Conservation Easement Amendments: A View from the Field**

Andrew C. Dana
Attorney
Bozeman, Montana

Draft prepared for

The Back Forty

(** *If there is any doubt, the "Field" referred to above consists of relatively natural habitat, scenic open-space, and agricultural land that is protected by a conservation easement, granted in perpetuity in accordance with Section 170(h)(4) of the Internal Revenue Code, for the benefit of fish and wildlife and plants, the scenic enjoyment of the general public, and pursuant to a clearly delineated state and local governmental conservation policy.*)

Conservation Easement Amendments: A View from the Field

Andrew C. Dana[1]

I. Introduction.

When I began practicing land conservation law fifteen years ago, my land trust clients heatedly debated whether to include amendment clauses in conservation easements. Such clauses were viewed by some land trusts as unwarranted invitations to hostile landowners, to county governments, or to developers to erode the "perpetual" conservation restrictions memorialized in conservation easements. Advocates of omitting amendment clauses from conservation easements ingenuously argued that land trusts could simply avoid amendment discussions altogether, reasoning that if the conservation easements made no provision for amendment, the land trusts had no authority to grant such amendments when asked to do so: They could just say, "No." The original terms and conditions of the easement therefore would have to remain intact, and conservation easements would truly represent perpetually immutable documents.

By contrast, today my land trust clients typically ask me to address three to five conservation easement amendment questions a month. The range of amendment issues is broad, including updating language in older easements to conform to current drafting standards; clarifying ambiguous language or correcting clerical errors; incorporating additional property; eliminating rights previously reserved to landowners; terminating parts of conservation easements to accommodate improved or upgraded roadways; and consolidating several conservation easements into one. In the past month alone, for example, I drafted or reviewed:

- A restated conservation easement, which was originally donated to a national organization in 1986, to replace outdated conservation easement language and to define more precisely the landowner's reserved development rights along the banks of the Yellowstone River;
- A revised conservation easement to eliminate ambiguous language that caused a land trust and the landowners to inch toward litigation because of a misunderstanding about the scope of the landowners' reserved rights to engage in "historic guest ranching;" and

[1] J.D., Stanford Law School, 1989. An original draft of this paper was prepared for the Environmental and Natural Resources Law Seminar , Stanford Law School, April 10, 2006, in response to a forthcoming article in the **University of Richmond Law Review**, written by Professor Nancy A. McLaughlin entitled *Amending Conservation Easements: A Case Study of the Myrtle Grove Controversy*. Because Professor McLaughlin's article is not yet in print, no direct citations to her article appear in the text of this paper. This paper is also responsive to Professor McLaughlin's article, *Rethinking the Perpetual Nature of Conservation Easements*, 29 **Harvard Env. L. Rev.** 421 (2005) (hereafter "*Rethinking Easements*"). Many of the arguments advanced in Section IV of this paper we first developed at the Advanced Legal Roundtable seminar, Land Trust Alliance National Rally, Madison, Wisconsin, October 15, 2005.

- Amendments to two conservation easements on adjacent lands owned by the same family to provide that the lands subject to each conservation easement must transfer in unified title.

In most cases, my land trust clients seek now advice about *how* to accomplish amendments. I am much less frequently asked for advice about how to *refuse* amendment requests altogether.[2]

II. Evolving Attitudes about Conservation Easement Amendments.

Thus, in the span of a decade, the attitude of the land trust community toward conservation easement amendments has changed from one of disdain to one of broad acceptance. What accounts for this change in attitude? In such a short time, how can land trusts have become so comfortable with amendments to conservation easements that they are nominally bound to honor "in perpetuity"? The answer is a complicated one, explained by a host of factors. For example, the oldest conservation easements held by my clients are now nearly 30 years old. The economy and the demographics of the Northern Rockies have changed dramatically in these three decades, and, as a consequence, the manner in which the public perceives that value of individual conservation easements has changed. In some cases, advances in resource management sciences have revealed that the land management prescriptions which were written in to conservation easements two or three decades ago are no longer "state-of-the-art." In other cases, landowners who originally granted conservation easements have died, sold, or given their lands to new owners who may not share the same understanding or interpretations of the meaning of the conservation restrictions, and in the process of questioning these easement terms, ambiguities in conservation easement language come to light.

As land trusts have gained experience with holding and administering conservation easements for the benefit of the public, they have discovered that they must adapt their management approaches to best serve the public interest, just like owners of land in fee title who must adapt their land management practices to changing economic demands, social and community mores, and new scientific knowledge. Land trusts are fast realizing that rigid adherence to an ideology that conservation easements simply lock land into unchanging patterns of use will ultimately lead to shattered, broken conservation easements. The nature and the pace of change in our society, and the changes in public opinion, require adaptive land-use resource management to address changing social conditions and advances in resource sciences across the entire spectrum of property owners, including the owners of "perpetual" conservation easements.

Nevertheless, the tension between (a) land trusts' conservation easement stewardship responsibilities to protect and preserve, in perpetuity, a complement of conservation values for the benefit of the public, and (b) changing social demands and values, poses perhaps the most difficult challenge that the private land conservation community has faced to date. No clearly

[2] Although I receive numerous questions about how to amend conservation easements, and not as many about whether easements should be amended at all, that is not evidence that land trusts are willing to entertain most easement amendment requests. I am typically called only if land trust staff has initially determined that the public interest might be served by considering an amendment request. That is, even before consulting with counsel, the land trusts I represent refuse to consider any amendments that may enrich underlying landowners or others, or that may contradict the conservation purposes for which they hold the easements in the first place. Often, I do not hear about those decisions.

definitive legal standards exist that sets conservation easement amendment protocol, and easement holders now face accelerating pressures to weaken or change conservation easements.

III. Current Conservation Easement Amendment Policies and Practices

The response of the land trust community to these pressures has been to develop conservation easement amendment policies and procedures that are derived from a number of disparate laws and regulations that govern tax-exempt organizations, generally, and conservation easements, specifically.[3] Most conservation easement amendment policies that have been adopted by land trusts permit amendments under the following circumstances:

- To correct clerical or scriveners' errors in original drafting;
- To fulfill prior agreements specified in the conservation easement;
- To clarify an ambiguities in the conservation easement;
- To address condemnation proceedings by a public agency; and
- To add restrictions that strengthen the resource protection of the easement.[4]

Furthermore, most leading land trusts build flexibility into conservation easement deeds by inserting amendment clauses into conservation easements. For example, a sample amendment clause used by Montana land trusts in their easements reads:

> "If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the Grantor and Land Trust may jointly amend this Easement; provided that no amendment shall be allowed that affects the qualification of the Easement or the status of the Land Trust as an organization qualified to hold conservation easements under any applicable laws, including Section 170(h) of the Internal Revenue Code of 1986, as amended, or Section 76-6-101, et seq., MCA. Any amendment must be consistent with the purposes of this Easement, shall not affect its perpetual duration, and must either enhance or have no effect on any of the Conservation Values protected by this Easement. Amendments made pursuant to this paragraph may not result in prohibited inurement or private benefit to any party. Any amendment shall be in

[3] The laws of particular importance to conservation easement amendment policies are the federal tax laws of private benefit and inurement that govern tax-exempt organizations and, of course, state conservation easement enabling legislation. For a discussion of land trusts' adoption of conservation easement amendment policies, *see* The Land Trust Alliance's "Standards and Practices (Revised 2004)," Practice 11.I., at 14, available at http://www.lta.org/sp/ (visited March 25, 2006). The LTA reported that in 2004 only 45% of land trusts responding to its survey had adopted conservation easement amendment policies, but that the rate of adoption had been very high (63%) since 2000. This rate of adoption underscores the changing attitudes in the land trust community toward perpetuity requirements and the need for easement flexibility.

