).

	proposals that involve the purchase of <b>rural-lands-protection easements</b> , which are defined as perpetual rights or interests in agricultural land that are appropriate to retaining such land in predominantly its current state and preventing its subdivision and conversion to other uses. <sup>6</sup>
<b>ID</b> <sup>7</sup>	Idaho legislation authorizes the Idaho Transportation Board to acquire, maintain and improve areas adjacent to highways on the state highway system for the restoration, preservation, and enhancement of scenic beauty, and for the rest and recreation of the traveling public. These areas may be acquired in fee or in the form of <b>scenic easements</b> , and may be acquired by gift or purchase.
<b>IN</b> <sup>8</sup>	Indiana legislation authorizes the Director of the Indiana Department of Natural Resources to acquire <b>scenic easements</b> on behalf of the state by purchase or donation for the purpose of preserving natural, scenic, and recreational rivers and authorized related land areas. <sup>9</sup>
<b>IA</b> <sup>10</sup>	Iowa legislation authorizes the creation of a Development and Conservation Authority, the mission of which is to develop and coordinate plans for projects related to the unique natural resource, rural development, and infrastructure problems of counties in a specific area of Iowa. The Authority, which consists of members appointed by the boards of supervisors of the relevant counties, is given supervisory power over an "Alliance," which consists of residents of the relevant counties. The Alliance is empowered to purchase <b>restrictive easements</b> .
<b>LA</b> <sup>11</sup>	Louisiana legislation authorizes the Department of Natural Resources "to purchase property along that portion of Bayou Liberty from its headwaters to U.S. Hwy. 190 to be used as <b>conservation easements</b> ," provided the legislature appropriates funding for such purchase.
<b>ME</b> <sup>12</sup>	Maine legislation establishes the Maine Rivers Protection Fund within Maine's Department of Conservation. The Commissioner of Conservation, who is the chief executive officer of the Department of Conservation, <sup>13</sup> is

<sup>6</sup> The legislation also authorizes the Department to accept applications for project proposals that involve the purchase of perpetual conservation easements as defined in Florida's general enabling statute. Those provisions are discussed *infra* at note 32 and accompanying text.

<sup>7</sup> IDAHO CODE ANN. §§ 40-301 to -322 (2002 & Supp. 2009) (Idaho Transportation Board). Section 40-313(3) authorizes the acquisition of scenic easements for highway purposes.

<sup>8</sup> IND. CODE ANN. §§ 14-29-6-1 to -29-6-15 (LexisNexis 2003) (Natural, Scenic, and Recreational River System).

<sup>9</sup> IND. CODE ANN. § 14-8-2-71 ("Director" refers to the Director of the Department of Natural Resources); *id.* § 14-8-1-1 ("Except as otherwise provided, the definitions in this article apply throughout this title").

<sup>10</sup> IOWA CODE ANN. §§ 161D.1. to D.8 (West Supp. 2011) (Loess Hills and Southern Iowa Development and Conservation)

<sup>11</sup> LA. REV. STAT. ANN. § 56:1431 (2004) (Bayou Liberty).

<sup>12</sup> ME. REV. STAT. ANN. tit. 12, § 5015 (2005) (Maine Rivers Protection Fund).

<sup>13</sup> *Id.* § 5012.

	authorized to administer a state grant-in-aid program, the purpose of which includes assisting local governments and river conservation or management groups to, <i>inter alia</i> , secure shoreland gifts and <b>conservation easements</b> .
MT <sup>14</sup>	Montana legislation authorizes the creation of a drinking water state revolving fund program that can make loans to municipalities or nonprofit water systems to acquire land or <b>conservation easements</b> if the land is necessary to ensure compliance with the national primary drinking water regulations or protect the source of water from contamination.
NJ <sup>15</sup>	New Jersey legislation authorizes the governing body of any municipality to establish an Environmental Commission for the protection, development, or use of natural resources located within the municipality's territorial limits. Subject to the approval of the governing body, the Environmental Commission may acquire property, both real and personal, in the name of the municipality by gift, purchase, grant, bequest, or devise for any of its purposes, and shall administer the same for such purposes subject to the terms of the conveyance or gift. Such an acquisition may be to acquire the fee or any lesser interest, including <b>conservation easements</b> , as may be necessary to acquire, maintain, improve, protect, limit the future use of, or otherwise conserve and properly utilize open spaces and other land and water areas in the municipality.
NY <sup>16</sup>	Pursuant to New York's Agriculture and Markets Law, the Commissioner of the Department of Agriculture and Markets is authorized to administer two matching grant programs focused on farmland protection. One assists county governments in developing agricultural and farmland protection plans to maintain the economic viability of the State's agricultural industry and its supporting land base; the other assists local governments in implementing their farmland protection plans and has focused on preserving the land base by providing for the purchase and bargain purchase of development rights on farms using <b>conservation easements</b> .

<sup>14</sup> MONT. CODE ANN. § 75-6-201 to -236 (2010) (Drinking Water State Revolving Fund Act). See also <http://deq.mt.gov/wqinfo/srf/dwsrf/default.mcp> (Montana Department of Environmental Quality, Drinking Water State Revolving Fund) (last visited May 24, 2011).

<sup>15</sup> N.J. STAT. ANN. §§ 40:56A-1 to :56A-12 (West 1992) (Natural Resources; Environmental Commission). See also <http://www.anjec.org/> (Association of New Jersey Environmental Commissions) (last visited May 24, 2011).

<sup>16</sup> N.Y. AGRIC. & MKTS §§ 25-321 to -326 (McKinney 2004 & Supp. 2011) (Agricultural and Farmland Protection Programs). See also <http://www.agmkt.state.ny.us/AP/agservices/farmprotect.html#purchase> (New York State, Department of Agriculture and Markets; Farmland Protection Program) (last visited May 24, 2011).

NY <sup>17</sup>	The Hudson River Valley Greenway Act was enacted to facilitate the development of a regional strategy for preserving the scenic, natural, historic, cultural, and recreational resources of the Hudson River Valley while encouraging compatible economic development and maintaining the tradition of home rule for land use decision-making. The Act created two organizations within the executive department of the state to facilitate the greenway process: the Greenway Communities Council and the Greenway Conservancy. Both organizations are authorized to make grants to municipalities and nonprofit entities to assist them in preserving the unique resources of the greenway using a variety of methods, including the acquisition of <b>conservation easements</b> .
OK <sup>18</sup>	The Oklahoma Constitution creates a Department of Wildlife Conservation and a Wildlife Conservation Commission. The Commission is authorized to acquire by purchase, gift, or otherwise all property necessary, useful, or convenient for its use in carrying out the management, restoration, conservation, and regulation of the bird, fish, game, and wildlife resources of the State. State legislation authorizes the creation and, through licensing, the funding of various funds, one of which may be used to, among other things, purchase <b>easements</b> on real property to be used as public hunting, fishing, and trapping areas. <sup>19</sup>
RI <sup>20</sup>	Rhode Island legislation authorizes the use of the money derived from fresh water fishing, hunting, and combination licenses and permits for, <i>inter alia</i> , the acquisition of <b>conservation easements</b> for the purpose of creating wildlife reservations and protecting wildlife habitats.
SD <sup>21</sup>	South Dakota legislation authorizes any county or municipality to acquire, by purchase or donation, <b>historic easements</b> in any area within its respective jurisdiction wherever and to the extent that the governing body of the county or municipality determines the acquisition to be in the public

<sup>17</sup> N.Y. ENVTL. CONSERV. §§ 44-0101 to -0121 (McKinney 2008 & Supp. 2011) (Hudson River Valley Greenway). *See also* <http://www.hudsongreenway.state.ny.us/abouttheGreenway/OverviewandMission.aspx> (New York State, Hudson River Valley Greenway) (last visited May 24, 2011).

<sup>18</sup> OKLA. CONST. art. 26, §§ 1-4; OKLA. STAT. ANN. tit. 29, §§ 4-130 to -141 (West 2009 & Supp. 2011) (Oklahoma Wildlife Conservation Code). *See also* <http://www.wildlifedepartment.com/aboutodwc/commission.htm> (Oklahoma Department of Wildlife Conservation, The Commission) (last visited May 24, 2011).

<sup>19</sup> OKLA. STAT. ANN. tit. 29, §§ 4-140.C.1.a, -141.1 (West Supp. 2011). The Commission is also authorized to accept private contributions and donations made for the purposes of the relevant sections. *See* OKLA. STAT. ANN. tit. 29, §§ 4-132, -134 (West 2009 & Supp. 2011).

<sup>20</sup> R.I. GEN. LAWS §§ § 20-2-6 to -7 (1998) (Fish and Wildlife; Licensing).

<sup>21</sup> S.D. CODIFIED LAWS § 1-19B-16 (2004 & Supp. 2010) (Acquisition of Historical Easements).

	interest. “Historic easement” is defined as any easement, restriction, covenant, or condition running with the land, designated to preserve, maintain, or enhance all or part of the existing state of places of historical, architectural, archaeological, paleontological, or cultural significance.
TN <sup>22</sup>	Tennessee’s Natural Areas Preservation Act of 1971 was enacted for the purpose of providing protection for areas in the state possessing scenic, scientific, biological, geological, and recreational values. The Tennessee General Assembly, with the advice of the Department of Environment and Conservation, the Wildlife Resources Agency, and the Conservation Commission, is authorized to designate scenic-recreational and natural-scientific areas as worthy of permanent protection. Within the boundaries of those areas, the Commissioner of Environment and Conservation is authorized to acquire, on behalf of the state, lands in fee title, or, if applicable and preferably, interests in land in the form of <b>conservation easements</b> . The Act provides that easements should especially be sought in establishment of trails or other narrow, elongated, or extensive land uses. Such acquisitions may be by donation or purchase. The Act also provides that permitted activities must not be inconsistent with the purpose of perpetual preservation of such areas.
TN <sup>23</sup>	Tennessee legislation authorizes the state, municipalities, and counties to expend or advance public funds to acquire, by purchase, gift, grant, bequest, or devise, <b>conservation easements</b> that protect open space, farmland, and forestland.
TN <sup>24</sup>	Tennessee legislation authorizes “public bodies” (defined as “the state, counties, municipalities, metropolitan governments, the historic commission of any state, county, municipal, or metropolitan government, and park or recreation authorities”) to acquire interests and rights in real property that are adjacent to or have a visual, audible, or atmospheric effect on the state’s historic, architectural, archaeological, or cultural resources, or on its natural areas. The state and other public bodies are specifically authorized to acquire <b>scenic easements</b> in land or historic structures by donation, purchase, or otherwise.

<sup>22</sup> TENN. CODE ANN. §§ 11-14-101 to -117 (1999 & Supp. 2010) (Natural Areas Preservation Act of 1971). *See also* [http://tennessee.gov/environment/tn\\_consrv/archive/naturalareas.htm](http://tennessee.gov/environment/tn_consrv/archive/naturalareas.htm) (Tennessee Department of Environment and Conservation; Natural Areas Act Turns 30) (last visited May 24, 2011).

<sup>23</sup> TENN. CODE ANN. §§ 11-14-201 to -203 (1999) (Agricultural, Forest and Open Spaces Land).

<sup>24</sup> *Id.* §§ 11-15-101 to -108 (1999 & Supp. 2010) (Protective Easements).

VA <sup>25</sup>	Virginia legislation creates the Office of Farmland Preservation, the powers and duties of which include developing (i) model policies and practices that may be used as a guide to establish local purchase of development rights (PDR) programs; (ii) criteria for the certification of local PDR programs as eligible to receive grants, loans, or other funds from public sources; and (iii) methods and sources of revenue for allocating funds to localities to purchase <b>agricultural conservation easements</b> . <sup>26</sup>
WA <sup>27</sup>	Washington legislation authorizes public bodies and charitable conservation organizations to purchase or otherwise acquire (except by eminent domain) rights in perpetuity to future development of any open space, farm, agricultural, or timber land for the purpose of conserving the same. These developmental rights are referred to as <b>conservation futures</b> . The legislation also authorizes counties to levy an amount against the assessed valuation of all taxable property within the county to raise funds to be used to acquire conservation futures.
WA <sup>28</sup>	Washington legislation creates the <b>agricultural conservation easements</b> program. The State Conservation Commission manages the program and is authorized to adopt rules as necessary to implement the legislature's intent to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of the state. The legislation authorizes the Commission to provide funds to local governments and nonprofit organizations on a match or no match required basis to purchase easements in perpetuity or for a fixed term.
WI <sup>29</sup>	Wisconsin legislation directs the State's Department of Agriculture, Trade and Consumer Protection to administer a program pursuant to which the Department, together with cooperating political subdivisions and nonprofit conservation organizations, acquires <b>agricultural conservation easements</b> in purchase or bargain purchase transactions. An "agricultural conservation

<sup>25</sup> VA. CODE ANN. §§ 3.2-200 to -206 (2008 & Supp. 2010) (Preservation of Farm and Forest Lands).

