

PROTECTING THE PUBLIC INTEREST AND INVESTMENT IN
CONSERVATION: A RESPONSE TO PROFESSOR KORNGOLD’S
CRITIQUE OF CONSERVATION EASEMENTS

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I. INTRODUCTION

The use of conservation easements as a land-protection tool has grown considerably over the past several decades, and with that growth has come criticism from a variety of sources.¹ In an article published in this journal, “Solving

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¹ See, e.g., JEFF PIDOT, LINCOLN INST. OF LAND POL’Y, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (2005); John D.

the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process” (hereinafter “Promoting Flexibility”), Professor Gerald Korngold offers his most recent critique of conservation easements, as well as a variety of suggestions for reform.² While the use of conservation easements has not been free of inefficiencies and abuses, and appropriate reforms could make easements a more effective tool, some of the reforms suggested in “Promoting Flexibility” could have a significant adverse impact on what has heretofore been a largely successful voluntary land-protection program and a uniquely American form of conservation philanthropy.

Many who have questioned the use of conservation easements as a land-protection tool view such easements primarily through the prism of real property law and as “private” arrangements. This perspective is perhaps understandable given that conservation easements are partial interests in real property and the land protected by conservation easements continues to be owned by private persons. But conservation easements are not simply interests in real property, nor are they accurately described as private. Rather, they are public or charitable assets and their status as such has important legal and policy implications that are often misunderstood or overlooked by critics and would-be reformers.

Part II of this article discusses five misconceptions that tend to pervade the criticism of conservation easements and result in proposals for reform that would be contrary to the public interest. Part III discusses three of the primary reforms suggested in “Promoting Flexibility” and why those reforms are both unnecessary and inadvisable.³ Part IV briefly concludes.

Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1 (2005); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002); Jerd Smith & Burt Hubbard, *Abuses Taint Land Deals: Conservation Easements Approved for Pricely Subdivisions, Fairways, Small Parcels*, ROCKY MTN. NEWS, Feb. 9, 2008, at 19; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation: Donors Reap Tax Incentives by Giving to Land Trusts, but Critics Fear Abuse of System*, WASH. POST, Dec. 21, 2003, at A1.

² See Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039 [hereinafter Korngold, *Promoting Flexibility*]. For previous critiques by Korngold, see Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U.L. REV. 1525, at 1575–78 (2007) [hereinafter Korngold, *Preserving Free Markets*]; Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984) [hereinafter Korngold, *Policy Analysis*].

³ The authors agree with the following reforms proposed by Professor Korngold, although not necessarily for the reasons provided in his article: (i) the recommendation that states require county recorder offices to maintain separate books for conservation easements, see Korngold, *Promoting Flexibility*, *supra* note 2, at 1070; (ii) the recommendation that state attorneys general play a greater role in the enforcement of

II. MISCONCEPTIONS

A. The “Private” Misnomer

Many describe conservation easements as “private” or “privately held” because they are often acquired and enforced by nongovernmental charitable conservation organizations (typically referred to as “land trusts”).⁴ But use of the term “private” to describe conservation easements is both inaccurate and confusing. Hundreds of local, state, and federal government entities hold thousands of conservation easements.⁵ Indeed, in some states, such as Maryland and Virginia,

conservation easements to ensure that the entities administering such easements employ good governance practices, see *id.* at 1044, 1071–72; and (iii) the recommendation that states require recorders of deeds to notify the attorney general of all conservation easements recorded, see *id.* at 1072. Professor Korngold also recommends that the Internal Revenue Code be amended to require that any conservation easement intended to protect open space or natural habitat and that does not provide for public access receive “local, state, or federal governmental certification that the conservation easement serves a public conservation purpose in order for its donor to receive a federal tax deduction.” *Id.* at 1067–68. While the idea of a pre-approval process for conservation easements may have some merit, particularly in some contexts (such as easement purchase programs), it is not a new concept. In drafting § 170(h) of the Internal Revenue Code (“IRC § 170(h)”), which is the provision authorizing a federal charitable income tax deduction for the donation of a conservation easement, Congress considered and rejected the idea of requiring government certification of tax-deductible conservation easements. See, e.g., *Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong. 156–57 (1980) (statement of Daniel I. Halperin, Deputy Assistant Secretary, Department of the Treasury). And in drafting the Uniform Conservation Easement Act (UCEA), the Uniform Law Commission (ULC) similarly considered and rejected the idea of government certification, citing numerous concerns. See UNIF. CONSERVATION EASEMENT ACT, Prefatory Note, 12 U.L.A. 165, 167 (1981) (amended 2007) [hereinafter UCEA], available at http://www.law.upenn.edu/bll/ulc/ucea/2007_final.htm. Government certification of tax-deductible conservation easements would constitute a fundamental change in existing policy, and one that carries with it significant risks and costs. Accordingly, such a change should be seriously considered only if (i) the alleged problems with the current system are conclusively established and (ii) there is good evidence that government certification programs are feasible, would produce higher quality easements, and would produce benefits that outweigh their costs.

⁴ See, e.g., Korngold, *Promoting Flexibility*, *supra* note 2, at 1042 (“Over the past three decades, nonprofit organizations and trusts have been granted the authority to hold conservation easements . . . Such conservation easements are referred to as being ‘private’ or ‘privately held’ in contrast to being owned by a governmental body.”).

⁵ See ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 8–9 (2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK] (“Hundreds of public agencies across the country also hold conservation easements. The total number of easements held by federal, state, and local agencies has not

government entities acquire the majority of conservation easements conveyed in the state.⁶ Moreover, even conservation easements conveyed to land trusts cannot be accurately described as private. A private servitude is a private contract between private parties created for private benefit, such as a traditional right-of-way easement agreed to between neighbors.⁷ Conservation easements are fundamentally different. They are generally validated under state law only if they are (i) created for certain conservation or historic preservation purposes intended to benefit the public and (ii) conveyed to a government entity or charitable organization to be held and enforced for the benefit of the public.⁸ The public subsidizes the acquisition of conservation easements through appropriations to easement-purchase programs and the provision of tax benefits to landowners who donate conservation easements as charitable gifts.⁹ In addition, regulatory authorities, including state attorneys general and the Internal Revenue Service (IRS), supervise the administration and enforcement of conservation easements on behalf of the public.¹⁰ In sum, conservation easements are public or charitable assets. They are conveyed to government entities or charitable organizations to be

been documented, although a 2004 survey by American Farmland Trust counted 9,453 easements on nearly 1.5 million acres of farmland, held primarily by state and local agencies.”).

⁶ See Welcome to the Maryland Environmental Trust Homepage, <http://www.dnr.state.md.us/met> (last visited Dec. 27, 2008) (describing the work of the Maryland Environmental Trust); Maryland Agricultural Land Preservation Foundation, <http://www.malpf.info> (last visited Dec. 27, 2008) (describing the work of the Maryland Agricultural Land Preservation Foundation); Virginia Outdoors Foundation: Preserving Virginia’s Natural, Scenic, Historic, Open-Space, and Recreational Lands for Future Generations, <http://www.virginiaoutdoorsfoundation.org> (last visited Dec. 27, 2008) (describing the work of the Virginia Outdoors Foundation).

⁷ See Korngold, *Policy Analysis*, *supra* note 2, at 448–56.

⁸ See generally Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, 26–54 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (describing the state statutes facilitating the creation and enforcement of conservation easements, typically referred to as “easement-enabling statutes”).

⁹ See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 9 (describing easement purchase programs); Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1 (2004) [hereinafter McLaughlin, *Tax Incentives*] (describing the federal tax incentives); DEBRA PENTZ, THE CONSERVATION RESOURCE CENTER, STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS (2007) (describing the state tax incentives), available at http://conserveland.org/lpr/library?parent_id=18216.

¹⁰ See, e.g., Steven T. Miller, Comm’r, Tax Exempt and Gov’t Entities, Remarks at the Spring Public Lands Conference (Mar. 28, 2006) (describing the Internal Revenue Service’s enforcement efforts in the conservation easement context); *infra* note 71 (describing state attorney general enforcement efforts in the conservation easement context).

held and enforced for the benefit of the public, and the public is the beneficiary and beneficial owner of such easements.

It also is not accurate to describe the over 1,700 land trusts operating in the United States as “nonrepresentative, nonaccountable private organizations.”¹¹ While not government entities, land trusts are publicly-supported charitable organizations and, as such, they depend upon the approval and generosity of the public for their survival.¹² Indeed, one could argue that land trusts are more accountable to the public than government entities because land trusts depend directly upon the public for their ongoing support, while the accountability of government entities is far less immediate or direct.¹³ The activities of land trusts are also regulated on behalf of the public by both state attorneys general and the IRS, both of which have increased their enforcement efforts in recent years.¹⁴ Accordingly, neither conservation easements nor land trusts can be accurately described as “private,” and to refer to them as such obscures the essential public nature of both.

B. *Putting Conservation Easements in Perspective*

The use of conservation easements as a land-protection tool also does not constitute a crisis that requires dramatic and draconian changes to existing law. While land trusts reportedly held conservation easements encumbering approximately nine million acres of land as of 2006,¹⁵ nine million acres represents less than one-half of 1 percent of the total land area of the contiguous lower forty-eight states.¹⁶ Nine million acres also represents the cumulative amount of land protected by land trusts through the use of conservation easements *over the past century*. In contrast, during just the five-year period between 1992 and 1997, more than eleven million acres were converted to development.¹⁷ More recent data

¹¹ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1043.

¹² See McLaughlin, *Tax Incentives*, *supra* note 9, at 61–62.

¹³ See *id.*

¹⁴ See, e.g., *supra* note 10.

¹⁵ See Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673, 675 n.8 (2007) [hereinafter McLaughlin, *Perpetuity and Beyond*] (explaining that, as of “the end of 2005, local, state, and regional land trusts reportedly held conservation easements encumbering more than 6.2 million acres, and as of the summer of 2006, The Nature Conservancy,” which operates on a national level, reportedly “held conservation easements encumbering more than 2.7 million acres.”).

¹⁶ See NATURAL RESOURCES CONSERVATION SERVICE, 2003 NATURAL RESOURCES INVENTORY 1 (2007), available at <http://www.nrcs.usda.gov/technical/nri/2003/Landuse-mrb.pdf>.