[4] Brenda Lind, Consultant for the Land Trust Alliance's Conservation Easement Amendment Working Group, Telephone Interview Questions (March 3, 2006); *see generally* **The Conservation Easement Handbook** (Second Ed.) 2005 at Ch. 12 (CD attachment) for examples of actual conservation easement amendment policies adopted by land trusts.

writing, shall be signed by the Grantor and Land Trust, and shall be recorded."[5]

With the adoption of these amendment clauses and easement amendment policies, land trusts have recognized that amendments to conservation easements are a legitimate method to administer "perpetual" easements flexibly, but within broad legal constraints that are designed to protect the public's interest.

As with any public policy, however, the effectiveness of conservation easement amendment policies in protecting the public interest ultimately depends on how such policies are applied and implemented. In my experience, complex conservation easement amendments often require a detailed, painstaking analysis of conservation impacts, financial ramifications, legal propriety, and public interest considerations. Because of the number and range of issues that may arise, the question of whether a land trust should agree to a significant conservation easement amendment does not lend itself well to *ad hoc* decision-making. Often a team of experts – including land trust staff, naturalists, attorneys, and appraisers -- should evaluate thoroughly the propriety of complex amendment requests.

Summarized in Appendix A to this paper is one approach to this conducting this analysis that some land trusts in Montana have developed and applied. This procedure is designed to evaluate two main criteria by which any easement amendment request must be judged:

1. What are the ***impacts to the conservation values*** protected by the original easement; and
2. What are the ***financial ramifications*** of amending the easement?

If the analysis of these criteria reveals that conservation values will be diminished, the land trust must deny the amendment request. If a qualified appraiser determines that the amendment will confer any significant private financial benefit on the landowner or other third party at the expense of the public, the land trust must also deny the amendment request.

These evaluations can sometimes be complicated, difficult, and costly. Consider, for example, an amendment request from a single landowner who has purchased three adjacent properties encumbered by three separate conservation easements:

> *Conservation easement consolidation example.* A landowner asks a land trust to consolidate three easements into one document so that the land-use restrictions under which she must operate are easier to understand. Furthermore, the landowner asks to relocate a "building envelope" defined in one easement to another location on another easement property because she prefers the scenic views from the new location, although the site will be partially visible from a public road. In return, the landowner will terminate completely another reserved "building envelope" on the third property which is adjacent to critical wetland habitat for trumpeter swans.

[5] S*ee also* **The Conservation Easement Handbook** (Second Ed.) 2005 at Ch. 21 (CD attachment) for examples of similar amendment clauses used by other land trusts across the country.

> Among other issues, the land trust must evaluate whether the trade-off of less development near the trumpeter swan habitat serves the public better than protecting the viewshed from a public road. Furthermore, the appraiser looking at the proposal concludes that the landowner will receive some financial benefit as a result of the enhanced views, but that benefit will be largely offset by the landowner's agreement to abandon one of the reserved homesites.

Should the land trust grant the amendment? Does the decision-making procedure set forth in Exhibit A protect the public's interest in perpetual land conservation? If not, why not?

The procedural steps outlined in Appendix A have not been adopted broadly and are offered only to illustrate how seriously many land trusts take their responsibilities to protect the conservation values that are enumerated in their conservation easements. Moreover, between (i) the adoption of conservation easement amendment policies, (ii) the inclusion of amendment clauses in conservation easements, and (iii) the development of standards of review similar to the standards set forth in Exhibit A, land trusts have laid the groundwork for legal challenges to conservation easement amendments that fail to follow internal policies and procedures or that breach of the express requirements of the amendment clauses.[6]

IV. Conservation easement amendments and charitable trust proceedings.

The universe of conservation easement holders is limited to non-profit, tax-exempt organizations and governmental entities. The fundamental public policy assumption underlying these limitations is that tax-exempt organizations and governmental agencies must act to protect the public interest. If they fail to do so, they are held accountable. In her important article, *Rethinking the Perpetual Nature of Conservation Easements*,[7] Professor Nancy A. McLaughlin argues that conservation easements when granted in perpetuity create charitable trusts, either expressly or by operation of law. Accordingly, Professor McLaughlin argues in *Rethinking Easements* that all conservation easement termination actions – and, by extension, many conservation easement amendment decisions -- must be submitted for approval to state attorneys general and, ultimately, to the courts to ensure that the public interest is protected.

In general, it is important to note that the current debate does *not* challenge the basic premise of the assumption that exempt organizations and governmental agencies effectively serve the public interest when they accept perpetual conservation easements. Instead, much of the current debate focuses on whether easement holders are sufficiently accountable to the public

[6] Easement holders' failure to follow their amendment policies, or to respect the terms of the amendment clauses in their conservation easements, or to follow their own procedural standards may give rise, for example, to claims that the holders have acted arbitrarily and capriciously, for breach of contract, and breach of fiduciary duties. A separate issue, of course, is one of standing to bring these claims against easement holders. For a discussion of conservation easement enforcement standing issues, *see* Jessica E. Jay, *Third Party Enforcement of Conservation Easements*, 29 **Vt. L. Rev.** 757 (2005). Additional statutory clarification of the standing rules governing conservation easement amendment challenges may be warranted in many jurisdictions.

[7] See Note 1, *supra.*

when they make conservation easement amendment and termination decisions.[8] Professor McLaughlin proposes to improve accountability in conservation easement amendment and termination decisions that may affect the public interest by submitting them to judicial review and equitable reformation under charitable trust principles, including administrative deviation and *cy pres* procedures.

Of course, the courts will be the final arbiters, as they always are, in specific land-use and conservation easement amendment disputes. Less clear, however, is the applicable law and standard of review that the courts should apply in reviewing easement holders' decisions about whether and how to amend their conservation easements. For many reasons that are discussed below, judicial application of the charitable trust rules and *cy pres* procedures to conservation easement amendments may not best serve the public's interest.

A. Legal problems with broad application of charitable trust rules.

The law of charitable trusts and the law of conservation easements are derived from two separate legal traditions. As King and Fairfax explain with respect to the Uniform Conservation Easement Act, real property law provides the philosophical and legal underpinning of most conservation easement enabling legislation.[9] Conservation easements are drafted, implemented, and widely understood by easement holders, by easement grantors, and by the general public as transfers of a complement of private property rights from private owners to tax-exempt organizations. These tax-exempt organizations serve the public interest by virtue of their organizational missions and constraints imposed by conservation easement statutes and laws governing non-profit organizations.[10]

A charitable trust arises, often by operation of law and not express agreement, "when a trustor directs a trustee to manage designated property to achieve specific benefits" for the general public.[11] For a charitable trust to arise with respect to donated property, including conservation easements, the gift of property must be "restricted."[12] *Therefore, if a gift of a conservation easement does not constitute a restricted gift of a partial interest in real property, a charitable trust does not arise, either explicitly or as a matter of law.* In such circumstances, there is no legal justification for grafting charitable trust common law principles on to conservation easements created pursuant to statute.

---

[8] Such concerns about easement holder accountability to the public, for example, permeate recent Congressional proposals to reform conservation easement tax law. *See, e.g.*, Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures,* Section VIII.F, at 277 – 288 (Doc. JCS-02-05) (January 27, 2005); s*ee also* Jeff Pidot, "Reinventing Conservation Easements," Lincoln Land Institute (2005).

[9] Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning From the Uniform Conservation Easement Act Debates*, ___ **Nat. Res. J. ___** (2006) (forthcoming) (draft in author's files dated March 18, 2006, at 24 – 29, cited with permission).

[10] See Section V.A., *infra.* Conservation easements that are donated to or purchased by governmental entities also involve government acting in a proprietary capacity, not in a sovereign one.

[11] King & Fairfax note 9, *supra*, at 53.

[12] *Rethinking Easements*, at 437 – 39.