<sup>26</sup> See <http://www.vdacs.virginia.gov/preservation/#assist> (Virginia Department of Agriculture and Consumer Services, Office of Farmland Preservation) (last visited May 24, 2011).

<sup>27</sup> WASH. REV. CODE §§ 84.34.200 to .250 (West 2004 & Supp. 2011) (Open Space, Agricultural, Timber Lands - Current Use - Conservation Futures).

<sup>28</sup> *Id.* §§ 89.08.010; 89.08.530 -.540 (Conservation Districts; Agricultural Conservation Easements).

<sup>29</sup> WIS. STAT. § 93.73 (West Supp. 2010) (Purchase of Agricultural Conservation Easements). See also [http://datcp.wi.gov/Environment/Working\\_Lands\\_Initiative/PACE/index.aspx](http://datcp.wi.gov/Environment/Working_Lands_Initiative/PACE/index.aspx) (Wisconsin Department of Agriculture, Trade and Consumer Protection; Purchase of Agricultural Conservation Easements (PACE)) (last visited May 24, 2011).

	<p>easement” is defined as a conservation easement, the purpose of which is to assure the availability of land for agricultural use, including crop or forage production; the keeping of livestock; beekeeping; nursery, sod, or Christmas tree production; floriculture; aquaculture; fur farming; and any other use the Department identifies as an agricultural use. An easement purchased pursuant to this program must prohibit the land from being developed for a use that would make the land unavailable or unsuitable for agricultural use and must “continue in perpetuity.”</p>
<p><b>Statutes that Refer to the General Enabling Statute</b></p>	
<p>AZ<sup>30</sup></p>	<p>The Arizona Agricultural Protection Act was enacted for the purpose of enabling and facilitating the establishment of <b>agricultural easements</b>. Pursuant to the Act, the Director of the Arizona Department of Agriculture is authorized to make grants to state agencies or instrumentalities, political subdivisions of the state or agencies or instrumentalities thereof, and nonprofit conservation organizations for the purpose of acquiring agricultural easements by purchase or bargain purchase. Such easements must be established pursuant to Arizona’s general enabling statute, which is based on the UCEA,<sup>31</sup> and must be granted either in perpetuity or for a renewable term of at least twenty-five years.</p> <p>Agricultural easements acquired under the Act must impose limitations or affirmative obligations regarding the types of activities that are permitted or prohibited on the land. The permitted and prohibited activities are negotiated on a case-by-case basis, but must be consistent with (i) the purpose of conserving farmland, rangeland, or the local production of food and fiber, and (ii) at least one of the following additional purposes: the conservation of open space, the conservation of native species and their habitat, or the conservation of large tracts of undeveloped land. Agricultural easements must also prohibit activities that are inconsistent with the preservation of open space and the local production of food and fiber. If the easement holder is a nonprofit organization, the state must be authorized to enforce the easement if the holder fails to do so.</p>

<sup>30</sup> ARIZ. REV. STAT. ANN. §§ 3-3301 to -3308 (2002) (Arizona Agricultural Protection Act). See also <http://www.azda.gov/agprotection.htm> (Arizona Department of Agriculture; Arizona Agricultural Protection Commission) (last visited May 24, 2011).

<sup>31</sup> For Arizona’s general enabling statute see *supra* Appendix A, at 71 n.22.

FL <sup>32</sup>	Florida legislation authorizes the Department of Agriculture and Consumer Services to allocate moneys to acquire perpetual less-than-fee interests in land for the purpose of protecting wildlife habitat, water resources and wetlands, open space lands with significant natural areas, and agricultural lands threatened by conversion to other uses. The Department is authorized to, <i>inter alia</i> , accept applications for project proposals that involve the purchase of perpetual <b>conservation easements</b> as defined in Florida's general enabling statute. <sup>33</sup>
GA <sup>34</sup>	The Georgia Department of Natural Resources is authorized to establish a land conservation program. The program is intended to promote partnerships for the conservation of land that cities or counties have identified as locally valuable, or the Department has identified as having state-wide significance. Pursuant to the program, money is made available to all cities and counties in the state, the Department, the State Forestry Commission, other state departments or agencies, other state authorities, and nongovernmental entities for the acquisition of <b>conservation easements</b> that permanently protect land. For purposes of the program, a "conservation easement" is defined as a conservation easement established in accordance with the Georgia general enabling statute, which is based on the UCEA. <sup>35</sup>
MA <sup>36</sup>	The Massachusetts Secretary of Environmental Affairs is required to establish a program to assist the Commonwealth in the acquisition of <b>agricultural preservation restrictions</b> , as defined in the Massachusetts general enabling statute. <sup>37</sup> The Commissioner of Agricultural Resources is authorized to purchase such easements from agricultural land owners for an agreed upon price not to exceed the difference between the fair market value of such land and the fair market value of such land restricted for agricultural purposes. Title to the easements is held in the name of the Commonwealth or the Commonwealth and the city or town in which such

<sup>32</sup> FLA. STAT. ANN. §§ 570.70 to .72 (West 2003 & Supp. 2010) (Conservation Easements and Agreements).

<sup>33</sup> *Id.* § 570.71(1)(b). The legislation also authorizes the Department to accept applications for project proposals that involve the purchase of "rural-lands-protection easements." See *supra* note 5 and accompanying text. For Florida's general enabling statute see *supra* Appendix A, at 71 n.2.

<sup>34</sup> GA. CODE ANN. §§ 12-6A-1 to -12 (Supp. 2010) (Land Conservation). See also <http://glcp.georgia.gov/02/glcp/home/0,2682,82613131,00.html> (Georgia Land Conservation Program) (last visited May 24, 2011).

<sup>35</sup> For Georgia's general enabling statute see *supra* Appendix A, at 71 n.26.

<sup>36</sup> MASS. GEN. LAWS ANN. ch. 20, § 23 (West 2010) (Agricultural Preservation Restrictions).

<sup>37</sup> For the Massachusetts general enabling statute see *supra* Appendix A, at 72 n.45 and accompanying text.



	<p>land is located.</p> <p>Notwithstanding any general or special law to the contrary, the Department of Agricultural Resources, with the approval of the co-holder, if any, is permitted, in its sole discretion, to grant to any owner of land subject to an agricultural preservation restriction a nonassignable special permit allowing nonagricultural activities on the land, provided: (i) the land is being actively utilized for full-time commercial agriculture; (ii) the permit is for a maximum of five years duration, which may, at the discretion of the department, be renewed; and (iii) the agricultural lands preservation committee finds that the grant of a special permit will not defeat or derogate from the intent and purposes of retaining the land for agricultural use and preserving the natural agricultural resources of the commonwealth.</p>
<p>MA<sup>38</sup></p>	<p>The Massachusetts Secretary of Environmental Affairs is required to establish a program to assist the Commonwealth in the acquisition of <b>watershed preservation restrictions</b>, as defined in the Massachusetts general enabling statute.<sup>39</sup> The Commissioner of the Department of Conservation and Recreation is authorized to purchase such easements from watershed land owners for an agreed upon price not to exceed the difference between the fair market value of such land and the fair market value of such land restricted for watershed protection purposes. Title to the easements is held in the name of the Commonwealth or the Commonwealth and the city or town in which such land is located.</p>
<p>NY<sup>40</sup></p>	<p>New York legislation establishes the Albany Pine Bush Preserve Commission in the Department of Environmental Conservation.<sup>41</sup> The purpose of the Commission is to protect and manage the Albany Pine Bush, a landscape of rare and endangered natural communities and species, by establishing an Albany Pine Bush Preserve consisting of dedicated public and dedicated private land. Land owned by private persons or organizations may be dedicated to be part of the preserve only through the voluntary execution of a <b>conservation easement</b> pursuant to New York’s general enabling statute,<sup>42</sup> and acceptance of such instrument by the Commission.</p>

<sup>38</sup> MASS. GEN. LAWS ANN. ch. 21 § 59 (Watershed Preservation Restrictions).

<sup>39</sup> *Id.* ch. 184 § 31.

<sup>40</sup> N.Y. ENVTL. CONSERV. §§ 46-0101 to -0115 (McKinney 2008) (Albany Pine Bush Preserve Commission).

<sup>41</sup> *Id.* § 1-0303.11 (McKinney 2005 & Supp. 2011) (defining “Department” as the state Department of Environmental Conservation”).

<sup>42</sup> For New York’s general enabling statute see *supra* Appendix A, at 75 n.51 and accompanying text.

<b>Statutes with Unique Provisions</b>	
<b>AL</b> <sup>43</sup>	<p>The Alabama Constitution establishes the Alabama Forever Wild Land Trust for the purpose of identifying, acquiring, managing, protecting, and preserving natural lands and waters in the state that are of environmental or recreational importance. The state, acting through the Forever Wild Land Trust, is authorized to acquire both fee title to land and <b>conservation easements</b> to ensure the protection and use of land for conservation, educational, recreational, or aesthetic purposes.</p> <p>A “conservation easement” is defined as “a right, whether or not stated in the form of restriction, easement, covenant or condition, in any deed, will, or other instrument executed by or on behalf of the owner of land providing for the retention of properties predominantly in their natural, scenic, open or wooded condition, or as suitable habitat for fish and wildlife, or as recreational lands.”</p> <p>The Constitution provides that conservation easements may be released, in whole or in part, by the holder for such consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interest in land, subject to such conditions as may have been imposed at the time of creation of the restriction.</p>
<b>AR</b> <sup>44</sup>	<p>The Arkansas general enabling statute provides that a <b>conservation easement</b> held by the Old State House Commission (a statewide board of nine citizens appointed by the Governor) can be modified or terminated only after:</p> <ul style="list-style-type: none"> <li>(i) the holding of a public hearing, and</li> <li>(ii) a determination by the Commission, after taking into consideration any national, state, regional, and local comprehensive land use or development plan affecting the historical, architectural, archeological, or cultural aspects of the real property, that continuance of the easement is not in the public interest.<sup>45</sup> With regard to compensation, the statute provides that a conservation easement may be modified or released for such consideration, if any, as the Commission may determine, in the same manner as the Commission may dispose of land or other interests in land.</li> </ul>

<sup>43</sup> ALA. CONST. art. XI, § 219.07 § 3. *See also* <http://www.outdooralabama.com/public-lands/statelands/foreverwild/> (Alabama Department of Conservation and Natural Resources, Alabama’s Forever Wild Program) (last visited May 24, 2011).

<sup>44</sup> ARK. CODE ANN. §§ 15-20-401 to -410 (2009).

<sup>45</sup> *Id.* § 15-20-410.

<p>AR<sup>46</sup></p>	<p>Arkansas legislation establishes the Arkansas Natural Heritage Commission and authorizes dedications to the Commission. “Dedication” is defined as the creation of a <b>scenic, conservation, or environmental easement</b> to be vested in and legally enforceable by the Commission.<sup>47</sup> Dedications may be made either by donation or for consideration. Easements created by dedication must be perpetual, but may be altered, changed, or modified if the Commission finds, after public notice and hearing, that:</p> <ul style="list-style-type: none"> <li>(i) the particular change, alteration, or modification is required by imperative public necessity;</li> <li>(ii) there is no feasible and prudent alternative thereto; and</li> <li>(iii) all possible planning has been done to minimize harm caused to the state system of natural areas thereby.<sup>48</sup></li> </ul> <p>Any finding made by the Commission as a result of such a hearing is subject to judicial review under the Arkansas Administrative Procedure Act.</p>
<p>CA<sup>49</sup></p>	<p>California legislation provides for the establishment of the California Farmland Conservancy Program and an accompanying fund, both which are managed by the Department of Conservation. The purpose of the program is to encourage and make possible the long-term conservation of agricultural lands. Cities, counties, nonprofit organizations, resource conservation districts, and regional park or open-space districts or authorities that have the conservation of farmland among their stated purposes can apply for grants from the fund to be used toward the purchase or bargain purchase of <b>agricultural conservation easements</b>. An “agricultural conservation easement” is defined as an interest in land granted in perpetuity representing the right to prevent the development or improvement of the land for any purpose other than agricultural production.</p> <p>Agricultural conservation easements can be amended only with the consent of the director of the Department of Conservation, and the director must determine that the amendment is not inconsistent with the purpose of the easement before the easement may be amended.</p> <p>Twenty-five or more years from the date of the bargain sale of an agricultural conservation easement, the landowner may make a request to the Department of Conservation that the easement be reviewed for possible termination. To terminate an easement:<sup>50</sup></p>

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<sup>46</sup> *Id.* §§ 15-20-301 to -319 (2009) (Arkansas Environmental Quality Act of 1973).  
<sup>47</sup> *Id.* § 15-20-308.  
<sup>48</sup> *Id.* § 15-20-314.  
<sup>49</sup> CA. PUB. RES. §§ 10200-10277 (West 2007) (California Farmland Conservancy Program Act).  
<sup>50</sup> *See id.* §§ 10272-10273.