¹⁷ See FARMLAND INFORMATION CENTER, REVISED 1997 NATIONAL RESOURCES INVENTORY: CHANGES IN LAND COVER/USE 4 (2005), available at http://www.farmlandinfo.org/documents/28616/nri_briefing_5-05.pdf.

indicates that the rate of development is accelerating.¹⁸ And despite the public land-use planning process, much of this development is wasteful, with larger homes being built on larger lots farther from central cities, which has significant negative impacts on remaining open space and agricultural lands.¹⁹

Moreover, it is this wasteful development of land, rather than the conveyance of conservation easements, that is significantly reducing the choices available to future generations. The destruction of wildlife habitat and ecosystems, of scenic and historic sites and landscapes, and of rural agricultural communities as a result of development is almost always substantially irreversible.²⁰ On the other hand, the protection of land through the use of conservation easements holds far more options open for future generations because conservation easements do not involve physical changes to the land and, as discussed in Part III.A. below, easements can be terminated in appropriate circumstances either in a court proceeding or through condemnation.²¹ Once put into perspective, it becomes clear that the modest conservation gains achieved by land trusts through the use of conservation easements do not constitute a crisis that needs addressing with draconian “reforms.” Rather, it is the continued failure of the public land-use planning process to prevent wasteful and substantially irreversible development that constitutes a crisis necessitating immediate reform.

C. Land-Use Planning

Professor Korngold suggests that the current use of conservation easements is ill-advised because it results in checkerboard protection and such protection is not consistent with modern planning theory and practice, which favors broader

¹⁸ See NATURAL RESOURCES CONSERVATION SERVICE, PRODUCTIVE LAND, HEALTHY ENVIRONMENT: NATURAL RESOURCES CONSERVATION SERVICE STRATEGIC PLAN 2005–2010, at 61 (2005), available at http://www.nrcs.usda.gov/about/strategicplan/StratPlan_read.pdf (“The rate of development accelerated from 1.4 million acres per year between 1982 and 1992 to 2.2 million acres per year between 1992 and 2001.”).

¹⁹ See *id.* at 62 (“Urban areas are continuing to grow into the countryside, and more isolated large-lot housing development is occurring beyond the urban fringe,” adversely impacting forest land, cropland, grazing lands, and agricultural viability).

²⁰ See, e.g., RALPH E. HEIMLICH & WILLIAM D. ANDERSON, DEVELOPMENT AT THE URBAN FRINGE AND BEYOND: IMPACTS ON AGRICULTURAL AND RURAL LAND, USDA AGRICULTURAL ECONOMIC REPORT NO. 803, at 4 (2001) [hereinafter USDA 2001 DEVELOPMENT REPORT], available at <http://www.ers.usda.gov/publications/aer803/aer803.pdf> (“Inaccurate judgments about future landscapes are locked in because development is irreversible.”); Korngold, *Promoting Flexibility*, *supra* note 2, at 1055 (“[D]evelopment activities on unique environments are highly expensive if not impossible to reverse.”).

²¹ Indeed, the argument that the current generation is committing hubris through the creation of perpetual conservation easements falls flat when one compares the use of conservation easements with development practices. See Korngold, *Promoting Flexibility*, *supra* note 2, at 1065.

community, regional, and cross-border solutions to land-use and land-protection issues.²² Many would agree that effective local, state, and regional land-use planning would be preferable to the necessarily incremental and somewhat haphazard system of land protection that is accomplished through voluntary measures. But there is no effective land-use planning in many jurisdictions.²³ In fact, it is the very lack of effective land-use planning that led to the popularity of conservation easements as a land-protection tool.²⁴ There also is no indication that the land-use planning process has become any more effective in the twenty-five or so years during which conservation easements have become popular. Accordingly, conservation easements should not be compared to an effective land-use planning process that is, at this point, largely theoretical. Rather, the use of conservation easements should be understood for what it is—an imperfect but nonetheless effective response to the well-recognized inadequacies of the traditional land-use planning process.

D. Perpetuity Is Neither New Nor Dangerous

Professor Korngold argues that placing perpetual restrictions on the use of land “represent[s] a break from prior legal rules and traditional concerns about restrictions on land.”²⁵ But perpetual restrictions on land are neither new nor unique to the conservation easement context. Perpetual restrictions have been placed on the development and use of land in the charitable context for centuries. In countless cases, individuals have donated fee title to land to government entities and charitable organizations to be used for specified charitable purposes in perpetuity (such as the site of hospitals, libraries, public parks, and nature preserves), thereby limiting the use of the land for economic development or other

²² See Korngold, *Promoting Flexibility*, *supra* note 2, at 1059.

²³ See, e.g., USDA 2001 DEVELOPMENT REPORT, *supra* note 20, at 55 (discussing the difficulties facing states and localities in developing and implementing appropriate land use plans given the fragmented nature of local land use control authorities and the strong interest in maintaining individual landowner’s property rights, and noting that local land use planning efforts are in desperate need of updating because in some localities land use plans have not been updated since the 1920s, and in others, such plans are nonexistent); *id.* at 5 (noting that “[l]ocal governments often fail to appreciate impending growth facing them, and generally lack capacity to develop adequate responses before growth overwhelms them”).

²⁴ See Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands* in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9, 17 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (“[M]any people across the country have become frustrated and disillusioned by the failings of various government programs to adequately protect cherished land from sprawling development. This disappointment factor has played a significant role in the phenomenal growth of land trusts.”).

²⁵ Korngold, *Promoting Flexibility*, *supra* note 2, at 1043.

purposes.²⁶ Moreover, these gifts are not only enforced pursuant to charitable trust principles,²⁷ they are encouraged because the public benefits significantly when privately-owned land—land that otherwise would be retained by private individuals and devoted to private uses—is devoted to public uses.²⁸ And concerns about dead-hand control are addressed in this context through condemnation²⁹ and a variety of legal mechanisms that operate as safety valves in the charitable context, including a trustee’s express and implied powers,³⁰ and the equitable doctrines of administrative deviation and cy pres.³¹ These mechanisms balance

²⁶ See, for example, cases cited in Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 423, 432 nn. 29 & 30, 465 n. 48, 486 n. 224 (2005).

²⁷ See, e.g., *In re Estate of du Pont*, 663 A.2d 470, 479–480 (Del. Ch. 1994) (enforcing the use of the donor’s ancestral home as the site of a hospital and as a monument to the donor’s family); *Chattowah Open Land Trust, Inc. v. Jones*, 636 S.E.2d 523, 525 (Ga. 2006) (enforcing a devise of decedent’s home and surrounding acreage for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of IRC § 170(h)); *Cohen v. City of Lynn*, 598 N.E.2d 682, 683–87 (Mass. App. Ct. 1992) (declaring null and void a city’s conveyance to a developer of land that had been conveyed to the city to be used “forever for park purposes”); *Tinkham v. Town of Mattapoisett*, 22 Mass. L. Rptr. 635 (2007) (invalidating a town’s attempt to convey property received as a gift to be used for conservation purposes to a developer in exchange for other property); *Town of Cody v. Buffalo Bill Memorial Ass’n*, 196 P.2d 369, 381–82 (Wyo. 1948) (voiding a charitable association’s transfer of land that had been conveyed to the association to be used to memorialize the memory of Buffalo Bill).

²⁸ See, e.g., I.R.C. § 170(a) (2008) (authorizing a federal charitable income tax deduction for charitable contributions).

²⁹ See, e.g., *State v. Rand*, 366 A.2d 183, 186–88 (Me. 1976) (involving the condemnation of land that had been given to a city to be “forever held and maintained. . . as a public park” in memory of the donor’s parents for use as part of an interstate highway).

³⁰ See GEORGE GLEASON ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 551 (3d. ed. 2008) (“The powers of a trustee may be divided into those which are expressly granted the trustee in the governing instrument or by statute, and powers that are implied or inferred by the court from those granted or from the terms of the entire trust instrument.”).

³¹ See Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1237 (2007) (“To deal with unanticipated circumstances, the law protects charitable trusts by the equitable saving devices of deviation and cy pres. These venerable doctrines allow courts to modify restrictions that can no longer be carried out or that impede the purposes of the trust; courts apply similar principles to restricted gifts made to corporate charities.”); see also, e.g., *Estate of Zahn*, 93 Cal. Rptr. 810, 814–16 (Cal. Dist. Ct. App. 1971) (applying the doctrine of cy pres to bequests of real property to be used for specific charitable purposes when neither of the parcels was suitable for carrying out the testatrix’s declared intention at her death); *Blumenthal v. White*, 683 A.2d 410, 413–414 (Conn. App. Ct. 1996) (permitting a city to transfer land that had been conveyed to it to be used as a public park to another entity pursuant to the doctrine of administrative deviation); *In re Neher’s Will*, 18 N.E.2d 625, 626 (N.Y. 1939) (applying the doctrine of cy pres to permit a village to use as an

respect for the intent of charitable donors (so as not to chill future donations) with society's interest in ensuring that assets perpetually devoted to specific charitable purposes continue to provide benefits to the public.³²

Like their fee-title counterparts discussed above, many conservation easements are donated in whole or in part as charitable gifts to government entities or land trusts to be held and enforced for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the instrument of conveyance in perpetuity.³³ In addition, such gifts are not only enforced, they are encouraged. All fifty states and the District of Columbia have enacted some form of legislation to facilitate the creation and enforcement of conservation easements (easement-enabling statutes);³⁴ Congress has, since 1980, offered federal income, gift, and estate tax benefits to landowners who donate qualifying conservation easements to government entities and charitable organizations;³⁵ and a growing number of states further encourage the donation of conservation easements within their borders through a variety of state tax incentives.³⁶ Moreover, although the public is not typically granted access to the land protected by conservation easements, federal and state policymakers have overwhelmingly recognized that conservation easements nonetheless provide significant benefits to the public in the form of, for

administrative building a homestead that had been devised to the village to be used as a hospital and as a memorial to the testatrix's husband).

³² See McLaughlin, *Perpetuity and Beyond*, *supra* note 15, at 700–01.