In the vast majority of conservation easement transactions, conservation easements are donated to land trusts and governmental entities as *unrestricted* transfers of limited interests in property. As Professor McLaughlin writes,

> [a] gift of property to a government agency or charitable organization will . . . be deemed to be unrestricted if the instrument of conveyance contains language concerning the donee's use of the property, but such language is couched in terms of a request, suggestion or entreaty (rather than a command) and an examination of the instrument of conveyance in its entirety and the circumstances surrounding its execution indicate that the donor intended such language to be merely precatory in nature.[13]

As explained below, most conservation easement transactions involve grants of unrestricted rights to organizations or agencies which share the grantors' common land ethic and conservation purposes.

1. Words of "grant and conveyance" in deeds determine whether rights transferred are restricted or unrestricted.

In conservation easements, the explicit words of grant and the specific conveyance of rights, not generalized statements of grantors' preferences and intentions, determine whether a gift is restricted or unrestricted. For example, the Maryland Environmental Trust's conservation easements state that:

> . . . Grantor *unconditionally* and irrevocably hereby grants and conveys to Grantee . . . forever and in perpetuity, a Conservation Easement of the nature and character and to the extent hereinafter set forth . . . .[14]

An unconditional grant is, of course, an unrestricted grant.[15] The Marin Agricultural Land Trust's conservation easement contains a similarly broad conveyance of unrestricted property rights from the Grantor to the Grantee and states:

> The rights conveyed by this Easement to the Grantee are . . . *To identify*, and to preserve and protect in perpetuity the Conservation Values, subject, however, to Grantor's reserved rights as herein provided.[16]

---

[13] *Rethinking Easements,* at 438.

[14] *See* Maryland Environmental Trust sample conservation easement, in **The Conservation Easement Handbook** (Second Ed.) 2005 at Ch. 21.8 (CD attachment) (emphasis supplied).

[15] Of course, the law is well-established that conservation easements transfer a partial interest in real property from the fee title owner to the easement holder. Such transfers of a *limited* number of rights in a partial interest conveyance does not necessarily result in a transfer of *restricted* rights.

[16] Marin Agricultural Land Trust sample conservation easement, in **The Conservation Easement Handbook** (Second Ed.) 2005 at Ch. 21.8 (CD attachment) (emphasis supplied). This language is derived from The Nature

Note that these words grant to land trusts the right "*to identify*" the conservation values to be protected. This right of identification gives to land trusts extraordinarily broad authority to define the nature of the rights they hold.

Of equal importance, a close examination of the actual text of most conservation easements reveals that easement donors typically do not "*restric*t" the broad rights that are transferred to easement holders by conservation easements. Instead, easement donors specifically *reserve* to themselves specific rights in a "Reserved Rights" or "Permitted Uses" section of the conservation easement,[17] clarifying that they intend to keep those rights to themselves intact, notwithstanding the unrestricted language of grant and conveyance included in most conservation easements.

In other words, both the language of conservation easement conveyances and the structure of conservation easement deeds are not consistent with the language and structure of restricted charitable gift deeds.[18] By conveying conservation easements, Grantors restrict their own rights to use property, not the manner in which easement holders manage the conservation rights they have been granted to safeguard the public interest.

2. Conservation easements are mutually negotiated instruments.

To constitute a restricted charitable gift that gives rise to a charitable trust, donors must clearly manifest their intentions to control the trustees' management of trust property. The Purposes clause and the Recitals in most conservation easements, however, usually document a *mutual* intention of the parties to the conservation easement to ensure management of the conservation rights conveyed to achieve *mutual* conservation purposes. The Purposes clause in the conservation easement form used by the Minnesota Land Trust, for example, states:

> The *Owner and the Trust* are committed to protecting and preserving the Conservation Values of the Protected Property in perpetuity. Accordingly, it is *their* intent to create and implement a conservation easement that is binding upon the current Owner and all future owners of the Protected Property and that conveys to the Trust the right to

---

Conservancy's original conservation easements, has been adopted by many land trusts, and is still in broad use by the Conservancy and others.

[17] *See, e.g.*, American Farmland Trust sample conservation easement at 3, in **The Conservation Easement Handbook** (Second Ed.) 2005 at Ch. 21.8 (CD attachment) ("Notwithstanding any provision of this Easement to the contrary, Grantor reserves all customary rights and privileges of ownership, including the rights to sell, lease, and devise the Property, as well as any other rights consistent with the Statement of Purpose . . . above and not specifically limited or prohibited by this Easement."); *Id*., (Colorado Open Lands sample conservation easement, at 3) ("Grantor retains the right to perform any act not specifically prohibited or restricted by this easement.")

[18] For example, the gift deed in *Nickols v. Commissioners of Middlesex County*, 166 N.E.2d 911 (Mass. 1960), which is discussed extensively in *Rethinking Easements* at 439-441 as evidence that conservation easements should be construed as restricted charitable gifts, conveyed the subject property in that case "*subject to* [a] restriction and condition" unilaterally imposed by the Grantor. *Id.* at 439 (emphasis supplied). Conservation easement deeds, however, very rarely include such conveyances which are made explicitly "subject to" restrictions that are unilaterally imposed by Grantors.

> protect and preserve the Conservation Values of the Protected Property for the benefit of this generation and generations to come.[19]

As noted above, many other conservation easements contain language that actually restricts the Grantors' and successor landowners' use of the contributed property, not the land trusts' rights. The Little Traverse Conservancy's conservation easement, for example, contains the following clause:

> The *Owner agrees* to confine the use of the Property to activities consistent with the Purposes of this Easement and the preservation of the Conservation Values.[20]

Note that in this form of conservation easement the Owner agrees, on behalf of himself or herself and all successors and assigns, *to restrict the Owner's rights to use property*. It is simply not possible to read this conservation easement as a gift received by the easement holder sufficient to create a charitable trust.

3. Conservation easement "perpetuity" clauses often do not manifest landowner attempts to assert dead-hand control.

Professor McLaughlin's argument that conservation easements constitute restricted charitable gifts leads to another assumption that is questionable. As stated in *Rethinking Easements,* landowners who donate conservation easements,

> should be viewed as striking the following *cy pres* bargain with the public: the landowner should be permitted to exercise dead hand control over the use of the property encumbered by the easement, but only so long as the easement continues to provide benefits to the public sufficient to justify its enforcement.[21]

In some cases, conservation easements donations do constitute restricted charitable gifts in perpetuity, reflecting donors' intentions to assert dead-hand control over future generations. In such cases, the charitable trust analysis and framework for termination and amendments of easements presented in *Rethinking Easements* may be appropriate.

Yet, these cases are unusual. Very few conservation easements are created as simple restricted charitable gifts between one landowner and one easement holder, in which the landowner's goals are plainly to assert dead-hand control over property in perpetuity ***and*** in which the easement holder intends or expects to accommodate such landowner goals to assert such dead-hand control. As explained below, Professor McLaughlin's arguments do not consider the complexity of conservation easement ownership and the rights of various

---

[19] *See* Minnesota Land Trust sample conservation easement, in **The Conservation Easement Handbook** (Second Ed.) 2005 at Ch. 21.8 (CD attachment) (emphasis supplied).

[20] *Id.* (Little Traverse Conservancy sample conservation easement at Section 1.B.) (emphasis supplied); *see also* the sample conservation easement deeds cited in note 17, *supra.*

[21] *Rethinking Easements*, at 461.

stakeholders in many conservation easement transactions.[22] Furthermore, the charitable trust analysis in *Rethinking Easements* rests on arguably faulty assumptions about the motivations of grantors and the rights conferred to easement holders in most conservation easement transactions.

Taken in the context of overall conservation easement negotiations,[23] the perpetuity clause reflects easement donors' *preferences* for future property management according to the mutual conservation purposes that articulated in the conservation easement. As a practical matter, the perpetuity clause is inserted in conservation easements:

> (i) by landowners to qualify for tax deductions;
> (ii) by land trusts whose land conservation programs favor perpetual conservation easements, believing that such perpetual easements best serve the public interest;
> (iii) by both parties by mutual agreement about how the conservation rights transferred will be administered; or
> (iv) by both parties sometimes to comply with state law.

