

AN EMPIRICAL STUDY OF MODIFICATION AND TERMINATION OF CONSERVATION EASEMENTS: WHAT THE DATA SUGGEST ABOUT APPROPRIATE LEGAL RULES

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The acquisition of conservation easements by nonprofit organizations (NPOs) over the past twenty-five years has revolutionized the preservation of American land. Recently, however, legislatures, courts, practitioners, and commentators have debated whether and how conservation easements should be modified and even terminated. The discussion has almost always been on a theoretical level without empirical grounding and has sometimes generated much heat but little light. The discussion has lacked the necessary empirical context to allow legislatures and courts to thoughtfully develop resolutions to these issues free from sloganeering and posturing.

This Article provides and analyzes a previously uncollected dataset that offers guidance on the appropriate rules of law for conservation easement modification. It examines policy goals in light of the data to suggest various modification rules that would be more effective than current practice. The dataset represents a significant sample of easement modifications that have been made

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during a six year period (2008–2013) and indicates several findings: first, modifications have actually been taking place, despite claims that conservation easements are “perpetual,” apparently indicating that NPOs need flexibility in at least some areas; second, most of the changes have been “minor” and have been either conservation neutral or conservation positive, though one would expect pressure for more significant alterations over time due to shifts in the environment and human needs; third, there is a range of types and degree of modifications to this point, suggesting that there should be a spectrum of procedural and substantive requirements for the different varieties of modifications; and last, a mandate for a stand-alone, state registry of conservation easements and modifications would allow for improved policymaking.

The Article suggests that a doctrine that requires different procedures and substantive rules for various categories of modifications—a sliding scale—may yield the best, policy-based results. The work also identifies and analyzes existing doctrines—federal tax law, specific state statutes, charitable trust doctrine, standing rules, and director liability—that would need to be altered or clarified to adopt effective modification rules.

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INTRODUCTION

Conservation easements have revolutionized land preservation in the United States over the past thirty-five years. These interests restrict landowners from altering the natural, environmental, and ecological features of their property and have been obtained and held by nonprofit organizations (NPOs) to permanently preserve millions of acres across the country.¹ The perpetual, cost-effective, and nongovernmental attributes of conservation easements bring significant benefits to preservation strategy and execution.

The greatest strength of conservation easements—perpetual protection of land—also presents, at times, their most significant challenge.² Sometimes circumstances may require alteration of an easement to a small or major degree rather than perpetual enforcement of the original terms. For example, relatively minor changes in conservation easements may be needed to correct errors and glitches that can arise in any land transfer instrument. Moreover, the easement document may need to be amended to clarify the intent of the parties when the original drafting is unclear. More significantly, the use of land historically has shifted based on changes in the natural world and evolving human conditions. This experience raises the questions of whether and

¹ Our database and this Article focus on NPO-held conservation easements. Governmental entities are also empowered to hold conservation easements, and these easements may be acquired by government by donation and by purchase for consideration (full consideration or bargain sale). See Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467 (2013) [hereinafter Korngold, *Governmental Conservation Easements*]; ALICO, INC., CURRENT REPORT (FORM 8-K) (Sept. 6, 2012), http://www.sec.gov/Archives/edgar/data/3545/000089109212005222/e49824_8k.htm (showing sale of perpetual conservation easement on 11,600 acres in Florida to U.S. Dept. of Agriculture for \$20.7 million).

² As discussed below, donated easements are typically perpetual because of Internal Revenue Code requirements. See *infra* Section IV.A.1. Moreover, under enabling statutes, there is often a presumption of perpetuity unless the parties otherwise provide. See UNIF. CONSERVATION EASEMENT ACT § 2(c) (UNIF. LAW COMM'N 1981). Some conservation easements, often involving governmental rather than NPO holders, might have limited durations. See, e.g., *Long Green Valley Ass'n v. Bellevalle Farms, Inc.*, 68 A.3d 843 (Md. 2013) (discussing an agricultural easement valid only as long as farming is feasible), *aff'g* 46 A.3d 473 (Md. Ct. Spec. App. 2012); see News Release, U.S. Dep't of Agric., USDA to Provide \$332 Million to Protect and Restore Agricultural Working Lands, Grasslands and Wetlands (Mar. 31, 2015), <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/pr/newsroom/releases/?cid=nrcseprd334218> (describing USDA program of thirty year easements).

how perpetual conservation easements should be modified or even terminated by future generations in light of a dynamic ecology and new human needs.

The issue of conservation easement alteration has been debated over recent years by courts, legislatures, the Internal Revenue Service, practitioners, and commentators. Some maintain that conservation easements must be protected in perpetuity, with modification of the exact terms of a given easement permitted only under extreme conditions and subject to strict, if not onerous, procedural guidelines.³ Others, however, believe that a more flexible approach to easement terms may be needed in order to respond to routine errors and to emerging environmental and human conditions.⁴ Supporters of flexibility would allow modifications only if the NPO continues to administer the easement within the overall terms of its environmental mission.⁵ This Article focuses on the issue of consensual modification or termination, where the NPO holding the easement would agree with the fee owner of the burdened land to amend or end the easement. The parties themselves would set the terms of the modification or termination as well as the amount of consideration that would change hands (most likely a payment by the fee owner to the easement holder where the fee rights are enhanced by the release of the restrictions).⁶

³ See *infra* Section II.G.1

⁴ See *infra* Section II.G.2

⁵ See *infra* note 80 and accompanying text

⁶ A conservation easement could also be modified or terminated without consent of all parties. It could be altered by one of the parties acting unilaterally, perhaps on the theories of violation of public policy, changed conditions, or relative hardship. 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, 1077–1080 [hereinafter Korngold, *Contentious Issues*]. The easement could be terminated involuntarily, where government takes it, and perhaps the underlying fee interest, through eminent domain. See N.Y. ENVTL. CONSERV. LAW § 49-0307(1)(c) (McKinney 2015) (allowing modification by eminent domain); 32 PA. STAT. AND CONS. STAT. ANN. § 5055(d) (West 2015) (permitting eminent domain taking of conservation easement); GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES 268–71 (2d ed. 2004) [hereinafter, KORNGOLD, PRIVATE LAND USE ARRANGEMENTS]. The conservation easement could be terminated by operation of law if the NPO holder goes bankrupt See Cameron Johnson, Note, *Perpetuating Perpetuity*, 31 UTAH ENVTL. L. REV. 437 (2011) (describing the bankruptcy of The Environmental Trust, Inc., a nonprofit corporation that held conservation easements). If the easement is not considered to be a “charitable

The purpose of this Article is not to add more heat to this already tendentious debate. Rather, it is our view that too often the discussion has taken place in a vacuum, with arguments about “modifications” and “amendments” being mere legal and philosophical abstractions. For this Article, the authors developed an empirical dataset of *actual* amendments to conservation easements made by a significant sample of land trusts (i.e., NPOs with the mission of land preservation, primarily through ownership of conservation easements and fee interests as well)⁷ during the six-year period of 2008 to 2013. We have then classified these easement amendments by type, which yielded nine categories of consensual easement modifications.

We believe that this data provides essential context for meaningful discussion and action on easement modification and termination. Hopefully, this data can inform and contextualize the debate over whether amendments and changes in easements should be permitted, in what type of circumstances, and pursuant to what procedures and substantive standards. Furthermore, the data might prove helpful to legislatures and courts on how to approach the variety of modification issues, now and going forward.

We reach four conclusions from our dataset. First, despite any claims that conservation easements must remain perpetual and unaltered, modifications are actually currently taking place. Changes are part of the reality of conservation easements. This seems to indicate that land trusts administering conservation easements require at least some flexibility to achieve their missions. Second, so far—in the comparatively early years of use of conservation easements—most of the changes are self-described by the parties (typically the easement holders) as what might be called “minor.” Importantly, it appears that the modifications usually have a neutral or net-positive conservation effect. The alterations are typically depicted as involving correction of the original easement, often with respect to the legal description of the property. There have been amendments that increase the size and scope of the easement restriction, but there have been some

asset,” then in case of bankruptcy it could perhaps be sold to the fee owner thus relieving the fee owner of the restriction. See Reid K. Weisbord, *Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization*, 10 BERKELEY BUS. L.J. 305, 311–13 (2013).

⁷ On land trusts, see RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* (2003).

amendments that reduce the extent of the conservation restriction and thus benefit the fee owner. We would expect that the pressure for more substantial amendments will increase over time as ecological conditions and human needs evolve. Third, the data already indicate a range of easement modifications—from supposed scrivener errors to increased fee owner rights. This in turn suggests that a “one-size-fits-all” modification procedure may not be optimal to achieve conservation values, efficiency gains, and public policy goals. Rather, a jurisdiction might prefer a range of procedures depending on the category of modification in question and underlying policies and objectives. For example, for minor corrective actions, it may be sufficient to have a process that adequately memorializes the change but does not require the NPO holder to expend significant funds obtaining approvals. A jurisdiction might choose, however, to require greater process, stakeholder involvement, and substantive standards for more significant alterations or termination. Fourth, the state’s formulation of public policy with respect to land conservation through easements likely would be improved by achieving transparency concerning all conservation easements and executed amendments. This could be accomplished by requiring the recording of such instruments and the creation of a separate recording index for them.

Section I of this Article provides background on conservation easements necessary to understand our data set and ramifications; it defines conservation easements and how they operate, compiles the best available data on the number of conservation easements and acreage, and examines the policies favoring conservation easements and the concerns with these interests. Section II develops various scenarios where pressure for modification or even termination of the original conservation easement may develop. These scenarios are drawn from our data set, case law, reports, and some hypotheticals. The Section also examines the competing perspectives on whether modification should be pursuant to strict or flexible procedural and substantive rules. Our data set and findings are presented in Section III. It shows the overall number of conservation easements, classifies them into categories, and offers some hypotheses about the data. Section IV develops and critiques the various doctrines that currently limit modification of conservation easement agreements. It suggests that to the extent that decision makers seek to inject flexibility into

easement instruments along the lines that the data indicate, these doctrines need adjustment. Restrictions on flexibility include various provisions in the Internal Revenue Code deduction for conservation easements, some specific state statutory provisions on conservation easement modification, the automatic application of charitable trust law and *cy pres* to all conservation easements, third party standing in neighbors to enforce easement agreements, liability concerns for directors (or trustees) of NPOs, and organizational concerns of NPOs.

I. BACKGROUND ON CONSERVATION EASEMENTS

Conservation easements are restrictions on land that bar current and successor owners from interfering with the properties' natural, ecological, open, or scenic features.⁸ Usually, easements set out a general promise not to interfere with natural attributes and to maintain the land in its current environmental state. The documents typically include specific clauses prohibiting building of additional structures and roads or removal of timber or natural growth, and may also include affirmative obligations such as removal of non-native species.⁹ Conservation easements do not

⁸ See UNIF. CONSERVATION EASEMENT ACT, *supra* note 2, at § 1(1); see generally RUSSELL L. BRENNEMAN, PRIVATE APPROACHES TO PRESERVATION OF OPEN LAND (1967); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 633 (1984) [hereinafter Korngold, *Conservation Servitudes*]; Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 L.S.U. J. ENERGY L. & RESOURCES 101 (2014) [hereinafter Korngold, *New Energies*]; Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 29 WIS. INT'L L.J. 584 (2011) [hereinafter Korngold, *Globalizing Easements*]; 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, 1525–27 (2007) [hereinafter Korngold, *Future Generations*]; James Boyd, Kathryn Caballero & David R. Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 2009 (2000); Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119 (2010); Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012) [hereinafter Jay, *Perpetual Not Forever*].

⁹ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 469–70. For affirmative obligations under conservation easements, see UNIF. CONSERVATION EASEMENT ACT, *supra* note 2, at §1(1) (defining a conservation

typically grant access to the public.¹⁰ The terms of a conservation easement can be targeted to accomplish an organization's specific goals. Thus, in recent years, some conservation easements have required active farming of the subject property in order to maintain the agricultural tenor of an area.¹¹

In order to resolve doubts as to validity under the common law, statutes have been passed in the various states to specifically authorize conservation easements.¹² While there is variation, common features of the statutes include: only NPOs or governmental entities can hold easements; easements are usually held "in gross"—the easement holder does not need to own nearby land directly benefitted by the easement; easements are typically perpetual, with the Internal Revenue Code making that a requirement for deductibility; and conservation easements bind successor owners of the burdened property.¹³

easement as "imposing limitations or affirmative obligations" to preserve real property); *id.* §4(5) (upholding conservation easements even though they may impose affirmative obligations); *id.* at *Commissioners' Prefatory Note* (giving the examples of a maintenance obligation and affirmative actions to preserve the property as included within the concept of a conservation easement); ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 76–77 (2d ed. 2005) (describing affirmative rights granted to easement holder, such as land management and right to conduct scientific studies); *id.* at 223–24 (describing affirmative obligation of fee owner to maintain a building subject to a preservation easement); *id.* at 339 (sample easement provision place affirmative duty on fee owner to mow and perform related activities on open fields to preserve scenic views); Peter Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 *NATURAL RESOURCES J.* 373, 399 (2001) (describing affirmative obligations such as fencing and development of a timber cutting plan).

¹⁰ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 470. A limited right of access for the purpose of inspection to determine compliance may be granted to the easement holder. *Id.* at 470 n.6.

¹¹ See Matt A.V. Chaban, *Amid Preservation Efforts, Farmland in the Hamptons Goes for Other Uses*, *N.Y. TIMES* (Aug. 4, 2014), <http://www.nytimes.com/2014/08/05/nyregion/amid-preservation-efforts-farmland-in-the-hamptons-goes-for-other-uses.html>; Lindsey Lucher Shute & Benjamin Shute, *Keep Farmland for Farmers*, *N.Y. TIMES* (Sept. 30, 2013), <http://www.nytimes.com/2013/10/01/opinion/keep-farmland-for-farmers.html>.