³³ The federal tax incentives offered to landowners who donate conservation easements as charitable gifts have been a driving force in the growth of the use of such easements as a land protection tool. See Gustanski, *supra* note 24, at 55 (stating conditions in the early 1980s were right for landowners to capitalize on federal tax incentives). In addition, even easement purchases are often structured as “bargain sales,” where the landowner is paid some percentage of the value of the easement and makes a charitable donation of the remaining percentage. See, e.g., *Browning v. Comm’r.*, 109 T.C. 303, 305–06 (1997) (involving the bargain sale of a conservation easement to a county’s agricultural land preservation program). There also is no question that the promotion of environmental quality and the preservation of the beauties of nature are valid charitable purposes. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. 1 (2003) (“[A] trust is charitable if its purpose is to promote . . . environmental quality” and “[a] trust to promote the contentment or well being of members of the community is charitable. Thus, a trust to beautify a city or to preserve the beauties of nature, or otherwise to add to the aesthetic enjoyment of the community, is charitable.”); *Chattowah Open Land Trust*, 636 S.E.2d 523, 525 (Ga. 2006) (holding that the devise of decedent’s home and surrounding acreage to a land trust for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of IRC § 170(h) “unambiguously created a charitable trust”).

³⁴ See Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS. L. REV. 1897, 1900 & n.5 (2008) [hereinafter McLaughlin, *Condemning Conservation Easements*].

³⁵ See McLaughlin, *Tax Incentives*, *supra* note 9, at 14–15.

³⁶ See PENTZ, *supra* note 9, at 9–15.

example, the protection of habitat, scenic views, open space, historic sites, and watersheds, and the preservation of rural agricultural land and communities.³⁷ Finally, as with charitable gifts of fee title to land and as discussed in detail in Part III.A. below, concerns about dead-hand control in the conservation easement context can be addressed through condemnation, holders' express or implied powers to amend conservation easements consistent with their stated conservation purposes, and the equitable doctrines of administrative deviation and *cy pres*.

*E. The Market Camel's Nose*³⁸

Professor Korngold also argues that conservation easements “hamper the functioning of real estate markets” by impeding the efficient use of land.³⁹ This criticism is inapt because perpetual conservation easements are specifically intended to remove the development potential of land that has significant conservation and historic values from the reach of market forces. Market forces do not adequately take into account either the negative externalities that flow from the development of land that has significant natural, ecological, scenic, or historic

³⁷ The benefits to the public that flow from land in its undeveloped state also include the “purification of air and water,” the “mitigation of floods and droughts,” the “detoxification and decomposition of wastes,” the “generation and renewal of soil and soil fertility,” the “pollination of crops and natural vegetation,” and the “dispersal of seeds and translocation of nutrients.” See Gretchen C. Daily, *Introduction: What Are Ecosystem Services?*, in *NATURE'S SERVICES, SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 3–4 (Gretchen C. Daily ed., 1997) (defining such “ecosystem services [as] the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life”). Indeed, Congress specifically considered and rejected the idea that conservation easements donated for the purpose of protecting habitat or open space should be tax-deductible only if public access is granted to the protected land. The Treasury Regulations interpreting IRC § 170(h) expressly provide that easements protecting “habitat or ecosystems” need not grant the public either physical or visual access to the subject property. Treas. Reg. § 1.170A-14(d)(3)(ii)–(iii) (1999). And public access to property encumbered by an open space easement donated pursuant to a “clearly delineated governmental policy” is not required unless the conservation purpose of the donation would be “undermined or frustrated without public access.” *Id.* § 1.170A-14(d)(4)(iii)(B)–(C); see also STEPHEN J. SMALL, *FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 5–2 (1997) (noting that “[a] number of congressmen and interest groups . . . were known to be strongly opposed to a requirement of public access, claiming that donors who had to ‘open up’ their land to the public simply would not be interested in making easement donations”).

³⁸ This is an allusion to a fable about a camel who asks to put his nose into a person's tent to keep it from the cold and winds up inserting first his shoulders, then his legs, and so on, until he dispossesses the inhabitant. See GEOFFREY NUNBERG, *GOING NUCULAR: LANGUAGE, POLITICS, AND CULTURE IN CONFRONTATIONAL TIMES* 118 (2004).

³⁹ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1053 (arguing that “stripping away restrictions that would hamper the functioning of real estate markets helps to promote efficient use of our limited supply of land”).

attributes, or the positive externalities that flow from the conservation of such land. As a result, the market fails to leave a socially desirable amount of such land undeveloped.⁴⁰ It is precisely because of this market failure that conservation easements are granted in perpetuity and significant nonmarket hurdles are imposed with regard to their termination.⁴¹ These nonmarket hurdles help to ensure that the difficult-to-quantify benefits that flow to the public from preserving land in its undeveloped state are given appropriate weight when considering the termination of conservation easements. Recommendations to substantially lower or eliminate the barriers to the termination of conservation easements are attempts to reassert the market's dominance with regard to the use of the encumbered land (or, in other words, to let the market camel put its nose into the land protection tent).⁴² In light of the historic failure of the market to leave a socially desirable amount of privately-owned land undeveloped, as well as the recent spectacular failure of the market to produce socially desirable results in the financial sector, it would be imprudent at best to return to a reliance on the market to produce a socially desirable level of private land conservation.⁴³

⁴⁰ See, e.g., USDA 2001 DEVELOPMENT REPORT, *supra* note 20, at 3–4 (explaining that “[c]ontinued demand for low-density development despite negative consequences for residents can be understood as a market failure” and “[b]ecause there are no markets for some characteristics of land, such as scenic amenity, there are no observable prices apart from the land’s value for development”); Daily, *supra* note 37, at 2 (noting that the “goods and services flowing from natural ecosystems are greatly undervalued” and, for the most part, are “not traded in formal markets and do not send price signals of changes in their supply or condition”).

⁴¹ As discussed in *infra*, Part III.A.1, the nonmarket hurdles are generally the requirements that (i) the termination must be approved by a court, (ii) there must be a finding that continued use of the land for conservation purposes has become impossible or impractical, and (iii) there must be a payment of an appropriate share of the proceeds from the subsequent sale or development of the land to the holder of the easement to be used to accomplish similar conservation purposes in some other manner or location.

⁴² See, e.g., Korngold, *Preserving Free Markets*, *supra* note 2, at 1062–65.

⁴³ See, e.g., Sam Zuckerman, *Greenspan’s Free-Market Ideology Led to Mistakes; Former Fed Chief says His Faith in the System was Misplaced*, SAN. FRAN. CHRON., Oct. 24, 2008, at C1 (reporting that Federal Reserve Chairman Alan Greenspan, “a lifelong champion of free markets, publicly question[ed] the [free market] philosophy that guided him throughout his years as the world’s most powerful economic policymaker”; in his testimony before the House Committee on Oversight and Government Reform, Greenspan admitted that he had been wrong to think financial markets could police themselves).

III. SUGGESTED “REFORMS”

A. Lowering or Eliminating the Barriers to Conservation Easement Termination

Professor Korngold asserts that perpetual conservation easements are “immutable” and “lock in future generations,” and that, as a result, there is a serious risk “of the current generation creating a network of conservation easements that no longer serve environmental purposes and at the same time frustrates future generations from using the land to meet their pressing needs.”⁴⁴ He also posits, somewhat contradictorily, that nonprofit holders of conservation easements can decide on their own, and in a nonpublic process, whether to enforce the easements they hold, and that “key decision[s] on local land use control will [therefore] be made outside of the public view and electoral process and without public participation.”⁴⁵ He then suggests, again somewhat contradictorily, that state law be “clarified to allow nonprofit boards flexibility to deal with conservation easements without fear of breaching their fiduciary duty.”⁴⁶

As explained in Parts III.A.1 and 3 below, perpetual conservation easements should and likely will be modifiable and terminable pursuant to the equitable principles that govern the administration of charities and charitable trusts, and such easements are also subject to condemnation. Accordingly, conservation easements will neither bind future generations to outmoded or useless land use restrictions nor prevent them from using land to meet their pressing needs. Moreover, nonprofits will not have the power to decide on their own and in nonpublic processes whether to continue to enforce the conservation easements they hold. In addition, as explained in Part III.A.2 below, changing state law to give nonprofits greater flexibility to modify or terminate conservation easements is neither necessary nor advisable.

1. Applying Charitable Trust Principles to Conservation Easements

The Restatement (Third) of Trusts provides specific guidance on the type of conveyance that creates a charitable trust:

An outright devise or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field

⁴⁴ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1043, 1063, 1065.

⁴⁵ *Id.* at 1064.

⁴⁶ *Id.* at 1044.

of study, creates a charitable trust of which the institution is the trustee⁴⁷

Conservation easements are generally donated to a government entity or land trust to be used, not for that entity's general purposes, but for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the instrument of conveyance in perpetuity. Accordingly, the donation of a conservation easement should be treated as having created a charitable trust of which the acquiring entity serves as the trustee.⁴⁸ There also are compelling reasons to treat even those perpetual conservation easements acquired outside of the donative context (i.e., purchased for full value with unrestricted funds, exacted as part of development approval processes, or acquired in the context of mitigation) as similarly held in trust for the benefit of the public.⁴⁹

Because conservation easements are held in trust for the benefit of the public, the holder of a conservation easement should not be permitted to agree to terminate the easement, or modify it in a manner contrary to its stated conservation purpose (such as to permit the subdivision and development of the land), without receiving court approval in a *cy pres* or similar equitable proceeding. In such a proceeding, it would have to be shown that continued protection of the land for conservation purposes has become impossible or impractical due to changed conditions, and the court would supervise the holder's use of its share of the proceeds from the

⁴⁷ RESTATEMENT (THIRD) OF TRUSTS, § 28, cmt. a (2003). These principles also generally apply to charitable gifts made to state and local government entities. *See, e.g., Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) (“It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of trust.”). In some jurisdictions courts refer to gifts made to government entities or charitable organizations to be used for specific charitable purposes, not as charitable trusts, but as implied trusts, quasi-trusts, restricted charitable gifts, or public trusts. Regardless of how such gifts are characterized, however, the substantive rules governing the administration of charitable trusts generally apply. *See* Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 6 (2009) [hereinafter, McLaughlin & Weeks, *In Defense of Conservation Easements*].

⁴⁸ For a more detailed discussion of the application of charitable trust principles to conservation easements, see generally McLaughlin & Weeks, *In Defense of Conservation Easements*, *supra* note 47.