These motivations -- not an interest in asserting absolute control over the choices of future generations -- most frequently underlie the inclusion of perpetuities clauses in conservation easements.[24]

Thus, placed in the overall context of conservation easement negotiations and the external requirements and biases of state and federal tax law, the evidence is thin that conservation easement donors' motivations for including perpetuity clauses in easements are to assert "dead-hand" control over future generations, and, thereby, to create restricted charitable gifts. A landowner's interest in conveying a conservation easement may simply reflect a desired future condition for the donors' property and a calculated decision that the easement recipient is more likely than any other holder of conservation rights to ensure that outcome is achieved.[25]

---

[22] See Section IV.A.4, *infra*.

[23] "[A]n an examination of the instrument of conveyance *in its entirety* and *the circumstances surrounding its execution*" is critical to determining whether a conservation easement donation constitutes a restricted charitable gift. *Rethinking Easements*, at 438 (emphasis supplied).

[24] It is interesting to speculate whether conservation easements would include perpetuities clauses at all, but for the requirements of the Internal Revenue Code (I.R.C. §170(h)(5)(A)). It is possible that deletion of the statutory and regulatory perpetuity requirement would make no difference whatsoever to the number of perpetual conservation easements granted. After all, other types of easements, servitudes, and covenants which run with the land functionally may last "in perpetuity" under real property law if the holder does not agree to relinquish them, as long as traditional restrictions on holding such encumbrances "in gross" have been statutorily abolished.

[25] Despite granting conservation easements "in perpetuity," few (if any) of the landowners I've represented who have donated conservation easements expect the easements they grant to be immutable. They virtually always understand that circumstances change and their properties someday may no longer provide the types of conservation benefits they value. They donate conservation easements, however, because they believe that the land trusts will be better stewards of conservation rights for a far longer time than almost any other owner they can imagine, including members of their own families. *Cf.*, Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 **Nat.Res.J.** 601, 617 (2004) (discussing the appeal of conservation easements to avoid a "temporal tragedy of the commons"). Thus, in my experience, landowners have few illusions about their ability to assert dead-hand control in perpetuity through granting a conservation easement. That is simply not why they grant easements.

Viewed in this light, the "perpetuity" clause in conservation easement deeds from the *donors'* perspective is more precatory than restrictive.[26]

4. Conservation easement complexity.

The charitable trust analysis for easement terminations (and amendments) presented in *Rethinking Easements* addresses only a highly limited subset of conservation easements: Those easements that are created by restricted charitable gift. Accordingly, the charitable trust approach to conservation easement amendment may not apply at all to purchased, exacted, regulatory, and condemned conservation easements. This is a serious problem.

Land trusts and public agencies form new coalitions and partnerships daily to preserve property using conservation easements. Agencies and land trusts are making direct financial investments in each other's conservation easements, and conservation easements now routinely include back-up grantees, third-party enforcement rights, contingent rights, and springing interests. It is unclear how the charitable trust approach would address conservation easement amendments if multiple owners hold the easements jointly, or if the easements involve contingent or springing rights in other land trusts, or local, state or federal agencies.[27]

The limited applicability of the charitable trust approach to conservation easement amendments is important because distinct rules may develop to govern amendments of distinct types of conservation easements – for agency held, purchased, regulatory, and exacted easements, for example – notwithstanding the fact that all of these easements are likely to arise under precisely the same enabling statutes as donated easements. Before adoption of wide application of the charitable trust rules to conservation easement amendments, therefore, it is important to ask whether a uniform and predictable conservation easement amendment law can be developed for all types of easements.

B. Public policy concerns arising from the charitable trust rules.

In addition to the legal constraints and limitations of the charitable trust approach to dealing with conservation easement amendment issues, significant public policy questions arise. If the courts determine that charitable trust principles do apply to conservation easement amendments and terminations, the charitable trust doctrine requires application of the doctrine of administrative deviation or the *cy pres* doctrine.[28] The potential costs associated with application of these equitable rules are daunting and are not thoroughly explored in *Rethinking Easements.* Some of these costs are discussed below.

---

[26] *See* text accompanying Note 13, *supra* (gifts are considered unrestricted if donor's directions to charitable recipient are "precatory.").

[27] The application of the charitable trust doctrine and *cy pres* rules is especially troublesome with respect to conservation easements that are held by local land trusts but purchased with federal program dollars. The Farm and Ranch Protection Program (FRPP), administered by the Natural Resources and Conservation Service, for example, requires the grant of perpetual conservation easements under state law to local land trusts in exchange for federal funds. By federal regulatory fiat, the United States must be granted a springing interest in FRPP conservation easements if the local land trusts fail to enforce or defend the conservation easements. *See* 7 CFR §1491.22(d).

[28] *Rethinking Easements*, at 436 (discussing need for attorney general and court review and approval for easement terminations and modifications).

1. High transactions costs.

The transactions costs that are associated with any administrative deviation or *cy pres* proceedings, whether simple or complex, are likely to be significant. Consider the following examples:[29]

> *Example #1:* A conservation easement includes a prohibition on controlling noxious, invasive weeds with chemical herbicides or releases of exotic insects to achieve biological control. The original easement donor valued natural, organic approaches to land management, so these conservation easement restrictions were very important to her. Since granting the easement, however, the donor has died, and the property has become infested with spotted knapweed and leafy spurge. The property is now a seed source for weeds that are spreading throughout the local countryside and on to adjacent public lands. After consulting with state weed control authorities, the land trust that holds the easement now realizes that it is impossible to control these invasive plants without integrated application of herbicides and releases of benign insects to control seed production biologically. In addition, state law requires landowners to take steps to eradicate noxious weeds on their properties. Because the land trust concludes that the original conservation restrictions in the easement harm the public interest, the land trust amends the conservation easement to permit integrated weed control on the property, including herbicide applications and releases of insects.

Assuming for the sake of argument that the foregoing conservation easement was created as a restricted charitable gift, the land trust overstepped its authority by agreeing to amend the conservation easement as set forth above. Under charitable trust principles, attorney general review and court authorization is an absolute necessity before any such amendment is permissible. As Professor McLaughlin writes,

> [E]xcept to the extent granted the power in the deed of conveyance, the holder of a donated easement should not be permitted to agree with the owner of the encumbered land to modify or terminate the easement unless and until: (i) compliance with one or more of the administrative terms of the easement threatens to defeat or substantially impair the charitable purpose of the easement, and *a court applies the doctrine of administrative deviation to authorize the modification or deletion of such term or terms*, or (ii) the charitable purpose of the easement has become impossible or impracticable due to changed conditions, and *a court applies the doctrine of* cy pres *to authorize either a change in the conservation purpose for which the encumbered land is protected, or the extinguishment of the easement, the sale of the land, and the use of the proceeds . . . to accomplish the donor's specified conservation purpose . . .* in some other

[29] These examples are based on experiences of the author's land trust clients.

> manner or location. In addition, in either case the state attorney general . . . should be given the opportunity to intervene in the proceeding."[30]

As a matter of public policy, do we really want to involve the courts and state attorney general in a charitable trust proceeding to terminate an easement provision that obviously harms the public interest and is in violation of another state law? Is it worth the courts' time to engage in a detailed analysis of the "value" that this conservation easement right has to the public before the easement is amended?

> *Example #2:* The State Department of Transportation (DOT) determines that a public highway must be widened over a narrow strip of easement-protected property to reduce the automobile accident fatalities. The DOT approaches the land trust to negotiate for the acquisition of this a narrow strip of land and for termination of the conservation easement upon it. If a negotiated settlement cannot be reached, the DOT notifies the parties that it will commence eminent domain proceedings. Instead of forcing legal proceedings in which the land trust would surely lose, the land trust voluntarily agrees to terminate the conservation easement on this strip of land upon payment by DOT of fair market value for its conservation easement interest. Following its own easement amendment and termination policy and the express provisions of the conservation easement pertaining to application of proceeds, the land trust applies the funds it receives from DOT to a wetland fencing project on another part of the property.

