

# WHEN PERPETUAL IS NOT FOREVER: THE CHALLENGE OF CHANGING CONDITIONS, AMENDMENT, AND TERMINATION OF PERPETUAL CONSERVATION EASEMENTS

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*As the use of perpetual conservation easements to protect private property for the public's benefit grows in popularity, so grow the challenges associated with these perpetually binding promises. Today's conservation community faces significant challenges to amending and terminating perpetual conservation easements in the face of changing conditions, landscapes, climate, and public interests. Because of variations among different legal regimes' guidance for perpetual conservation easements, much remains unsettled regarding perpetual conservation easement amendment and termination. This Article examines inconsistencies in the legal regimes and explores current and emerging common law, legislation, and policies addressing perpetual easement amendment and termination. This Article posits that the conservation community can protect the integrity of perpetual conservation easements by providing clear, consistent guidance through existing or new legal frameworks for state legislatures, courts, landowners, and easement holders, and suggests the means to achieve or craft such guidance.*

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## INTRODUCTION

Nearly nine million acres of land in the United States are currently protected by perpetual conservation easements held by state or local conservation organizations, an increase of over six million acres since 2000.<sup>1</sup> As the use of perpetual conservation easements to protect private property for the public's benefit continues to grow in popularity, so grow the challenges associated with these perpetually binding promises. Today's conservation community<sup>2</sup> faces two immutable challenges to perpetual conservation easements: their holders' willingness and capacity to steward and enforce them, and their durability and relevance in the face of changing conditions.<sup>3</sup> This Article focuses on the latter challenge — the intersection of perpetual conservation easements with changing landscapes, climate, and public interests. It refrains from questioning per se the perpetual nature of conservation easements in favor of focusing on the different legal regimes and on the evolving law guiding perpetual conservation easement amendment and termination.<sup>4</sup>

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<sup>1</sup> KATIE CHANG, LAND TRUST ALLIANCE, 2010 NATIONAL LAND TRUST ALLIANCE CENSUS REPORT 5 (Rob Aldrich & Christina Soto eds., 2011), available at <http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report>.

<sup>2</sup> For the purposes of this Article, "conservation community" is defined to include non-profit tax-exempt organizations and government-entity holders of perpetual conservation easements, landowner donors, and all of the professionals and practitioners involved in perpetual conservation easement transactions.

<sup>3</sup> See Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. L. 441 (2000) for the argument that perpetual conservation easement enforcement is one of the most daunting and important challenges an easement holder faces.

<sup>4</sup> For articles questioning the legality, efficacy, and effectiveness of perpetual donated conservation easements, see generally Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119 (2010); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1098-1100 (1996); John D. Echeverria, *Skeptic's Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE, Aug. 31, 2005, at 1; Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523 (2006); Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573 (2004); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 430 (2005) [*hereinafter* McLaughlin, *Rethinking*]; Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121

A conservation easement is defined generally as “a legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values” and legally as a less-than-fee, non-possessory property interest in land, created by deed conveyance, and held by a third party (usually a land trust or government entity), which, to protect certain conservation values, imposes permanent restrictions on the use of land through negative limitations or affirmative obligations.<sup>5</sup> Conservation easements fit incongruously within common law real property doctrines governing the use and conveyance of land because they allow easement donors to direct land uses for all time, for their own and the public’s benefit, without relinquishing ownership of the land, and — under certain circumstances — in exchange for valuable tax benefits.<sup>6</sup> Assisted by the development of several legal regimes to guide their creation, implementation, enforcement, modification, and termination, conservation easements have become a familiar, significant, and invaluable component of private land protection.<sup>7</sup> Because of variations among the different legal regimes’ guidance, however, much remains unsettled regarding certain aspects of perpetual conservation easements: in particular, their modification and termina-

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(2011); Barton H. Thompson Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601 (2004).

<sup>5</sup> ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7 (2d ed. 2005); Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 9, 14 (Julie Ann Gustanski & Roderick H. Squires eds., 2000). The legal definition blends together many legal regimes’ definitions because conservation easements are defined differently depending on where one looks. The Restatement (Third) of Property: Servitudes (“Restatement”) defines conservation easements in sections 1.6(1) and 4.3(4) as perpetual servitudes

created for conservation . . . purposes [which] include retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6(1)(2000); *see also id.* § 4.3(4) (defining conservation easements as “perpetual”). The Uniform Conservation Easement Act (“UCEA”) defines conservation easements as non-possessory interests in real property

imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

UNIFORM CONSERVATION EASEMENT ACT § 1.1(1) (2007), *available at* [http://www.law.upenn.edu/bll/archives/ulc/ucea/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm). Section 1.170A-14(b)(2) of the Treasury Regulations (“Regulations”) define conservation easements as “a restriction granted in perpetuity on the use which may be made of real property — including, an easement or other interest in real property that under state law has attributes similar to an easement.” Treas. Reg. § 1.170A-14(b)(2) (as amended in 2009); *see also* 26 U.S.C § 170(h)(2)(C) (2006).