	<p>(i) the local government in which the subject land is located must approve the termination after undertaking an inquiry to determine the feasibility of profitable farming on the land, which inquiry shall include onsite inspection of the land, the holding of a public hearing, and the preparation of a report documenting the local government's findings, and</p> <p>(ii) the Department of Conservation must make all of the following findings:</p> <ol style="list-style-type: none"> <li>(1) The termination is consistent with the purposes of the program.</li> <li>(2) The termination is in the public interest.</li> <li>(3) The termination is not likely to result in the removal of adjacent lands from commercial agricultural production.</li> <li>(4) The termination is for an alternate use that is consistent with the applicable provisions of the city or county general plan.</li> <li>(5) The termination will not result in discontinuous patterns of urban development.</li> <li>(6) The conservation purposes, as defined in the easement, can no longer be achieved.</li> <li>(7) There is no land available and suitable for the use to which it is proposed that the restricted land be put, or development of the restricted land would provide more contiguous patterns of urban development than development of proximate unrestricted land.</li> </ol> <p>The Department must request from the easement holder, and shall consider the easement holder's assessment of, information regarding the continuing value and viability of the subject property for the conservation purposes for which the easement was originally created.</p> <p>The uneconomic character of existing agricultural use is not, by itself, sufficient reason to terminate an easement, unless the director determines there is no other reasonable or comparable agricultural use for the land, and the conservation purposes, as defined in the easement, can no longer be achieved.</p> <p>If the termination of an easement is approved pursuant to the conditions set forth above, or in a judicial proceeding, the landowner must repurchase the easement by paying to the fund and, if so provided in the easement, to any other contributing parties, the difference, at that time, between the fair market value and the restricted value of the land. Money deposited into the fund will be used for the purposes of the program, including administrative costs.<sup>51</sup></p> <p>The legislation also provides that an easement may, at the request of the landowner, contain provisions that are more restrictive than the provisions prescribed by the statute, although an agricultural conservation easement acquired with grant funds may not restrict husbandry practices.</p>
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<sup>51</sup> See *id.* § 10276.

CT <sup>52</sup>	<p>Connecticut legislation establishes a program pursuant to which the Commissioner of Agriculture can acquire the <b>development rights</b> with regard to agricultural land on behalf of the state by bargain purchase or by gift. “Development rights” are defined, generally, as the rights of the fee simple owner of agricultural land to develop, construct on, sell, lease, or otherwise improve the land for uses that result in rendering such land no longer agricultural land.<sup>53</sup></p> <p>Once acquired by the Commissioner of Agriculture, such development rights are “deemed dedicated to the state in perpetuity,” except that the Commissioner, in consultation with such advisory groups as the Commissioner may appoint and the Commissioner of Environmental Protection, may approve a petition by the owner of the land to remove the restrictions provided:</p> <ul style="list-style-type: none"> <li>(i) the Commissioner holds at least one public hearing on the issue,</li> <li>(ii) the Commissioner determines that “the public interest is such that there is an overriding necessity to relinquish control of the development rights,”</li> <li>(iii) the petition is approved by resolution of the legislative body of the relevant town, and</li> <li>(iv) the legislative body of the town submits the question of removing the agricultural restrictions from such land or a part thereof, to the qualified voters of such town at a referendum, and a majority of those voting at such referendum are in favor of such removal.<sup>54</sup></li> </ul> <p>Upon satisfaction of the preceding conditions, the Commissioner conveys the development rights to the then owner of the land, provided the owner pays the Commissioner an amount equal to the value of such rights. The value of such rights is equal to the difference between the value of the property for its highest and best use and its value for agricultural purposes, as determined by the Commissioner.</p>
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<sup>52</sup> CONN. GEN. STAT. ANN. §§ 22-26aa to -26nn (West 2010 & Supp. 2011) (Agricultural Lands). *See also* <http://www.ct.gov/doag/cwp/view.asp?a=3260&q=399016> (Connecticut Department of Agriculture, Farmland Preservation Program).

<sup>53</sup> *Id.* § 22-26bb.

<sup>54</sup> *Id.* § 22-26cc(C).

DE <sup>55</sup>	<p>Delaware legislation establishes the Delaware Agricultural Lands Preservation Foundation (DALPF), which is governed by a twelve member Board of Trustees.<sup>56</sup> The focus of the DALPF program is to conserve, protect, and encourage improvement of agricultural lands within the state for the production of food and other agricultural products. It is also to encourage, promote, and protect farming as a valued occupation. Preservation of the state's farmlands and forestlands is considered essential to maintaining agriculture as a viable industry and important contributor to Delaware's economy.</p> <p>DALPF has the authority to acquire by gift or bargain purchase <b>agricultural lands preservation easements</b> with respect to lands located in Agricultural Preservation Districts. Such easements must be granted in perpetuity, but the statute provides that "[i]t is the intent of the General Assembly that the preservation easements purchased under this subchapter be held by the Foundation for as long as profitable farming is feasible on the land subject to the easement," and at a minimum for twenty-five years.<sup>57</sup></p> <p>Twenty-five or more years from the date of the donation or bargain sale of an agricultural lands preservation easement, the landowner may request that DALPF review the easement for possible termination. DALPF's board can approve the termination of an easement following:</p> <ul style="list-style-type: none"> <li>(i) on-site inspection of the subject land,</li> <li>(ii) a public hearing,</li> <li>(iii) review of the subject land under a scoring system adopted by the Department of Agriculture to determine the quality of farmland and forestland and the long-term agricultural viability of such lands; and</li> <li>(iv) a determination by DALPF's board that profitable farming on the subject land is no longer feasible.<sup>58</sup></li> </ul>
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<sup>55</sup> DEL. CODE ANN. tit. 3, §§ 901-941 (2001 & Supp. 2010) (Delaware Agricultural Lands Preservation Act). Subchapter III of this legislation (specifically §§ 913-917) deals with the acquisition and termination of agricultural land preservation easements. *See also* <http://dda.delaware.gov/aglands/index.shtml> (State of Delaware, Land Use Planning & Preservation, Delaware Agricultural Lands Preservation Foundation) (last visited May 24, 2011).

<sup>56</sup> The Board of Trustees consists of one member from the Senate, one member from the House of Representatives, and the ten trustees appointed by the Governor, including the Secretary of the Department of Agriculture or authorized designee, the Secretary of the Department of Natural Resources and Environmental Control or authorized designee, a member of the Delaware Farm Bureau, and three individuals actively engaged in farming or some other form of agribusiness in certain Delaware counties. DEL. CODE ANN. tit. 3, § 903(a).

<sup>57</sup> *Id.* § 917.

<sup>58</sup> *Id.*

	<p>If the request for termination is approved, the owner may repurchase the easement by paying DALPF the difference between the fair market value and the agricultural value of the subject land as of the valuation date, as determined by an appraisal obtained by DALPF, but in no event can the repurchase price be less than the amount paid by DALPF for the acquisition of the easement. “Agricultural value” is defined as the price, as of the valuation date, that a willing buyer would pay for a farm unit with land comparable in quality and composition to the property being appraised, but located in the nearest location where profitable farming is feasible.</p> <p>Judicial proceedings to review any of DALPF’s actions can be brought in the Superior Court of the State, provided such review is requested within thirty days from the date of the action to be challenged.</p>
<p>HI<sup>59</sup></p>	<p>Hawaii legislation authorizes the Board of the Department of Land and Natural Resources to acquire by purchase or gift interests or rights in land, including permanent <b>conservation easements</b> under Hawaii’s general enabling statute.<sup>60</sup> The Board is also authorized to make grants to state agencies, counties, and nonprofit land conservation organizations so that they can acquire conservation easements.</p> <p>The Board is authorized to, in consultation with the Senate President and Speaker of the House of Representatives, and with the approval of the Governor, sell, lease, or otherwise convey any land or interests therein that it has acquired, subject to terms and conditions that it deems appropriate and that will ensure that the transferee will not use the land in a manner that is inconsistent with the purposes for which it was acquired by the Board. The legislation provides that the terms and conditions shall run with the land and be binding on the transferee’s heirs, successors, and assigns.</p> <p>State agencies, counties, and nonprofit land conservation organizations are authorized to sell, lease, or otherwise dispose of conservation easements acquired with grant funds with prior written approval of the Board, subject, in the case of state agencies and counties, to other state laws applicable to such entities and, in the case of the acquisition of a conservation easement in partnership with a federal land conservation program, to the rules of that program. If an easement is sold by a state agency, county, or nonprofit land conservation organization, the portion of the net proceeds (sale price less expenses of sale) equal to the proportion that the grant by the State bore to the original cost of the easement must be paid to the State. Any proceeds received by the State</p>

<sup>59</sup> HAW. REV. STAT. ANN. §§ 173A-1 to -12 (LexisNexis 2008) (Acquisition of Resource Value Lands). See also <http://hawaii.gov/dlnr/dofaw/lcp> (Hawaii Department of Land and Natural Resources, Hawaii Legacy Land Conservation Program) (last visited May 24, 2011).

<sup>60</sup> For Hawaii’s general enabling statute, see *supra* Appendix A, at 71 n.11.

	attributable to amounts originally paid out of the fund administered by the Board must be redeposited in or credited to that fund, and may be used to pay administrative costs, stewardship expenses associated with protected lands, and the costs associated with other land protection projects.
<b>IL</b> <sup>61</sup>	Pursuant to the Save the Illinois Topsoil Program, the Illinois Department of Agriculture is authorized to acquire permanent <b>conservation easements</b> in bargain purchase transactions. The legislation provides that such easements “may be released at any time by mutual consent of the parties.”
<b>IL</b> <sup>62</sup>	Pursuant to the Illinois Open Land Trusts Act, the Illinois Department of Natural Resources is authorized to acquire <b>conservation easements</b> for the protection of natural areas. The legislation provides that such easements “may be released at any time by mutual consent of the parties.”
<b>KY</b> <sup>63</sup>	<p>Kentucky legislation authorizes the Commonwealth of Kentucky to acquire <b>agricultural conservation easements</b> by bargain purchase or donation. An “agricultural conservation easement” is defined as “an interest in land, less than fee simple, which represents the right to restrict or prevent the development or improvement of the land for purposes other than agricultural production.” Such easements may be granted to the Commonwealth or to a qualified organization described in section 170(c) of the Internal Revenue Code, and may be granted in perpetuity, as the equivalent of the covenants running with the land.<sup>64</sup></p> <p>The easement acquisition program is overseen by the Purchase of Agricultural Conservation Easement Corporation (PACEC), which is a public agency attached to the Kentucky Department of Agriculture. The program is “designed to ensure that land is selected for easement purchase because it will make a significant contribution to agricultural production,”<sup>65</sup> and during the term of an agricultural conservation easement, the restricted land must be used solely for the production of crops, livestock and livestock products, nursery and greenhouse products, or the raising and stabling of horses for commercial purposes.<sup>66</sup></p> <p>Numerous activities (including the building of new agricultural and residential structures, paving, mining and extraction of mineral</p>

<sup>61</sup> 505 ILL. COMP. STAT. ANN. 35/1-1 to /4-1 (West 2004) (Illinois Conservation Enhancement Act).

<sup>62</sup> 525 ILL. COMP. STAT. ANN. 33/1 to /999 (West 2004 & Supp. 2011) (Illinois Open Land Trust Act).

<sup>63</sup> KY. REV. STAT. ANN. §§ 262.900 to .920 (LexisNexis 2005 & Supp. 2010) (Agricultural Conservation Easements).

<sup>64</sup> I.R.C. § 170(c) contains a more expansive definition of qualified organization than section 170(h).

<sup>65</sup> KY. REV. STAT. ANN. § 262.908(2)(c).

<sup>66</sup> *Id.* § 262.910.