Again, the charitable trust rules would require the land trust to force the DOT to institute eminent domain proceedings and to obtain a court order to accomplish what the land trust otherwise accomplished by negotiation at far less cost, with far less waste of public resources, and in far less time.

If charitable trust law is applied uniformly and consistently, land trusts, attorneys general and the judiciary must apply the administrative deviation or *cy pres* framework to **all** questions pertaining to conservation easement amendment, no matter how trivial. Easement holders, acting unilaterally, are afforded no principled way under the charitable trust laws to exclude some conservation easement amendment questions from the judicial review process while including others. This is because some "public" constituent somewhere may object. This procedure therefore raises the prospect of creating a hugely inefficient use of judicial and attorney general resources to consider the most mundane of conservation easement amendment issues.

For more complicated amendments like the "Aubry Farm" situation described so thoroughly in *Rethinking Easements* and the "conservation easement consolidation example" noted above,[31] the cost to litigate complex issues of (i) "impossibility and impracticability"; (ii) original charitable intentions of donors; and (iii) an appropriate "deviation" or substitute plan if an easement is amended may be enormous. Every one of these issues is likely to be mired in unique facts that must be individually weighed by the presiding judge. Because of the unique factual circumstances and characteristics of each case, there is virtually no chance of that the

---

[30] *Rethinking Easements*, at 436 (emphasis supplied).

[31] See Section III, *supra*.

courts, acting in equity, will develop standardized remedies or solutions to questions of conservation easement administration under administrative deviation or *cy pres* law.

2. Charitable trust proceedings will not produce predictable outcomes.

Equitable proceedings lead to unpredictable outcomes because decisions about whether and how to terminate conservation easements will be left almost entirely up to the discretion of presiding judges.[32] In equitable administrative deviation and *cy pres* proceedings, the judge alone determines the appropriate balance between dead-hand control and society's interest in reallocating resources, and judges are not shy about exercising this authority to do what *they believe* is right, not necessarily what is the best public interest outcome.

The broad equitable powers of judges to amend conservation easements for widely divergent reasons in similar circumstances will not lead to predictability and stability in conservation easement amendment law. Instead, the result is more likely to be a patchwork of decisions based on each judges' predilections and preferences, or the parties' practical settlement of controversies before a judicial decision is reached.[33] The lack of predictability and reliability that is inherent to charitable trust proceedings may result in profound social demoralization costs, as the public, conservation easement donors, and easement holders find that conservation easement enforcement decisions turn on individual judges' idiosyncrasies, not on a set of clearly defined criteria that are designed to protect the interest of all parties.

3. Lack of judicial expertise.

Under the charitable trust rules, judges are asked to determine whether a conservation easement at issue "continues to provide benefits to the public sufficient to justify its enforcement."[34] Furthermore, the appropriate threshold proposed for conservation easement termination or amendment is when the "requisite public benefits" are no longer conferred by a conservation easement.[35] Thus, under the charitable trust framework, judges must ultimately engage in challenging cost-benefit analyses: Do the social costs of continued conservation easement enforcement, as written, outweigh the social benefits provided?

Leaving such cost-benefit determinations to the courts raises highly complicated natural resource and land-use policy questions, including:

- How should a judge properly weigh conflicting public benefits (e.g., open space v. land for a new Interstate highway)?

---

[32] *See generally* Andrew C. Dana, "The Silent Partner in Conservation Easements: Drafting for the Courts," 8 **The Back Forty** 3-4 (Jan./Feb. 1999) (discussing the influence of judicial biases in conservation easement enforcement cases); *see also Rethinking Easements*, at 460, 477, 485 and 487 for examples of the expansive scope of judicial discretion in *cy pres* proceedings.

[33] Even in the *Myrtle Grove* litigation, in which the Maryland Attorney General intervened in a conservation easement amendment case under charitable trust principles, the parties settled the case pursuant to private settlement negotiations before the presiding judge rendered a decision on the merits. *See* Peter S. Goodman, *Agreement Saves Estate on Maryland's Eastern Shore; Trust had Wrongly Approved Subdivision*, WASH. POST, Dec. 11, 1998, at G7.

[34] *Rethinking Easements*, at 430.

[35] *Id.* at 477.

- How does a judge determine what public benefits are "sufficient" to justify enforcement of a conservation easement as written?
- Should a judge take into account the public benefits that could be provided by unleashing some conservation easement land for private development (i.e., increased tax revenue, job creation, housing, etc.)?
- Are judges qualified to make these decisions for all of us based on their perceptions of fairness and equity?
- Do we want to give judges this discretion as a matter of sound public policy?
- Are there alternatives that will lead to more predictable outcomes?

The charitable trust framework proposed in *Rethinking Easements* provides judges, the parties, and the public with no clear answers to these questions.

Moreover, little empirical evidence exists that judges accurately determine what actions and policies are in the public interest when making resource allocation decisions without regulatory guidance about how to weigh conflicting resource demands. By necessity, judges are generalists; they are not experts, for example, at understanding the diffuse benefits provided by ecosystem services, or wildlife habitat, or open-space land protection. Understanding foregone short-term economic opportunities (lost revenues, lost jobs, etc.) is much easier – and provides a more expeditious basis on which to make decisions – than understanding the value to society of protecting habitat for butterflies. Complicated, time-consuming arguments, based on extensive scientific testimony, that the purposes of a conservation easement *have not* become impossible or impracticable are unlikely to be well received by many judges, with crowded criminal and civil dockets.

4. Public accountability concerns.

Another highly disturbing aspect of the charitable trust law framework is the lack of accountability in judicial decision-making and attorney general review. The judiciary is the least representative branch of government, and because charitable trust proceedings are equitable proceedings, even jury trials are unavailable. The broader public's influence over appointed judges is tenuous, at best, and elected judges may be biased in favor of elements of the electorate which are hostile to land conservation but which are powerful political allies.

Similar concerns militate against reliance on attorneys general to protect the public interest in land conservation. Many state attorney general offices have far higher priorities than overseeing conservation easements, and many do not have staff sufficient to represent the interest of the public in such proceedings. As elected officials, some attorneys general may not be interested in becoming advocates for land conservation. In *Hicks v. Dowd*, for example, the Wyoming attorney general refused to become involved in conservation easement termination case under charitable trust principles, despite being invited to do so by the presiding judge.[36]

[36] *Rethinking Easements*, at 457-58, n. 119; Jay, *Third Party Enforcement of Conservation Easements*, at note 6, *supra* (text accompanying notes 141-143 therein).

Of equal concern, both elected judges and especially attorneys general may politicize conservation easement amendment decisions.[37] Because of the vast discretion to pursue (or not to pursue) charitable trust proceedings which is lodged with these political officials, the charitable trust approach may invite easement amendment proceedings by those who believe, rightly or wrongly, that they have influence over public officials. Attorneys general who are philosophically opposed to private land conservation may actively work against easement holders in termination or amendment actions. The lack of clear standards and criteria upon which judges and attorneys general are required to evaluate petitions to amend conservation easements under charitable trust proceedings exacerbates these risks.

Finally, most conservation easement amendment cases under the charitable trust framework will originate in local courts. If federal charitable income or estate tax deductions have been claimed in conjunction with such conservation easements, local courts and state attorneys general should not be expected to protect the interest of federal taxpayers who have invested a tax subsidy in the conservation easements.

In short, the charitable trust process creates incentives for litigants to exploit political and personal leanings of judges and attorneys general rather than to focus on the merits of the land conservation issues involved in conservation easement amendment. The lack of judicial accountability that is endemic to proceedings in equity, and the risk of politicizing conservation easement amendment decisions by inviting charitable trust review of conservation easement amendments, raises significant and disturbing public policy concerns.