¹² See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 470–71. The Uniform Conservation Easement Act was initially approved in 1981 and currently has been adopted by twenty-one states. UNIF. LAW COMM'N, *LEGISLATIVE FACT SHEET—CONSERVATION EASEMENT ACT* (2015), [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation Easement Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation+Easement+Act) (last visited Oct. 21, 2015).

¹³ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 470–71.

A. Conservation Easement Data

There is only limited data on the number, acreage, holders, and location of conservation easements held by both NPOs and governments. Current sources of data include the Land Trust Alliance's censuses of land trusts (a voluntary survey) and the Form 990 (the annual tax return filed by NPOs under the Internal Revenue Code). Moreover, in 2011, a consortium of NPOs and federal agencies launched the National Conservation Easement Database (NCED) to gather, on a voluntary basis, information about conservation easements.¹⁴ The NCED does not include easements that are not currently in digital format and it estimates there are an additional 12,182 easements, covering over 2 million acres, that have not been entered its database for this reason.¹⁵

Table 1 sets out the most recent NCED data. This is only an incomplete picture, as the reporting is voluntary; thus it does not include all conservation easements held by all NPOs and governmental units.¹⁶

¹⁴ See NAT'L CONSERVATION EASEMENT DATABASE, <http://nced.conservationregistry.org> (last visited Oct. 21, 2015); *Easement Database Is a Big Boost for Conservation Effort*, THE TRUST FOR PUBLIC LAND (Oct. 24, 2011), <https://www.tpl.org/media-room/easement-database-big-boost-conservation-effort>.

¹⁵ See NAT'L CONSERVATION EASEMENT DATABASE, USER'S GUIDE 8 (2011), http://conservationeasement.us/pdf/NCED_Users_Guide_6_8_2011.pdf.

¹⁶ One of the authors has argued for increased legislative action to increase data collection. See Korngold, *Contentious Issues*, *supra* note 6, at 1070.

Table 1. Conservation easement number and acreage held by governmental entities, NPOs and other type of easement holders.¹⁷

Easement Holder	Count	Acres	Acres as Percentage of Total
Non-Governmental Organization (including NPOs)	36,716	9,576,831	40.48%
Private	75	44,368	0.19%
Federal	27,299	5,034,823	21.28%
Jointly Held	1,648	979,953	4.14%
Local Government	15,694	1,140,130	4.82%
Native American	6	345	0.00%
Regional Agency	281	42,387	0.18%
State	30,761	6,330,211	26.76%
Unknown Easement Holder	1,738	508,351	2.15%
Grand Total	114,218	23,657,399	100.00%

The available data show that there has been tremendous and continued growth in the number of conservation easements over the years. The number of acres under conservation easement reported by members of the Land Trust Alliance grew from several thousand in 1985 to 8.8 million in 2010.¹⁸

B. *The Competing Policies*

Various public policies support the validation and continued enforcement of conservation easements. At the same time, there are some policy concerns about conservation easements that become more acute with both the passage of time and changes in ecological conditions and public needs.

¹⁷ Source: NAT'L CONSERVATION EASEMENT DATABASE, <http://conservationeasement.us> (last visited July 2015). Percentages are calculated to two decimal points. At three decimal points, Native American-held conservation easements equal 0.001 percent.

¹⁸ See LAND TRUST ALL., 2010 NAT'L LAND TRUST CENSUS REPORT 5 (2011), <https://web.archive.org/web/20120122083920/http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report>.

1. *Values Favoring Conservation Easements*

a. *Efficiency*

Conservation easement transactions allow parties to engage in market transfers for their mutual benefit. Fee owners can convey their development rights in exchange for cash or valuable tax benefits, and NPOs can acquire veto rights on development which they desire.¹⁹ Subsequent buyers of the burdened land who take with notice of the easement are presumed to consent to it and can adjust their offers down to reflect the easement's limitations on the property's use.²⁰ Such market-based, consensual deals can yield an efficient allocation of land resources. An NPO can conserve a property by obtaining an easement rather than spending more to acquire a fee that the NPO actually does not need to achieve its preservation goal, and the fee owner can liquidate development rights it does not wish to retain while continuing to enjoy aspects of the property, such as using it as a residence.²¹

b. *Property Rights*

Not only do conservation easements serve efficiency goals, they also are consistent with the concepts of freedom of contract, respect for property rights, and the notion that people can freely dispose of their property as they see fit.²² Owners of land are entitled to seek personal satisfaction through their free choices about their land, and so decisions to create a conservation easement should be respected. The law should trump such consensual arrangements only in rare circumstances.

c. *Private Action*

When an NPO holds the easement, there may be additional

¹⁹ See Korngold, *New Energies*, *supra* note 8, at 107.

²⁰ See *Zarlengo v. Comm'r*, 108 T.C.M. (CCH) 155, at *10 (T.C. 2014) (stating that, had a purchaser taken possession before the seller recorded a façade conservation easement on the property, the easement would not be binding because the seller did not give actual notice); *McClure v. Montgomery Cty. Planning Bd.*, 103 A.3d 1111, 1118 (2014) (purchaser of property subject to properly recorded forest conservation easement has record notice of it).

²¹ While state and local land trusts in 1990 held approximately the same amount of acres (300,000) in fee and under easement, in 2010 they held approximately four times as much land under conservation easement (approximately 8 million acres versus 2 million acres). LAND TRUST ALL., *supra* note 18, at 5. Easements appear to be attractive to the parties.

²² See Korngold, *Contentious Issues*, *supra* note 6, at 1056.

advantages over governmental conservation. In such cases, the cost of acquisition payments, monitoring, stewardship, and enforcement is shifted from government to the NPO.²³ NPOs may be able to act more nimbly in acquiring and managing an easement than governmental entities. Moreover, conservation easements held by NPOs are created by consent of the fee owner, while some governmental conservation efforts, such as zoning, are coercive.²⁴

d. *Conservation Values*

Finally, the legal validation and popularity of conservation easements represent a new American attitude towards land that favors balancing preservation against development rather than merely favoring full development.²⁵ Conservation easements have been lauded for yielding increased social and economic value, through species preservation, remediation of the atmosphere, watershed protection, retention of ecological capital, protection of food security, psychic benefits, and more.²⁶

2. *Concerns with Conservation Easements*

a. *The Tax Expenditure*

Significant federal, state, and local tax expenditures are often involved in the creation and holding of conservation easements by NPOs. It is legitimate to consider whether the public is getting good value for these subsidies.

A taxpayer receives a federal income tax deduction for a qualifying donation of a conservation easement to an NPO under I.R.C. §170(h).²⁷ Professor Roger Colinvaux reports that the federal income tax deductions for the donation of conservation and

²³ See *id.* at 1055. Note, though, that the tax expenditure is borne by government. See *infra* Section I.B.2.a.

²⁴ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 477–78 (noting that, while there is no acquisition cost with regulation, subsequent litigation may add costs). Zoning imposed against public opposition could also create intangible costs to public morale.

²⁵ See Korngold, *New Energies*, *supra* note 8, at 108.

²⁶ *Id.*

²⁷ See 26 U.S.C.A. §170(h); see generally Kate B. Deal, Note, *Incentivizing Conservation: Restructuring the Tax-Preferred Easement Acceptance Process to Maximize Overall Conservation Value*, 101 GEO. L.J. 1587 (2013); C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1 (2005); Stephen Small, *Real Estate Developers and Conservation Easements*, 19 PROB. & PROP. 24 (2005).

façade easements equaled \$2.18 billion in 2007 and \$1.22 billion in 2008.²⁸ Assuming a tax rate of 35%, this yielded a revenue loss of \$1.19 billion during 2007 and 2008 combined.²⁹ For the period of 2003 through 2008, Professor Colinvaux estimates a tax revenue loss due to conservation and façade easement deductions of \$10.21 billion.³⁰ Table 2 provides information on the extent of conservation easement donations and their percentage of property donations during the period 2003–2012.

²⁸ Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. EVTL. L. 1, 3 (2012). Conservation easement deductions alone totaled \$1.95 billion in 2007 and \$1.18 in 2008. *Id.* at 10. See Korngold, *Contentious Issues*, *supra* note 6, at 1057-58 (discussing tax subsidy and estimating figures). NPOs also acquire easements by purchase rather than gift, in which case there would be no deduction if full consideration is paid. See generally *The Nature Conservancy v. Sims*, 680 F.3d 672 (6th Cir. 2012); *In re Strieter*, No. 14-56980, 2015 WL 2215418 (Bankr. Ct. E.D. Mich. 2015).

²⁹ Colinvaux, *supra* note 28, at 10.

³⁰ *Id.* For criticism of the expenditure, see Richard Rubin, *IRS Cracks Down on Breaks Tied to Rich Americans' Land*, BLOOMBERG, Nov. 8, 2013, <http://www.bloomberg.com/news/articles/2013-11-06/irs-cracks-down-on-breaks-in-land-of-rich-americans>. The federal purse is additionally reduced because the presence of conservation easements lowers the value of land for estate tax purposes. See Korngold, *Contentious Issues*, *supra* note 6, at 1049.

Table 2. Conservation Easement Donation Data³¹

Tax Year	Total Donations	Total Easements Donations	Total Donations Value (in Thousands of Dollars)	Easement Donations Value (in Thousands of Dollars)	Easement Value as Percentage of Total Donations Value
2003	14,273,171	2,407	36,902,794	1,491,924	4.04%
2004	15,878,310	3,365	37,189,160	1,449,210	3.90%
2005	16,465,082	3,439	41,070,632	2,123,184	5.17%
2006	15,682,030	4,674	46,841,245	1,754,164	3.74%
2007	18,599,215	2,647	52,827,286	2,176,391	4.12%
2008	19,478,520	4,554	34,597,290	1,216,043	3.51%
2009	18,371,824	2,205	27,986,691	1,018,173	3.64%
2010	20,508,458	3,241	34,898,507	765,539	2.19%
2011	21,814,286	2,202	38,698,506	694,696	1.80%
2012	22,369,208	1,238	42,913,291	971,276	2.26%

Moreover, some states provide income tax deductions or credits for easement donations.³² Furthermore, the presence of a conservation easement reduces the valuation of real estate, thus reducing the collectable property tax for local and state government.³³ Government must respond by reducing services or increasing taxes on other citizens to cover the shortfall.³⁴

³¹ Source: I.R.S. STATISTICS OF INCOME BULLETINS, Spring 2006, Spring 2007, Spring 2008, Summer 2009, Spring 2010, Winter 2011, Spring 2012, Winter 2013, Spring 2014, Spring 2015, <http://www.irs.gov/uac/SOI-Tax-Stats-SOI-Bulletin-Articles-Index-by-Topic#4>.

³² See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 471.

³³ See Korngold, *Contentious Issues*, *supra* note 6, at 1049.

³⁴ See generally Christopher M. Anderson & Jonathan R. King, *Equilibrium Behavior in the Conservation Easement Game*, 80 LAND ECON. 355 (2004) (discussing tax increases to offset revenue loss due to conservation easement). Some maintain that local government saves money, however, when land is held for open space rather than used for residential development. See Alex Bridges, *Easement Funding Gains Support*, NORTHERN VA. DAILY (Strasburg, Va.), Sept. 4, 2014, <http://www.nvdaily.com/news/2014/09/easement-program-funding-gains-support/>.

b. *Public Process*

While some NPOs follow “best practices” on easement selection, NPOs are not bound to accept conservation easements pursuant to a public land use plan. This could create a patchwork of easements that do not add up to a viable community preservation program.³⁵ Open space and habitat protection is thus established based on the somewhat random decisions of donors and donees, not through a broad-based, predetermined community plan. Moreover, acquisition, stewardship, and other easement-related decisions are made by private organizations, outside of a democratic, public process. Because easements can be held in gross—by organizations not otherwise owning land in the community—the possibility of outside influence over local land use decisions may be exacerbated. While there are benefits to non-governmental ownership and NPO staff and directors are usually dedicated to the public welfare, there may be times where broader public participation would be beneficial.

c. *Class Issues*

There are potential class issues inherent in conservation easements. The effect, albeit not the intent, of these easements can be to create “private large lot zoning,” limiting the building of additional, affordable housing.³⁶ Moreover, even William H. Whyte, an early and highly visible proponent of conservation easements, noted the inherent “muted class and economic conflicts.”³⁷ He suggested that easement donors would be the “gentry” with an interest in natural areas in the countryside rather than accessible open space for parks and playgrounds.³⁸

II. SCENARIOS FOR MODIFICATIONS OF CONSERVATION EASEMENTS

Courts, regulators, and commentators have viewed the perpetuity requirement as a hurdle to the modification of an executed conservation easement, except perhaps in the most extraordinary circumstances.³⁹ It may well be that there will never

³⁵ See Korngold, *Contentious Issues*, *supra* note 6, at 1059–60.

³⁶ See *id.* at 1060.

³⁷ *Id.* at 1061.

³⁸ *Id.*

³⁹ See *infra* Sections II.G.1 (discussing arguments favoring stricter process and substantive rules for modification) & IV.A. (discussing provisions of the Internal Revenue Code and accompanying regulations that limit modification).

be a need or desire for modification of the vast number of conservation easements—only time will tell. But as with other consensual land transfer documents, it is likely that at least some parties or their successors may seek changes at some point in the future. Moreover, because conservation easements are perpetual, potential problems lurking in the documents will not naturally expire with the term of the document. Additionally, with the passage of time and evolution in environmental and social circumstances, there will likely be increased desire to adjust some older conservation easements. Thus, there could well be interest in future modification of some conservation easements.