	<p>substances, and the building of public or private recreational facilities other than golf courses) require approval of the board of directors of PACEC, but the board is mandated to give such approval unless the proposed activity would significantly or substantially diminish or impair the agricultural production capacity of the restricted land. The board is also mandated to approve subdivision of the restricted land unless it would diminish or impair the agricultural productivity of the land.</p> <p>The legislation provides that the grantor may terminate an agricultural conservation easement, in whole or in part, only by filing an action in the Franklin Circuit Court and demonstrating by clear and convincing evidence that conditions on or surrounding the land have changed so much that agriculture is no longer viable and it has become impossible to fulfill any of the easement’s conservation purposes.<sup>67</sup></p> <p>If the easement was purchased with Commonwealth funds, upon its termination the grantor must pay PACEC the “fair value” of the easement, which, in the discretion of the court, could mean either: (i) “an amount equal in current dollars to the full cost of acquiring and monitoring the easement during its full duration, plus reasonable interest as determined by the court,” or (ii) “an amount equal to the easement’s current market value as determined by independent appraisal.”<sup>68</sup> PACEC must place the proceeds from the termination of the easement in the fund established for purposes of the program, and such fund may be used for the land protection purposes of the program as well as administrative costs.</p>
<p>ME<sup>69</sup></p>	<p>Maine legislation establishes two funds, the Land for Maine’s Future Fund and the Public Access to Maine Waters Fund, both of which are administered by an eleven-member board.<sup>70</sup> Both funds are available to state agencies and “cooperating entities” (defined to include local governments and nonprofit organizations) to assist them in acquiring property or interests in property, including <b>conservation easements and scenic easements</b>, on behalf of the State for the conservation and public access purposes described in the legislation. Title to all lands acquired pursuant to the legislation must be vested solely in the State, and such lands may not be sold or used for purposes other than those stated in the</p>

<sup>67</sup> *Id.* § 262.918(1).

<sup>68</sup> *Id.* § 262.918(2).

<sup>69</sup> ME. REV. STAT. ANN. tit. 5, §§ 6200-6211 (2002 & Supp. 2010) (Land for Maine’s Future). *See also* <http://www.maine.gov/spo/lmf/about.htm> (Maine State Planning Office, Land for Maine’s Future Program) (last visited May 24, 2011).

<sup>70</sup> The members of the board are the Commissioner of Conservation; the Commissioner of Inland Fisheries and Wildlife; the Commissioner of Marine Resources; the Commissioner of Agriculture, Food and Rural Resources; the Director of the State Planning Office; and six private citizens appointed by the Governor. ME. REV. STAT. ANN. tit. 5, § 6204.1 (2002).

	legislation, unless approved by a two-thirds majority of the state legislature. Although the statute is ambiguous, the term “lands” as used in the previous sentence appears to encompass conservation and scenic easements.
ME <sup>71</sup>	Maine legislation establishes a voluntary municipal farm support program pursuant to which a farmer can grant to the relevant municipality an <b>agricultural conservation easement</b> for the purpose of ensuring that no development other than that related to agricultural use occurs on the farmland. In exchange, the farmer receives from the municipality annual farm support payments during the term of the easement in an amount up to 100 percent of the annual property taxes assessed by the municipality against the land and buildings subject to the easement up to the fair market value of the easement. Such easements are limited to a term of not less than 20 years <sup>72</sup> and, thus, presumably could be granted in perpetuity. It appears that municipalities may either assess property taxes and then deduct the amount of the farm support payments from the farmer’s property tax bill, or collect the property taxes and then reimburse the farmer. The legislation provides that these farm support arrangements, once finally executed, are binding on the municipality, and the municipality cannot cease to make payments under the arrangement unless the land subject to the easement is taken by eminent domain or state law otherwise authorizes the payments to cease. In the event that a municipality’s obligation to make farm support payments ceases, the farm support arrangement and the related easement are void and may not be given effect.
MD <sup>73</sup>	Maryland legislation establishes the Maryland Agricultural Land Preservation Foundation (MALPF) in the Maryland Department of Agriculture. MALPF is governed by a thirteen member Board of Trustees consisting of the State Treasurer, the Comptroller, the Secretary of Planning, and the Secretary of Agriculture (all serving <i>ex officio</i> ), and nine members from the State at-large appointed by the Governor, at least six of whom must be farmer representatives (actively engaged in or retired from active farming) from different areas of the State. <sup>74</sup> A person may be appointed to and serve on the board as an at-large member even

<sup>71</sup> ME. REV. STAT. ANN. tit. 7, § 60 to 60-A (2002 & Supp. 2010) (Voluntary Municipal Farm Support Program).

<sup>72</sup> *Id.* § 60.3.B.

<sup>73</sup> MD. CODE ANN., AGRIC. §§ 2-501 to -519 (LexisNexis 2007 & Supp. 2010) (Maryland Agricultural Land Preservation Foundation). See also <http://www.malpf.info/> and <http://www.mda.state.md.us/malpf.php> (Maryland Department of Agriculture, Maryland Agricultural Land Preservation Foundation) (last visited May 24, 2011).

<sup>74</sup> MD. CODE ANN., AGRIC. § 1-101(i) (LexisNexis 2007) (“Secretary” means Secretary of Agriculture or his designee).

if the person has sold an easement to MALPF.

MALPF has the authority to acquire by gift or bargain purchase “**easements in gross** or other rights to restrict the use of agricultural land and woodland as may be designated to maintain the character of the land as agricultural land or woodland.” MALPF is directed to adopt guidelines to identify easements for purchase that further the goals of the program and entail consideration of (i) whether the land is located in a priority preservation area of the relevant county, (ii) the soil and other characteristics of the land associated with agricultural productivity, (iii) the agricultural production and contribution of the land to the agricultural economy, and (iv) “[a]ny other unique county considerations that support the goals of the program.”

Once an easement has been acquired, MALPF has the authority to enter into “corrective easements” with landowners to adjust boundary lines, resolve easement violations, or “accommodate a plan that [MALPF] has determined will benefit the agricultural operations.”<sup>75</sup> These corrective easements “may be accomplished by the exchange and release of farmland subject to easement restrictions with other farmland that meets the requirements of this subtitle.” In other words, MALPF can agree to “swaps” (to remove a portion of farmland from an easement’s protections, thereby partially extinguishing the easement, in exchange for placing some other farmland that meets the requirements of the program under easement). Corrective easements are specifically excepted from the provisions of state law that require independent property appraisals when the state acquires or sells real property interests.<sup>76</sup>

Easements acquired under the MALPF program also must permit (i) “any farm use of land,” (ii) “operation at any time of any machinery used in farm production or the primary processing of agricultural products,” and (iii) “all normal agricultural operations performed in accordance with good husbandry practices which do not cause bodily injury or directly endanger human health.”<sup>77</sup> In certain counties, MALPF may not require that natural gas rights be subordinated to an easement if MALPF determines that exercise of such rights “will not interfere with an agricultural operation conducted on the land.”<sup>78</sup>

The MALPF program has different rules governing the wholesale termination of an easement depending upon when acquisition of the easement was approved.

*Easements approved on or before September 30, 2004*

<sup>75</sup> MD. CODE ANN., AGRIC. § 2-513(b)(9) (LexisNexis 2007 & Supp. 2010).

<sup>76</sup> *Id.* § 2-513(9)(iii).

<sup>77</sup> *Id.* § 2-513(a).

<sup>78</sup> *Id.* § 2-509(c).

The statute provides that “[i]t is the intent of the General Assembly that any easement whose purchase is approved . . . on or before September 30, 2004, be held by the Foundation for as long as profitable farming is feasible on the land under easement, and an easement may be terminated only in the manner and at the time specified in this section.” The statute then provides that, any time after twenty-five years from the date of the conveyance of an easement, the landowner may request that MALPF review the easement for possible termination.<sup>79</sup> When such a request is made, MALPF must conduct an inquiry to determine “the feasibility of profitable farming on the subject land,” and the inquiry must include (i) an on-site inspection of the subject land and (ii) a public hearing in the county containing the subject land.

The easement can be terminated upon (i) the affirmative vote of a majority of the members at-large of MALPF’s Board of Trustees, (ii) the approval of the governing body of the county containing the subject land, and (iii) the approval of the Secretary of Agriculture and the State Treasurer.<sup>80</sup>

If MALPF denies a request to terminate a conservation easement, the landowner may appeal the decision directly to the circuit court of the county where the land is located.<sup>81</sup>

If a request for termination is approved, the landowner may repurchase the easement by paying MALPF the difference between the fair market value and the agricultural value of the subject land, as determined by an appraisal. The “agricultural value” of land is the price, as of the valuation date, that willing seller would accept and a willing buyer would pay for the property as a farm unit, to be used for agricultural purposes.<sup>82</sup> Such value is determined by a formula approved by the Department that measures the farm productivity of the land by taking into consideration weighted factors that may include rents, location, soil types, development pressure, interest rates, and potential agricultural use.<sup>83</sup>

If the easement was originally purchased with the help of funds contributed by a county, the repurchase payment is divided between MALPF and the county according to the percentage of the original easement purchase price each contributed. MALPF’s portion is deposited

<sup>79</sup> *Id.* § 2-514(b). MALPF can make grants to counties to purchase easements using installment purchase agreements, and the statute provides that easements purchased using such grants are jointly held by the county and the Foundation, and a landowner “may not terminate” such an easement. *Id.* § 2-514(h).

<sup>80</sup> *Id.* § 2-514(d).

<sup>81</sup> *Id.* § 2-514(i)(3).

<sup>82</sup> *Id.* § 2-511(a).

<sup>83</sup> *Id.* § 2-511(d)(2).

	<p>into the Maryland Agricultural Land Preservation Fund. That fund is used both for MALPF’s general operating costs and to purchase agricultural land preservation easements. The county must deposit an amount that is at least equal to the percentage of the original easement purchase price that was paid out of its special agricultural land preservation program account into that account, and the balance is deposited into the county’s general fund.</p> <p><i>Easements approved on or after October 1, 2004</i></p> <p>In 2004, the MALPF legislation was amended to provide that easements whose purchase is approved on or after October 1, 2004, “shall be held by the Foundation in perpetuity.”<sup>84</sup> The amended legislation is silent regarding the termination of such easements, whether compensation is payable to the holder in such event, or the holder’s use of such compensation.</p>
<p>MI<sup>85</sup></p>	<p>Michigan legislation authorizes the Department of Agriculture to purchase <b>agricultural conservation easements</b> pursuant to which the owner relinquishes to the public in perpetuity his or her development rights and makes a covenant running with the land not to undertake development.<sup>86</sup> The legislation provides that such easements may be terminated:</p> <p>(i) if the land, as determined by the Commission of Agriculture, meets certain criteria, the precise nature of which are unclear because of an unclear cross-reference in the statute, although they appear to relate to whether agricultural production on the land remains economically viable, and</p> <p>(ii) the termination is approved by the local governing body, the Commission of Natural Resources, and the Commission of Agriculture.<sup>87</sup></p> <p>If an agricultural conservation easement is terminated, the current fair market value of the development rights, at the time of termination, must be paid to the Department of Agriculture to be used to acquire agricultural conservation easements on additional farmland. Pursuant to the statute, it appears that the value of the development rights would be determined by subtracting the current fair market value of the property without the development rights from the current fair market value of the property with all development rights.</p>

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<sup>84</sup> *Id.* § 2-514.1.  
<sup>85</sup> MICH. COMP. LAWS ANN. §§ 324.36101 to .36117 (West 2009) (Farmland and Open Space Preservation).  
<sup>86</sup> *Id.* § 324-36101(g).  
<sup>87</sup> *Id.* § 324.36111(b)(7).

MI <sup>88</sup>	<p>Michigan legislation also directs the Department of Agriculture to establish a program pursuant to which grants are provided to local units of government for the purchase or bargain purchase of <b>agricultural conservation easements</b> pursuant to which “the owner relinquishes to the public in perpetuity his or her development rights and makes a covenant running with the land not to undertake development.”<sup>89</sup> Such easements are held jointly by the state and the local unit of government. The legislation provides that an agricultural conservation easement may be transferred to the owner of the burdened land (which would result in extinguishment of the easement) if the state and the local unit of government holding the easement agree to the transfer and the terms of the transfer.</p>
MN <sup>90</sup>	<p>Minnesota legislation directs the Minnesota Board of Water and Soil Resources, in consultation with the state’s Commissioner of Agriculture and Commissioner of Natural Resources, to establish and administer the “reinvest in Minnesota reserve program.” Pursuant to this program, the Board may acquire permanent <b>conservation easements</b> on behalf of the state by gift or donation for the purpose of protecting fish, wildlife, and native plant habitats, reducing erosion, and protecting water quality. The Board may similarly acquire permanent easements for the purpose of preserving or restoring wetlands and in connection with its clean energy program.</p> <p>The legislation provides that payment for conservation easements protecting wetlands may be made in ten equal annual payments, but if funds are not available and payments are not made, the restrictions on the use of the property owner’s wetlands are terminated. The legislation further provides that any conservation easement may be altered, released, or terminated by the Board, after consultation with the Commissioners of Agriculture and Natural Resources, if the Board determines that “the public interest and general welfare are better served by the alteration, release, or termination.”</p>

<sup>88</sup> *Id.* §§ 324.36201 to .36207 (Agricultural Preservation Fund). *See also* [http://www.michigan.gov/mda/0,1607,7-125-1567\\_1599\\_2558-11788--,00.html](http://www.michigan.gov/mda/0,1607,7-125-1567_1599_2558-11788--,00.html) (Michigan Department of Agriculture & Rural Development, Agriculture Preservation Fund) (last visited May 24, 2011).