5. Disruption of settled expectations.

Many conservation easement donors and easement holders would consider it shocking and unwelcome news to discover that they have "struck a *cy pres* bargain" when they conveyed a conservation easement, as Professor McLaughlin urges.[38] To many participants in private land conservation transactions, the value of conservation easement laws is that they create a private property rights regime under which they can express their conservation ethic with minimal state involvement. This expectation is consistent with the development and theoretical underpinnings of conservation easement law.[39]

While the UCEA suggests that *cy pres* principles *may* apply to conservation easement termination and amendment decisions, if appropriate under state law, the UCEA does not mandate its application.[40] In fact, some of the delegates to the UCEA remained decidedly uncomfortable with the application of *cy pres* principles to conservation easements, believing that they should be treated similarly to other partial interests in real property (servitudes, covenants, and easements).[41] Moreover, only about half of the states have conservation

[37] The Montana Republic Party Platform, for example, states, without ambiguity, that: "We oppose any easement in perpetuity." *See, e.g.*, http://www.mtgop.org/platform_NaturalResources.asp (last visited March 12, 2006).
[38] *See* text accompanying note 21, *supra* (quoting *Rethinking Easements*, at 461).
[39] See King & Fairfax, note 9, *supra.*
[40] *Cf.* Pidot, "Reinventing Conservation Easements," at 22, note 8, *supra* ("[T]he Uniform Conservation Easement Act (UCEA) is ambiguous on [easement termination and amendment] issues . . . . and thus *leaves open* the possibility for application of charitable trust rules under state law." (Emphasis supplied.)).
[41] King & Fairfax, at 41-42, note 9, *supra*.

easement statutes based on the UCEA. Most other statutes that authorize conservation easements are lodged in the real property code, not the trust code, and there is no suggestion in these statutes that charitable trusts arise when conservation easements are created.

For those easement holders and donors who subscribe to the theory of conservation easements as manifestation of "private ordering," it is arguably unfair and inequitable to graft complex common law charitable trust rules onto conservation easements when there were no expectations that such rules would ever apply when easements were created. The demoralization cost associated with disruption of the settled expectations of donors and easement holders who do not believe their conservation easements entail charitable trusts – and who find little basis in statutory conservation easement law for the contention that charitable trust law overlays conservation easement laws -- could be substantial.

6. Charitable trust law exaggerates dead-hand control issues**.**

Unfortunately, grafting common law charitable trust principles on to conservation easement termination and amendment decisions will also have the perverse effect of exaggerating the dead-hand control of conservation easement grantors. As noted in *Rethinking Easements,* charitable trust laws requires judge to weigh heavily the original charitable intentions of the donors of conservation easements, thereby discounting other societal interests, including the immediate interests of easement holders if they no longer believe the certain provisions of their conservation easements serve the public interest.[42] If the courts take this charitable trust doctrine review requirement seriously, the courts themselves may be forced to impose a donor's "dead-hand" to a far greater extent than an easement holder – and society at large -- would deem necessary and appropriate to protect the public interest.

As argued above,[43] the "dead hands" of easement donors do not control the use and administration of conservation easements – living and vital easement holders do. Easement holders are active, visible, engaged owners of partial interests in real property. Unlike traditional dead-hand control that the law has discouraged for centuries, land trusts and public agencies which hold and administer their conservation easements do so with a "living hand" just like all others who own property and are a part of the community. Conservation easement holders interact all the time with underlying landowners, with their members, with community leaders and government agencies, and with the general public. Therefore, it is simply wrong to assume that land trusts and other easement holders are unresponsive to the needs and demands of the community as they manage conservation easements under the cold thumbs of easement donors' dead hands.[44]

---

[42] *Rethinking Easements,* at 476 (courts are required to give deference to an easement donor's original charitable intentions in a charitable trust review, rather than relying on the current calculus of social costs and benefits associated with a conservation easement).

[43] See Section IV.A.1-3, *supra*.

[44] For these reasons, among others, the dead-hand concerns about conservation easements which have been advanced in the academic press are vastly overblown.

V. Protecting the public interest.

Many of the problems noted above that are endemic to the charitable trust approach to conservation easement amendment are reduced or eliminated if conservation easements transactions treated as unrestricted transfers of property rights to easement holders, rather than as restricted charitable gifts. With this approach, the "dead hand" concerns recede to near insignificance because land trusts and easement holders will be fully respected as owners of a complement of property rights, with the authority to determine how to interpret and enforce their conservation easements for the public benefit. Donors' conservation goals as stated in the easements will remain important, as long as mutual conservation goals may be achieved, even in part, but such donor intentions will not necessarily be controlling of the easement holders' public interest concerns. Such an approach to easement administration is more consistent with the typical bi-lateral or multi-lateral negotiations between easement holders and landowners at the time of easement creation and therefore protects settled social expectations better than application of charitable trust rules to easement amendment decisions.

But, how is the public interest protected if there is no charitable trust arising from donated conservation easements? If conservation easement donations are not restricted charitable gifts, what then ensures that land trusts will hold their unrestricted, unencumbered rights for land conservation purposes? Why don't land trusts just sell off their assets?

A. Evolving conservation easement amendment standards.

Out of the tens of thousands of conservation easements that now exist, only a handful of conservation easement amendment abuses have been documented. In the absence of empirical evidence of abusive conservation easement amendments by easement holders, the critical questions become: Do the current constraints on conservation easement amendments adequately protect the public interest? And, even if the current system has flaws, may such flaws be addressed at a lower social cost than the cost of grafting the charitable trust rules onto a statutory system of private property rights?

Conservation easement law today is clear that easement holders may not amend or terminate their conservation easements freely and voluntarily without serious consideration of the ramifications of such actions on the public interest. Current legal constraints on easement holders who are considering conservation easement amendments include conservation easement enabling legislation; easement holder governance documents; and laws governing non-profit management. Easement holders who disregard these constraints face legal actions that may arise in many forms, such as breach of fiduciary duties, fines and penalties levied by the Internal Revenue Service, and audits by state officials charged with oversight of non-profit organizations.[45] These penalties are potentially very severe, especially for small nonprofit land trusts whose existence often largely depends on community good will and sterling public

[45] Note the important distinction between (i) state (attorney general) oversight of easement holders' *general* compliance with non-profit laws and duties, and, (ii) as required under the charitable trust framework, state (attorney general) review of how easement holders actually administer and interpret the *specific* conservation rights conveyed to them in individual conservation easement transactions.

reputations, and they serve as substantial deterrents to cavalier amendments of conservation easements.

In addition, easement holders must consider the serious extra-legal consequences of inappropriate conservation easement amendment decisions. Most easement holders are non-profit organizations or public agencies that are directly accountable to their members and funders, or to the electorate. Such organizations cannot disregard public opinion in their conservation easement amendment decisions. If they do so, they will lose critical public support and suffer potentially withering negative publicity. Such extra-legal sanctions can result in dramatic shifts in organizational policies and procedures to protect the public interest. In 2003, for example, a series of articles in *The Washington Post* about various conservation initiatives at The Nature Conservancy effectively led to reforms of many of the Conservancy's practices and procedures to ensure transparency in operations and compliance with public interest laws.[46]

Similarly, as easement holders' experience with conservation administration has ripened over the years, the private land trust community has recognized the need for development of standardized procedures to deal with difficult conservation easement administration issues, including procedures to deal with conservation easement amendments, so that the public interest responsibilities of easement holders are thoroughly respected.[47] The Land Trust Alliance, for example, recently convened a working group of experienced attorneys, land trust professionals, and academics to consider development of comprehensive conservation easement amendment policies, procedures, and suggested practices to protect the public interest. Furthermore, serious efforts are underway to develop conservation easement defense and enforcement insurance policies. A significant beneficial by-product of these efforts, if successful, is likely to be greater standardization of conservation easements practices across the nation, including presumably, development of standards to govern amendments. If such efforts to standardize conservation easement practice are successful, the courts if faced with an action alleging an improper conservation amendment could be expected to refer to these standards in weighing whether an easement holder acted arbitrarily, capriciously or contrary to the public interest when amending a conservation easement.