Set out below are a few scenarios where the parties to an executed conservation easement may seek to alter it. These scenarios are based on examples from our data set, facts of case decisions, reported examples, and hypothetical scenarios that we believe are plausible based on industry developments. The *extent* of an amendment of an easement may range from minor to substantial and the *effect* of an amendment on the conservation goals of a *particular* easement may be positive, neutral, or negative (understandably, many of these terms are value laden and involve judgment calls). At the same time, the amendment of a particular easement may have a different net *effect* on *overall* land conservation values in the community and the overall land conservation program of an NPO; for example, an amendment weakening a particular conservation easement to a tiny extent in exchange for a gift of a new conservation easement in the area arguably will have an overall net positive community and NPO conservation effect.⁴⁰

A. “Correction” of the Original Document

After a conservation easement has been signed, one or all of the parties may require an amendment to the easement to “correct” an error in the original document. This might be a correction in the legal description of the easement or related property. Or it may be a “clarification” of the intention of the parties’ undertakings and responsibilities under the easement arrangement,⁴¹ to resolve an

⁴⁰ Buyouts, however, may raise social equity issues if previously restricted landowners can simply reverse deals by making large payments.

⁴¹ See *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341 (2014) (describing attempts of parties to reach agreement as to whether permission to build “farm” structures in the original easement included a

ambiguous provision or to avoid a potential dispute;⁴² arguably, this could entail substantive changes of the original text of the conservation easement couched as mere “clarification.” Our data set contains examples of easement corrections. Assuming that corrections and clarifications do not alter the parties’ original intent, it seems fair to characterize these amendments as minor.

B. *Specific Changes to Accomplish Overall Intent*

Particularly with the passage of time, a deviation from a specific provision of a conservation easement may be necessary in order to achieve the articulated overall intent of the easement. For example, a conservation easement dedicated to maintaining a property’s natural flora may also bar the use of chemical herbicides.⁴³ In the face of an aggressive invasive species and the failure of natural deterrents, the easement holder might seek easement modification to allow the use of chemical herbicides to protect the land.

C. *Mission Serving Changes*

There are numerous scenarios in which an NPO might be confronted with an offer to modify conservation easements in order to better serve its mission, conservation values, and the community. Consider just these two examples among many.

1. *Conflict with Other Conservation Land*

One actual situation has been reported where the federal government sought to add land to a national wildlife preserve.⁴⁴ All stakeholders were in favor, as it would be a major conservation

winery; arguably such an agreement could be viewed as a modification rather than a simple clarification of the original language).

⁴² See Memorandum from Robert Klein, Chair of the Easement Amendment Working Group, to Members of the General Assembly 3 (Jan. 15, 2013), <http://www.leg.state.vt.us/reports/2013ExternalReports/285680.pdf> (addressing the Vermont General Assembly).

⁴³ See generally *McEvoy v. Palumbo*, CV106002253S, 2011 Conn. Super. LEXIS 2939 (Nov. 15, 2011) (describing a situation where a town owned a conservation easement over property that prohibited owner from disturbing the natural habitat. At the owner’s request, Town Selectmen voted to permit the owner to remove invasive species and to mow a portion of the land. McEvoy, who owned another property in the town, brought suit against the Town and owner to enjoin the mowing on the basis that such an action violated the terms of the easement.).

⁴⁴ See Klein, *supra* note 42, at 3.

advance for the community and the NPO players. The sticking point, however, was that the land was subject to a conservation easement held by an NPO and federal regulations require that the government can only acquire land with clear title. In such a situation, termination of the easement would arguably serve the public interest but was barred by law.

2. *Swaps for Higher Conservation Value Land*

The fee owner of land burdened by a conservation easement may suggest a swap to the NPO holder: the NPO would modify or release the easement in exchange for an easement on other land of the fee owner that has higher environmental value or a greater number of acres.⁴⁵ Alternatively, the fee owner may offer cash for the modification or release of the easement that the NPO could then use to acquire other conservation land that better serves the NPO's mission (perhaps contiguous to other lands it holds, higher ecological importance, etc.). The swap could enhance overall societal conservation goals by protecting more important land and would free less valuable conservation land for development.⁴⁶

Importantly, the swap would serve the mission of the NPO—the holder of the easement. The NPO, utilizing its expertise, would determine the wisdom of the swap in light of its mission and strategy. The conservation easement concept is predicated on the empowerment of non-governmental actors to seek, acquire, and administer easements as private actors. Like all nonprofit decisions, fiduciary duty would apply to swap decisions and the IRS could withdraw the NPO's tax exempt status for violation of nonprofit norms.⁴⁷ But consistent with the conservation easement ethos, NPOs would be free to act according to their mission and

⁴⁵ See generally Klein, *supra* note 42, at 3 (cemetery expansion example).

⁴⁶ See generally Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL L.J. 121, 158–59 (2011) (discussing a situation where a land trust traded a 3.8-acre lot that it held in fee for a 16-acre plot held by a developer. The developer planned a housing development on the 3.8-acre plot, despite a restriction requiring the land to be open to the public. The 16-acre lot was larger, possessed unique environmental features, and would be open to the public).

⁴⁷ For a discussion of fiduciary obligations of nonprofits and IRS supervision, see *infra* Sections II.G.2 & IV.C.1; I.R.S. Private Letter Ruling 201405018 (Jan. 31, 2014), <http://www.irs.gov/pub/irs-wd/1405018.pdf> (revoking tax exempt status of organization formed to hold conservation easements because it was not operated exclusively for tax-exempt purposes but as a conduit for the president to allow his clients to obtain deductions).

their vision of how to best achieve land preservation. Moreover, knowledge and best practices in land conservation continues to evolve, providing new understanding of what lands should be acquired and continued in preserved status. Conservation organizations should be able to apply current science to their decisions about amending conservation easements.

Nonprofit boards have the duty to make such decisions regarding their assets, including real property, in the regular course of serving their missions.⁴⁸ Unfortunately, courts have held that swap provisions in conservation easement documents prevent deductibility of the donation of an easement under the Internal Revenue Code, thus chilling the swap option in many situations.⁴⁹

D. *Competing Environmental Goals*

Land conservation through conservation easements represents one aspect of the environmental ethos. Another strain is the drive to increase the use of renewable energy sources, such as wind turbines and solar, in order to reduce the overall carbon footprint, prevent depletion of resources, and reduce spillovers of carbon-based or nuclear energy.⁵⁰ Most often these environmental goals can co-exist, but at times there can be a conflict between the preservation goals of a conservation easement and a renewables project. For example, wind turbines can run directly counter to the standard purposes of conservation easements because the former can interfere with habitats and wildlife, create noise, kill local and

⁴⁸ See, e.g., Sharon Otterman, *Helping to Building a School for the Poor, by Selling One in a Wealthier Area*, N.Y. TIMES, Feb. 3, 2014 (discussing how the Children's Aid Society sold an Upper East Side pre-school building to acquire a location for a charter school in the South Bronx); Matt A. V. Chaban, *A Sprawling Manor for \$125,000 (Some Disassembly Required)*, N.Y. TIMES, Feb. 10, 2015, at A19 (describing a preservation society offering a historic home for sale as its maintenance costs burdened other society activities).

⁴⁹ See *Belk v. Comm'r*, 140 T.C. 1 (2013), *aff'd*, 774 F.3d 221 (4th Cir. 2014); *Bosque Canyon Ranch, L.P. v. Comm'r*, T.C.M. 2015-130 (T.C. 2015). It could be argued that *Belk* should be limited to situations when the easement document itself specifically provides for a swap, but that swaps that arise *sui generis* over time might be treated differently. In light of the court's opinion and 26 C.F.R. § 1.170A-14(g)(6), discussed *infra* notes 129–132, this might be a distinction without a difference.

⁵⁰ Various state policies support renewables. See CONN. GEN. STAT. § 16a-35k; Jeffrey D. Moss, *Solar Panels, Tax Incentives, and Your House*, PROB. & PROP., Jan.–Feb. 2010, at 17, http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v24/01/2010_aba_rpte_pp_v24_1_article_moss.authcheckdam.pdf.

migratory birds, and mar vistas.⁵¹ The siting of solar fields may also create negative environmental impacts.⁵² Thus, a conservation easement might need to be altered to accommodate a proposed renewable project on land protected by the easement.⁵³

One reported analogous land dispute highlighted the conflict between preservation and renewables development. When a company sought to lease federal land in the Mojave Desert to build wind farms and solar plants, Senator Dianne Feinstein introduced legislation to bar such projects because local citizens were concerned about the effect on scenery and natural land features. The New York Times quoted Robert F. Kennedy, Jr. as saying that “this is arguably the best solar land in the world, and Senator Feinstein shouldn’t be allowed to take this land off the table without a proper scientific environmental review.”⁵⁴

E. *The Effect of Climate Change*

Climate change has already had a significant negative impact on lands, habitats, and species.⁵⁵ Moreover, climate change may

⁵¹ See generally *Fairwindct, Inc. v. Conn. Siting Council*, No. CV116011389S, 2012 WL 5201354 (Conn. Super. Ct. 2012); *GPH Cohasset LLC v. Trustees of Reservations*, No. 11 MISC 446618(AHS), 2013 WL 3022390 (Mass. Land Ct. 2012); *In re Green Mountain Power Corp.*, 60 A.3d 654 (Vt. 2012); see also Katharine Q. Seelye, *A 12-Year Duel Over A Wind Farm*, N.Y. TIMES, October 23, 2013, at A12; Peter Schworm & David Filipoy, *Flicker Shadows From Wind Turbines Draw Complaints*, BOSTON GLOBE, April 5, 2013, <http://www.bostonglobe.com/metro/2013/04/04/turbine-flicker-effect-draws-complaints/UKgf7nOwMHm8CWAtZ47V5L/story.html>, last visited Oct. 1, 2013 (explaining shadow flicker); Dan Frosch, *A Struggle to Balance Wind Energy with Wildlife*, N.Y. TIMES, Dec. 17, 2013, at A18 (bird kills); Diane Cardwell, *U.S. Offshore Wind Farm, Made in Europe*, N.Y. TIMES, Jan. 23, 2014, B1 (interference with view).

⁵² See generally *Save Panoche Valley v. San Benito County*, 158 Cal. Rptr. 3d 719 (Cal. App. Ct. 2013).

⁵³ See Eileen M. Adams, *Residents to Decide on Town Ownership of Lots*, SUN JOURNAL (Me.), Dec. 1, 2009, 2009 WLNR 24232103 (reporting on town meeting to discuss rescinding town’s conservation easement so that six wind towers could be built).

⁵⁴ Todd Woody, *Desert Vistas vs. Solar Power*, N.Y. TIMES, Dec. 21, 2009, at B1.

⁵⁵ See Felicity Barringer, *Climate Change Will Disrupt Half of North America’s Bird Species, Study Says*, N.Y. TIMES, Sept. 8, 2014, at A14; Burt Helm, *The Climate Bottom Line*, N.Y. TIMES, Feb. 1, 2015, at Bus. 1; Michael Wines, *Climate Change Threatens to Strip the Identity of Glacier National Park*, N.Y. TIMES, Nov. 23, 2014, at A20; Verlyn Klinkenberg, *Forever Wild*, NAT’L GEOGRAPHIC MAG., Summer 2011, <http://ngm.nationalgeographic.com/2011/09/adirondack-park/klinkenberg-text>

destroy the ecological value of property that is under conservation easement restrictions. The director of the California Academy of Sciences in 2008 observed that “[w]e have over a 100-year investment nationally in a large suite of protected areas that may no longer protect the ecosystems for which they were formed.”⁵⁶ Commentators have suggested that enforcement of original conservation easement terms may no longer be sensible if ongoing climate change degrades the environmental value of preserved land and its natural habitat, causes out-migration of protected species, or spurs the rise of invasive species on the property.⁵⁷ If there is little or no conservation benefit remaining from the original easement, the sensible approach would be for the fee owner to pay the NPO holder of the conservation easement to ease the restrictions to align them with the current ecological condition of the property or even terminate the NPO’s rights. The NPO could then reinvest these sums on other conservation projects and the fee owner could make increased productive use of the newly less restricted land.

F. *Competing Social Needs*

A fee owner may seek the modification or termination of a conservation easement to devote the land to a conflicting use that is socially important. For example, the owner may wish to build affordable housing that is in desperately short supply in the community, an economic development project that will provide important jobs in an area suffering unemployment, or a needed medical facility. The fee owner would pay for the release of the easement, enabling the NPO easement holder to acquire other important preservation fees or easements while the formerly restricted property can be used to meet societal needs.

One news item, for example, reported on a conflict in

(last visited Aug. 13, 2014).

⁵⁶ Cornelia Dean, *The Preservation Predicament*, N.Y. TIMES, January 29, 2008, at F1 (quoting Healy Hamilton).

⁵⁷ See Julia D. Mahoney, *Perpetual Restrictions on Land and The Problem of the Future*, 88 Va. L. Rev. 739, 753–57 (2002); Owley, *supra* note 46, at 153–54; Duncan M. Greene, Note, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U.L. REV. 883, 905–07 (2005); see generally J.L. Olmstead, *The Butterfly Effect: Conservation Easements, Climate Change, and Invasive Species*, 38 ENVTL. AFFAIRS 41 (2011) (discussing how climate change causes species to become invasive into new climate zones and the benefits of dynamic conservation easements).