<sup>89</sup> *Id.* § 324.3201(a).

<sup>90</sup> MINN. STAT. ANN. §§ 103F.501 to .535 (West 2009 & Supp. 2011) (Reinvest in Minnesota Resources Law). *See also* <http://www.bwsr.state.mn.us/easements/rim/index.html> (Minnesota Board of Water & Soil Resource, Reinvest in Minnesota (RIM) Reserve) (last visited May 24, 2011).

<p>MS<sup>91</sup></p>	<p>Mississippi legislation creates the State Scenic Streams Stewardship Program, which is coordinated by the Mississippi Department of Wildlife, Fisheries and Parks. Once the state legislature has designated a stream as a state scenic stream, the Department may receive <b>conservation easements</b> or other interests in real property by gift, devise, grant, or dedication for purposes of the program. The legislation provides that “[i]f any land is donated to the state for the Scenic Streams Stewardship Program and the land ceases to be used in the program, the title to the land reverts to the donor.”<sup>92</sup> The Department’s description of the program indicates that this reversion language applies to conservation easements.<sup>93</sup></p>
<p>NH<sup>94</sup></p>	<p>New Hampshire legislation authorizes the state’s Department of Environmental Services to make water supply land protection grants to municipalities and nonprofit organizations that have public water supply or land conservation as their principal mission. Such grants may be used to acquire <b>conservation easements</b> for the purpose of protecting a drinking water source and associated natural resources. The municipalities and nonprofits are authorized to acquire such conservation easements in bargain purchase transactions or as donations. Such easements must be granted in perpetuity, the land must be maintained to protect the drinking water source, and no land use or development can occur that would diminish the quantity or quality of the drinking water.</p> <p>The legislation provides that lands and interests in lands acquired by the state or other public entity with a water supply land protection grant are held in public trust and must be used and applied for the purpose of protecting a drinking water source and associated natural resources. Notwithstanding any other provision of law relating to the disposal of publicly-owned real estate, no deviation in the uses of any such land or interest in land is permitted. However, the sale, transfer, conveyance, or</p>

<sup>91</sup> MISS. CODE ANN. §§ 51-4-1 to -4-23.10 (2003 & Supp. 2010) (Mississippi Scenic Streams Stewardship Act).

<sup>92</sup> *Id.* § 51-4-11(3)(b).

<sup>93</sup> See <http://home.mdwfp.com/ContentManagement/Html/htmldownload.aspx?id=280> (Mississippi Department of Wildlife, Fisheries, and Parks; Scenic Streams Program) (last visited May 24, 2011) (“An example of a significant conservation easement [acquired pursuant to the program] is International Paper Company’s agreement to limit disturbance in a 300-foot forested buffer on either side of the Wolf River for 15 miles in Harrison County. The Company negotiated the terms of the easement, and was afforded tax relief. Land donated to the state reverts back to the donating landowner if the land ceases to be used in the program.”).

<sup>94</sup> N.H. REV. STAT. ANN. §§ 486-A:1 to :15 (LexisNexis 2003) (Aid To Public Water Systems).

	<p>release of any such land or interest in land from public trust is permitted in two circumstances.</p> <p>1) Land can be released from public trust in order to be converted to another use if:</p> <ul style="list-style-type: none"> <li>(a) the municipality holding title to the conservation easement proposed for release votes in favor of such a release by a two-thirds vote of its legislative body;</li> <li>(b) a public hearing is held prior to the municipal vote;</li> <li>(c) all other municipalities using the water supply protected by the conservation easement vote in favor of the release by a two-thirds vote of their legislative bodies and after holding a public hearing;</li> <li>(d) the land proposed for release from the program will be publicly owned after its release from the program; and</li> <li>(e) the municipality proposing the release of the conservation easement repays the department the amount of the water supply land protection grant, plus interest, and the department uses the repayment to further the water supply land protection purposes of the legislation.</li> </ul> <p>2) Land may be released from public trust due to termination of use if:</p> <ul style="list-style-type: none"> <li>(a) the grantee successfully demonstrates to the Department that the source of drinking water that the conservation easement is intended to protect is not and will not be viable due to the inability to remediate contamination or provide treatment that improves water quality so that it is suitable for human consumption; and</li> <li>(b) the municipality voting to release the conservation easement from the program repays the Department the amount of the water supply land protection grant plus interest, and the Department uses the repayment to further the water supply land protection purposes of the legislation.<sup>95</sup></li> </ul> <p>The legislation does not specifically address the modification or termination of conservation easements acquired by nonprofit organizations with water supply land protection grants; the above provisions apply only to easements “acquired by the state or other public entity.”</p>
NH <sup>96</sup>	<p>New Hampshire legislation enacted in 1985 established an agricultural lands preservation (ALP) program, which is overseen by an Agricultural Lands Preservation Committee that functions within the state’s Department of Agriculture, Markets, and Food. The Committee is authorized to acquire by purchase or bargain purchase agricultural land</p>

<sup>95</sup> *Id.* § 486-A:13.

<sup>96</sup> N.H. REV. STAT. ANN. §§ 432:18 to :31-a (LexisNexis 2002 & Supp. 2010) (Acquisition of Agricultural Land Development Rights).



development rights, defined as rights of the fee simple owner of agricultural land that, if exercised, would result in rendering such land no longer suitable for agricultural use. Once conveyed to the state, those rights are held by the state in the form of an **agricultural preservation restriction**, which is defined as a restraint placed on the development rights of agricultural land appropriate to retaining land or water areas predominantly in agricultural use.

The statute contains ambiguous provisions governing the release of agricultural preservation restrictions. The first provision provides that agricultural preservation restrictions shall be in perpetuity except as released pursuant to the terms of the first provision and a second provision described below.<sup>97</sup> The first provision then states that (i) the Committee may release a restriction if the site “is no longer suitable for agricultural purposes” and a public hearing is held in the municipality in which the land is located, and (ii) the owner of land encumbered by a restriction may request the Committee’s approval to release the restriction “for the public good.” If the restriction was purchased with public funds, the first provision provides that it may be released upon repayment by the landowner of a reasonable value thereof, which shall not be less than the difference between fair market value of the land at the time of the release and the fair market value of the land restricted for agricultural purposes at the time the development rights were acquired.

The second provision provides that (i) agricultural land development rights may be acquired by any governmental body or charitable corporation or trust that has the authority to acquire interests in land, (ii) the restrictions arising from the acquisition of such rights may be enforced by injunction or other proceeding, (iii) such restrictions may be released, in whole or in part, by the holder for consideration in an amount determined by the governmental body or charitable corporation or trust that purchased the development rights, and (iv) prior to release of a restriction by a governmental body, a public hearing must be conducted in the municipality in which the site is located.<sup>98</sup>

A third provision provides that prior to action by a governmental body to release an agricultural preservation restriction, the body shall consider (i) the public interest in such agricultural preservation, (ii) any national, state, regional or local program in furtherance thereof, and (iii) and any state, regional or local comprehensive land use plan.<sup>99</sup>

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<sup>97</sup> *Id.* § 432:24.

<sup>98</sup> *Id.* § 432:25.

<sup>99</sup> *Id.* § 432:26.

	<p>Finally, a fourth provision provides that release by the state of an agricultural land preservation restriction, in whole or in part, must be approved by Governor and the Governor's Council.<sup>100</sup></p>
NH <sup>101</sup>	<p>New Hampshire legislation, effective in 2000, established the New Hampshire Land and Community Heritage Investment (LCHI) program. The purpose of the program is to preserve the state's most important natural, cultural, and historical resources through the acquisition of lands or interests therein in partnership with the state's municipalities and the private sector. The program is administered by an Authority that has the power to distribute funds to nonprofit corporations and municipalities and other political subdivisions of the state to assist them in acquiring, <i>inter alia</i>, easement interests. The term "easement interest" is defined to include "<b>conservation, historic preservation, or scenic easements, development rights, or any other similar protective interest in real property held in perpetuity.</b>"<sup>102</sup> Any easements acquired pursuant to the program are held in the name of the acquiring political subdivision or nonprofit corporation, although the state of New Hampshire holds an executory interest in all such interests.<sup>103</sup></p> <p>The legislation provides that (i) assets (including easements) acquired pursuant to the LCHI program are held "in public trust" and must be used for the purposes of the program, (ii) notwithstanding any other provision of law relating to the disposal of publicly-owned real estate, no deviation in the use of any such asset to a use or purpose not consistent with the purposes of the LCHI program is permitted, and (iii) the sale, transfer, conveyance, or release of any such asset from public trust is prohibited, except as provided in the legislation, which sets forth a detailed process for the diversion of such assets when required for minor expansions or modifications to the existing state highway system.<sup>104</sup></p>

<sup>100</sup> *Id.* § 432:31-a. *See also* N.H. CONST. art. 60 (providing for the biennial election of five councilors for advising the Governor in the executive part of government).

<sup>101</sup> N.H. REV. STAT. ANN. §§ 227-M:1 to :17 (LexisNexis 2010) (Land and Community Heritage Investment Program).

<sup>102</sup> *Id.* § 227-M:2, IV. Easements purchased with funds from the LCHI program must be "open in perpetuity for passive recreational purposes," although the Authority has the discretion to limit or prohibit such recreational use on a case-by-case basis.

<sup>103</sup> An executory interest is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate. BLACK'S LAW DICTIONARY 652 (9th ed. 2009).

<sup>104</sup> N.H. REV. STAT. ANN. § 227-M:13, M:14. The extent to which public trust status will protect LCHI easements from modification or termination is unclear. In some jurisdictions, land purchased by a state or municipality and dedicated to a public use is deemed to be held in public trust, but such land can be diverted to other uses with express legislative permission. On the other hand, if the land were held as a restricted charitable gift or in a

<p>NJ<sup>105</sup></p>	<p>New Jersey legislation establishes the State Agriculture Development Committee (SADC). Among other things, SADC reviews and approves applications from County Agricultural Development Boards and other qualified entities for grants to assist them in acquiring <b>development easements</b> within certified agricultural development areas by purchase or donation. Such easements, which may be permanent, prohibit development for nonagricultural purposes, but cannot prevent the landowner from constructing and operating biomass, solar, or wind energy generation facilities on the preserved land for the purpose of generating a limited amount of power or heat, provided that, among other things, such facilities do not interfere significantly with the use of the land for agricultural or horticultural production.</p> <p>The legislation provides that no development easement purchased pursuant to the provisions of the statute may be sold, given, transferred, or otherwise conveyed in any manner except in cases where development easements have been purchased on land included in a sending zone established by a municipal transfer of development rights (TDR) ordinance. Lands permanently restricted through development easements or conservation easements that were acquired before the adoption of a TDR ordinance may be included in a sending zone upon a finding by the municipal governing body that inclusion is in the public interest. If a county acquires development easements after the adoption of a TDR ordinance, it can sell the development potential associated with such easements to landowners in the receiving zone, provided the state is reimbursed for the amount it contributed toward the purchase of such easements. The legislation further provides that repeal of a TDR ordinance shall in no way rescind or otherwise affect the restrictions imposed on land in the sending zone, unless all of the municipal, county, or state agencies to which the deed restrictions run and whose funds were used to purchase the easement agree that it is in the public interest to release the restrictions.</p>
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charitable trust, diversion would require court approval and a finding of impossibility or impracticality in a *cypres* proceeding. Thus, as one commentator noted in a discussion of the protection of public parklands, “the charitable trust doctrine may actually protect [a] park from destruction in situations in which the public trust doctrine would allow for diversion or alienation, a reason for maintaining that the two concepts are separate and distinct.” Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine?*, 10 S.C. Envtl. L.J. 23, 40 (2002).

<sup>105</sup> N.J. STAT. ANN. §§ 4:1C-1 to -55 (West 1998 & Supp. 2011) (Right to Farm Act; Agriculture Retention and Development Act; State Transfer of Development Rights Bank Act). See also <http://www.nj.gov/agriculture/sadc/index.shtml> (New Jersey Department of Agriculture, State Agricultural Development Committee) (last visited May 24, 2011).