⁴⁹ *See infra* note 63 and accompanying text (discussing the Restatement (Third) of Property: Servitudes, which provides that the substantial modification or termination of conservation easements, regardless of how they were acquired, is governed by rules based on the charitable trust doctrine of *cy pres*); *see also* McLaughlin, *Perpetuity and Beyond*, *supra* note 15, at 701–04 (setting forth reasons why “all perpetual conservation easements—regardless of how they were acquired—[should] be terminated or modified in contravention of their stated purpose only in the context of a *cy pres* or similar proceeding”) (emphasis in original).

subsequent sale or development of the land to accomplish similar conservation purposes in some other manner or location.⁵⁰ In addition, because the beneficiary of a conservation easement is the public rather than any particular individual, the state attorney general (or other designated public official) would be a necessary party to the proceeding to represent the interests of the public.⁵¹

Support for applying charitable trust principles to conservation easements is found in a variety of sources. First is the Uniform Conservation Easement Act (UCEA), which is a model for the state easement-enabling statutes.⁵² The UCEA was approved by the Uniform Law Commission (ULC) in 1981 and has since been adopted in whole or in substantial part by twenty-four states and the District of Columbia.⁵³ Although the application of charitable trust principles to conservation easements was not directly addressed in the UCEA, the act has always contemplated that conservation easements are more than mere contracts or property arrangements between private parties.⁵⁴ Thus, while the UCEA provides that a conservation easement may be modified or terminated “in the same manner as other easements”⁵⁵ (i.e., by agreement of the holder of the easement and the owner of the encumbered land), it also confirms that “[the] Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”⁵⁶ In the original comments to the UCEA the drafters explained: “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.”⁵⁷ In other words, the UCEA does not and was never intended to abrogate the well-settled principles that apply when

⁵⁰ For a more detailed discussion of the doctrine of cy pres and the manner in which it should apply in the conservation easement context, see McLaughlin & Weeks, *In Defense of Conservation Easements*, *supra* note 47, at 52–53; McLaughlin, *Perpetuity and Beyond*, *supra* note 15, at 681–82.

⁵¹ See, e.g., AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT AND FRATCHER ON TRUSTS, § 391, at 360–61 (4th ed. 1989).

⁵² See UCEA, *supra* note 3.

⁵³ See Uniform Law Commissioners, A Few Facts About the... Uniform Conservation Easement Act, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Dec. 6, 2008) (listing the following as having adopted the UCEA: Alabama, Alaska, Arizona, Arkansas, Delaware, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia and the U.S. Virgin Islands). Georgia and Oklahoma have also effectively adopted the UCEA. See GA. CODE ANN. §§ 44-10-1 to 44-10-5 (West 2008); OKLA. STAT. ANN. tit. 60, §§ 49.1 to 49.7 (West 2008).

⁵⁴ See UCEA *supra* note 3, § 3 cmt.

⁵⁵ *Id.* § 2(a).

⁵⁶ *Id.* § 3(b).

⁵⁷ *Id.* § 3 cmt. (emphasis added).

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

The ULC amended the comments to the UCEA in 2007 to confirm its intention that conservation easements be enforced as charitable trusts in appropriate circumstances. The amended comment to section 3 of the UCEA explains:

because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.⁵⁸

The comment concludes:

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.⁵⁹

Next is the Uniform Trust Code (UTC), which provides that the section of the UTC that allows for the modification or termination of certain “uneconomic” trusts does not apply to conservation easements—thereby implying that other UTC

⁵⁸ *Id.*

⁵⁹ *Id.* By providing that a holder “may” be prohibited from agreeing to terminate an easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding, the ULC was leaving open the question of whether conservation easements not acquired in whole or in part as charitable gifts (i.e., purchased for full value with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation) should be governed by similar equitable principles. E-mail from K. King Burnett, member and past president of the ULC to Nancy McLaughlin, Professor of Law, University of Utah S.J. Quinney College of Law, (Aug. 17, 2008 10:51 MST) (on file with authors) [hereinafter Burnett Communication]. The comments also implicitly acknowledge that government entities and land trusts could negotiate for freely terminable conservation easements, which would expressly grant them the discretion to agree to modify or terminate the easements, in whole or in part, as they might see fit from time to time in the accomplishment of their general public or charitable missions.

sections do apply to such easements in appropriate circumstances.⁶⁰ In their commentary, the UTC drafters confirm this interpretation, explaining:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust.⁶¹

As with comments to any Uniform Act, the comments to the UCEA and the UTC should be relied upon as a guide in interpreting those acts so as to achieve uniformity among the states that have adopted them.⁶²

The Restatement (Third) of Property: Servitudes, published by the American Law Institute in 2000, similarly provides that the modification and termination of

⁶⁰ See UNIF. TRUST CODE (2000) § 414(d) (amended 2005), 7C U.L.A. 512 (2006), available at <http://www.law.upenn.edu/bll/ulc/uta/2005final.htm> [hereinafter UTC].

⁶¹ *Id.* § 414 cmt. Again, by providing that the conveyance of a conservation easement will “frequently” create a charitable trust, the drafters of the UTC were leaving open the question of whether perpetual conservation easements not acquired in whole or in part as charitable gifts should be governed by similar equitable principles. See Burnett Communication, *supra* note 59.

⁶² Both the UCEA and the UTC provide that they are intended to be applied and construed so as to make the law uniform among the states that have adopted them. UCEA, *supra* note 3, § 6, 12 U.L.A. 192 (2008) (“This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.”); UTC, *supra* note 60, § 1101, 7C U.L.A. 670 (2008) (“In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.”). Accordingly, courts should rely upon the comments to the acts as a guide in interpreting them. As explained by the Connecticut Supreme Court:

Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.

Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993). As of August 2008, thirty-two states, the Virgin Islands, and the District of Columbia had adopted either the UTC or the UCEA, or both. See UNIF. CONSERVATION EASEMENT ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 12 U.L.A. 165 (2008); UNIF. TRUST CODE (2000), Table of Jurisdictions Wherein Act Has Been Adopted, 7C U.L.A. 42 (Supp. 2008).

conservation easements held by government bodies or conservation 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*.⁶³ In their commentary, the drafters of the Restatement explain “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes”⁶⁴

Federal tax law also contemplates the application of charitable principles to conservation easements. To be eligible for federal tax incentives, a conservation easement must, *inter alia*, be

(i) conveyed as a charitable gift to a government entity or charitable organization to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for one or more of the conservation purposes enumerated in the Internal Revenue Code “in perpetuity”;⁶⁵

(ii) expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement;⁶⁶ and

(iii) extinguishable by the holder only in what essentially is a *cy pres* proceeding—in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes.⁶⁷

⁶³ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES §7.11 (2000).

⁶⁴ *Id.* § 7.11, cmt. a; see also *id.* § 8.5, cmt. a (providing that, because “[t]he resources protected by conservation servitudes provide important public benefits, but are often fragile and vulnerable to degradation by actions of the holder of the servient estate[.]” such servitudes are enforceable by coercive remedies and other relief designed to both give full effect to the purposes of the servitudes and deter servient owners from conduct that threatens the protected resources). The drafters explain that “[§ 8.5], in combination with § 7.11, is designed to protect the long-term utility of conservation servitudes by encouraging courts to enforce them as vigorously as possible and by discouraging servient owners from engaging in conduct that lessens the effectiveness of the servitude or frustrates its purpose.” See *id.*

⁶⁵ See generally I.R.C. § 170(h) (2008) (defining a “qualified conservation contribution”); Treas. Reg. § 1.170A-14 (2008) (interpreting IRC § 170(h)). The conservation purposes enumerated in the Internal Revenue Code are (i) protection of land for public recreation or education; (ii) protection of wildlife habitat; (iii) protection of open space; and (iv) historic preservation. I.R.C. § 170(h)(4)(A) (2008). For a detailed history and explanation of IRC § 170(h), see McLaughlin, *Tax Incentives*, *supra* note 9, at 10–17.

⁶⁶ See Treas. Reg. § 1.170A-14(c)(2).

⁶⁷ See *id.* § 1.170A-14(g)(6); see also I.R.S. Priv. Ltr. Rul. 200836014 (June 3, 2008) (providing that the easement at issue met the requirements of Treasury Regulation § 1.170A-14(g)(6) because it “provides for no means to extinguish the restrictions other than

The interest in the property retained by the easement donor must also be subject to legally enforceable restrictions that will prevent any use of the property inconsistent with the conservation purposes of the easement.⁶⁸ And, at the time of the donation, the possibility that the easement will be defeated by the performance of some act or the happening of some event must be so remote as to be negligible.⁶⁹ To satisfy these various requirements, most conservation easements expressly provide, among other things, that the easement is granted in perpetuity and can be transferred or extinguished only in the manner described above.⁷⁰

State attorneys general are also increasingly acknowledging their right and obligation, as supervisors of charitable trusts, to enforce conservation easements on behalf of the public.⁷¹ And various controversies to date illustrate that government

by judicial proceeding and all proceeds received by the Donee are to be used in a manner consistent with the original conservation purposes of the Easement”).

⁶⁸ See Treas. Reg. § 1.170A-14(g)(1).

⁶⁹ See *id.* §§ 1.170-1(e), 1.170-14(g)(3).

⁷⁰ See, e.g., THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 160–61 (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION EASEMENT HANDBOOK] (containing a Model Conservation Easement). For a more extended discussion of the federal tax law requirements, see McLaughlin & Weeks, *In Defense of Conservation Easements*, *supra* note 47, at 78–81.