Woodstock, New York, between proponents of a proposed affordable housing rental development and persons concerned with the possible ecological damage from the construction.⁵⁸ The town supervisor said the resistance was because “people don’t want change.”⁵⁹ One elderly resident of a nearby town observed that “[w]hat they have now is mostly city people who can afford it. Us little folks can’t.”⁶⁰

There is an intergenerational concern here as well, as changing conditions may shift priorities. While many today quite reasonably see environmental degradation as the fundamental challenge facing the planet now and for years to come, and celebrate all that we can do to avert environmental disaster, the future is unknown. We must be careful that in imposing our best vision for the world based on our current ideas and understanding, we do not foreclose the future citizens of our planet from making decisions about the world that they and their children must inhabit.

G. *The Challenge: Finding the Process and the Standard*

These scenarios for consensual amendment or termination of conservation easements provoke a series of questions as to the appropriate process, procedures, participants, and substantive standards for the modification of conservation easements. The fee owner and the holder of a “regular” easement such as a right of way (or the successors of both) can simply agree to alter the easement as they see fit.⁶¹ Is this model appropriate for the modification of donated conservation easements or should there be special procedures and guidelines? For example, if a public charity is involved, should the approval of the state’s attorney general be required for modifications, or even a court action and judicial approval? Because of the potential effect on the local environment, should neighbors have special standing to contest changes? In

⁵⁸ Peter Applebome, *In Woodstock, Values Collide Over Housing*, N.Y. TIMES, Sept. 13, 2011, at A27.

⁵⁹ *Id.*

⁶⁰ *Id.* Currently, some courts are interpreting whether the language of certain conservation easements prohibit subsurface energy development through hydraulic fracturing from adjacent parcels. See Korngold, *New Energies*, *supra* note 8. It is possible that evolving conditions in the future favoring energy security might lead to a challenge of even a clear prohibition of such energy development.

⁶¹ See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 6, at 256–58.

order to protect the public's interest in the environment, should changes be barred unless the purpose of the easement is no longer achievable?

As developed below, legislatures, courts, and commentators have suggested a variety of positions for the process, procedures, participants, and substantive standards for conservation easement amendment, alteration, and termination.⁶² These are typically one-size-fits-all rules, to be applied in all cases of easement modification, and they range from positions quite opposed to changes to those that are more receptive.⁶³

The alteration examples and hypotheticals developed in Section II above, as well as the data on easement modification described in Section III, indicate that the nature of the easement changes that will likely develop over time will range from minor to major. Given that there is no monolithic scenario in terms of importance, motivation, scope, and effect of the proposed modification, perhaps a unitary procedure and substantive rule for all easement alterations might not produce optimal policy results. Rather, decision makers might develop a continuum of procedures and substantive rules depending on the nature of the easement amendment. This may best achieve desired conservation and goals.

There are thoughtful policies supporting both sides of the question of whether the process and substantive rules for easement modification by current interest holders or successors should be flexible or strict. These policies often reflect some of the competing values inherent in conservation easements in general which are discussed above.⁶⁴ It seems, however, that no single policy is overriding and controlling in all cases. Different considerations will prove to be the most compelling in some situations but not others depending on the type of proposed change. For example, concerns over administrative and legal expenses for the nonprofit may be paramount when correcting legal descriptions but not if termination of an easement is proposed. Decision makers—legislatures and courts—may well be advised to build their procedural and substantive rules based on the paramount policy of the category of modification that they are considering.

⁶² See *infra* Section IV.

⁶³ See *id.*

⁶⁴ See *supra* Section I.B.

1. *Stricter Process and Substantive Rules*

There are several reasons supporting stricter procedural and substantive guidelines for the modification of conservation easements. First, there is a concern that the public will lose the benefit of its tax subsidy if a modification allows the conservation easement to be weakened or dissipated.⁶⁵ Requiring more process and third party approvals, and permitting changes only in limited circumstances, might help to prevent such losses to the public purse.⁶⁶

Second, the public policy favoring conservation easements, as exemplified by the adoption of enabling statutes in all states, should be respected. Conservation easements are recognized property rights that should not be easily compromised or dismissed. Moreover, the underlying assumption of conservation easements, indeed the default requirement under many statutes, is that they should have unlimited duration.⁶⁷ For those who would like conservation easements to remain exactly as they were created, strict procedural and substantive standards would limit changes.⁶⁸

Additionally, it is claimed that the public interest in conservation is better served through a public process controlling modifications rather than private agreements between NPO holders and fee owners.⁶⁹ A court-supervised public process may be necessary to prevent political and economic pressure from forcing

⁶⁵ See Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why It is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 239 (2013); Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1, 27–28, 55–56, 80–82 (2009).

⁶⁶ See 26 C.F.R. § 1.170A-14(g)(1) (contemplating termination only if conservation easement is impossible or impracticable).

⁶⁷ See UNIF. CONSERVATION EASEMENT ACT, *supra* note 2, at § 2(c). See Schwing, *supra* note 65, at 234 (noting that conservation easements “imposed by land trusts are routinely intended and normally required to be perpetual”).

⁶⁸ See *generally* Schwing, *supra* note 65, at 218 (“[T]he law is clear: Easements are solicited and granted in perpetuity, to be amended or terminated only in extraordinary circumstances and to be terminated only with court approval or through condemnation.”); McLaughlin & Weeks, *supra* note 65, at 5.

⁶⁹ See Schwing, *supra* note 65, at 241 (“The further one deviates from a true judicial proceeding to extinguish a tax-deductible easement, the less protection there is for donors, the public, and federal taxpayers.”); see *generally* McLaughlin & Weeks, *supra* note 65, at 70–71.

modifications and to preserve conservation land for the public.⁷⁰ Moreover, modification procedures and standards should be sufficiently rigorous and transparent to generate public confidence in the process and the actions of holders. The public esteem for the conservation easement vehicle and the reputation of land trusts in general could be damaged if a few bad actors engage in abusive modifications and terminations.

Finally, it has been argued that the intent of the conservation easement donor compels that modification and termination should be strictly limited.⁷¹ Some have claimed that easement donors “are principally motivated by a desire to protect the specific land they love.”⁷² Flexible modification procedures and substantive rules, it is asserted, would hurt conservation efforts and violate legal standards:

Having acquired an easement based on promises of perpetuity, land trusts are obligated to fulfill those promises by federal tax law, by charitable trust principles, by fiduciary duty to donors, by the terms of the conservation easement, and by the practical reality that future donations will dry up if promises are known to be breached.⁷³

2. *Flexible Process and Substantive Rules*

There are various arguments supporting more flexible procedures and substantive rules for at least some types of modification conservation easements by current and future fee and easement owners. First, greater process, such as judicial approval or even simply obtaining consent from a state official, entails increased time and expense for NPOs.⁷⁴ This presents a strain on

⁷⁰ Nancy McLaughlin & Mark Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1580 (2008).

⁷¹ Certainly, some donors are motivated to perpetually preserve the specific property which they donated. See, e.g., *Portland Museum of Art Purchases Land to Preserve Homer's View of the Sea*, PORTLAND PRESS HERALD (Me.), Sept. 8, 2014, 2014 WLNR 24770680 (describing how art museum purchased land surrounding Winslow Homer studio to protect view to the sea and donated conservation easement on it to land trust).

⁷² See Schwing, *supra* note 65, at 237.

⁷³ See Schwing, *supra* note 65, at 238–39. As developed below, others disagree on whether charitable trust doctrine and its particular fiduciary duty apply automatically to gifts of conservation easements. See *infra* Section IV.C.

⁷⁴ The granting of standing to neighbors to sue an NPO for alteration of an easement complicates the negotiations and the likelihood of compromise and

resource-constrained NPOs.⁷⁵ Even major NPOs with large budgets and their donors would likely prefer to invest organizational resources in direct preservation activity, rather than in compliance that brings negligible or no benefits to the public.

Second, the fundamental conservation easement concept and the impetus behind enabling statutes across the country is that nonprofits have particular expertise, energy, and capability to seek, acquire, and retain conservation easements.⁷⁶ An understanding that conservation should not be left only to government and that the NPO sector can be a major catalyst for the land preservation effort led to the passage of easement statutes and the IRC deduction. The data on easement acquisition, described above, shows the successful track record of NPOs in easement creation.⁷⁷ Thus, some argue that many modification decisions are also best left to the NPOs: they continue to have the expertise and knowledge of best practices in conservation and can make the best decisions about modification.⁷⁸ A state attorney general or a trial judge, no matter how well evidence may be presented, cannot have the depth of knowledge and experience in these matters equal to the NPO.⁷⁹ Moreover, the expense and uncertainty of obtaining approval for all modifications can discourage the NPO from experimenting with new approaches and may dissuade it from developing creative best practices in land preservation. There is a strong legal history of courts and legislatures deferring to association and corporate decision makers for these reasons.⁸⁰

Underlying this desire for procedural and substantive flexibility in at least some types of modification decisions is the lesson of history: the human condition and the environment

increases costs to the NPO. Moreover, it allows private parties (the neighbors) to leverage a public good for their own benefit, hardly the purpose behind a charitable gift and IRC deduction. *See supra* Section I.A.2.a.

⁷⁵ *See* C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25, 79, 81–82 (2008) [hereinafter Lindstrom, *End of Perpetuity*]; While 26 C.F.R. § 1.170A-14(c)(1) requires that an NPO have adequate resources to enforce an easement in order for the deduction to be valid, this does not mean that the organization should expending funds needlessly on administering the easements.

⁷⁶ *See* Korngold, *Contentious Issues*, *supra* note 6, at 1085–86.

⁷⁷ *See supra* Section I.A.

⁷⁸ *See* Lindstrom, *End of Perpetuity*, *supra* note 75, at 80 n. 228.

⁷⁹ *See* Lindstrom, *End of Perpetuity*, *supra* note 75, at 80 n. 227.

⁸⁰ *See, e.g.*, *Levandusky v. One Fifth Ave. Corp.*, 75 N.Y.2d 530 (1990) (applying business judgment rule to housing cooperative board decisions).

evolve, creating new challenges, needs, and opportunities. The scenarios presented in Section II above are but a few examples of this dynamism, and there are likely to be others. Good drafting of the original conservation easement may anticipate and provide for those changes that the parties can contemplate at the present.⁸¹ But no matter how thorough and extensive a real estate document may be, a circumstance unforeseen by the parties can always arise.⁸² Such an event is even more likely with legal documents and obligations lasting into perpetuity. Fallible human beings are drafting the documents—indeed, a substantial number of the modifications of our dataset were required to correct errors in conservation easement documents. While most conservation easements may stand the test of time, the inevitability of new and unforeseen circumstances and the potential needs of future generations support flexibility.

Moreover, flexibility also allows for a state-based solution, rather than a national one. A rigid, uniform rule is likely not the best response. Each state has particular needs based on its situation and open space availability. Our laboratory of federalism should allow for different solutions on modification and termination and other state-law issues related to conservation easement.⁸³ For

⁸¹ Schwing, *supra* note 65, at 242; *see* Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P., 88 Va. Cir. 341 (2014) (parties included clause acknowledging that they could not address all circumstances that might arise in future but stating overall purpose to protect property's natural, scenic, and open condition in perpetuity).

⁸² *See* Sidney G. Saltz, *Drafting Made Easy*, 15 PROB. & PROP., May–June 2001, at 31, http://www.americanbar.org/publications/probate_property_magazine_home/rppt_publications_magazine_2001_01mj_01mjsaltz.html (“Of course the title of this article is a misrepresentation. There is no easy formula for drafting real estate documents, but there are some methods that can be followed to make them less ambiguous, easier to read, easier to negotiate and less prone to future dispute.”); Alex Iliff et al., *The Shifting Sands of Contract Drafting, Interpretation, and Application*, 32 CONSTRUCTION LAWYER 31, 32 (2012) (“Many construction projects are immensely complex—with durations measured in years of performance through winters of snow, springs of rain, and summers of blistering heat. Without the benefit of clairvoyance, parties have choices: . . . (3) leave gaps. . . . The third may seem the most frightening, but it is also inevitable. At a certain point, the cost and time required to address every potential issue and to allocate the possible risk for those issues in the contract become too large, and the parties must leave certain questions unanswered.”).

⁸³ *See generally* Jessica E. Jay, *Understanding When Perpetual is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, 37 HARV. ENVTL. L. REV. 247, 249 (2013) [hereinafter Jay, *Response*]

example, states with significant federal open lands may have different concerns than a highly-developed state with limited remaining open space.

Finally, it may be argued that existing rules controlling NPOs are sufficient to prevent misconduct and no special procedural and substantive rules are necessary for at least many modifications of conservation easements. The Internal Revenue Service prevents revenue loss by policing NPOs for failure to fulfill their obligations under section 501(c)(3), such as situations of personal inurement of directors or officers or failure to operate the organization for its tax exempt—i.e., mission-related—activities.⁸⁴ The IRS has revoked the 501(c)(3) certification of an NPO improperly acting with respect to conservation easements.⁸⁵ Moreover, state law typically empowers the attorney general to bring actions against board directors for breach of fiduciary duty and to set aside improper board actions.⁸⁶ Often, specific legislation requires board process⁸⁷ and court or attorney general approval⁸⁸ if a nonprofit disposes of all or substantially all of its assets, which should include conservation easements. Under this

(suggesting that differences in state law may not permit a unilateral approach).

⁸⁴ See Lindstrom, *End of Perpetuity*, *supra* note 75, at 78, 83; I.R.C. § 501(c)(3); 26 C.F.R. 1.501(c)(3)-1(c)(2) (prohibition of private inurement); *see generally* 26 C.F.R. § 1.503(a)-1; 9 MERTENS LAW OF FED. INC. TAX., EXEMPT ORGANIZATIONS §§ 34:134, 135, 187 (Westlaw, updated May 2015).