Thus, conservation easement standards and practices and easement holder governance documents are steadily evolving to ensure that the public interest is robustly protected in conservation easement amendment decisions. The law will inevitably follow suit. A dramatic example of this evolutionary process occurred recently in Tennessee in the context of legal standing rules to challenge conservation easements. In *Tennessee Environmental Council, Inc. v. Bright Par 3 Associates*,[48] the Tennessee Court of Appeals ruled that all citizens in the state had

---

[46] *See, e.g.*, David B. Ottaway & Joe Stephens, "Nonprofit Land Bank Amasses Billions," and "How A Bid to Save a Species Came to Grief," and "Nonprofit Sells Scenic Acreage to Allies at a Loss," The Washington Post, May 4-6, 2003, at http://www.washingtonpost.com/wp-dyn/nation/specials/natureconservancy/. In response to these articles and to the attention the articles garnered in Congress, The Nature Conservancy instituted a series of reforms in governance and oversight, many of which are summarized on the website entitled, "Summary of Actions Taken to Strengthen Governance, Policies and Procedure June 2003 – May 13, 2005" located at http://nature.org/aboutus/leadership/art15473.html (visited March 16, 2006).

[47] See Section III, *supra.*

[48] 2004 WL 419720 (Tenn. Ct. App. March 8, 2004). *See* Jay, *Third Party Enforcement of Conservation Easements*, at note 6, *supra* (text accompanying notes 144 – 157 therein) for a discussion of the background and

standing to enforce conservation easements for public benefit. Within months, however, the Tennessee legislature amended its conservation easement statute to overrule this decision by limiting the pool of parties with standing to enforce conservation easements to:

> "(1) an owner of the interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having [an express] third-party right of enforcement; (4) the attorney general if the holder is no longer in existence and there is no third-party right of enforcement; or (5) a person authorized by law."[49]

Such give-and-take between the courts and legislatures, suggests that conservation easement amendment laws will also evolve to reflect public interest concerns.

While mistakes will be made before the law is fully developed, and while the public may be harmed in individual cases by the inappropriate amendment of some easements, the evolutionary processes at work in conservation easement law should be respected, just as the evolution of new laws and remedies, in general, has been respected throughout our legal history. As Professor Barton Thompson has written with respect to changes in land conservation laws,

> [C]ourts and legislatures may want to develop new doctrines for evaluating over time whether particular conservation easements remain in the public interest . . . . Perpetual conservation easements raise unique issues, calling for doctrines that more finely and appropriately balance the social importance of conservation, the need for adaptive management as conditions and knowledge change, and the legitimate interests of future generations.[50]

Applying ancient common law precepts underlying our charitable trust laws to statutory conservation easement property rights regime may forestall the development of new, more appropriate legal doctrines that precisely address the tension between perpetuity and flexibility in conservation easements. Instead of grafting common law charitable trust principles onto this new system of "private ordering" of public conservation rights, the law of conservation easement amendments should be given time to develop on its own. In this area of law, patience is likely to be a virtue.

B. Possible legislative reforms.

If it is simply unrealistic to expect patience in policy makers, other alternatives exist that avoid the complications of applying common law charitable trust principles to the statutory conservation easement property rights system. Conservation easement enabling acts could be revised to clarify the public interest criteria that must be respected by easement holders, third

---

disposition of this case. Note the legislature's express limitation on the Tennessee Attorney General's standing to enforce conservation easements.

[49] Jessica E. Jay, *Third Party Enforcement of Conservation Easements*, 25(1) **Exchange** 24, 27 (Winter, 2006) (citing Tenn. Code Ann., Title 66, Ch. 9, Pt. 3 §66-9-303, 307).

[50] Thompson, *The Trouble with Time*, at 619, note 25, *supra*.

parties, and the courts in any conservation easement amendment procedure, and statutory and regulatory reforms could be imposed to implement greater public accountability for easement holders.

1. Codify conservation easement amendment standards.

Instead of requiring judges to determine on an *ad hoc* equitable basis whether a conservation easement has become "impossible" or "impracticable" to enforce, legislatures (or agencies that have been delegated rule-making authority by legislatures) could define broad standards to govern conservation easement amendments. Instead of asking judges to decide the proper calculus of social costs and social benefits in determining whether a conservation easement should be amended, legislatures or rule-making agencies could provide guidance to the courts about important public interest criteria to consider.

Statutory enactment and regulatory rule-making procedures will guarantee broad public input into the development of such criteria, which is lacking, of course, in conservation easement amendment procedures under the charitable trust framework. Furthermore, a set of administrative rules or codified statutes will promote predictability and certainty in the easement amendment process for both easement holders, affected third parties, and the general public. Unlike easement amendment decisions made by judges acting in equity, the parties involved in conservation easement amendment decisions will know in advance the public interest criteria that they have to meet before a conservation easement may be amended.

By contrast to the charitable trust approach, a major benefit of proposing legislative and administrative rules to govern conservation easement amendments decisions is that the same rules and procedures for amendments could apply to donated, exacted, purchased, and regulatory easements. If the legislation is drafted inclusively, amendments of conservation easements held by state and local agencies could be considered under the same criteria that would apply to easements held by non-governmental land trusts. Potential problems associated with disparate treatment of conservation easement amendments, based on how the easement was created, therefore may be reduced.[51]

2. Easement Amendment and Termination Review Boards.

Another possible statutory and regulatory reform might be to provide for the establishment of Conservation Easement Amendment and Termination Review Boards under the purview of state attorneys general, as supervisors of charitable organizations (or under the authority of other state agencies, as appropriate). Such review boards could be set up to review easement amendments and terminations that are proposed by easement holders to ensure that such plans serve the public interest.

[51] State-based reforms, arising either in the legislature or the state courts, will not solve the problem of how to address the easement amendment and termination issues that may arise with respect to the growing federal interests in conservation easements. Federal legislation or regulatory reform will almost certainly be necessary to address these problems.

Review boards appointed by attorneys general or governors or other designated officials, should include representatives from the easement holder community, including land trusts and easement holding agencies in state government; the attorney general's office, and citizen delegates. Such broad review board composition would allow peer review of easement holder practices, provide oversight by the attorney general's office, and institutionalize direct public input into easement amendment decisions. A widely representative review board also minimizes the possibility of undue influence of special interests in easement amendment decisions that may plague charitable trust proceedings.[52]

Judicial review of review board decisions would be available, just as review of other administrative decisions is available under state law. The burden on the courts would be reduced, however, compared to conservation easement decisions that are made under charitable trust law. Because the review boards would make factual determinations in any disputed conservation easement amendment decision, judges would be relieved of burdensome and lengthy fact-finding duties that are necessary in charitable trust determinations. The scope of judicial review will be limited in most cases to whether the review boards appropriately applied the law (i.e., the public interest criteria defined by regulation) to the facts, and whether the findings of fact were arbitrary and capricious.

As with other regulatory boards, Conservation Easement Amendment and Termination Review Boards could meet at scheduled times -- from once a month to once a year depending on demand -- after public notice and with the possibility of public testimony, to inform Review Board deliberations. Such public participation will enhance the transparency of conservation easement amendment decisions.