⁷¹ See, e.g., State’s Motion to Intervene, *Windham Land Trust v. Jeffords*, RE-2007-77 (Me. Cumberland Sup. Ct. Nov. 28, 2007) (granting the Maine Attorney General’s motion to intervene in a case involving the enforcement of a conservation easement); Complaint for Declaratory Judgment Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions at 13, *Salzburg v. Dowd*, No. 2008-0079 (Wyo. D. Ct. July 8, 2008) [hereinafter WY AG’s Complaint] (in which the Wyoming Attorney General alleges, inter alia, that a Board of County Commissioners violated its fiduciary duty to assure the permanent protection of a ranch encumbered by a perpetual conservation easement by agreeing to terminate the easement outside of a judicial proceeding); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1069 (2006) (describing a case, subsequently settled, in which the Maryland Attorney General defended a perpetual conservation easement on the ground that the easement constituted a charitable trust, and noting that state attorneys general in a growing number of states, including Maryland, California, Pennsylvania, Maine, Connecticut, and Massachusetts are beginning to recognize “that they have the right and the obligation to enforce [conservation] easements on behalf of the public”). The New Hampshire Attorney General has similarly taken the position that conservation easements are charitable trusts enforceable by the Attorney General. E-mail from Terry Knowles, past President of the National Association of State Charity Officials and Assistant Director of the Charitable Trusts Unit of the New Hampshire Attorney General’s Office, to Nancy McLaughlin, Professor of Law, University of Utah S.J. Quinney College of Law (Sept. 30, 2008, 07:25:00 MST) (on file with author). The New Hampshire Attorney General is working with land trusts in New Hampshire to

entities and land trusts assume they have the power to terminate or substantially modify conservation easements “on their own” at their peril.⁷² Accordingly, it does not appear that nonprofit holders of conservation easements can decide on their own and in a nonpublic process whether to continue to enforce the easements they hold. Rather it appears that the decision to terminate a perpetual conservation easement, or modify it in a manner contrary to its stated conservation purpose, must be made in a *cy pres* or similar equitable proceeding, and that the state attorney general must be a party to that proceeding to represent the interests of the public.

Moreover, applying charitable-trust principles to conservation easements does not mean that such easements are hopelessly inflexible and unable to adjust to inevitably changing conditions. Nor does it mean that every deviation from the terms of a conservation easement requires a “cumbersome, expensive, and impractical” court proceeding.⁷³ To the contrary, considerable flexibility to modify conservation easements can be and often is built into conservation easement instruments in the form of an amendment provision. These provisions typically grant the holder the express power to simply agree with the owner of the encumbered land to amendments that are consistent with or further the conservation purposes of the easement.⁷⁴ The Land Trust Alliance has discussed the wisdom of including such a provision in conservation easement instruments since the publication of the first Conservation Easement Handbook in 1988,⁷⁵ and the Alliance strongly recommends the use of such provisions in its recently published report on amendments.⁷⁶ Moreover, even in the absence of such an amendment provision, a holder may be deemed to have the implied power to agree to amendments that are consistent with the purpose of a conservation easement, and could seek court approval of such “consistent” amendments in a more flexible

develop guidelines regarding Attorney General and court oversight of conservation easement modification and termination. *Id.*

⁷² See, e.g., McLaughlin, *Perpetuity and Beyond*, *supra* note 15, at 690–93, 695–700 (discussing the Myrtle Grove and the Wal-Mart controversies); Nancy A. McLaughlin, *Could Coalbed Methane be the Death of Conservation Easements?*, 29 WYO. LAW. 18 (2006) (discussing Johnson County, Wyoming’s controversial attempt to terminate a perpetual conservation easement outside of a *cy pres* proceeding). The Wyoming Attorney General has filed suit to defend the Johnson County easement. See WY AG’s Complaint, *supra* note 71. See also Bjork v. Draper, 381 Ill. App. 3d 528 (2008), in which the Illinois Appellate Court invalidated amendments to a perpetual conservation easement that the land trust holder agreed to at the request of new owners of the land. For a brief discussion of the Bjork case, see Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, forthcoming in PROBATE & PROPERTY (2009).

⁷³ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1073.

⁷⁴ See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 377 (providing a sample amendment provision).

⁷⁵ See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 70, at 205–06.

⁷⁶ See LAND TRUST ALLIANCE RESEARCH REPORT, AMENDING CONSERVATION EASEMENTS, EVOLVING PRACTICES AND LEGAL PRINCIPLES 31–32 (2007).

administrative deviation proceeding.⁷⁷ It is only the outright termination of a conservation easement, or its modification in a manner inconsistent with its conservation purpose, such as to permit the subdivision and development of the land, that would require court approval in a *cy pres* proceeding (as is contemplated under federal tax law).⁷⁸

Finally, requiring court approval of the termination of a conservation easement in a *cy pres* proceeding is appropriate given (1) the significant public investment in conservation easements and the conservation and historic values they protect; (2) the enormous economic value inherent in the development and use rights restricted by conservation easements; (3) the political, financial, and other pressures that may be brought to bear on both governmental and nonprofit holders to release or terminate conservation easements; (4) the increasing scarcity of undeveloped land; (5) the high stakes involved in the termination of a conservation easement;⁷⁹ and (6) the necessity of according a certain amount of deference to the intent of conservation easement donors so as not to chill future conservation easement donations. With regard to this last point, it is well settled that government entities and charitable organizations cannot solicit and accept charitable donations to be used for one charitable purpose and then use those assets for another purpose absent court approval obtained in a *cy pres* proceeding.⁸⁰ The main reason for this is simple—failing to honor the intent of charitable donors is likely to result in fewer charitable donations.⁸¹ This is particularly true in the

⁷⁷ See McLaughlin & Weeks, *In Defense of Conservation Easements*, *supra* note 47, at 41–56 (discussing the manner in which charitable trust principles should apply to amendments and terminations).

⁷⁸ See *id.* For convenience purposes, references to the “termination” of a conservation easement hereinafter will encompass both outright termination and the modification of an easement in a manner inconsistent with its conservation purpose.

⁷⁹ The stakes involved in the termination of a conservation easement are high because termination will generally result in the development or other intensive use of the subject land and, thus, the generally irreversible degradation or destruction of the land’s natural, ecological, scenic, or historic values.

⁸⁰ See, e.g., *City of Salem v. Attorney Gen.*, 183 N.E.2d 859, 860 (Mass. 1962) (holding that a gift of land to a city to be used “forever as Public Grounds” established a trust restricting the use of the land to public park purposes, and the city could therefore not use three acres of the land for a public school building); *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.”).

⁸¹ According to a recent nationwide survey by Zogby International: (i) “97 percent of the respondents said they consider it a ‘very’ or ‘somewhat’ serious matter if charities are spending money donated to them on unauthorized projects, while 78.7 percent said they would ‘definitely’ or ‘probably’ stop giving to any nonprofit organization that accepts contributions for one purpose and uses the money for another”, (ii) “[]72.4 percent[] said that, when a nonprofit organization uses money ‘for a purpose other than the one for which it was given,’ the managers of the recipient organization ‘should be held legally or

conservation easement context, where a strong personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved is the primary factor motivating many easement donations.⁸²

2. Clarifying the Law

Judicial or legislative confirmation that conservation easements can be terminated by their government or nonprofit holders only in *cy pres* or similar equitable proceedings, as well as clarification of the extent of the holders' implied powers to amend conservation easements consistent with their stated purposes, would clearly be desirable. Such confirmation and clarification would promote efficiency and standardization in the administration of conservation easements and help ensure that the public interest and investment in such easements is

criminally liable for acting in a fraudulent manner,” and (iii) “97.4 percent said that respecting a donor’s wishes was ‘very’ or ‘somewhat’ important to the ‘ethical governance’ of a nonprofit.” *See* Public will Punish Nonprofits that Misuse Designated Grants, New Zogby Survey Finds (Dec. 14, 2005) at 1 (on file with author) (explaining the results of the survey commissioned by the plaintiffs in the Robertson v. Princeton University case). *See also* John Hechinger, *Big-Money Donors Move to Curb Colleges’ Discretion to Spend Gifts*, WALL ST. J., Sept. 18, 2007, at B1 (explaining that, upset by the apparent disregard for donor intent on the part of many colleges and universities, “several philanthropists—including . . . the billionaire founder of Home Depot Inc., . . . —are launching a nonprofit that will advise donors on how to attach legally enforceable restrictions to their gifts”). According deference to the intent of charitable donors also facilitates a diversity of projects and programs within the nonprofit sector and is consistent with the deeply-rooted tradition in this country of respecting an individual’s right to control the use and disposition of his property.

⁸² *See, e.g.,* McLaughlin, *Tax Incentives*, *supra* note 9, at 45 (“[T]he surveys indicate that for most easement donors, a strong personal attachment to and concern about the long-term stewardship of their land is the primary factor motivating their donations, while tax incentives generally play a subsidiary or supplemental role.”); VERMONT LAND TRUST, LAND CONSERVATION: THE CASE FOR PERPETUAL EASEMENTS 1 (2007), *available at* <http://www.vlt.org/TermEasementsJuly2007.pdf> (noting, with regard to easements granted to the Vermont Land Trust, “[a]lthough the tax and financial benefits were usually important considerations, the owner’s primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends”); *see also* McLaughlin, *Tax Incentives*, *supra* note 9, at 45–46 (noting that the survey results “are not surprising given that the federal tax incentives compensate the typical easement donor for only a modest percentage of the reduction in the value of his or her land resulting from an easement donation. Any charitable donation that requires a significant financial sacrifice must be motivated by factors other than, or in addition to, the anticipated tax savings”). For a detailed discussion of the legal and ethical responsibilities of government entities and land trusts soliciting and accepting perpetual conservation easement donations, *see generally* McLaughlin & Weeks, *In Defense of Conservation Easements*, *supra* note 47.

appropriately protected. On the other hand, attempting to change state law through legislation to grant government entities and land trusts greater flexibility to modify and terminate the conservation easements they hold is both unnecessary and inadvisable. Such legislation is unnecessary because significant flexibility to modify the terms of perpetual conservation easements in manners consistent with their stated purposes can already be built into easements in the form of an amendment provision,⁸³ and government entities and land trusts can and should employ other, less permanent land-protection tools (such as leases, management agreements, or terminable easements) where greater flexibility is desired.⁸⁴ Such legislation is also inadvisable because it could be vulnerable to challenge on constitutional grounds, render easements in the adopting jurisdiction ineligible for federal tax incentives, and significantly chill future easement conveyances.⁸⁵

3. *Condemnation*

Some might worry that projects of great importance to the public (such as the construction of highways or electric transmission towers and lines) could be precluded or hindered by the existence of conservation easements and the protection afforded to them by the doctrine of *cy pres*. Those concerns would be unfounded. In circumstances where it is determined that the best place to locate a public works project is on land that is protected because it has significant conservation or historic values, the public can simply condemn the easement. None of the easement-enabling statutes preclude condemnation, and half of them expressly provide that easements are subject to condemnation.⁸⁶ The real danger is not that conservation easements will endure in the face of more important public needs. Rather, the danger is that, absent even minimal statutory or judicial safeguards, easement-encumbered land could become the path of least resistance for condemning authorities.⁸⁷

⁸³ See *supra* Part III.A.1.