⁸⁵ See I.R.S. Priv. Ltr. Rul. 201405018 (Jan. 31, 2014), <http://www.irs.gov/pub/irs-wd/1405018.pdf> (revoking tax exempt status of organization formed to hold conservation easements because it was not operated exclusively for tax-exempt purposes but as conduit for the president to allow his clients to obtain deductions); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, D.C. FEDERAL COURT BARS COMPANY FROM PROMOTING ALLEGED TAX SCHEME INVOLVING IMPROPER EASEMENTS ON HISTORIC BUILDINGS (2011), <http://www.justice.gov/opa/pr/dc-federal-court-bars-company-promoting-alleged-tax-scheme-involving-improper-easements> (barring defendants from promoting valuations and accepting easement donations where they have reason to know there is inadequate conservation purpose).

⁸⁶ See N.Y. NOT-FOR-PROFIT CORP. L. § 720(b) (McKinney).

⁸⁷ See N.Y. NOT-FOR-PROFIT CORP. L. § 509(b) (McKinney); *see generally* Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1463 (1998); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999).

⁸⁸ See N.Y. Not-For-Profit Corp. L. §§ 511, 511-a (McKinney); N.Y. STATE OFFICE OF THE ATT'Y GEN., CHARITIES BUREAU, A GUIDE TO SALES AND OTHER DISPOSITIONS OF ASSETS PURSUANT TO NOT-FOR-PROFIT CORPORATIONS LAW §§ 510-511 AND RELIGIOUS CORPORATIONS LAWS § 12 (2014), http://www.charitiesnys.com/pdfs/sales_and_other_dispositions_of_assets.pdf.

view, donations of conservation easements are not considered gifts in trusts triggering special requirements, unless specific language of trust is employed.⁸⁹

III. WHAT THE DATA REVEAL

Discussions and debates on whether conservation easements can and should be modified have appropriately addressed legal and public policy considerations. What has been missing, however, is consideration of actual data on the number and types of easement modifications that have been actually be made. This project has collected and classified a detailed national sample of modifications that have been made to conservation easements over a six-year period. The data indicate, importantly, that whatever commentators and lawmakers may think about the issue in the abstract, modifications have been taking place in reality and seem to reflect NPOs' need for flexibility in at least some conservation easement scenarios. Moreover, the data indicate the range of situations in which modifications have been needed through these early years of conservation easement history. This data, therefore, should inform policy makers on the questions of whether conservation easements should be subject to modification and the process and substantive rules that might apply. We believe that this and future data should be a central reference in the discussion.

The goal of the data collection was to identify actual amendments of conservation easements that easement holders and fee owners have made, to get a sense of their magnitude relative to the stock of easements held by a selected sample of leading land trusts (i.e., NPOs with a land preservation mission), and to better understand the types of easement alterations being made by the parties. The IRS provides the only publicly and realistically available raw source of data about the number and type of *modifications* made to existing conservation easements.⁹⁰ This information is found in the tax returns (Schedule D of the Form

⁸⁹ See *infra* Section IV.C.

⁹⁰ Theoretically one could find modifications that were recorded with the county recorder's office but it would require that the searcher know that there had been a modification, the parties actually recorded the modification, the searcher knows the precise names of the parties to the modification document (for a grantor-grantee index), and other information—making the attempt to track down modifications in a jurisdiction a herculean task if not a practical impossibility.

990) that tax-exempt organizations are required to file annually under the Internal Revenue Code.⁹¹ Our research and database focuses on consensual modification or termination of conservation easements, where the parties agree to a change, as opposed to unilateral termination by eminent domain or foreclosure.⁹²

A. Overall Methodology

Schedule D of the 990 Form requires the filer to state its total number of conservation easements, total acreage under easement, and, importantly, the total number of easements “modified, transferred, released, extinguished, or terminated.”⁹³ The Schedule requires the filer to provide descriptions for such modifications, transfers, releases, extinguishments, or terminations.⁹⁴ As described below, we built a data set to show the number of changes, but we also classified the types of easement alterations based on the information that the land trusts themselves provided in the Forms 990. These descriptions of modifications provide insights into the changes fee owners and easement holders are confronting.

Given the large number of NPOs that hold conservation easements, we focused attention on a select group of forty-nine land trusts throughout the United States. Our working hypothesis was that land trusts with large holdings of acres under easement would be more likely to encounter situations that required modification or termination of easements. Using information from the Land Trust Alliance (LTA) 2010 Census of land trusts across the United States,⁹⁵ we identified the land trust in each of forty-

⁹¹ See Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or A Better Way*, 74 LAW & CONTEMP. PROBS. 29, 36–37 (2011); Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 699–70 n.45 (2013).

⁹² We also found 10 terminations by or in lieu of eminent domain and one by foreclosure but as these are not consensual modifications, they are not included in our database.

⁹³ I.R.S. Schedule D (Form 990), Part II (2015), <http://www.irs.gov/pub/irs-pdf/f990sd.pdf>. Additional information on whether there is a written monitoring and enforcement policy, staff and volunteer hours spent in monitoring and enforcement, and compliance with I.R.C. §170(h) is also required by the Schedule.

⁹⁴ See *id.* at Part XIII.

⁹⁵ See LAND TRUST ALLIANCE, NAT’L LAND TRUST CENSUS REP.: A LOOK AT VOLUNTARY LAND CONSERVATION IN AMERICA (2010),

nine states⁹⁶ with the highest number of acres under conservation easement that filed a Form 990 in 2008.⁹⁷ These forty-nine land trusts became our sample set, and we followed this group over all six years.⁹⁸

We have confidence in our methodology because we compared the number of modifications made by the land trusts in our sample with a much larger dataset purchased from Guidestar in 2012.⁹⁹ The Guidestar dataset included every tax exempt organization that answered “yes” to the Form 990 question asking whether the organization held a conservation easement in the most current form year (which included 2010 and 2011).¹⁰⁰ There were a total number of 1,480 organizations in this dataset, reporting 270 conservation easement modifications. The forty-nine land trusts in our sample, representing just 3 percent of the 1,480 organizations in the Guidestar dataset, were responsible for 15 percent of the total conservation easement amendment activity reported in the dataset. We interpreted this as support for our intuition that land trusts with large holdings of acres under easement are more likely

<http://s3.amazonaws.com/landtrustalliance.org/page/files/2010LandTrustCensus.pdf>. Tables accompanying the LTA Census are on file with the authors.

⁹⁶ With the exception of North Dakota, where we were not able to identify a land trust.

⁹⁷ If the land trust with the highest number of acres under conservation easement in the state did not file a Form 990, we selected the land trust with the second highest number of acres under easement.

⁹⁸ In a few cases, the land trust with the highest number of acres dropped out of the top spot in ensuing years. We elected, however, to follow the original forty-nine land trusts because all remained major easement holders and we believed that there was a benefit in following the same entities on the theory that they may have maintained consistent internal modification policies. Moreover, the IRS permits the filing of a short return 990-EZ rather than the long Form 990, based on certain financial limits of the NPO. The IRS criteria for who must file the long 990 form, rather than the short return 990-EZ, can vary from year to year. Information about conservation easements modification is only reported in Schedule D of the long 990 form. Because of the yearly variations in the IRS filing criteria, a few of the land trusts we studied did not meet the threshold for filing the long Form 990 in a given tax year, which leaves some minor gaps in our dataset.

⁹⁹ Guidestar, among other services, aggregates data from Forms 990. See *GuideStar Presents Most Important, Comprehensive Nonprofit Information in a New, Easy-to-Understand Format*, GUIDESTAR (Jan. 26, 2012), <http://www.guidestar.org/rxa/news/news-releases/2012/1-26-12-new-nonprofit-reports.aspx>.

¹⁰⁰ Form 990, Part IV, line 7: “Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures?”

to encounter the need to amend conservation easements.

The data that we present are subject to certain caveats. First, we relied on information reported by the organizations themselves in Schedule D of their Forms 990 that they submitted to the IRS, as to the number of modifications that they made and related details. Second, as an important related matter, we relied on the NPO's own description of the modifications which they self-reported in their 990 forms. Third, the choice of how to categorize and classify some of the particular modifications necessarily involved some degree of exercise of our judgment based on the information available in the forms. When there was inadequate information for us to make what we felt was a rational judgment, we placed the easement in the "Reason Unknown" category. Finally, our study does not assess, and is not intended to imply any question about, the validity, legality, or appropriateness of any specific modification that we examined, either under governing documents or the law. We simply attempted to classify the self-reported data on the Schedules D.

B. *Number of Modifications: Data and Findings*

We tracked the conservation easement modification activity of the forty-nine land trusts in our sample as reported in tax returns for calendar years 2008–2013.¹⁰¹ During this six year span, 388 easements were altered, of which 377 were by consensual agreement. The highest percentage of changes in the dataset occurred in 2008 and it represented 1.42 percent of the total number of conservation easements held by the forty-nine land trusts that year. Table 3 shows the number of alterations each year relative to the total conservation easement count.

¹⁰¹ When available, Forms 990 for calendar years 2008 through 2013 were obtained for each land trust.

Table 3. Percentage of Total Conservation Easements that Were Modified for 49 Land Trusts

Year	Total Conservation Easement Count	Total Conservation Easement Modifications	Percentage of Total Conservation Easements Modifications
2008	6,698	95	1.42%
2009	7,726	74	0.96%
2010	8,622	50	0.58%
2011	8,507	56	0.66%
2012	8,769	52	0.59%
2013	8,722	61	0.70%

The total amendments constitute a small proportion of the total conservation easement portfolio held by NPOs in our sample. The noteworthy takeaway, however, is that amendments are actually taking place. The fact that conservation easements are in fact being modified runs counter to the paradigm of perpetuity. Because easement alteration is a reality, one would hope that there could be a serious, policy-based dialogue about substantive and procedural rules for amendments that could lead to direction from decision makers.

C. *Type of Modifications: Data and Findings*

In addition to exploring the scale of amendment activity among these land trusts, the study also sought to identify and classify the type of amendments that land trusts are actually making to existing conservation easements.¹⁰² After reviewing descriptions of these modifications provided in the Forms 990, we classified them into the following nine categories: add new acreage (usually by the fee owner) to the original conservation easement; correct the description of the nature of the restriction or rights granted to the easement holder or retained by the fee owner; correct an error in the legal description of property; increase the rights of the fee owner, in effect lessening the power of the easement restriction; amend the easement to achieve compliance with tax requirements; increase the extent of conservation

¹⁰² Descriptions of the modifications are included in Form 990 Schedule D, Part XIV, or in Schedule O of the IRS return.

restrictions; transfer the easement to or from another NPO or governmental unit; new exchange of rights between the fee owner and easement holder; and reason unknown (either no description is available in the Form 990 or the description does not clarify what type of modification is being made).¹⁰³

Many of the categories are self-explanatory, such as adding acreage to the original conservation easement area, increasing the extent of the conservation restrictions, and correcting the legal description (assuming a simple scrivener's error). Other classifications require additional explanation and can best be explicated by reference to actual examples from the Forms 990 themselves:

- *Correct description of rights*: these modifications are stated as corrections to the original easement document necessary to clarify the extent of the restriction granted to easement holder or the rights retained by the fee owner. While not expressly stated, these descriptions seem to have read as if they are correcting a "scrivener's error" in the original document. Some examples of this type of modification include, in the words of the 990s: "conservation easements were amended to correct an error that had been made in the list of water rights tied to the property;" "two easements were amended to include the percent ownership attributed to state agency co-holdings;" "the correction was needed to . . . specifically acknowledge a 60 foot road right-of-way easement along the southern edge of the property that existed prior to the date of conveyance of the conservation easement."
- *Increase fee owner's rights*: this type of modification can fairly be read as increasing the rights of the fee owner beyond those envisioned by the original conservation easement document. Such amendments resulted in the decrease of the conservation restrictions and expansion of the fee owner's rights. Examples from actual descriptions in Forms 990 include: "one easement was amended to allow a baptismal addition to the church to penetrate 600 sq. ft. of the 1.29 acre conservation easement;" "revise permitted uses - added a farm

¹⁰³ While on one level, the transfer of a conservation easement may not appear to be a modification of the terms of the easement, we discovered that a number of the stated explanations for transfer could have an effect on the administration of the easement. For example, the transferee could better monitor because of proximity or greater expertise.

labor housing clause for use by those engaged in the farming operation;” “reconfigure project - allowed a subdivision and separate conveyance of the two non-contiguous parcels and reconfigured the exclusion.”

- *Compliance with tax requirements*: sometimes a change was agreed to in order to qualify for a state tax program. Examples include: “second amendment to [another] amendment adding the Georgia Tax Credit Program language to the conservation easement;” “four easements were amended to change the language required by the Georgia Certification Tax Credit Program.”
- *New exchange of rights between fee and easement owners*: in some situations, the modification appears to strike a new bargain between the fee owner and easement holder with respect to aspects of the easement restriction. There may be give and take on both sides, increasing some fee owner rights in exchange for granting restrictions elsewhere. Examples from the Forms 990 include: “this second amendment acknowledges the grantors reserved right to replace a former house on the south side of Allen Lake. The amendment further granted the ability to relocate this house site away from Allen Lake to an upland planted pine area delineated on a map (exhibit a) made part of the amendment;” “added the right for one farm labor house, relocated the existing farmstead complex, reduced the size of the farmstead complex from 3 acres to 1 acre, capped the size of the residence permitted in the farmstead complex at 1800 sq. ft.,] eliminated the farmstand complex, extinguished the existing seasonal camp right, permitted a driveway to the new farmstead complex; released from the protected property one acre of land with a house located in the farmstead complex and in exchange, added to the protected property one acre of land with an existing house located southerly of town highway #21 and subject to the restriction that the house be limited to no more than 2500 square feet of total floor area.”