3. Costs of reform.

The short-term costs to easement holders and to the public that are associated with changing the conservation easement laws in all fifty states or with implementing a regulatory review process would be very high. Moreover, Treasury Regulation 1.170A-14(g)(6) would also have to be revised if state statutory and regulatory definitions of "perpetual" conservation easements does not coincide with Treasury Department or Congressional interpretations of the term.[53]

It is possible that such costs may be prohibitive in some states. Accordingly, in these states there is significant appeal to allowing easement holders to develop standards and practices over time, and thereby letting legal standards governing conservation easement amendments evolve slowly. Other states may determine, however, that the long-term benefits may exceed the costs associated with *ad hoc* conservation easement amendment determinations made under charitable trust rules or other approaches. In these states, presumably, the costs of codification or regulation will be manageable. Regulatory review boards, for example, are common features

[52] See Section IV.B.4., *supra*.

[53] This regulation currently provides that to qualify for a charitable income tax deduction easements may be terminated "by judicial proceeding" as a result of changed conditions. A simple amendment of this regulation may be possible to allow extinguishment "by judicial proceeding, *or after appropriate administrative review to protect the public interest*, as may be authorized by state law . . . ."

of administrative law. Models on which to base conservation easement review boards therefore abound, which will lower the costs of implementation.

VI. Conclusion

Before The Washington Post's stories on The Nature Conservancy, before Congressional hearings on allegedly abusive land trust practices, and before the rising tide of academic critiques of land trusts and conservation easements, I wrote a paper entitled "Rogue Land Trusts, Abused Conservation Easements and Regulation of the Private Land Trust Movement." A major purpose of this paper was to compare the explosive growth and development of the land trust movement, and its use of conservation easements, with the growth of many other industries that grew up around innovative technologies, products, or ideas.[54] In that paper, I noted that:

> As an industry matures, it typically "moves through four distinct phases: innovation, commercialization, creative anarchy, and rules." During the "innovation" phase, industrial pioneers operate without formalized rules because no rules are needed . . . . The public and government tend not to call for regulation because new industries are so small and apparently so insignificant.
>
> Once others discover the new industry and begin to commercialize it, however, anarchy reigns in the absence of any formal rules and regulations. Of course, commercialization and anarchy cannot peacefully co-exist. Anarchy – a state of lawlessness without well-defined property rights and codes of responsibility – undermines stability in markets and in public expectations. As a result, strong demand arises for rules and regulations, including substantive penalties for disobedience, both from within industries themselves within and from the outside government and public.[55]

Applying this rubric, it is now clear that the land trust movement and conservation easement law have matured to the "rules" phase of the industrial cycle. *Everyone* wants to regulate the private land conservation field, to a greater or lesser degree, including Congress, attorneys general, academics, and the land trusts themselves.

Although conservation easement law is maturing, it is very far from maturity. In the midst of this period of ferment, overreaction to perceived problems and shortcomings in the land conservation field is easy. Adopting a disciplined and measured response to these challenges is far harder. Yet, if our experiment with private land conservation for the public benefit, based as

---

[54] The paper applies the descriptive model of industrial cycles developed by Debora L. Spar in *Ruling the Waves: Cycles of Discovery, Chaos, and Wealth from the Compass to the Internet* (New York: Harcourt Inc., 2001). Spar's examples include the rise of industries based on navigation systems, the telegraph, radio, satellite television, encryption technology, software, and online music.

[55] Andrew C. Dana and Susan W. Dana, Rogue Land Trusts, Abused Conservation Easements, and Regulation of the Private Land Trust Movement, White Paper at 10 – 11 (2005, updated draft) (citing and quoting Spar, at 10 – 18, note 59, *supra*) (copy in author's files).

it is in private property law, is to have any chance of success, such a disciplined measured response is needed. Overbearing regulation and significant deviation from the legal underpinnings of conservation easement law in real property doctrines should both be avoided.

In short, the existing laws needs time to adapt to the innovations in the private land conservation industry. We are not in a crisis, which calls for radical reshaping of conservation easement law doctrine. If given such time, the property laws governing conservation easements will inevitably evolve in ways that are likely to be unpredictable, uneven, and maybe even messy. Eventually, however, the property law of land conservation will adapt to reflect the public's interest in fostering *flexible* and *perpetual* land and resource protection.

What an exciting prospect!

Appendix A

Land Trust Procedural Steps for Evaluating Complex Conservation Easement Amendment Requests:

When faced with a complicated conservation easement amendment question, the following procedure may be followed by Land Trust staff to ensure that the public interest is served by entertaining the amendment request.

1. **Develop a written summary of the scope of the Amendment requested.**
2. **Conduct a preliminary analysis of whether the request meets a land trust's amendment policy. Two threshold questions for land trust staff:**
    a. Does the proposal increase, or at least have no effect on, the land conservation goals of the original easement?
    b. Will the proposal confer a prohibited private benefit or result in prohibited inurement to a land trust insider?
    c. If preliminary answers to these questions are that conservation will be enhanced (or not harmed) and no private benefit or inurement is suspected, proceed to next step.
3. **Draft the Conservation Easement Amendment**.
    a. Develop the amended conservation easement in a form that best meets the goals and objectives of the landowner and the land trust in pursuing amendment.
    b. Include statements of landowners' ratification of original conservation purposes.
    c. In the Recitals, summarize the reasons for amendment and list the specific conservation enhancements associated with the amendment. For example:
        i. New lands or habitats or viewsheds to be protected;
        ii. Reductions in levels of development; and
        iii. Elimination of ambiguities in original easement.
4. **Closely compare the amended easement with the original easement.**
    a. Develop a matrix which lists, side-by-side, all protected Conservation Values in the original easement and all of the Conservation Values protected by the amended easement.
    b. Submit the original and amended easements and the matrix to a review team composed of a naturalist, an independent appraiser, and a land trust's attorney.
    c. Convene the team to discuss the specific changes to the original easement, asking:
        i. Are there conservation values that are lost or diminished?
        ii. Do the changes result in more overall land conservation, but at the expense of certain restrictions in the original easement?
        iii. If so, is weakening these specific restrictions compromise the goals and purposes of the original easement?
        iv. Even if the changes result in net land conservation gains, what are the likely financial benefits to the landowner?
            1. Are there significant cash flow benefits?
            2. Are there significant property value appreciation benefits?

v. Does the amended easement eliminate or reduce ambiguities or arcane language in the original easement, thereby enhancing enforceability?
vi. How does the public benefit from the amendment?

d. Develop a rough "scoring" system to track conservation benefits v. conservation losses and financial benefits v. financial losses.
e. The detailed team analysis fosters comprehensive review and discussion of the public v. private benefits and costs. If the team concludes that the amendment enhances conservation and confers no prohibited private benefit or inurement, go to Step 5.

5. **Revise Amended Easement per analysis in Step 4 and obtain written expert reports for land trust files.**
   a. *Naturalist:* The naturalist should write a letter report to the land trust memorializing the enhancements to, or lack of effect on, the conservation goals of the original easement.
      i. This can be an analysis of the net conservation gain from an amendment, as long as the conservation values of the original easement are not compromised.
   b. *Appraiser:* The appraiser should write up a limited opinion (typically not a full appraisal) concluding that changes to the original conservation easement will not result in significant private benefit or prohibited inurement under the pertinent IRS standards.
      i. The financial analysis should consider whether the conservation values in the original easement for which any tax subsidies were granted are compromised.
         a. For example, if those subsidies were awarded for a particular conservation purpose and landowner realizes significant financial gain in the amended easement from relaxation of restrictions designed to protect that purpose, the amendment may not be defensible.
      ii. Note: If the Amendment results in substantial loss of value for the landowner, a new tax deduction may be available.
         1. Landowner should obtain a separate appraisal to support additional conservation easement tax deduction.
   c. *Land trust attorney*: The land trust's attorney should write a comprehensive memo reviewing the proposed amendment and concluding that the amendment comports with the land trust's amendment policy and serves the public interest by:
      i. Increasing (or at least not diminishing) conservation,
      ii. Avoiding conferral of private benefit; and
      iii. Strengthening the enforceability of conservation easements for the public benefit by eliminating ambiguities and by updating arcane language to modern standards.