<p>NJ<sup>106</sup></p>	<p>The purpose of New Jersey's Wild and Scenic Rivers Act is to preserve, protect, and enhance the natural and recreational values of New Jersey's wild and scenic rivers. The Act authorizes the Department of Environmental Protection to acquire <b>scenic easements</b> by donation or purchase. A "scenic easement" is defined as a perpetual easement in land that (i) is held for the benefit of the public, (ii) is specifically enforceable by its holder or beneficiary, and (iii) limits or obligates the holder of the servient estate, his heirs, and assigns with respect to their use and management of activities conducted on the land, with the purpose of the easement being the maintenance or enhancement of the natural beauty of the land or the areas affected by it.</p> <p>State statutory provisions applicable to the Department of Environmental Protection provide that "lands" (a term defined to include easements) acquired by the state and administered by the Department of Environmental Protection may not be conveyed unless the Department first (i) prepares a report identifying the reasons for, and all advantages and disadvantages and benefits and detriments of, the proposed conveyance, (ii) conducts two public hearings, and (iii) either (a) is paid amount equal to the value of such land based upon its intended use upon conveyance or upon its highest and best use, whichever shall provide to the state the greatest value in return, and such amount is used by the Department for the acquisition of lands by the state for recreation and conservation purposes, or (b) receives land in exchange and manages that land for the same purposes as the land exchanged.<sup>107</sup></p>
<p>NJ<sup>108</sup></p>	<p>New Jersey has two statutes that authorize funding for land protection and historic preservation within the state. The first, New Jersey Green Acres Land Acquisition and Recreation Opportunities Act, which is commonly referred to as the Green Acres Program (GAP), was enacted in 1975. Under GAP, the Commissioner of Environmental Protection uses appropriated funds to acquire and develop lands for recreation and conservation purposes. The Commissioner may also make grants to assist local governments in acquiring and developing lands for recreation and conservation purposes.</p> <p>The second statute, New Jersey's Garden State Preservation Trust</p>

<sup>106</sup> N.J. STAT. ANN. §§ 13:8-45 to -63 (West 2003) (New Jersey Wild and Scenic Rivers Act).

<sup>107</sup> *Id.* §§ 13:1D-51 to -58 (Department of Environmental Protection).

<sup>108</sup> *Id.* §§ 13:8A-35 to -55 (Green Acres Program); *id.* §§ 13:8C-1 to -42 (West 2003 & Supp. 2011) (Garden State Preservation Trust). *See also* <http://www.nj.gov/dep/greenacres/> (New Jersey Department of Environmental Protection, Green Acres Program) (last visited May 24, 2011); <http://www.state.nj.us/gsp/> (New Jersey Garden State Preservation Trust) (last visited May 24, 2011).

<p>Act, was enacted in 1999 and established the Garden State Preservation Trust (GSPT). The GSPT is an independent instrumentality of the state that reviews and funds land protection and historic preservation projects submitted by the Department of Environmental Protection, the State Agriculture Development Committee, and the New Jersey Historic Trust. Such projects include the bargain purchase of <b>conservation easements</b> by such entities or by local government units and qualifying nonprofit organizations.</p> <p>GAP provides that lands acquired by local governments cannot be disposed of or diverted to a nonrecreation or conservation purpose without a public hearing followed by approval of the Commissioner of Environmental Protection and the State House Commission. For land disposal, approval by the State House Commission is contingent upon the local government's agreement to pay an amount equal to fifty percent of the current value of the land to the State Recreation and Conservation Land Acquisition and Development Fund, if the original grant was made from that fund, or, if not, to the State Treasury.</p> <p>GAP also provides that lands acquired by the State cannot be disposed of or diverted to a non recreation or conservation purpose without the approval of the State House Commission. The Department of Environmental Protection must also prepare a report identifying the reasons for, and all advantages and disadvantages and benefits and detriments of, the proposed disposal or diversion, and hold two public hearings. In addition, approval of the State House Commission cannot be granted unless the Commissioner of Environmental Protection agrees to pay an amount equal to the value of the land into the State Recreation and Conservation Land Acquisition and Development Fund.</p> <p>The GSPT provides that conservation easements acquired by the state and by local government entities and nonprofits can be conveyed, disposed of, or diverted only after a series of steps, which may include approval by the Commissioner of Environmental Protection and the State House Commission; preparation of a report identifying the reasons for, and all advantages and disadvantages and benefits and detriments of, the proposed conveyance, disposal, or diversion; the holding of one or more public hearings; and the acquisition of substitute protected property or the payment of an amount equal to or greater than the fair market value of the lands to the applicable fund to be used for the acquisition of lands or easements for recreation and conservation purposes as provided pursuant to the GSPT.</p>
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NY <sup>109</sup>	<p>As noted in the section of this Appendix listing statutes that are silent with regard to modification and termination, the Hudson River Valley Greenway Act created two organizations within the executive department of the state to facilitate the greenway process: the Greenway Communities Council and the Greenway Conservancy. Among other things, the Act authorizes the Greenway Conservancy to acquire, in the name of the state, interests or rights in real property, including <b>open space easements</b> (easements for the conservation, management and preservation of open space). The Conservancy is authorized to transfer such interests or rights in real property to municipalities or not-for-profit corporations, “which contract to hold such property for the beneficial enjoyment of the people of the state and in no event shall such land be sold by any such municipality or not-for-profit corporation except for purposes consistent with the beneficial enjoyment of the people of the state.”<sup>110</sup></p>
NC <sup>111</sup>	<p>North Carolina law includes the Agricultural Development and Farmland Preservation Enabling Act, the purpose of which is to authorize counties and cities to undertake a series of programs to encourage the preservation of qualifying farmland and to foster the growth, development, and sustainability of family farms. The Act authorizes counties to acquire by purchase or bargain purchase <b>agricultural conservation easements</b> over qualifying farmland. An agricultural conservation easement is defined as “a negative easement in gross restricting residential, commercial, and industrial development of land for the purpose of maintaining its agricultural production capability.”<sup>112</sup></p> <p>The Act provides that agricultural conservation easements “[s]hall be perpetual in duration, provided that, at least 20 years after the purchase of an easement, a county may agree to reconvey the easement to the owner of the land for consideration, if the landowner can demonstrate to the satisfaction of the county that commercial agriculture is no longer practicable on the land in question.”<sup>113</sup></p> <p>The Act further provides that the Commissioner of Agriculture may</p>

<sup>109</sup> N.Y. ENVTL. CONSERV. §§ 44-0101 to -0121 (McKinney 2008 & Supp. 2011) (Hudson River Valley Greenway). *See also* <http://www.hudsongreenway.state.ny.us/AbouttheGreenway/OverviewandMission.aspx> (New York State, Hudson River Valley Greenway) (last visited May 24, 2011).

<sup>110</sup> N.Y. ENVTL. CONSERV. § 44-0113(10).

<sup>111</sup> N.C. GEN. STAT. §§ 106-735 to -745 (2009) (The Agricultural Development and Farmland Preservation Enabling Act). *See also* <http://www.ncadfp.org/index.htm> (NC Agricultural Development & Farmland Preservation Trust Fund) (last visited May 24, 2011).

<sup>112</sup> N.C. GEN. STAT. § 106-744(b).

<sup>113</sup> *Id.* § 106-744(b)(2).

	distribute monies from a trust fund created under the Act to both counties and private nonprofit conservation organizations for, <i>inter alia</i> , the purchase of agricultural conservation easements. Accordingly, nonprofit organizations can also acquire agricultural conservation easements under the Act. The Act does not address a nonprofit organization’s modification or termination of agricultural conservation easements.
OH <sup>114</sup>	Ohio legislation authorizes the Director of Agriculture, the legislative authority of a municipal corporation, a board of county commissioners, a board of township trustees, a board of supervisors of a soil and water conservation district, and charitable organizations to acquire <b>agricultural easements</b> by purchase, gift, devise, or bequest. An agricultural easement is defined as “an incorporeal right or interest in land that is held for the public purpose of retaining the use of land predominantly in agriculture” and “imposes any limitations on the use or development of the land that are appropriate at the time of creation of the easement to achieve that purpose.” <sup>115</sup>  In the case of agricultural easements acquired by gift, devise, or bequest, the legislation provides that (i) such easements may include terms necessary or appropriate to preserve on behalf of the grantor the favorable federal tax consequences of the gift, devise, or bequest, and (ii) such easements may be extinguished in accordance with the terms and conditions set forth in the instrument of conveyance. <sup>116</sup>
OR <sup>117</sup>	The Oregon Constitution provides for the use of net proceeds from the state lottery for salmon restoration and watershed and wildlife habitat protection. The Constitution specifically provides that such proceeds may be used for, <i>inter alia</i> , the purpose of entering into agreements to obtain from willing owners <b>conservation easements</b> that protect watershed resources.

<sup>114</sup> OHIO REV. CODE ANN. §§ 901.21 to .22, (LexisNexis 1988 & Supp. 2011) and § 5301.691 (LexisNexis 1989 & Supp. 2011). Ohio’s acquisition of agricultural easements program is included, in part, in the state’s general conservation easement enabling statute. *See id.* § 5301.67 -.70.

<sup>115</sup> *Id.* § 901.21 and § 5301.67(c).

<sup>116</sup> *Id.* § 901.21(B) and § 5301.691(B)(2), (C)(2). *See also* OHIO AGRICULTURAL EASEMENT DONATION PROGRAM, GUIDELINES, OHIO DEPARTMENT OF AGRICULTURE OFFICE OF FARMLAND PRESERVATION (February 2011), *available at* [http://www.agri.ohio.gov/divs/farmland/docs/Farm\\_AEDP\\_Guidelines.pdf](http://www.agri.ohio.gov/divs/farmland/docs/Farm_AEDP_Guidelines.pdf) (last visited May 24, 2011) (providing, in part, “[i]f the donor landowner took advantage of donation-related federal tax benefits, only a court may extinguish the easement” and “[i]n the rare event that an agricultural easement is extinguished, IRS regulations and ODA policy requires that ODA be entitled to a share of the proceeds”).

<sup>117</sup> ORE. CONST. ART. XV, § 4b; OR. REV. STAT. §§ 541.351 to .426 (2009) (Watershed Management and Enhancement). *See also* <http://www.oregon.gov/OWEB/aboutus.shtml> (Oregon Watershed Enhancement Board) (last visited May 24, 2011).

	<p>A portion of the state lottery proceeds are deposited into a special subaccount, and the Oregon Watershed Enhancement Board is authorized to use such proceeds to enter into agreements to obtain conservation easements protecting watershed resources from willing owners. The Board also administers a watershed improvement grant program pursuant to which it can make grants from a separate fund for the purpose of entering into agreements to obtain conservation easements protecting watershed resources from willing owners. The legislation provides that “land” purchased through a grant agreement with the Board “shall be subject to title restrictions that give the board the authority to approve, approve with conditions or deny the sale or transfer of the land.”<sup>118</sup> It is not clear if this provision applies only to lands held in fee, or also to conservation easements.</p>
PA <sup>119</sup>	<p>Pennsylvania’s Agricultural Area Security Law establishes the State Agricultural Land Preservation Board within the state’s Department of Agriculture. The Board is authorized to, <i>inter alia</i>, acquire <b>agricultural conservation easements</b> on behalf of the state by purchase, bargain purchase, or donation. Counties, local government units, and charitable organizations are similarly authorized to acquire agricultural conservation easements, although local governments and charitable organizations must co-hold such easements with a county or the state. The Board is authorized to allocate state funds to counties for the purchase of agricultural conservation easements and to approve county programs for the purchase of such easements.<sup>120</sup></p> <p>An agricultural conservation easement is defined as an “interest in land, less than fee simple, which interest represents the right to prevent the development or improvement of a parcel for any purpose other than agricultural production.” Such easements must be “granted in perpetuity.”<sup>121</sup></p> <p>The legislation provides that an agricultural conservation easement must not prevent, <i>inter alia</i>: (i) the exploration, development, storage, or removal of coal, oil, and gas by certain methods, (ii) the granting of rights-of-way for the installation, transportation, or use of water, sewage, electric, telephone, coal by underground mining methods, gas, oil or oil</p>

<sup>118</sup> OR. REV. STAT. § 541.376(1).

<sup>119</sup> 3 PA. CONS. STAT. §§ 901-915 (West 2008) (Agricultural Area Security Law). *See also* [http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_24476\\_10297\\_0\\_43/http%3B/10.41.0.36/AgWebsite/ProgramDetail.aspx?name=Easement-Purchase-&navid=12&parentnavid=0&palid=11&](http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/http%3B/10.41.0.36/AgWebsite/ProgramDetail.aspx?name=Easement-Purchase-&navid=12&parentnavid=0&palid=11&) (Pennsylvania Department of Agriculture: Easement Purchase) (last visited May 24, 2011).