Table 4 shows the distribution of amendments by type. It is important to note that the last category, *reason unknown*, is the largest partly because we were not able to locate the full Form 990 for some NPOs, while others declare only the number of modifications without providing additional details in their tax returns.

Year	Total Modifications	Type of Modifications									
		Add Acreage	Correct Description of Rights	Correct Legal Description of Property	Increase Fee Owner's Rights	Compliance w/ Tax Requirements	Increase Conservation Restrictions	Transfer to/from another NPO or Gov't	New Exchange of Rights b/1 Fee & Easement Owners	Reason Unknown	
2008	90	17	6	14	5	1	12	10	6	19	
2009	74	13	0	14	4	4	7	4	9	19	
2010	47	6	4	8	2	0	9	7	6	5	
2011	55	3	0	6	2	0	7	1	3	33	
2012	50	6	1	3	1	0	6	1	4	28	
2013	61	6	4	7	1	1	6	9	3	24	
Total	377	51	15	52	15	6	47	32	31	128	

The dataset provides some important findings. First, even in the relatively early years of conservation easement history, NPOs are engaged in a fairly wide *range* of conservation easement amendments. The variety of changes, from ministerial (correcting legal descriptions) to more significant (new exchange of rights), suggests that different legal standards and procedures should be employed in assessing the validity of such changes. Second, the majority of modifications in our dataset appear to have a neutral or net-positive conservation effect (fifty-one amendments added acreage, forty-seven increased conservation restrictions, thirty-two were transferred to another NPO or governmental organization, fifteen corrected description of rights, and fifty-two corrected legal descriptions of property).¹⁰⁴ This may well support the theory that NPOs need some degree of flexibility to exercise their expertise in pursuing their missions through conservation easements. Third, there seems to be some willingness by at least some easement holders to exchange or decrease easement rights, hopefully for increased conservation values elsewhere, but whether an effective process was followed is not clear from the data. Legislatures and courts need to develop practical and transparent rules to address realistic pressures for change to prevent erosion of donated easements. Finally, the variety of desired alterations may grow from the already robust spectrum of modifications described in our data, as time, the environment, and human needs evolve. This may support the development of a range of substantive and procedural requirements for various types of modifications, rather than a one-size-fits-all approach.

IV. RESTRICTIONS ON MODIFICATION AND TERMINATION OF CONSERVATION EASEMENTS

The data set in Section III and scenarios in Section II indicate a wide range of situations in which the holder of a conservation easement and the burdened fee owner may agree to alter the terms of the original conservation easement document. This Section examines various legal doctrines and organizational factors that

¹⁰⁴ These five categories (totaling 197) represent 79 percent of the modifications, after deducting the “reasons unknown” category (127) from the total modifications (377). Even including the “reasons unknown” category, which skews the results since it is likely that some of the unknown modifications were conservation neutral or positive, the five categories comprise 52 percent of the modifications.

may discourage if not preclude the consensual modification of conservation easements. These include: the tremendous incentives of the Internal Revenue Code, which permits modification only under highly limited circumstances; some specific state legislation limiting alteration of conservation easements; the automatic application of charitable trust law and the cy pres doctrine to all conservation easements, which creates an expensive process and a high substantive bar for modifications; expansive third party standing rules that allow neighbors and others to enforce these easements, making compromise harder; and concerns over liability by nonprofit directors (trustees) who seek to negotiate changes. To the extent that legislatures and courts wish to provide for flexibility in conservation easements through modifications, either through a unitary rule or a sliding scale approach, these decision makers will have to address and modify the following legal doctrines that prevent such changes.

A. *Internal Revenue Code*

The tax benefit granted by the Internal Revenue Code for donated conservation easements is arguably the major driver for the perpetual duration of conservation easements and strict limitations on modifications. The Internal Revenue Code provides major tax benefits to donors of conservation easements through income tax deductions.¹⁰⁵ The IRC requirements necessary for an easement to qualify for deductibility has profoundly influenced the substantive provisions included in donative easement documents. Most particularly, in order to meet the requirements of the Code and Regulations, donative conservation easements are created for an unlimited duration and contemplate amendment or modification only in the most unusual and extraordinary circumstances. With few exceptions, state law does not mandate this,¹⁰⁶ and arguably good conservation planning does not require unlimited duration with stringent limits on flexibility in all situations.¹⁰⁷

¹⁰⁵ There are other federal tax benefits: for example, the reduction of the value of the property due to the placement of a conservation easement lowers the estate tax exposure. See Korngold, *Contentious Issues*, *supra* note 6, at 1049.

¹⁰⁶ For those few jurisdictions that limit modification as a matter of state law, see *infra* Section IV.B.

¹⁰⁷ State property tax law may influence other substantive provisions of conservation easements. For example, there have been some unsuccessful challenges to charitable exemption for property tax purposes on land held for conservation purposes where there is no public access. See, e.g., New England

1. *The I.R.C. Perpetuity Requirement*

The Internal Revenue Code provides for deductibility of qualified gifts of conservation easements. Section 170(h) provides that a taxpayer can deduct for federal income tax purposes the value of a “restriction”¹⁰⁸ “exclusively for conservation purposes”¹⁰⁹ donated by the taxpayer to a “qualified”¹¹⁰ nonprofit organization.¹¹¹ The allowance of a deduction for a conservation easement—a less-than-fee interest in real property—is an exception to the general rule that a taxpayer may not deduct the value of a contribution that is less than the taxpayer’s full interest in the property.¹¹²

Importantly, for the issue of duration, modification, and termination, the Code has, since 1977, imposed a perpetuity requirement on conservation easements in two ways: a conservation restriction must be “granted in perpetuity” and a contribution will not be treated as exclusively for conservation purposes unless “the conservation purpose is protected in perpetuity.”¹¹³ The Regulations currently make clear that only perpetual conservation easements, restrictive covenants, or equitable servitudes will qualify for deductibility under the Code.¹¹⁴

There was a period, though, where deductions were permitted for non-perpetual conservation easements. Under the 1976 version

Forestry Found. v. Bd. of Assessors, 9 N.E.3d 310 (Mass. 2014) (reversing lower court denial of exemption); *Francis Small Heritage Tr. v. Limington*, 98 A.3d 1012 (Me. 2014) (allowing deduction for easement with access). If such a challenge is successful, however, it may lead some organizations to prefer conservation easements with a right of public access though this is currently not the norm. *See supra* note 10 and accompanying text.

¹⁰⁸ I.R.C. § 170(h)(2)(C).

¹⁰⁹ I.R.C. § 170(h)(1)(C).

¹¹⁰ I.R.C. § 170(h)(1)(B). *See Korngold, Contentious Issues, supra* note 6, at 1049.

¹¹¹ These elements are defined in the statute and regulations and provide various interpretational and application issues not directly relevant to questions of modification and termination. They include, for example, the definition of conservation purposes. *See* 26 C.F.R. § 1.170A-14(d).

¹¹² *See Schmidt v. Comm’r*, No. 1743-12, 2014 WL 3866066, at *8 (T.C. Aug. 6, 2014); *Belk v. Comm’r*, 140 T.C. 1 (2013), *aff’d*, 774 F.3d 221 (4th Cir. 2014).

¹¹³ I.R.C. § 170(h)(2)(C) and (5)(A); Jay, *Perpetual Not Forever, supra* note 8, at 6. *See Belk*, 140 T.C. 1 (emphasizing the dual requirements of perpetual property interest and conservation purpose).

¹¹⁴ *See* 26 C.F.R. § 1.170A-14(b)(2).

of the IRC, deductibility was allowed for easements that lasted thirty years or longer.¹¹⁵ The Tax Reduction and Simplification Act of 1977 removed the deductibility of such easements and stated the current perpetuity requirement.¹¹⁶ The legislative history and reasoning for Congress's embrace and subsequent rejection of deductibility for non-perpetual easements is not clear. The Conference Report to the 1977 Act simply stated that while deductions for conservation easements were extended, "the conference agreement does not allow a deduction for contributions for conservation purposes after June 13, 1977, of leases, options and easements which are not perpetual."¹¹⁷ One commentator has suggested that, while there was debate among conservation groups, the change occurred because "[r]epresentatives from land conservation organizations apparently had convinced the Treasury that term easements would not result in the long-term protection of land for conservation purposes because land subject to a term easement was likely to be developed at the expiration of the term."¹¹⁸ It has also been suggested that some conservation organizations believed that the availability of the thirty year deduction option reduced the nonprofits' leverage to bargain with donors for perpetual conservation easements and protection.¹¹⁹ One can imagine, moreover, that the Treasury and Congress were concerned with revenue loss without corresponding social benefit that could arise where owners with an intent to only develop their land in the future received public conservation subsidies and then simply built after the thirty year period as they had planned all along. Finally, given the difficult experience in valuation of *perpetual* conservation easements over the prior twenty-five years,¹²⁰ adding the variable of limited duration easements seems

¹¹⁵ See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2124(e)(1), § 170(f)(3)(B)(iii), 90 Stat. 1520 (1976).

¹¹⁶ See Pub. L. No. 95-30, § 309(a), 91 Stat. 126, 154 (1977), codified at 26 U.S.C.A. § 170.

¹¹⁷ H.R. Rep. 95-263 at 30–31 (1977) (Conf. Rep.).

¹¹⁸ Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Reasonable Approach*, 31 *ECOLOGY L.Q.* 1, 13 (2004) [hereinafter McLaughlin, *Tax Incentives*] (citing Stephen J. Small, *The Tax Benefits of Donating Easements on Scenic and Historic Property*, 7 *REAL EST. L.J.* 304, 316 (1979)).

¹¹⁹ See McLaughlin, *Tax Incentives*, *supra* note 118, 13 n. 39, citing Small.

¹²⁰ See, e.g., *Comm'r v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011); *Butler v. Comm'r*, 103 T.C.M. (CCH) 1359 (T.C. 2012); *Hughes v. Comm'r*, 97 T.C.M. (CCH) 1488 (T.C. 2009).

to increase complexity for taxpayers and the IRS.¹²¹

The Regulations seek to ensure perpetuity of the conservation restriction in several ways. First, the donor's retained property interest must be "subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purpose of the donation."¹²² A deduction will not be disallowed, though, "merely . . . because the interest . . . may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible."¹²³ Second, the lien of any mortgage on the property must be made subordinate to the conservation easement, so that foreclosure of the mortgage will not erase the conservation right.¹²⁴

2. *I.R.C. Limits on Easement Modifications*

Not only do the Code and Regulations require perpetual easements, they contemplate deviation only in strictly circumscribed situations. The Regulations provide that if there is an "unexpected change in the conditions surrounding the property" that "can make impossible or impractical the continued use of the property for conservation purposes," the conservation purpose will still be considered as having been protected in perpetuity—and the deduction still proper—if the restrictions "are extinguished by judicial proceeding," the property sold, and the donee organization's portion of the proceeds are used in a manner consistent with the contribution purpose of the original gift.¹²⁵ A

¹²¹ See generally Theodore S. Sims, *Qualified Conservation Restrictions: Recollections of and Reflections on the Origins of Section 170(H)*, 33 UTAH ENVTL. L. REV. 41, 45-46 (2013) (describing the benefit of permitting donation of a full interest as matching the fair market value of the claimed deduction to the value of the interest passing to the recipient). On the difficulty in valuing conservation easements in general, see *Esgar Corp. v. Comm'r*, 103 T.C.M. (CCH) 1185 (T.C. 2012).

¹²² 26 C.F.R. § 1.170A-14(g)(1).

¹²³ *Id.* § 1.170A-14(g)(3).

¹²⁴ See *id.* § 1.170A-14(g)(2); see also *Kaufman v. Comm'r*, 687 F.3d 21 (1st Cir. 2012); *Minnick v. Comm'r*, 104 T.C.M. (CCH) 755 (T.C. 2012).

¹²⁵ 26 C.F.R. § 1.170A-14(g)(6); see *Irby v. Comm'r*, 139 T.C. 371 (2012) (applying this provision and finding that clause that required the nonprofit holder to repay its share of proceeds on extinguishment to another nonprofit that provided the funding for the bargain purchase of the easement did not prevent the easement from qualifying). As a related matter, a donee organization may transfer a conservation easement only if transferring to another qualifying organization and if the transferring organization requires the transferee comply

fair reading of the statutory language “extinguished” indicates that only termination, rather than modification or amendment, of a problematic conservation easement is contemplated.¹²⁶ A direct reading of the Regulation would seem also to require the termination of an existing easement rather than its modification or amendment,¹²⁷ despite the modern trend towards empowering courts to modify other types of land servitudes.¹²⁸

Moreover, the standard for permissible extinguishment is strict. Extinguishment of a conservation easement is possible only if the easement is “impossible or impractical,” foreclosing the possibility of modifications where there is no impossibility or impracticality but the conservation goals of the organization or the easement itself would be furthered by a change (such as a small release of the easement in exchange for the addition of high conservation-value acreage to the original easement).

Finally, the language indicates that a judicial proceeding would be required for extinguishment, rather than any less formal process. The IRC apparently would not permit consensual changes between the parties without court action and all that it would entail. A modification not in compliance with § 170 would seemingly expose the taxpayer to scrutiny of past returns where the now “improper” deduction was taken, potential loss of tax benefits and the determination of a deficiency, and possible penalties.¹²⁹

3. *The Cases*

The cases decided under the Code and accompanying Regulations have read the extinguishment provisions narrowly. One recent Tax Court case, for example, held that no deduction was permitted under the “remote future event test” of the Regulations because it was inevitable that the easement would terminate under existing state legislation that limited duration of easements to ninety-nine years.¹³⁰ Federal tax deductions would

with the conservation restrictions. 26 C.F.R. § 1.170A-14(c)(2).