<sup>6</sup> *See* *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE*, *supra* note 5, at xxi; UNIFORM CONSERVATION EASEMENT ACT prefatory note (2007).

<sup>7</sup> *See* CHANG, *supra* note 1, at 4.

tion. The unsettled nature of the law surrounding perpetual conservation easement amendment and termination provides the impetus for this Article.<sup>8</sup>

This Article is intended principally for the community of perpetual conservation easement donors, holders, practitioners, and professionals, all of whom are working on the land and attempting to orienteer the different legal regimes' guidance for easement amendment and termination.<sup>9</sup> Although conservation practitioners, professionals, and academics do not universally agree about whether, when, and how perpetual conservation easements ought to be amended or terminated, this Article presupposes that many do agree with the common goal of protecting the integrity and perpetual nature of conservation easements. Practitioners, professionals, and academics might further agree with the notion that a process should exist to guide certain perpetual easement modifications and all terminations.<sup>10</sup> Starting with this common goal, this Article builds a foundation for clear guidance, recognizing that pathways toward the goal may diverge and overlap along the way.

The conservation community can protect the integrity of perpetual conservation easements by providing clear and consistent guidance through existing or new legal frameworks for state legislatures, as well as the courts, landowners, and easement holders that are evaluating and deciding requests for easement modification and termination. In so doing, the community does its best to ensure that perpetual conservation easements and the purposes they protect will endure with flexibility and relevance over time.

This Article addresses these issues in three stages. Part I examines the guidance set out by the different legal regimes, including the Internal Revenue Code ("the Code") and its attendant Treasury Regulations ("Regulations"), the Restatement (Third) of Property: Servitudes ("Restatement"), the Uniform Conservation Easement Act ("UCEA"), and the Land Trust Al-

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<sup>8</sup> Concern over unwinding perpetual conservation easements is likely due not only to easements' increasing popularity, but also to the fact that many easements are subsidized by the public through valuable tax benefits or direct purchase, which may be viewed as lost investments if or when easements are terminated or amended without regard to such investment. See Bray, *supra* note 4, at 130–31 (noting that conservation easements' growth in popularity and the public's subsidy of the easements through federal tax deductions and benefits are intertwined).

<sup>9</sup> This Article also is intended for the benefit of the authors, reporters, drafters, and creators of the existing or new legal regimes guiding land conservation through the use of perpetual conservation easements, including but not limited to: the U.S. Congress; the U.S. Treasury Department; the Internal Revenue Service ("IRS"); state legislatures, administrators, and regulators; the American Law Institute; the Uniform Law Commission National Conference of Commissioners on Uniform State Laws ("ULC"); and the Land Trust Alliance ("LTA"), each of which are responsible for crafting laws, codes, regulations, or guidance for perpetual easements.

<sup>10</sup> In furtherance of protecting the integrity of perpetual conservation easements, some practitioners and professionals can agree generally that a process exists or should exist to guide donated easement amendments and modifications that affect a donated easement's original purpose(s) or donor intent, or that terminate the easement in part or in whole. Otherwise, most of the control and decision-making authority generally remains or should remain and be vested in the holder.

liance (“LTA”) Standards and Practices (“Standards and Practices”). Next, Part II studies emerging judge-made common law and evolving statutory law, regulations, and policies crafted by legislatures, regulators, administrators, and communities of holders to provide additional guidance in the midst of these different legal regimes. Finally Part III examines options and next steps for addressing the overlap between these regimes, including: waiting and seeing; doing something to interpret, amend, or create state law, policy, or regulations to assist in decision-making; doing something to make consistent the legal regimes and their guidance; and doing something to inspire the Internal Revenue Service (“IRS”) to provide its own guidance, defer to state law, or revise the Regulations specifically to address perpetual easement amendment.

## I. ORIGINS, LEGAL FRAMEWORK, AND GUIDANCE

No fewer than four different legal regimes guide perpetual conservation easements: the Code and its associated Regulations;<sup>11</sup> the Restatement;<sup>12</sup> the UCEA;<sup>13</sup> and the LTA Standards and Practices.<sup>14</sup> Each regime serves a different purpose, with different goals and foci. The Code outlines requirements for tax-deductible conservation easement gifts, and the Regulations guide the implementation of the Code.<sup>15</sup> The Restatement guides judge-made common law, and the UCEA guides statutory law for conservation easements.<sup>16</sup> The LTA’s Standards and Practices establishes rules and procedures for member nonprofit-organization holders of conservation easements.<sup>17</sup>

Each regime’s purpose, goals, and foci lead to slightly different treatment of amending and terminating perpetual conservation easements. These variations may confuse landowners, easement holders, and courts facing easement amendment and termination requests and thereby undermine the overall integrity of perpetual conservation easements. It is therefore prudent to understand with specificity the language, purposes, and goals of the regimes; to identify variations between, among, and within them; and to determine how the variations might be reconciled going forward.