<sup>120</sup> Fifty-seven county programs currently receive state funds under the program. *See* [http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_24476\\_10297\\_0\\_43/http%3B/10.41.0.36/AgWebsite/ProgramDetail.aspx?name=Easement-Purchase-&navid=12&parentnavid=0&palid=11&](http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/http%3B/10.41.0.36/AgWebsite/ProgramDetail.aspx?name=Easement-Purchase-&navid=12&parentnavid=0&palid=11&) (last visited May 24, 2011).

<sup>121</sup> 3 PA. CONS. STAT. § 903.



	<p>products lines, or (iii) the construction and use of structures on the subject land necessary for agricultural production or a commercial equine activity.<sup>122</sup> In addition, counties are permitted to establish programs that allow subdivision of the land, with the only restrictions being that such subdivision must not (i) harm the economic viability of the farmland for agricultural production or (ii) convert land devoted primarily to agricultural use to another primary use.<sup>123</sup></p> <p>The legislation further provides that, except to the extent subdivision is permitted, an agricultural conservation easement cannot be sold, conveyed, or extinguished, in whole or in part, for a period of twenty-five years beginning on the date of the purchase of the easement. After the expiration of the twenty-five year period, however, the Commonwealth, subject to the approval of the Board, and the county, subject to the approval of the county board, may sell or convey an agricultural conservation easement to the current owner of record of the land:</p> <p>(i) “if the land subject to the agricultural conservation easement is no longer viable agricultural land” and</p> <p>(ii) for a price equal to the difference between the farmland value and the market value of the land at the time of such sale or conveyance.<sup>124</sup></p> <p>The purchase price must be payable to the Commonwealth and the county in accordance with their respective legal interests in the easement, and any payment to the Commonwealth must be paid into the fund for the agricultural conservation easement acquisition program. Money in that fund is used to pay the administrative costs of the program, to purchase agricultural conservation easements, and to pay the transaction costs associated with such purchases.</p>
<p>PA<sup>125</sup></p>	<p>To broaden the existing methods by which the Commonwealth of Pennsylvania and its local governments can protect open space lands, state legislation authorizes the Commonwealth (with the consent of the applicable county) and local governments to acquire interests in real property by purchase, gift, devise, or otherwise for the purpose of protecting open space, water resources, watersheds, forestland, farmland, wildlife habitat, recreational sites, scenic resources, and historic, geologic, or botanic values. Local governments are also authorized to appropriate money to land trusts to acquire interests in real property for the purpose of achieving open space benefits. The term “interest in real property” is defined broadly to mean any right in real property whatsoever, including but not limited to <b>easements, restrictions, or covenants of any sort.</b></p>

<sup>122</sup> *Id.* § 914.1(c)(6).

<sup>123</sup> *Id.* § 914.1(c)(7).

<sup>124</sup> *Id.* § 914.1(c)(2).

<sup>125</sup> 32 PA. CONS. STAT. §§ 5001-5013 (West 1997 & Supp. 2011) (Open Space Lands; Acquisition and Preservation).

	<p>The legislation provides that if the Commonwealth (through either the Department of Conservation and Natural Resources or the Department of Agriculture with the approval of the State Planning Board), a county or county authority (with the approval of its County Planning Commission), or other local government unit (with the approval of the planning commission serving the municipality in which the real property is located) determines that “it is essential for the orderly development of an area” to terminate or sell an interest acquired pursuant to the legislation, such entity may offer to transfer the interest to the property owner from whom the interest was acquired (or such owner’s estate) for a price equal to the price that was paid for the interest. If that offer is not accepted, the entity can sell the interest at a public sale. Before a local government can dispose of an interest, however, the question must be put to the local electorate to determine if a majority of the voters assent to the proposed disposition.</p> <p>The legislation does not address a land trust’s termination or sale of a conservation easement acquired in part with appropriated funds.</p>
RI <sup>126</sup>	<p>Rhode Island’s Green Acres Land Acquisition Act authorizes the state’s Director of Administration to acquire by purchase, gift, devise, or otherwise, on behalf of the state and with the approval of the Governor, lands for recreation and conservation purposes.<sup>127</sup> The term “lands” is defined to include <b>conservation easements and scenic easements</b>. Cities, towns, and agencies thereof are also authorized to acquire lands for conservation and recreation purposes, and the Director is authorized to make grants to such entities for such purposes.</p> <p>The Act provides that lands acquired by the state pursuant to the Act can be disposed of with the approval of the Governor. Lands acquired by cities, towns, or agencies thereof with the aid of a grant under the Act can be disposed of with the approval of the Director, but that approval cannot be given unless the entity agrees to repay to the state the amount of the grant.</p>

<sup>126</sup> R.I. GEN. LAWS §§ 32-4-1 to -15 (1994) (Green Acres Land Acquisition Act of 1964).

<sup>127</sup> R.I. GEN. LAWS § 42-11-1 (2007) (establishing, within the executive branch of the state government, a Department of Administration, the head of which is the Director of Administration).

<p>RI<sup>128</sup></p>	<p>Rhode Island’s Farmland Preservation Act establishes a nine-member Agricultural Lands Preservation Commission.<sup>129</sup> The Commission is authorized to acquire <b>development rights</b> on behalf of the state by purchase, bargain purchase, gift, or otherwise, and to use monies in a fund created specifically for this program for such purposes. “Development rights” are the rights of the fee simple owner to develop, construct on, divide, sell, lease, or otherwise change the property in such a way as to render the land unsuitable for agriculture, and such rights are conveyed to the state in the form of a covenant.<sup>130</sup></p> <p>The Act authorizes the Commission to consider petitions from landowners who wish to repurchase development rights previously sold to the state (that is, extinguish the covenants burdening their land). The Commission can approve an extinguishment if:</p> <ul style="list-style-type: none"> <li>(i) two-thirds of the governing body of each municipality where the land lies approve the repurchase of the development rights and the proposed development of the land and provide the landowner with a certificate stating the same,</li> <li>(ii) the Commission holds at least one public hearing in each such municipality before considering the petition,</li> <li>(iii) the petition sets forth the facts and circumstances that the Commission shall consider approval, and</li> <li>(iv) at least seven members of the Commission determine by vote that “there is an overriding necessity to relinquish control of the development rights.”<sup>131</sup></li> </ul> <p>If the Commission approves a sale of development rights, it must receive the value of such rights at the time of the sale, defined as the difference between the value of the land at its highest and best use and the value of the land for agricultural purposes. The proceeds of the sale must be returned to the fund created for the program, which is used to purchase development rights and pay the administrative costs of the program.</p>
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<sup>128</sup> *Id.* §§ 42-82-1 to -17 (2006 & Supp. 2010). See also <http://www.dem.ri.gov/programs/bpoladm/plandev/landacq/index.htm> (Rhode Island Department of Environmental Management; Land Acquisition & Real Estate) (last visited May 24, 2011).

<sup>129</sup> The Commission consists of the Directors of the Department of Environmental Management and the Department of Administration (or their designees) and seven members of the public appointed by the governor. R.I. GEN. LAWS § 42-82-3. The public appointees must include at least two members with knowledge or experience in agriculture, one member familiar with land use and community planning issues, and one member active in land preservation. *Id.*

<sup>130</sup> *Id.* § 42-82-2(5).

<sup>131</sup> *Id.* § 42-82-5(3).

SC <sup>132</sup>	<p>South Carolina legislation established the South Carolina Conservation Bank for the purpose of improving the quality of life in South Carolina through the conservation of significant natural resource lands, wetlands, historical properties, and archeological sites. The Bank is governed by a twelve-member board and is authorized to award grants from a specific trust fund to the South Carolina Department of Natural Resources, the South Carolina Forestry Commission, the South Carolina Department of Parks, Recreation and Tourism, municipalities, and not-for-profit conservation organizations.<sup>133</sup> The grants may be used by such entities to, <i>inter alia</i>, acquire by purchase or bargain purchase <b>conservation easements</b> that accomplish the objectives of the Bank.</p> <p>Conservation easements acquired with trust funds must be managed and maintained in order to perpetuate the conservation, natural, historical, open space, and recreational uses or values for which they were acquired. However, uses that are adverse to the original purposes for which an easement was acquired are permitted with:</p> <p>(i) a two-thirds vote of the board, following a finding of fact that the land no longer exhibits the characteristics that qualified it for acquisition with funds from the trust fund; and</p> <p>(ii) a majority vote of the State Budget and Control Board.</p> <p>The owner of land subject to a conservation easement that was acquired in whole or in part with trust funds, whether the original owner who conveyed the easement or a successor-in-interest, may reacquire and thereby extinguish the easement if:</p> <p>(i) such owner determines that the easement no longer exhibits the characteristics that qualified it for acquisition with trust funds, and the board, by majority vote, makes a finding of fact agreeing with that</p>
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<sup>132</sup> S.C. CODE ANN. §§ 48-59-10 to -140 (2008) (South Carolina Conservation Bank Act). *See also* <http://sccbanc.sc.gov/> (South Carolina Conservation Bank) (last visited May 24, 2011).

<sup>133</sup> The board consists of the Chairman of the Board for the Department of Natural Resources, the Chairman of the South Carolina Forestry Commission, and the Director of the South Carolina Department of Parks, Recreation and Tourism, all of whom serve *ex officio* and without voting privileges; three members appointed by the Governor from the state at large; three members appointed by the Speaker of the House of Representatives, one each from the third, fourth, and sixth congressional districts; and three members appointed by the President Pro Tempore of the Senate, one each from the first, second, and fifth congressional districts. S.C. CODE ANN. § 48-59-40(A).

	<p>contention,</p> <p>(ii) such owner pays the holder the current fair market value of the conservation easement,<sup>134</sup></p> <p>(iii) the holder replaces the extinguished easement with interests in land that exhibit characteristics that meet the purpose for which the bank was established and are of substantially equal fair market value to the extinguished easement, with any deficit being made up by a contribution to the trust fund, and</p> <p>(v) the board verifies that suitable replacement interests in lands have been identified and will be obtained before authorizing the extinguishment of a conservation easement, although where replacement in whole or in part is impossible, the funds realized that are not used for replacement interests are paid to the trust fund.<sup>135</sup></p> <p>If either the owner of land seeking extinguishment of a conservation easement or the entity holding the easement is aggrieved by a decision of the board, such owner or entity can appeal the decision to the Administrative Law Court.</p> <p>The legislation also provides that, when conservation easements are purchased with trust funds, the conservation easement is the controlling legal document regarding what is and what is not permitted upon the land, how the land will be preserved, and what rights are vested with the holder, and if any inconsistencies or ambiguities arise between the provisions of the legislation and the terms and conditions of the easement, the terms and conditions of the easement prevail.</p> <p>The legislation establishing the Bank is scheduled to be repealed effective July 1, 2013, unless reenacted or otherwise extended by the South Carolina General Assembly.<sup>136</sup> In such event, the Bank may continue to operate as if the legislation was not repealed until the Bank's trust fund is exhausted or July 1, 2016, whichever first occurs. After the Bank's termination, the State Budget and Control Board will be the Bank's successor, except that certain of the board's voting rights provided in the repealed legislation (including those relating to the extinguishment of conservation easements) will devolve upon the Department of Natural Resources Board, and any contribution to the trust fund required pursuant to the repealed legislation will be payable to the Heritage Trust Program.</p>
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<sup>134</sup> The legislation does not indicate how the fair market value of a conservation easement should be determined, but requires that the board establish reasonable procedures to determine fair market value through appraisal.

<sup>135</sup> *Id.* § 48-59-80(G)(1), (H).

<sup>136</sup> *Id.* § 27-8-120.

<p>TN<sup>137</sup></p>	<p>Tennessee legislation established the Tennessee Heritage Conservation Trust Fund to assist the state with, <i>inter alia</i>, permanently protecting tracts of land containing important cultural, archeological, historical, and environmental resources. Expenditures from the trust fund may be made only upon authorization of an eleven-member board that, while attached to the Department of Environment and Conservation for administrative purposes, is independent of that Department.<sup>138</sup> The board is authorized to acquire interests in real property for conservation purposes on behalf of the state by purchase or donation. The board is also authorized to make grants to state and local governments and nonprofit organizations to acquire <b>interests in real property</b> for conservation purposes.<sup>139</sup></p> <p>The legislation authorizes the board to convey, sell, exchange, lease, or otherwise transfer any interests in real property held on behalf of the state.</p> <p>Public agencies and nonprofits seeking grant funding to acquire interests in real property must agree that (i) the board will take appropriate action to protect the public interest in the acquisition by ensuring that the land will be permanently conserved, and (ii) any subsequent transfer of an interest in the real property acquired pursuant to the legislation is subject to approval of the board, and a new agreement, sufficient to protect the public interest, shall be entered into between the board and the transferee.</p> <p>The legislation also permits an interest in real property acquired with grant funds by public agencies or nonprofits to be used as security for a debt if the board approves.</p>
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<sup>137</sup> TENN. CODE ANN. §§ 11-7-101 to -109 (Supp. 2010) (Tennessee Heritage Conservation Trust Fund Act of 2005). *See also* <http://tn.gov/environment/trustfund/> (Tennessee Department of Environment and Conservation; Heritage Conservation Trust Fund) (last visited May 24, 2011).