¹²⁶ See Jay, *Perpetual Not Forever*, *supra* note 8, at 10–11.

¹²⁷ See *id.*

¹²⁸ See RESTATEMENT (THIRD) OF PROPERTY § 7.1 (2000); KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 6, at 419–24.

¹²⁹ See *Internal Revenue Bulletin 2004:28, Notice 2004-41* (July 12, 2004), http://www.irs.gov/irb/2004-28_IRB/ar09.html; *Belk v. Comm’r*, 140 T.C. 1 (2013), *aff’d*, 774 F.3d 221 (4th Cir. 2014) (IRS sought deficiency for three prior years’ tax returns because on non-compliance with §170).

¹³⁰ *Wachter v. Comm’r*, 142 T.C. 140 (2014).

thus not be available for such conservation easements in that jurisdiction (North Dakota). Another court held that where the fee owners did not immediately record a conservation easement, the possibility that a hypothetical third party could have purchased the property and defeated the easement because it lacked notice of it was not an occurrence “so remote as to be negligible.”¹³¹ The easement thus was not perpetual and a deduction was not appropriate until the time the easement was recorded.

In *Belk v. Commissioner*, the Tax Court rejected the notion of “floating easements”—a structure that would allow the fee owner to subsequently remove restrictions from certain pieces of a tract in exchange for placing them on other portions.¹³² The developer of a 402 single-family home development placed a conservation easement on a 184-acre golf course serving the development. The easement, held by a local land conservancy, expressly provided that the developer could substitute an equal or lesser area of land contiguous to the original easement area provided the conservancy believed that it had the same or better ecological stability as the original land. The Tax Court found that the perpetuity requirement had not been complied with, even though the conservancy had to assent:

Because the conservation easement agreement permits petitioners to change what property is subject to the conservation easement, the use restriction was not granted in perpetuity. Petitioners did not agree never to develop the golf course. Under the terms of the conservation easement, petitioners are able to remove portions of the golf course and replace them with property currently not subject to the conservation easement. Thus, petitioners have not donated an interest in real property which is subject to a use restriction granted in perpetuity.¹³³

The fact that the conservation *purpose* would continue perpetually after the substitution was not sufficient since the statute also requires that the conservation *interest* must be protected perpetually and the developer was proposing to terminate

¹³¹ *Zarlengo v. Comm’r*, 108 T.C.M. (CCH) 155 (T.C. 2014).

¹³² 140 T.C. 1 (2013), *aff’d*, 774 F.3d 221 (4th Cir. 2014); *see* *Balsam Mountain Investments, LLC v. Comm’r*, 109 T.C.M. (CCH) 1214 (T.C. 2015) (following *Belk*).

¹³³ *Belk*, 140 T.C. at 10–11.

it on a portion of the golf course.¹³⁴

The Tax Court relied on a close reading of the Code in *Belk* to find that the substitution arrangement in the easement document prevented deductibility. This decision clearly reduces flexibility for easement arrangements. But *Belk* was decided on a specific set of facts, where the conservation easement document from the outset contemplated substitution and that substitution was for the developer's benefit. Such an arrangement arguably appeared to be an overreach by the developer-donor, where it obtained the easement deduction but retained control of the land for its development purposes. If, however, there had been no such control retained in the easement document, but the fee owner and the conservancy in the future negotiated a mutually beneficial substitution arrangement, there is a possibility that the court's decision could have been different. In the hypothetical case, the real property interest would indeed be protected in perpetuity by the initial agreement as required by subsection (h)(2)(C), unlike in *Belk*, and the conservation purpose would be maintained in perpetuity as mandated by subsection (h)(5) through its existence on a substitute parcel.

4. *Going Forward with the I.R.C.*

The Internal Revenue Code and its Regulations provide powerful disincentives for modification of conservation easements. Alteration of a conservation easement, except perhaps in certain narrow circumstances, may cause the donor of an easement to lose tax benefits under section 170. Because so many conservation easements are funded through the tax expenditure of the Code, its provisions provide a potent limitation on amendment of conservation easements. Easement acquisitions for market price rather than donations, however, will not be so affected. To the extent that more flexibility in the alteration of donated conservation easements is desired, it appears that changes will be required in section 170(h).

B. *Specific State Statutes on Conservation Easement Alteration*

Although most states have not done so, a few jurisdictions have passed statutes or regulations providing specific procedures and substantive standards for the consensual amendment and

¹³⁴ *Id.* at 11, comparing I.R.C. §§ 170(h)(5) and (h)(2)(C).

termination of conservation easements by the easement holder and fee owner.¹³⁵ These provisions typically make the modification determination a matter for more than just the fee owner and easement holder by involving additional stakeholders and imposing substantive standards. Thus, this type of legislation or regulation usually requires the attorney general to represent the public in a more formal process and a consideration of the public interest in the conservation values of the land. These statutes and regulations offer instructive, albeit differing, models for legislatures and courts in other jurisdictions to consider when seeking the right balance between conservation easement flexibility and strong adherence to initial easement terms.

From the initial passage of its conservation easement act in 1956, Massachusetts has required that termination of an NPO-held easement must be approved by the local governing body and a designated state bureau.¹³⁶ Partial releases of the easement would be covered though it is unclear that the statute controls other modifications of easements.¹³⁷

Other provisions on conservation easement alteration are more recent. In 2007, Maine revised its conservation easement statute to require that all new easements must indicate the holder's power to agree to termination or modification of the easement.¹³⁸ Moreover, a court must approve a proposed termination or any modification that will "materially detract from the conservation values" protected by the easement. The attorney general must be a party to this action. In making its determination, the court must consider the public interest. It would seem that parties operating under this statute would face significant risk as to whether a proposed modification would require judicial approval or whether it could be executed without such process because terms like "materially detract" and "conservation purpose" are at least somewhat ambiguous or very broad.

¹³⁵ Jay, *Perpetual Not Forever*, *supra* note 8, at 43–57; Jay, *Response*, *supra* note 83, at 253, 260. In addition to the statutes cited in the following notes, see also N.J. STAT. ANN. § 13:8B-5 (requiring public hearing before release of conservation easement); N.Y. ENVTL. CONSERV. LAW § 49-0307(1) (providing that a conservation easement can be modified only as provided in instrument, by eminent domain, or pursuant to general statutory provision providing for termination of restrictions that provide no substantial benefit).

¹³⁶ MASS. GEN. LAWS ch. 184, § 32.

¹³⁷ Jay, *Perpetual Not Forever*, *supra* note 8, at 45.

¹³⁸ ME. REV. STAT. ANN. tit. 33, §477-A.

Other state schemes provide a sliding scale for review of proposed modifications depending on the nature of the change and its effect on the original conservation purpose of the easement. New Hampshire's attorney general has imposed this system through a regulation under the attorney general's power to oversee charitable trusts: the attorney general determined that all gifts of conservation easements with specific charitable purposes made to NPOs constitute charitable trusts and are thus subject to oversight of the attorney general.¹³⁹ Under this regulatory scheme, easement amendments are characterized as "low," "more," or "high" risk to the initial conservation purpose. "Low" risk changes may be approved by the attorney general via a "no action" letter, while "high risk" modifications would require a *cy pres* proceeding, with participation by the attorney general and a judicial determination. The regulation provides various definitions of what constitutes the different risk levels.

New Hampshire's sliding scale of scrutiny for easement modifications provides an intriguing model for accommodating many of the competing policies invoked by consensual alteration of conservation easements.¹⁴⁰ It avoids the one-size-fits-all approach and associated inefficiencies, inordinate expense, overkill, and rigidity while preventing revenue and conservation loss for the public. Although the New Hampshire model is rooted in the assumption that charitable trust law applies—a notion rejected by others—¹⁴¹ the sliding scale concept can be adopted legislatively without relying on charitable trust law.¹⁴²

C. Charitable Trust Doctrine and *Cy Pres*

The question of whether charitable trust doctrine *automatically* applies to all gifts of conservation easements has been perhaps the most controversial issue in the area of easement

¹³⁹ Jay, *Perpetual Not Forever*, *supra* note 8, at 47–49.

¹⁴⁰ See *supra* Section II.G.2. For discussion of Vermont's efforts to establish a sliding scale for easement amendment similar to that of New Hampshire, see Jay, *Response*, *supra* note 83, at 260.

¹⁴¹ See *infra* Section IV.C.2.

¹⁴² One suspects that the attorney general needed to utilize charitable trust law as the basis for the attorney general's regulatory program because the attorney general had jurisdiction over charitable trusts. The legislature, however, has general police power over conservation easements, without a need to ground it in charitable trust law.

modification and termination.¹⁴³ If a donation of a conservation easement (or other property) to an NPO is viewed as an *absolute* gift, the organization has significant discretion in administering the easement. If, however, the gift is considered to be made in trust to the NPO (or subject to a condition), then the charitable trust doctrine applies. Under charitable trust doctrine, there are substantive limitations on the NPO's ability to alter the easement; changes must be approved by a court in a *cy pres* proceeding, and third parties, such as the attorney general and perhaps others, will have standing to challenge the proposed modification or termination.¹⁴⁴ Application of charitable trust doctrine invokes tradeoffs of the policy considerations discussed above: increased costs for NPOs, loss of flexibility and innovation in conservation arrangements, and potential rigidity in light of evolving reality versus continued adherence to the original terms, avoidance of revenue loss, respect for easements as property interests, and protection of the public's and donor's interests.

1. *Legal Ramifications*

While the comparisons between an NPO's obligations with respect to an absolute gift and a charitable trust donation could entail lengthy consideration, there are several salient points for the purpose of this Article. First, charitable trust doctrine would permit modifications of a conservation easement only if unforeseen events

¹⁴³ See, e.g., McLaughlin & Weeks, *supra* note 65 (supporting use of charitable trust law); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 434–35 (2005); Schwing, *supra* note 65, (supporting use of charitable trust law); C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009) (rejecting the use of *cy pres*); Lindstrom, *End of Perpetuity*, *supra* note 75 (rejecting *cy pres*); Matthew J. Richardson, Note, *Conservation Easements as Charitable Trusts in Kansas: Striking the Appropriate Balance Among the Grantor's Intent, the Public's Interest, and the Need for Flexibility*, 49 WASHBURN L.J. 175 (2009); Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757 (2005). For an excellent, thoughtful analysis of this issue, see Jay, *Perpetual Not Forever*, *supra* note 8.

¹⁴⁴ *Cy pres* is doctrine applied by courts when the specific purpose of a charitable trust becomes impracticable or impossible of accomplishment. In a *cy pres* proceeding, the court may direct that the proceeds of the trust should be directed to a new specific purpose "as near as" the original one, keeping within the overall general purpose of the trust. See RESTATEMENT (THIRD) OF TRUSTS § 67 (2001); GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES §§ 431–37 (3d ed., rev. 2008).

made the performance of the terms impossible or impracticable.¹⁴⁵ This would prevent modifications in the many scenarios described earlier in this Article, especially those that would enhance overall conservation or social goals, as long as the original easement remained viable according to its terms. Moreover, there is increased process. A judicial cy pres proceeding would be required for a modification,¹⁴⁶ with the attorney general,¹⁴⁷ and perhaps members of a small class of persons intended to be benefited by the trust,¹⁴⁸ empowered to participate in the proceeding. The process will entail expense, time, and risk for an NPO seeking a modification.

If the gift is absolute, these substantive and procedural guidelines will not control. The NPO is required to act responsibly within other legal controls, as described above.¹⁴⁹ But the NPO will have increased flexibility with respect to potential amendments:

In the case of the *absolute gift* full ownership of the property given vests in the corporation, subject to the duties imposed upon it by its charter or articles of incorporation and by the terms of any agreements it makes by contract or in its acceptance of a qualified gift. The Attorney General has the power, as a representative of the state and by *quo warranto* or other proceedings, to compel the corporation to perform these duties, but he acts in a different capacity than as enforcer of charitable trusts.¹⁵⁰

2. *Is Charitable Trust Treatment Automatic?*

Although various proponents have suggested that any gift of a conservation easement to an NPO creates a charitable trust, others disagree.¹⁵¹ Moreover, statutory and other legal sources are indefinite and also in conflict.¹⁵² Comments to uniform acts and restatement provisions are nonbinding and provide at best ambiguous support for automatic application of charitable trust

¹⁴⁵ RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

¹⁴⁶ *Id.* § 399 cmts. d, e.

¹⁴⁷ *Id.* §391 cmt. a.

¹⁴⁸ *Id.* § 391 cmt. c.

¹⁴⁹ *See supra* Section II.G.2.

¹⁵⁰ *See* BOGERT ET AL., *supra* note 144, § 324.

¹⁵¹ *See supra* note 140 (citing commentators).

¹⁵² *See* Korngold, *Governmental Conservation Easements*, *supra* note 1, at 508–12.

rules.¹⁵³

Case law is scarce and not particularly helpful. For example, *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, a closely watched Maryland case, held that an agricultural easement purchased by the state did not create a charitable trust that would give other parties standing to enforce it.¹⁵⁴ The case on some levels supports those that oppose automatic treatment of conservation easements as charitable trusts. The opinion states that a charitable trust will arise only on the showing by clear and convincing evidence that the transferor intended that the transferee would hold the property for a charitable purpose for the benefit of the public. The court found no such intent in this limited duration agricultural covenant, for which the state paid consideration. Because of these facts, however, the case has limited application on whether there was charitable intent in the typical gift of a perpetual easement to an NPO.