⁸⁴ See McLaughlin, *Perpetuity and Beyond*, *supra* note 15, at 704–07 (explaining that government entities and land trusts have an obligation to consider *ex ante* when protection of land with a perpetual conservation easement—with the legal and ethical responsibilities that such protection entails—is and is not appropriate). See also *id.* at 707–12 (discussing terminable conservation easements).

⁸⁵ See McLaughlin & Weeks, *In Defense of Conservation Easements*, *supra* note 47, at 87–94 (critiquing proposals to seek legislative changes).

⁸⁶ See McLaughlin, *Condemning Conservation Easements*, *supra* note 34, at 1929; see also *id.* at 1933–60 (discussing how just compensation upon the condemnation of land encumbered by a conservation easement should be calculated to ensure protection of the public’s interest and investment in conservation).

⁸⁷ See, e.g., Nancy A. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (Or Not)*, 26 VA. ENVTL. L.J. 399, 426–27 (2008) (explaining that “if we do not require condemning authorities to accord any weight to the protected status of easement-encumbered land when considering

B. Interpreting Conservation Easements in Favor of the Free Use of Land

Professor Korngold recommends that conservation easements be narrowly construed to “serv[e] the spirit of the antirestrictions policy,” which favors the free and unrestricted use of land,⁸⁸ and to protect the interests of future generation owners who, he suggests, should not be saddled with “unknown or unknowable restrictions.”⁸⁹ As explained in the following subparts, interpreting conservation easements in favor of the free use of land would be contrary to the express terms of most conservation easement instruments, the modern and traditional rules of interpretation applicable to servitudes, the rules of interpretation applicable to restricted charitable gifts and charitable trusts, and the requirements for tax deductibility under federal tax law—all of which require that conservation easements be interpreted to carry out their conservation or historic preservation purposes. Moreover, future generation owners have at least constructive notice of the terms and purposes of the conservation easements encumbering their land and should reasonably expect that such easements will be interpreted to carry out their public or charitable purposes.

condemnation alternatives, we risk subverting the strong public policy in favor of the use of conservation easements as a land protection tool through the condemnation process”). In *Texas E. Transmission Corp. v. Wildlife Preserves*, 225 A.2d 130 (N.J. 1966), the court held that, although a natural gas company had the power to condemn a right of way across a charitable organization’s wildlife preserve, the organization was entitled to a plenary trial of its claim that a satisfactory alternate route was available. The court explained:

[the charitable organization’s] devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking of its preserve or a portion of it by arbitrary action of a condemnor. . . The difference is not in the principle but in its application; that is, the quantum of proof required. . .to show arbitrariness. . .should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses. Existence of an alternate route for a pipeline which will reasonably serve the utility’s purpose, and which if utilized will avoid visiting on the condemnee’s land the significantly disproportionate damage which the originally intended route would cause, is a matter which rationally relates to the issue of arbitrariness.

Id. at 137.

In a later appeal, however, the court affirmed the trial court’s finding that the right of way sought by the company represented a reasonable exercise of judgment. *Texas E. Transmission Corp. v. Wildlife Preserves*, 230 A.2d 505 (N.J. 1967).

⁸⁸ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1052–53, 1076.

⁸⁹ See *id.* at 1074–76.

1. Conservation Easement Instruments

The conveyance of a conservation easement creates an ongoing relationship between the holder of the easement, as representative of the public, and the owner of the encumbered land. Both the grantor and the grantee intend that the easement will not only protect the identified conservation and historic values of the subject land (i.e., accomplish its purpose), but also permit the owner of the land to use the land in manners not inconsistent with that purpose. It is, however, impossible to specify at the time of the conveyance of a conservation easement every conceivable variation of use, activity, or practice that in the future might or might not have an adverse impact on the conservation or historic values to be protected. Accordingly, for a conservation easement to operate successfully as a long-term land-protection tool, consistency with the purpose of the easement must be the standard against which all future uses of the land are measured, and many conservation easement instruments expressly so provide. In accordance with the advice provided in the Conservation Easement Handbook, the typical conservation easement:

- (i) states the overall purpose of the easement, which generally is to protect certain identified conservation or historic values of the property “forever” or “in perpetuity,”
- (ii) prohibits all uses that are inconsistent with the easement’s purpose, including certain uses that are specifically listed in the easement as prohibited (such as industrial, mining, and certain development activities), and
- (iii) reserves to the grantor and his successors the right to engage in all uses that are consistent with the easement’s purpose, including certain uses that are specifically listed in the easement as permitted (such as limited residential use and certain farming, ranching, and recreational uses).⁹⁰

The stated purpose of the easement is intended to be the touchstone of the instrument—the easement is intended to be interpreted over time to permit all uses that are consistent with its purpose, and to preclude all uses that are inconsistent with its purpose.⁹¹ Easements drafted in this manner are intended to be flexible, but fundamentally stable instruments. That is, they are intended to protect the conservation or historic values of the subject land for the benefit of the public over the long term, but at the same time permit new, unanticipated, innovative, and stewardship-affirming uses of the land.

⁹⁰ See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 70, at 174–77.

⁹¹ See *id.* at 174; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 390.

Many conservation easements also expressly provide that, notwithstanding any general rule of construction, the easement must be construed liberally in favor of effecting its purpose (as well as the policy and purpose of the applicable easement-enabling statute), and if any provision in the instrument is found to be ambiguous, an interpretation consistent with the purpose of the easement should be favored.⁹² This type of provision is typically included in conservation easements as a form of belt and suspenders. It specifically instructs the court to interpret the easement to carry out its conservation or historic preservation purpose, and to *not* apply general rules of construction that might yield a contrary result (such as the rule that land-use restrictions be narrowly construed in favor of the free use of land).⁹³

2. Interpretation of Servitudes

Interpreting conservation easements to carry out their conservation or historic preservation purposes is also consistent with both the modern and traditional approaches to the interpretation of servitudes. The Restatement (Third) of Property reflects the modern approach to servitude interpretation. Pursuant to the Restatement, if the terms of a servitude are ambiguous, “[the] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, *and to carry out the purpose for which it was created.*”⁹⁴ The Restatement expressly rejects the rule that servitudes be narrowly construed in favor of the free use of land.⁹⁵ The drafters explained that servitudes are now widely used and play an important role in the utilization of land resources, and the “antirestrictions policy” is too restrictive in this context because it can both invalidate servitudes that continue to perform important functions and frustrate the parties’ intent.⁹⁶

⁹² See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 70, at 162; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 376.

⁹³ See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 70, at 202–03; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 466–67.

⁹⁴ See RESTATEMENT (THIRD) OF PROP., § 4.1(1) (2000) (emphasis added). With regard to the use of extrinsic evidence, many conservation easement deeds contain an “integration clause” providing that the deed sets forth the entire agreement of the parties and supersedes all prior discussions, negotiations, understandings or agreements relating to the easement. See, e.g., 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 70, at 162 (including an integration clause in its Model Conservation Easement); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 379 (including an integration clause in its sample conservation easement provisions).

⁹⁵ See RESTATEMENT (THIRD) OF PROP., § 4.1, cmt. a (2000).

⁹⁶ See *id.* § 3.1, cmt. a; Ch. 4, Introductory Note; § 4.1, cmt. a. The Restatement refers to the “antirestrictions policy” as the “strict-construction doctrine.” See *id.* § 4.1, cmt. a.

A close analysis of the rule of construction favoring the free use of land confirms that it simply has no place in the conservation easement context. That rule is a subset of a more general rule of construction, which provides that, in choosing among reasonable meanings of an ambiguous agreement or a term, the meaning that is more consonant with public policy or serves the public interest should generally be preferred.⁹⁷ In the past, interpreting land use restrictions in favor of the free use of land was considered to be in the public interest because land use restrictions were viewed as constraining socially productive uses of the land (i.e., residential, commercial, recreational, and industrial development).⁹⁸ There has, however, been a fundamental shift in our attitude toward land use restrictions, particularly in the land conservation context.⁹⁹ It is now recognized that imposing perpetual restrictions on the development and use of land to protect conservation and historic resources can provide significant benefits to the public and, thus, is in the public interest (in other words, that land conservation is itself a socially productive use of land).¹⁰⁰ This has led to legislation in all fifty states and the District of Columbia facilitating the creation and enforcement of conservation easements, as well as a significant investment of public resources in the acquisition of such easements through federal and state tax-incentive and easement-purchase programs. Accordingly, in construing conservation easements, the meaning that is consistent with or furthers the conservation or historic preservation purpose of the easement should be preferred because that interpretation serves the public interest.¹⁰¹

The modern purpose-focused rule of servitude interpretation is also supported by case law, including cases involving the interpretation of conservation easements.¹⁰² In fact, the conservation easement interpretation case cited by

⁹⁷ See *id.* § 4.1(2) (“Among reasonable interpretations, that which is more consonant with public policy should be preferred”); RESTATEMENT (SECOND) OF CONTRACTS § 207 (1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred”).

⁹⁸ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1054 (explaining that the “antirestrictions policy” is intended to strip away restrictions that hamper the functioning of real estate markets); RESTATEMENT (THIRD) OF PROP., § 3.1, cmt. a (2000) (explaining the history of the “antirestrictions policy”).

⁹⁹ See RESTATEMENT (THIRD) OF PROP., § 3.1, cmt. a.; Ch. 4, Introductory Note (2000).

¹⁰⁰ See, e.g., *id.* § 4.9, cmt. b (explaining that socially productive uses of land include conserving agricultural lands and open space and preserving historic sites).

¹⁰¹ See *supra* note 97 and accompanying text. See also RESTATEMENT (THIRD) OF PROP., § 4.9, cmt. b (2000) (providing that in the case of conservation, open space, and historic preservation servitudes, seeking to minimize their impact on the servient estate is not appropriate).