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<sup>11</sup> See 26 U.S.C. § 170(h) (2006); Treas. Reg. § 1.170A-14 (as amended in 2009).

<sup>12</sup> See RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 7.10, 7.11 (2000).

<sup>13</sup> UNIFORM CONSERVATION EASEMENT ACT (2007).

<sup>14</sup> LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES (2004) [hereinafter STANDARDS AND PRACTICES], available at <http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>.

<sup>15</sup> Treas. Reg. § 1.170A-14 (as amended in 2009); see also *infra* Part I.A.

<sup>16</sup> See *infra* Part I.B–C.

<sup>17</sup> See *infra* Part I.D.

A. *Internal Revenue Code and Treasury Regulations*

Congress crafted section 170(h) of the Code to create an income-tax deduction for donated conservation easements with conservation purposes, the protection of which provides significant public benefits.<sup>18</sup> The defining characteristic of all qualifying easement gifts is that they are perpetual, ostensibly to provide public benefit forever.<sup>19</sup> Although legislative history suggests the intention to revisit and possibly modify this provision of the Code, Congress does not appear to have contemplated the modification or termination of perpetual conservation easements.<sup>20</sup>

The Code states that to be eligible for a tax deduction based on the gift of a qualified conservation contribution, the contribution must be “of a qualified real property interest,” given in perpetuity “to a qualified organization,” and made “exclusively for conservation purposes.”<sup>21</sup> For the conservation gift to be made “exclusively for conservation purposes,” the conservation purpose must be protected in perpetuity.<sup>22</sup> Congress therefore required both the conservation easement and the easement’s purpose to be perpetual, because the conservation easement is a qualified real property interest that is given *in perpetuity*, and the conservation easement’s conservation purposes must be protected *in perpetuity*.<sup>23</sup>

The IRS together with the Department of Treasury drafts the Regulations to interpret the Code and guide taxpayer actions consistent with the Code. Section 1.170A-14 of the Regulations, drafted for Code section 170(h), similarly defines a qualified conservation contribution as “the contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes . . . [which] must be protected in perpetuity.”<sup>24</sup> To be eligible for a tax deduction, the qualified real property interest must be a perpetual conservation restriction, such as an easement or other similar real property interest under state law, which is “granted in perpetuity on the use which may be made of real property . . . .”<sup>25</sup> The qualified organization may only transfer an easement to another qualified organization if the recipient agrees to carry out the easement’s conservation purposes forever.<sup>26</sup> The Regulations, like the Code, state that both conservation purposes and conservation easements are perpetual.<sup>27</sup> However, by al-

<sup>18</sup> 26 U.S.C. § 170(h) (2006).

<sup>19</sup> S. REP. NO. 96-1007, at 8–9 (1980). The legislative history shows the requirement of perpetuity created an exception to the restriction on gifts of partial interests in real property by allowing the perpetual easement to be treated as an undivided interest in real property. *Id.* at 7.

<sup>20</sup> *See id.* at 9–10 (discussing the revision of the definition of “conservation purposes,” but not anticipating easement modification or termination).

<sup>21</sup> 26 U.S.C. § 170(h)(1); *see also id.* § 170(h)(2) (defining a “qualified real property interest”); *id.* § 170(h)(3) (defining a “qualified organization”).

<sup>22</sup> *Id.* § 170(h)(5)(A).

<sup>23</sup> *Id.* § 170(h)(1), (2)(C), (5)(A).

<sup>24</sup> Treas. Reg. § 1.170A-14(a) (as amended in 2009).

<sup>25</sup> *Id.* § 1.170A-14(b)(1)(ii), (b)(2).

<sup>26</sup> *Id.* § 1.170A-14(c)(2).

<sup>27</sup> *Id.*

lowing an easement's termination under certain circumstances, the Regulations emphasize perpetuating an easement's purposes over time, as opposed to perpetuating the deed of the easement itself.<sup>28</sup>

The Regulations envision specific circumstances in which an easement gift will be considered perpetual and therefore tax-deductible, even if the easement itself is extinguished, provided that the easement's purposes survive through the dedication of "proceeds" to those purposes elsewhere.<sup>29</sup> If an easement is terminated due to changed conditions, "proceeds" from any subsequent sale or exchange of the unencumbered property must be returned to the easement holder in proportion to the easement's value.<sup>30</sup> When the holder uses these "proceeds" in a manner consistent with the terminated easement's purposes, the conservation easement gift continues to be considered perpetual and tax deductible, even though the conservation easement itself has been terminated.<sup>31</sup> The Regulations therefore provide that even when a conservation easement deed itself is terminated, the gift of a qualified conservation contribution will continue to be defined as perpetual and will be tax-deductible, so long as the conservation easement's purposes continue to be promoted elsewhere through the dedication of proceeds.<sup>32</sup> Therefore, the deductibility of a perpetual conservation easement, which is determined at the time of its grant, is not necessarily defeated when at some time in the future the deed of conservation easement is terminated. The Regulations' process for the redistribution of proceeds to further the easement's