A gift of a fee interest to an NPO could be absolute or subject to a condition. Thus, a historical building could be donated without condition to a school or given under a condition that it be held and used as a library. The gift under condition is treated like a charitable trust, and cy pres would have to be applied for the school to alter the use where there is a specific condition of use.¹⁵⁵ Cy pres would not be required if the school decided to sell the building under the first scenario, however, as long as the directors complied with fiduciary duty and the mission was served. Perhaps the most salient lesson of *Long Green Valley* is the Maryland high court's foundational understanding that, as with the gifts of fee interests, not all transfers of conservation easements to NPOs create charitable trusts. Rather, the intent to create a charitable trust, manifested by the holding of property under a fiduciary duty to accomplish a charitable purpose, must be shown by clear and convincing evidence.¹⁵⁶ Absent that showing, there is not charitable trust.

¹⁵³ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 511 n. 190.

¹⁵⁴ *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 68 A.3d 843 (Md. Ct. App. 2013), *aff'g*, 46 A.3d 473 (Md. Ct. Spec. App. 2012).

¹⁵⁵ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 509.

¹⁵⁶ 68 A.3d at 857.

3. *More Mud in the Waters*

For those claiming that the donation of a conservation easement to an NPO always creates a charitable trust, consider this riddle: suppose that, instead of donating a “conservation easement” to preserve open space, the donor conveyed as a gift a traditional, common law “easement of view” to an NPO owning adjacent land.¹⁵⁷ The terms of the “easement of view” prohibit the grantor from building anything that would interfere with the view across the donor’s property. Would that transfer without more create a charitable trust? If not, how is that different than if the grantor had labelled the document “conservation easement” which proponents claim *would* create a trust?¹⁵⁸ If the transfer of the “easement of view” does create a charitable trust, then why doesn’t *every* transfer of real property to an NPO create a trust—something that we know is not the case?¹⁵⁹ The lesson, it seems, is that a hard and fast rule that all conservation easements create charitable trusts cannot be harmonized with other doctrines of property law.

4. *Charitable Trusts vs. the Sliding Scale*

The hunt for vague textual shibboleths supporting or countering the treatment of conservation easements as charitable trusts seems counterproductive.¹⁶⁰ It turns the issue from a needed open discussion over policy and the crafting of bespoke solutions in light of specific problems into a binary debate of whether a conservation easement is a charitable trust, or not. This may result in overkill—application of the charitable trust framework where it does not make sense in light of the extent of the changes and other policies—or “underkill”—the loss of some charitable trust protections where they are needed in light of the facts and proposed changes. A sliding scale approach offers a better, policy-based alternative than the one-size-fits-all method of the choice of

¹⁵⁷ See KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, *supra* note 6, at 7–10 (describing easements of view).

¹⁵⁸ See *generally* Kepple v. Dohrmann, AC 34056, 2013 Conn. App. LEXIS 126, at **15–16 (Mar. 12, 2013) (court noting similarity of easement of view and conservation easement).

¹⁵⁹ See BOGERT ET AL., *supra* note 144, § 324 (describing the difference between an absolute gift to NPO and a charitable trust). See also *Newhall v. Second Church & Soc. Of Boston*, 209 N.E.2d 296 (Mass. 1965); *In re Myra Found.*, 112 N.W.2d 552 (N.D. 1961).

¹⁶⁰ See Korngold, *Governmental Conservation Easements*, *supra* note 1, at 511 n. 190.

charitable trust doctrine, or not.

D. *Third Party Standing*

Some statutes permit third parties to have standing to enforce conservation easements.¹⁶¹ Presumably legislatures granted third party standing in many situations to create “private attorneys general”—to empower persons with a greater interest in the violation of an easement to bring actions that will benefit the public as a whole by preserving the conservation values. This theoretically serves conservation goals.

Third party standing raises several concerns, however, as it could create an impediment to consensual modifications of an easement by the holder and fee owner. The third party could bring an action to enforce the easement as originally written, thus calling into question the validity of the modification. Moreover, third party standing allows an interested party, such as a neighbor, to convert a public right—the easement—into a private right. For example, the neighbor could be enforcing the original easement, even though a modification would be beneficial to the public and conservation in general, because the change has a negative effect on the neighbor’s land.¹⁶²

In *Bjork v. Draper*, for example, an NPO holder of a conservation easement created by the current fee owners’ predecessors and the current fee owners agreed to a modification of the easement.¹⁶³ The NPO agreed to permit an addition of 1,900 square feet, rather than the 1,500 square feet permitted by the easement, and the fee owners agreed to replace the house’s aluminum siding with wood thus restoring it to original condition.

¹⁶¹ See, e.g., 765 ILL. COMP. STAT. ANN. 120/4; 32 PA. STAT. § 5055(7); see Thomas Celona, *Montgomery County Lands Trust Sued, Accused of Failing to Enforce Easement*, THE PHOENIX REPORTER & ITEM (Pa.), Feb. 17, 2011, <http://www.phoenixvilleneews.com/article/PV/20110219/NEWS01/302199966>; Jeremy Roebuck, *Montgomery County Lands Trust Caught Between Wealthy Feuding Neighbors*, Phila. Inquirer, Mar. 4, 2011, at A1.

¹⁶² Strict standing requirements also prevent the judiciary from deviating from cases and controversy requirement, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), and help to ensure active pursuit of cases since the result may create precedent that binds other actions through res judicata and collateral estoppel, see *Douglas v. Planning & Zoning Comm’n*, 13 A.3d 669, 673 (Conn. App. Ct. 2011).

¹⁶³ 886 N.E.2d 563 (Ill. App. Ct. 2008); see also *Bjork v. Draper*, 936 N.E.2d 763 (Ill. App. Ct. 2010) (affirming an appeal of the trial court’s decision on remand).

The parties also agreed to landscaping changes, and they agreed to release the easement on 3.2 percent of the property to allow the fee owners to build a driveway in exchange for an equal-sized easement on a previously unrestricted portion of the land. From a practical and policy perspective, the agreement made sense—it allowed the easement holder and fee owner to work out ongoing issues through dialogue, with a net benefit to conservation values (the removal of aluminum siding). Under the Illinois statute granting owners within 500 feet standing, however, a neighbor brought suit challenging the amendment. The neighbors' reason for the suit was not stated—was it to protect conservation generally and for the public benefit? Was the neighbors' view particularly affected by the landscaping change? Was the driveway placement inconvenient? Did the additional structure size interfere with the enjoyment of their land? Was there a personal gripe involved? Did this affect their property value? The various opinions found that the driveway land swap and the expanded structure were barred by the easement terms.¹⁶⁴

E. Director/Trustee Liability

Directors (aka trustees) of NPOs may hesitate to amend or release an easement out of a concern that this would violate their fiduciary duty of obedience to the organization's mission and expose them to personal liability.¹⁶⁵ Statements such as that of Senator Charles Grassley, then-Chair of the Senate Finance Committee, that “modifying these easements is a huge no-no” can intimidate nonprofit directors from approving alterations that are in the public interest and encompassed by the organization's mission.¹⁶⁶

Directors insurance and lawyers' opinion letters may give

¹⁶⁴ 936 N.E.2d at 768–69, 772–73 (affirming the trial court's holding on remand that the changes to the landscaping and driveway had to be reverted). In contrast, courts—where there was no express third party standing legislation—have rejected neighbor standing in other cases. *See, e.g.,* McEvoy v. Palumbo, CV106002253S, 2011 Conn. Super. LEXIS 2939 (Nov. 15, 2011); Zagrans v. Elek, No. 08CA009472, 2009 WL 1743203 (Ohio Ct. App. June 22, 2009).

¹⁶⁵ *See* Alan M. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457, 466–71 (2010/11).

¹⁶⁶ Lisa Black & Courtney Flynn, *Couple Sue Neighbor Over Use of Conservation Land*, CHI. TRIBUNE, Dec. 1, 2005, http://articles.chicagotribune.com/2005-12-01/news/0512010243_1_easement-conservation-land-conservation-agreement.

some comfort. What is really needed, however, is for legislatures and courts to clarify rules on modification and termination of conservation easements so that directors can fulfill their obligation to their NPOs' missions without fear.

Under any modification regime, however, directors should still be accountable for modifications that do not serve the organization's mission and thus breach the fiduciary duties of loyalty, care, and obedience, as well as for actions placing the NPO's 501(c)(3) tax status at risk. The specter of personal actions against directors for breach of duty is an important tool in ensuring that NPO modification decisions serve the organization's mission and bring overall conservation benefits. Notably, this obligation attaches to all NPOs and is not a function of charitable trust law.

F. *Organizational Considerations*

NPOs may face philosophical, practical, and market oppositions to a policy favoring modification of conservation easements. Additionally, there may be capacity issues.

1. *Mission*

First, NPOs are legitimately concerned that the loosening of conservation restrictions will violate the organization's mission and over time may weaken the organization's conservation ethic. They may also fear that if their organization has a significant record of making amendments, people might hesitate to donate or even sell conservation easements to it since the transferor may want to be sure that the land will be protected forever. Moreover, NPOs seek to avoid a potential public relations disaster if easement alterations are viewed by the general public and regulators as subverting the conservation mission. Nonprofits may also be reluctant to amend easements out of a concern that this will create complications for the donor under the Internal Revenue Code or raise concerns about the NPO's own tax status.¹⁶⁷

These are substantial considerations, ones that might lead many NPO boards to eschew a modification policy. Other boards, however, might believe that their conservation mission can be best served with a more flexible easement program. These boards might pursue a modification agenda and in doing so should proactively address concerns with potential donors, the broader community,

¹⁶⁷ See *supra* note 129.

and legal advisers in order to mitigate risks. Moreover, such NPOs might take additional steps. They should adopt a formal policy that consideration received to amend or transfer an easement must be reinvested for conservation purposes and should be commensurate with the value of the compromised easement rights. Easement holders should carefully explain this policy both at time of acquisition and time of amendment. The holder should also make clear that amendments will only be undertaken if they serve the organization's overarching conservation mission, by increasing the preservation gains of properties held by the organization or allowing for the purchase of other mission-enhancing property rights.

2. *Capacity*

Furthermore, some organizations lack the administrative capacity to consider and address amendment requests, just as some organizations lack the resources and staff to adequately steward easements that they hold.¹⁶⁸ If the easement holder lacks the human and financial resources to effectively respond to negotiation overtures from the fee owner, it will be difficult if not impossible for the parties to reach an agreement. There have been some attempts to address this issue, such as Internal Revenue Code requirements that a donee organization must have the resources to enforce the restriction and must be allowed access to inspect the easement. This does not guarantee, however, that the organization will operate effectively, especially over the long term.¹⁶⁹

G. *Lack of Transparency*

One of the greatest challenges to policy makers in addressing conservation easements and their modification is that, with few exceptions, there is no centralized list of conservation easements within any given jurisdiction.¹⁷⁰ While a title search on a given property will reveal any claims against it, including conservation easements, policy makers do not have an overall view of the

¹⁶⁸ See Korngold, *Contentious Issues*, *supra* note 6, at 1062–63.

¹⁶⁹ The IRS requires that an organization have adequate stewardship resources in order for a deduction to be valid. See 26 C.F.R. § 1.170A-14(c)(1). But the financial position of an NPO can easily erode so that it becomes hard pressed to adequately monitor easements. Best practices might include requesting a fund from the donor for monitoring but the donor may not agree.

¹⁷⁰ See Korngold, *Contentious Issues*, *supra* note 6, at 1046–47.

number, scope and pattern of easements across a region. The advances of the NCED to compile a census of easements have been noted above, but it must be noted again that this is only a voluntary system.¹⁷¹ The disclosure of easement ownership and amendments on the IRS Form 990 provides only partial information and is not sufficient for policy makers to make informed decisions.¹⁷²

States might consider increasing transparency of conservation easement holdings statewide by mandating special indices for conservation easements, as currently required by a few jurisdictions.¹⁷³ To ensure that information is current, this requirement should be extended to any modifications made to the original easement instrument.

CONCLUSION

Conservation easements held by nonprofit organizations have brought tremendous gains in land preservation over recent years by maintaining the environmental and ecological features of millions of acres of American land. While generally intended to be held in perpetuity, courts, legislatures, practitioners, and commentators have actively discussed whether and under what guidelines modifications should be permitted.

Our research has developed a database that provides evidence showing that modifications are already taking place, indicates that most of the changes are conservation neutral or positive, and appears to demonstrate that NPO holders need flexibility on some issues related to easement ownership. Moreover, we see a range of modification issues, and we might expect these to increase over time with changes in the environment and human conditions. Thus, a jurisdiction could seek to adopt a range of procedural and substantive rules depending on the type of modification and the particular policies that it invokes, rather than a unitary approach.

¹⁷¹ See *supra* Section I.A.

¹⁷² See *supra* Section III.

¹⁷³ See, e.g., CAL. GOV'T CODE § 27255(a) (West 2015) (for easements created after Jan. 1, 2002); ME. REV. STAT. § 479-C (requiring easement holders to register annually with the state's Department of Agriculture, Conservation and Forestry); N.Y. ENVTL. CONSERV. LAW § 49-0305(4) (McKinney 2015). Maine requires an annual filing by holders of conservation easements to a designated state department of the recording information of all conservation easements retained by the holder. ME. REV. STAT. ANN. tit. 33, § 477-C (2015).

We think that the best answers to the modification question will emerge from a policy-based discussion informed by, among other factors, empirical data about what NPOs are actually doing.