<sup>138</sup> The Commissioner of Environment and Conservation, the Commissioner of Agriculture, and the Executive Director of the Wildlife Resources Agency, or their designees, serve as *ex officio* nonvoting members of the board. The other members of the board are appointed by the Governor and must include some persons knowledgeable in the areas of land acquisition, management, conservation, and protection. TENN. CODE ANN. § 11-7-104(b).

<sup>139</sup> Although the term “interest in real property” is not defined in the statute, it includes conservation easements. *See* Tennessee Department of Environment & Conservation Press Release, July 24, 2008, Bresden Announces Heritage Conservation Trust Fund Grants, available at <http://tn.gov/environment/news/release/2008/Jul/hctfg.shtml> (last visited May 24, 2011) (describing the use of grant funds to acquire conservation easements).

<p>TN<sup>140</sup></p>	<p>Tennessee legislation authorizes the owners of open space land (defined to exclude agricultural or forestland) to donate to the state <b>open space easements</b> limiting the future use of the land. The Commissioner of Environment and Conservation is authorized to accept such easements on behalf of the state.</p> <p>The owner of land encumbered by an open space easement who wishes to cancel the easement may make a request in writing to that effect to the Commissioner, and the Commissioner is authorized to cancel the easement if:</p> <ul style="list-style-type: none"> <li>(1) the easement has been in effect for a period of at least ten years;</li> <li>(2) the Commissioner determines that the open space is not needed in that location and the public interest would be better served by the cancellation;</li> <li>(3) the planning commission having jurisdiction over the land adopts a resolution stating that the open space is not needed in that location and the public interest would be better served by the cancellation;</li> <li>(4) the Commissioner finds that there exists no overriding state concern to maintain such open space; and</li> <li>(5) the owner pays roll back property taxes to the county and municipality in which the land is situated an amount equal to the difference between the taxes actually paid during the ten preceding years and the taxes that would have been paid if the easement had not existed.<sup>141</sup></li> </ul>
<p>TX<sup>142</sup></p>	<p>State legislation establishes the Texas Farm and Ranch Lands Conservation Program, the purpose of which is to enable and facilitate the purchase and donation of <b>agricultural conservation easements</b>. A ten-member Council oversees the program and is authorized to award grants to state agencies, municipalities, and charitable conservation organizations for the purchase and bargain purchase of agricultural conservation easements.<sup>143</sup> An “agricultural conservation easement” is defined as a</p>

<sup>140</sup> TENN. CODE ANN. §§ 11-15-101 to -108 (1999 & Supp. 2010) (Protective Easements).

<sup>141</sup> *Id.* § 11-15-108.

<sup>142</sup> TEX. NAT. RES. CODE ANN. §§ 183.051 to .063 (West 2011) (Texas Farm and Ranch Lands Conservation Program). *See also* [http://www.glo.state.tx.us/res\\_mgmt/farmranch/index.html](http://www.glo.state.tx.us/res_mgmt/farmranch/index.html) (Texas Farm & Ranchlands Conservation Program) (last visited May 24, 2011).

<sup>143</sup> The Council consists of (i) four *ex officio* members (the Commissioner of the General Land Office; the Commissioner of Agriculture or the Commissioner’s designee; the presiding officer of the Parks and Wildlife Commission or the presiding officer’s designee; and the State Conservationist of the Natural Resources Conservation Service of the United States Department of Agriculture or a designee of that person, who serves as a nonvoting member) and (ii) six members appointed by the Governor (one member who operates a

	<p>conservation easement on land currently devoted principally to agricultural use that is designed to also accomplish one or more of the following additional goals: (i) conserving water quality or quantity; (ii) conserving native wildlife species through protection of their habitat; (iii) conserving rare or sensitive plant species; or (iv) conserving large tracts of qualified open-space land that are threatened with fragmentation or development. An agricultural conservation easement must be either perpetual or for a term of thirty years.<sup>144</sup></p> <p>The legislation provides that, at any time after the acquisition of an agricultural conservation easement with a grant awarded pursuant to the program, the landowner may request that the Council terminate the easement on the ground that “the landowner is unable to meet the conservation goals as described [above].” The termination request must contain a “verifiable statement of impossibility.” Upon receipt of a termination request from a landowner, the Council must notify the holder of the easement, conduct an inquiry, and then notify the parties of its decision. Either party may appeal the decision in district court.<sup>145</sup></p> <p>If the landowner’s request for termination is granted, the Commissioner of the General Land Office, who administers the program, must order an appraisal of both the fair market value and the agricultural value of the property subject to the easement, and the landowner is required to pay the difference between those two values to the holder of the easement. The agricultural value of the property is defined as the price, as of the appraisal date, that a willing buyer would pay for a farm or ranch unit with land comparable in quality and composition to the subject property, but located in the nearest location where profitable farming or ranching is feasible. The holder is required to reimburse the program for the grant it received and applied toward the purchase of the easement, but can keep any excess.</p>
UT <sup>146</sup>	<p>Utah’s Historical Preservation Act authorizes any owner of a fee simple interest in real property to convey, and any other party entitled to own real property interests to accept, a <b>preservation easement</b> pertaining to the real property if the real property possesses historical value that will</p>

family farm or ranch in Texas, one member who is the designated representative of an agricultural banking or lending organization, two members who are the designated representatives of a statewide agricultural organization, one member who is a designated representative of a statewide nonprofit organization that represents land trusts operating in Texas, and one member from a state institution of higher education who has significant experience with natural resources issues). TEX. NAT. RES. CODE ANN. § 183.061(a).

<sup>144</sup> *Id.* § 183.052.

<sup>145</sup> *Id.* § 183.055.

<sup>146</sup> UTAH CODE ANN. §§ 9-8-501 to -506 (LexisNexis 2007) (Historical Preservation Act).



	<p>be enhanced or preserved by the terms of the easement. The Act provides that any conveyance of a preservation easement may be deemed a charitable contribution for tax purposes in accordance with the laws, rules, and regulations pertaining to charitable contributions of interests in real property.</p> <p>The Act provides that the rule against perpetuities and the rule restricting unreasonable restraints on alienation may not be applied to defeat a preservation easement. The Act also provides that preservation easements are subject to the other laws of the state governing easements generally.<sup>147</sup></p>
<p>VT<sup>148</sup></p>	<p>Vermont legislation contains a chapter, the purpose of which is to (i) encourage and assist the maintenance of the present uses of Vermont’s agricultural, forest, and other undeveloped land and prevent the accelerated residential and commercial development thereof; (ii) preserve and enhance Vermont’s scenic natural resources; (iii) strengthen the base of the recreation industry and increase employment, income, business, and investment; and (iv) enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety and welfare. To carry out this purpose, the legislation authorizes municipalities, state agencies, and charitable conservation organizations to acquire, <i>inter alia</i>, rights and interests in real property, including <b>conservation easements</b>, by purchase, donation, or devise. Although the legislation instructs that, wherever possible, such interests in real property should contain a provision limiting their term to a specified number of years, such interests can be conveyed in perpetuity if both parties agree.</p> <p>The legislation provides that, if the legislative body of a municipality or a state agency finds that the retention of an interest in real property “is no longer needed to carry out the purposes of [the] chapter,” the interest may be released and conveyed to the owner of the land or a third party. Where the release and conveyance is to a party other than another public agency or qualified organization, the municipality or state agency must receive adequate compensation for the conveyance.<sup>149</sup></p> <p>The legislation does not address the release or other termination of an interest in real property acquired by a charitable conservation</p>

<sup>147</sup> See also <http://www.rules.utah.gov/publicat/code/r212/r212-008.htm#E3> (Utah Division of Administrative Rules, Utah Administrative Code, R212-8-3.(4), Granting of an Easement to the Division) (providing that preservation easements “shall be in place for as long as the owner specifies but for no less than that required by IRS rule, if any”) (last visited May 24, 2011)

<sup>148</sup> VT. STAT. ANN. tit. 10, §§ 6301-6309 (2006) (Acquisition of Interests in Land by Public Agencies).

<sup>149</sup> The term “adequate compensation” is not defined.

	<p>organization, other than to provide that if it is determined that property held by such an organization is no longer being held and maintained for the purposes expressed in the chapter, it shall be subject to a conversion tax equal to five times the amount of the taxes that were avoided by reason of the property's exemption from tax in the most recent year.</p>
WV <sup>150</sup>	<p>Pursuant to West Virginia's Farmland Protection Program, county commissions are authorized to adopt farmland protection programs and appoint farmland protection boards to administer such programs. The legislation also establishes the West Virginia Agricultural Land Protection Authority within the state's Department of Agriculture. The various farmland protection boards and the Authority are given the power to acquire <b>conservation or preservation easements</b> for the purpose of maintaining the character of land as agricultural land or woodland, and such easements may be acquired by gift, devise, bequest, purchase, or bargain purchase.</p> <p>The legislation provides that a conservation easement created for purposes of the farmland protection program must be held or co-held by at least one qualified holder "in perpetuity." A preservation easement created for purposes of the program must be held or co-held by at least one qualified holder "and must be perpetual in its duration."<sup>151</sup> Qualified holders are government entities and charitable conservation or preservation organizations.</p> <p>The legislation also provides that a provision may be inserted into a conservation or preservation easement acquired pursuant to the program that "would act as a mechanism to place the easement selling price into an escrow fund for the purpose of allowing the owner or owners up to five years to rescind the decision to enter into the farmland protection program."<sup>152</sup> The legislation thus permits a nominally perpetual easement to be drafted to allow the landowner to rescind (and thereby extinguish) the easement within five years of its conveyance, provided the board or Authority receives the amount such entity paid for the easement.</p>

<sup>150</sup> W. VA. CODE ANN. §§ 8A-12-1 to -21 (LexisNexis 2007) (Voluntary Farmland Protection Programs). *See also* [http://www.wvfarmlandprotection.org/acts\\_vfpa\\_summary.cfm](http://www.wvfarmlandprotection.org/acts_vfpa_summary.cfm) (West Virginia Farmland Protection, The Voluntary Farmland Protection Act) (last visited May 24, 2011).

<sup>151</sup> W. VA. CODE ANN. § 8A-12-10. It is not clear if the different manner in which the legislation references the perpetual duration of the easements has any consequence.

<sup>152</sup> *Id.* § 8A-12-11(f).

<p><b>WI</b><sup>153</sup></p>	<p>Wisconsin legislation authorizes the state’s Department of Agriculture, Trade and Consumer Protection to enter into <b>farmland preservation agreements</b> on land that has been included in a farmland preservation area.<sup>154</sup> Such agreements must specify a term of at least fifteen years and include provisions that restrict the land to agricultural, undeveloped natural resource, and open space uses. The legislation also provides that a farmland preservation agreement is binding on a person who purchases the land during the term of the agreement.</p> <p>The Department is authorized to terminate a farmland preservation agreement or release land from the agreement at any time if:</p> <ul style="list-style-type: none"> <li>(i) all of the owners of the burdened land consent to the termination or release, in writing,</li> <li>(ii) the Department finds that the termination or release will not impair or limit agricultural use of other protected farmland, and</li> <li>(iii) the owners of the land pay a conversion fee to the Department for each acre or portion thereof released from the agreement. The conversion fee is equal to three times the per acre value, for the year in which the agreement is terminated or the land is released, of the highest value category of tillable cropland in the city, village, or town in which the land is located.</li> </ul> <p>The Department must deposit such conversion fees into the state’s working lands fund, which is used for agricultural resource management.<sup>155</sup></p>
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<sup>153</sup> WIS. STAT. ANN. §§ 91.60 to .70 (West Supp. 2010) (Farmland Preservation Agreements). *See also* [http://datcp.wi.gov/Environment/Working\\_Lands\\_Initiative/Farmland\\_Preservation\\_Agreements/index.aspx](http://datcp.wi.gov/Environment/Working_Lands_Initiative/Farmland_Preservation_Agreements/index.aspx) (Wisconsin Department of Agriculture, Trade and Consumer Protection; Farmland Preservation Agreements) (last visited May 24, 2011).

<sup>154</sup> WIS. STAT. ANN. § 91.01(12) (West 2000 & Supp. 2010) (defining “Department”).

<sup>155</sup> *Id.* § 91.66.