¹⁰² For cases outside of the conservation easement context, see RESTATEMENT (THIRD) OF PROP., § 4.1, Reporter’s Note (2000). For conservation easement cases, see, e.g., *Goldmuntz v. Town of Chilmark*, 651 N.E. 2d 864, 866 (Mass. App. Ct. 1995) (holding that conservation easements should be “protected against expedient exemptions

Professor Korngold in support of his argument that conservation easements be interpreted in favor of the free use of land should properly be read to support the application of the modern rule.¹⁰³ In *Southbury Land Trust, Inc. v. Andricovich*, the Connecticut Appellate Court concluded that the construction of a second detached single-family dwelling on conservation easement-encumbered land for use by relatives of the farmer working the land was not, on its face, inconsistent with the easement drafters' intent to preserve the pastoral aspects of a working farm.¹⁰⁴ In a footnote, however, the court cautioned that

Of course, we can imagine circumstances in which the construction of a single family home on [the farm] would violate the conservation agreement. If, for example, a very large, contemporary mansion that obscured the pastoral view of the farm was built in the middle of [the farm], then the spirit of the easement would clearly be undermined. The plaintiff most likely would be able to enjoin the construction of such a house on the ground that it would undermine the entire purpose of the easement.¹⁰⁵

Accordingly, although the Appellate Court referenced the rule of construction favoring the free use of land in its opinion in *Southbury*,¹⁰⁶ it also implied that it would not apply that rule to allow the construction of a dwelling that would undermine the overall purpose of the easement.¹⁰⁷

Indeed, even in jurisdictions like Connecticut that continue to apply traditional rules of servitude interpretation, conservation easements should be

which defeat the purpose of preserving land in its natural state"); *Chatham Conservation Found., Inc. v. Farber*, 779 N.E.2d 134, 139 (Mass. App. Ct. 2002) (providing that a conservation easement "must be construed beneficially, according to the apparent purpose of protection or advantage . . . it was intended to secure or promote" (quoting *Maddalena v. Brand*, 7 Mass. App. Ct 466, 469 (1979))); *Weston Forest & Trails Assoc., v. Fishman*, 849 N.E.2d 916, 922 (Mass. App. Ct. 2006) (quoting *Maddalena v. Brand*, 7 Mass. App. Ct 466, 469 (1979)).

¹⁰³ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1074–75 (discussing *Southbury Land Trust, Inc. v. Andricovich*, 757 A.2d 1263, 1266–67 (Conn. App. Ct. 2000)).

¹⁰⁴ 757 A.2d 1263, 1266–67 (Conn. App. Ct. 2000).

¹⁰⁵ *Id.* at 1266–67 n. 8.

¹⁰⁶ See *id.* at 1265.

¹⁰⁷ See *supra* note 105 and accompanying text. The Appellate Court declined to determine whether the proposed additional dwelling would undermine the purpose of the easement because that claim had not been addressed or decided by the trial court. *Southbury Land Trust, Inc. v. Andricovich*, 757 A.2d 1263, 1267 (Conn. App. Ct. 2000). The court explained that such a determination is best made by the finder of fact and might even require the finder of fact to make a visual observation of the property. *Id.*

interpreted to carry out their conservation or historic preservation purposes.¹⁰⁸ The cardinal rule in the interpretation of servitudes is to effectuate the parties' intent, and the intent of the parties to a conservation easement that the easement be interpreted to carry out its conservation or historic preservation purpose should be clear, either because that intent is expressly stated in the easement (see Part III.B.1 above), or because it can be ascertained from a reading of the easement as a whole in light of the circumstances surrounding its execution, including the policy and purpose of the applicable easement-enabling statute and any relevant tax incentive or easement-purchase program. Accordingly, resort to rules of construction, such as that favoring the free use of land, should be both unnecessary and inappropriate in the conservation easement context.

3. *Interpretation of Charitable Gifts and Charitable Trusts*

Interpreting conservation easements to carry out their stated conservation purposes is also consistent with the rules governing the interpretation of charitable gifts and charitable trusts. Such gifts and trusts are particularly favored by the courts in all jurisdictions and are liberally construed to uphold the donor's charitable purpose whenever possible.¹⁰⁹ Accordingly, "[i]f the words of a gift are

¹⁰⁸ See, e.g., RESTATEMENT (THIRD) OF PROP., § 4.1 Reporter's Note (2000) ("Cases stating the rule favoring the free use of property often add a proviso that, if the parties intentions are sufficiently clear, they will be given effect"); *Joslin v. Pine River Dev. Corp.*, 367 A.2d 599, 601 (1976) ("Even some of those courts that speak in terms of strict construction have mitigated the harshness of the rule. They give great weight to the intent of the parties and will not defeat the purpose for which the covenant was established.").

¹⁰⁹ See, e.g., *Crippled Children's Found., v. Cunningham*, 346 So.2d 409, 411 (Ala. 1977) ("charitable gifts are viewed with particular favor and every presumption, consistent with the language of the instrument, should be employed to sustain them."); *Harris v. Georgia Military Acad.*, 146 S.E.2d 913, 915 (Ga. 1966) ("Gifts or trusts for charitable purposes are favorites of the law [and] courts of equity, it is said, will go to the length of their judicial power to sustain such gifts." (quoting 15 Am. Jur. 2d 111, Charities § 105)); *Webb v. Webb*, 172 N.E. 730, 735 (Ill. 1930) ("Gifts to charity have always been looked upon with favor by the courts. Every presumption consistent with the language used will be indulged to sustain them."); *In re Carlson's Estate*, 358 P.2d 669, 671-72 (Kan. 1961) ("charitable trusts, being favorites of the law, are to be upheld wherever possible, and instruments providing for their creation will be liberally construed to carry out the beneficent intention of the donor."); *In re Estate of Homburg*, 95-CA-01346-SCT (¶ 13) (Miss. 1997) ("[C]haritable trusts are favored and should be enforced where possible."); *Bd. of Trs. of Univ. of N.C. at Chapel Hill v. Unknown and Unascertained Heirs*, 319 S.E.2d 239, 242 (N.C. 1984) ("It is a well recognized principle that gifts and trusts for charities are highly favored by the courts. Thus, the donor's intentions are effectuated by the most liberal rules of construction permitted."); *Mercy Hosp. v. Stillwell*, 358 N.W.2d 506, 509 (N.D. 1984) ("It is well recognized that charitable gifts are favored by the law and by the courts . . . Courts will give effect to charitable gifts where it is possible to do so consistent with recognized rules of law."); see also *First Nat'l Bank & Trust Co. v.*

ambiguous or contradictory, they are . . . construed . . . to support the charity if possible.”¹¹⁰

As previously noted, many conservation easements are conveyed in whole or in part as charitable gifts to be used for a specific charitable purpose.¹¹¹ Accordingly, as with all other charitable gifts, such easements should be construed liberally to carry out their charitable purposes. Thus, if any terms in a conservation easement are ambiguous or contradictory, they should be construed to support the conservation or historic purpose of the easement.

4. Federal Tax Law Requirements

Interpreting conservation easements to carry out their conservation or historic preservation purposes is also consistent with the requirements of federal tax law relating to tax-deductible conservation easement donations. Pursuant to § 170(h) of the Internal Revenue Code, the conservation purpose of a tax-deductible

Brimmer, 504 P.2d 1367, 1369 (Wyo. 1973) (“In construing a [charitable] trust agreement the intention of the settlor must govern and if possible be ascertained from the trust instrument. Every word is to be given effect if it does not defeat the general purpose.”); GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 368, at 76 (2d ed. 1991) (“The courts have manifested a sympathetic attitude toward instruments alleged to create charitable trusts. They wish to find a charitable intent and to carry it out, if at all possible.”).

¹¹⁰ *Richards v. Wilson*, 112 N.E. 780, 795 (Ind. 1916). In *Noice v. Schnell*, 101 N.J. Eq. 252, 261–64 (Ct. Err. & App. 1927), the court determined that the testator intended to create a charitable trust to preserve the natural beauty of the Palisades along Hudson for the benefit of the public despite the testator’s failure to provide a specific plan for such preservation. The court explained:

[D]onors of public gifts have no special powers of divination. They cannot see the changes which time will bring. They cannot determine for all time the best methods for the development of the project for which the bequest is made. Charitable trusts are perpetual. It cannot be expected that the donors will be able to indicate except in a general way the purpose they have in mind and the class to be benefited by the gift. Vagueness is to be found in almost every charitable trust. . . . If the intention be charity, the court will execute it, however vaguely the donor may have indicated his purpose.

Id. at 264 (quoting in *Attorney-General v. Haberdashers CO*, 1 Mylne & K 421). Donors of conservation easements generally provide more detailed plans for the preservation of the subject property than did the testator in *Noice*. However, like the testator in *Noice*, easement donors have no special powers of divination and therefore cannot possibly specify every conceivable use that in the future might or might not have an adverse impact on the property’s conservation or historic values. Accordingly, as with all other charitable gifts, courts should liberally construe conservation easements to uphold the donors’ charitable conservation or historic preservation purposes.

¹¹¹ See *supra* note 33 and accompanying text.

conservation easement must be “protected in perpetuity.”¹¹² In explaining this requirement, the Treasury Regulations provide, in part, that “any interest in the property retained by the easement donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.”¹¹³ To satisfy this requirement, many conservation easements are drafted as described in Part III.B.1. above. That is, they state the broad conservation purpose of the easement, they reserve to the grantor (and the grantor’s successors) the right to engage in any uses that are consistent with that purpose, and they specifically prohibit any uses that are inconsistent with that purpose.¹¹⁴

If conservation easements are interpreted over time to permit only uses that are consistent with their conservation or historic preservation purposes, the purposes of such easements will be “protected in perpetuity” as required under federal tax law. Alternatively, if conservation easements are interpreted in favor of the free use of land or to otherwise permit uses of the land that are contrary to the easements’ conservation or historic preservation purposes, such purposes would not be “protected in perpetuity.” Accordingly, if a jurisdiction were to adopt Professor Korngold’s recommendation and interpret conservation easements in favor of the free use of land, conservation easements conveyed in that jurisdiction should no longer be eligible for federal tax incentives. In such a jurisdiction, there would be no guarantee at the time of donation that the purpose of a conservation easement would be “protected in perpetuity.”

5. *Legitimate Expectations of Future Generation Owners*

Interpreting conservation easements to carry out their conservation purposes also would not burden future generation owners with “unknown or unknowable restrictions.” Persons who acquire land encumbered by a conservation easement

¹¹² A tax-deductible conservation easement must be “granted in perpetuity.” See I.R.C. § 170(h)(2)(C) (2008). The easement’s contribution to a government entity or charitable organization must be “exclusively for conservation purposes.” See *id.* § 170(h)(1)(C). And the contribution will not be treated as exclusively for conservation purposes unless the conservation purpose of the easement is “protected in perpetuity.” See *id.* at § 170(h)(5)(A).

¹¹³ See Treas. Reg. § 170A-14(g)(1) (2008).

¹¹⁴ See, e.g., *Glass v. Commissioner*, 471 F.3d 698, 710 (6th Cir. 2006) (holding that two conservation easements satisfied the requirements for tax-deductibility under IRC § 170(h) in part because each easement contained an overarching restriction prohibiting “[a]ny activity on or use of the Property that is inconsistent with the purpose of [the easement]” (quoting 1992 and 1993 Conservation Easements, Joint Appendix at 121, 131)); I.R.S. Priv. Ltr. Rul. 200836014 (Sept 5, 2008) (ruling that the easement at issue satisfied the requirements for tax-deductibility under IRC § 170(h) in part because the easement provides that the exercise of any reserved right by the grantor (or his successors) must not be inconsistent with or detrimental to the purpose of the easement).

have at least constructive notice of both the terms and the public or charitable purpose of the easement. Moreover, many conservation easements expressly provide that any uses inconsistent with the purpose of the easement are prohibited, or that only uses consistent with the purpose of the easement are permitted, or both.¹¹⁵

In addition, purchasers of easement-encumbered land often pay a significantly reduced price due to the existence of the easement and many owners of easement-encumbered land benefit from lower property tax assessments. Accordingly, narrowly construing conservation easements in favor of the free use of land, which could permit the land to be used in manners contrary to the conservation or historic preservation purposes of the easements, could confer significant windfall benefits on the owners at the expense of the public, which in one way or another invests in and is the beneficial owner of conservation easements.

Narrowly construing conservation easements in favor of the free use of land could also result in the substantially irreversible degradation or destruction of the conservation and historic values the easements are intended to protect for the benefit of the public.¹¹⁶ And the prospect that a conservation easement could be construed to permit uses that are contrary to its stated conservation purpose, and

¹¹⁵ See *supra* note 114 and accompanying text; *supra* Part III.B.1. In rare cases, conservation easements may be drafted to provide that the restrictions listed in the easement are exclusive, and anything not expressly prohibited is permitted. See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 70, at 175, explaining that this approach is seen most frequently in simple, single purpose easements, such as the “pothole” easements acquired by the U.S. Fish and Wildlife Service to protect wetlands along the migratory waterfowl flyway of the upper Great Plains. The handbook explains that these easements generally prohibit the draining, filling, leveling, or burning of wetlands, but reserve all other rights to the grantor and his successors. *Id.* at 175–76. However, if there is a question as to the meaning of one or more of the restrictions in such an easement, such as the prohibition on “filling” or “leveling,” the restriction should be construed to carry out the overall habitat-protection purpose of the easement. Moreover, a close examination of such easements reveals that even they might be interpreted to preclude activities not expressly permitted if such activities are not “customary” and would be inconsistent with the easements’ overall habitat-protection purposes. See, e.g., *U.S. v. Peterson*, 2008 WL 4922413 (D.N.D.) (setting forth some of the terms of such an easement, which provide, *inter alia*, that the easement imposes no obligations or restrictions on the grantors or their successors other than the restrictions on draining, filling, and burning of the wetland areas, but also that they may utilize the lands “in the customary manner” except for the draining, filling, leveling, or burning provisions).

¹¹⁶ Applying a rule of construction in favor of the free use of land to conservation easements would require government entities and land trusts acquiring conservation easements on behalf of the public to anticipate and list in the easement deed every variation of use, activity, or practice that in the future might have an adverse impact on the conservation or historical resources to be protected. Given the impossibility of that task, such an approach would significantly reduce the effectiveness of conservation easements as land protection tools. See *supra* Part III.B.1.

that some of the value inherent in the easement could be thereby transferred as a windfall to a subsequent owner of the land, could both encourage speculators to purchase easement-encumbered land and chill future easement donations. Accordingly, such a rule of construction would be contrary to the public interest and investment in conservation easements, and the strong public policy in favor of the use of conservation easements as long-term land-protection tools. For all these reasons, persons who acquire land encumbered by a conservation easement should reasonably expect that any use to which they intend to put the land that is not expressly permitted in the easement must be consistent with the easement's conservation or historic preservation purpose.

C. Invalidating Conservation Easements on Public Policy Grounds

Professor Korngold also argues that courts should invalidate conservation easements on public policy grounds in those “rare” situations “where another major, clearly articulated state policy—such as one favoring economic development, affordable housing, or public planning—is threatened by the continued enforcement of the...conservation easement.”¹¹⁷ He suggests that, in such cases, a “court would have to balance the competing public interests, perhaps to the disfavor of conservation goals,” and that this “would be a legitimate expression of the principle that courts should not enforce covenants that violate public policy.”¹¹⁸ In addition to being unnecessary, this proposed reform would be inappropriate.

Seeking to invalidate conservation easements on the grounds that they violate public policy is unnecessary because, as discussed in Part III.A.3. above, conservation easements are subject to condemnation. Accordingly, in those “rare” cases where the continued enforcement of a conservation easement threatens a major state policy, the easement could simply be condemned. And the fact that economic development takings have been curtailed in many states in response to the Supreme Court's decision in *Kelo v. City of New London*¹¹⁹ is not a justification for seeking to terminate conservation easements on amorphous public policy grounds.¹²⁰ Indeed, to do so could have the perverse effect of making privately-owned land that has been identified as having conservation or historic values of significant importance to the public more susceptible to development than privately-owned land without such values.

¹¹⁷ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1080.

¹¹⁸ *Id.*

¹¹⁹ 545 U.S. 469 (2005).

¹²⁰ See Korngold, *Promoting Flexibility*, *supra* note 2, at 1082–83 (expressing concern regarding the “popular, legal, and scholarly backlash against the Kelo decision,” and arguing that “[e]minent domain is necessary to address those rare situations when an essential public need - for example, economic development or affordable housing - cannot go forward because of a prior privately made arrangement”).

Invalidating conservation easements on the grounds that they violate public policy would also be inappropriate given that the acquisition and enforcement of conservation easements is specifically supported by a variety of public policies, including the state easement-enabling statutes, federal and state tax laws, and easement-purchase programs. As provided in the Restatement (Third) of Property, while courts may apply the policies manifested by legislation more broadly than the legislation provides, they may not refuse to apply policies manifested by legislation in situations to which such policies clearly apply, except on constitutional grounds.¹²¹ As an example of this principle, the Restatement provides that a conservation easement created pursuant to a state enabling-statute could not be found invalid because it violates the policies favoring alienability and the productive use of land.¹²² Because legislatures in the various states have specifically authorized the creation and enforcement of perpetual conservation easements in the enabling statutes, a court would not be justified in finding that other policies outweighed the conservation policy expressed by those statutes.¹²³ In addition, and apropos of the preceding Part III.B., just as courts should not invalidate conservation easements outright on the grounds that they violate other policies (such as those favoring alienability and the productive use of land), they should not invalidate easements piecemeal by applying old common law rules of construction, such as that favoring the free use of land.

IV. CONCLUSION

Conservation easements are not property arrangements between private parties. They are assets that are conveyed to government entities and charitable organizations to be held and enforced for the benefit of the public. In many cases they are also charitable assets, having been conveyed in whole or in part as charitable gifts by donors interested in ensuring the permanent protection of their land and willing to make a considerable personal economic sacrifice to do so. Accordingly, applying doctrines and rules of construction that were developed in the context of private servitudes to conservation easements without also considering their status as public or charitable assets is inappropriate. Such doctrines and rules are not designed to protect the public interest or investment in conservation easements, and they do not accord the deference to the intent of charitable donors that is necessary to prevent the chilling of future charitable donations.

Conservation easements can be effective long-term land-protection tools only if they are construed to carry out their conservation purposes and insulated through

¹²¹ RESTATEMENT (THIRD) OF PROP., § 3.1, cmt. f (2000).

¹²² *See id.* § 3.1, cmt. f, Ill. 4. *See also supra* Part III.B.2. (explaining that land conservation is now considered to be a productive use of land).

¹²³ *See* RESTATEMENT (THIRD) OF PROP., § 3.1, cmt. f, Ill. 4 (2000).

the requirements of a *cy pres* or similar equitable proceeding from the short-term financial, political, and other pressures that may be brought to bear on their holders to permit the development of the land. This was recognized by Congress and the Treasury Department and is reflected in the requirements under federal tax law applicable to tax-deductible conservation easements. This was also recognized by the drafters of leading sources of legal analysis and authority, including the Restatement (Third) of Property: Servitudes, the Uniform Conservation Easement Act, and the Uniform Trust Code.

In many cases, the type of long-term protection provided by a perpetual conservation easement will be desirable. For example, when land has unique or otherwise significant conservation or historic values and it is anticipated that such land will retain those values over time, it may make sense to commit the land to the type of long-term protection provided by a perpetual conservation easement. In such cases, policymakers and government and nonprofit holders of easements might reasonably determine that the public benefits derived from ensuring the long-term protection of such values will outweigh the inconvenience and expense associated with the few *cy pres* or condemnation proceedings that may be required to later undo some of the protections.

The type of long-term protection afforded by perpetual conservation easements is not, however, appropriate in all circumstances. In some situations, nonpermanent or more easily modifiable and terminable means of land protection, such as leases, management agreements, or expressly terminable conservation easements, should be used. Indeed, government entities and land trusts have a responsibility to consider *ex ante* when the use of these more flexible instruments is appropriate. Whether this can or should be encouraged through education, additional tax incentives, or some other process is a topic for another article. What is clear, however, is that it is inappropriate to attempt to weaken the effectiveness of perpetual conservation easements as land-protection tools by lowering the barriers to their termination and construing them in manners contrary to their stated public or charitable conservation purposes. Such actions would be contrary to the public interest and investment in conservation easements and the conservation and historic values they protect. Such actions would also constitute a betrayal of past conservation easement donors and likely lead to a significant decline in future conservation easement donations.