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<sup>28</sup> See *id.* § 1.170A-14(a), (c)(2), (g)(6). It may be useful to envision the deed of conservation easement as a vehicle such as a taxicab, carrying its conservation purposes as passengers through time. In this way, the Code describes the perpetuation or continuation of both the taxicab and its passengers over time, with no concept of either the taxicab (conservation easement) or its passengers (purposes) ever being terminated or discontinued. The Regulations, on the other hand, envision a time when the taxicab might be terminated; in that case, as long as the passengers of the taxicab continue to be perpetuated over time, the easement will still be defined as perpetual and qualify for a tax deduction. The Regulations, therefore, emphasize the perpetuation of the taxicab's passengers as conservation purposes over time, even though the taxicab itself is terminated or extinguished (those terms being used interchangeably). In other words, a conservation easement may be terminated pursuant to the Regulations, but provided that its purposes continue to be perpetuated over time, both the easement and its purposes will still be considered to be perpetual, and the qualified contribution will still be tax-deductible, even though the conservation easement ceases to exist. The Regulations' taxicab, therefore, would let its passengers out to get into a new taxicab, while the original taxicab would be taken to a junkyard or driven off a cliff.

<sup>29</sup> *Id.* § 1.170A-14(c)(2), (g)(6). See *Kaufman v. Comm'r*, 134 T.C. 182, 186 (2010) (*Kaufman I*), *aff'd* 136 T.C. 294 (2011) (*Kaufman II*) (holding the dedication of proceeds to be a necessary part of the Code and Regulations' perpetuity requirements). In *Kaufman II*, Judge Halpern also comments on the judicial processes that appear to be required by the Regulations. See 136 T.C. at 306-07; see also *infra* note 50.

<sup>30</sup> Treas. Reg. § 1.170A-14(c)(2). It is unclear how these proceeds might be tracked over time, as it could be quite some time before the subsequent sale, exchange, or conversion of the unencumbered property. For a discussion of how proceeds must be distributed upon termination, see *Kaufman I*, 134 T.C. at 186-87 (finding that a perpetual easement holder must have a guaranteed and unfettered right to its proportionate share of future proceeds and that failure to so provide will render a conservation easement non-perpetual and not a qualified gift).

<sup>31</sup> Treas. Reg. § 1.170A-14(c)(2).

<sup>32</sup> *Id.* § 1.170A-14(c)(2), (g)(6).

purposes underscores the Regulations' focus on perpetuating conservation purposes in perpetuity, but not necessarily the deed of the conservation easement — the vehicle initially designed to protect and shepherd those purposes through time.

The Regulations anticipate various situations in which it will be difficult or impossible to enforce an easement into perpetuity. These scenarios fall into three categories: those that foreseeably could allow uses of land inconsistent with the purposes of the doctrine; those that have a likelihood of occurring which is “so remote as to be negligible;” and those that are the result of unexpected changed conditions.<sup>33</sup> Foreseeable uses of land that will be inconsistent with the purpose of the donation must be restricted by legally enforceable means.<sup>34</sup> The Regulations identify foreseeable inconsistent uses as including — but not limited to — foreclosure of mortgages or interests not subordinated to the terms of the conservation easement;<sup>35</sup> mineral extraction using any surface or irremediably destructive mining methods;<sup>36</sup> and protection of conservation purposes where the landowner reserves certain rights, the exercise of which may impair the protected conservation values.<sup>37</sup> The Regulations also recognize that although unanticipated or unlikely events may occur to defeat an easement, these events will not render the easement “non-perpetual” if, at the time of the grant, the possibility of these events occurring was so remote as to be negligible.<sup>38</sup> The Regulations further anticipate situations where a property's use for conservation purposes may later become impossible or impractical due to unexpected changed conditions.<sup>39</sup> In those cases, the Regulations allow the easement to be terminated.<sup>40</sup> If an easement is extinguished because of unexpected changed conditions surrounding the protected property, the Regulations provide that its purposes can still be perpetuated, even though the easement is terminated, by dedicating proceeds from the sale of the unencumbered land to the same purposes elsewhere. The Regulations therefore treat the easement purposes as perpetual, even though the easement itself is terminated, because the purposes continue to be promoted over time.<sup>41</sup> This language is important enough to parse through with attention to detail and word choice. Section 1.170A-14(g)(6), entitled “Extinguishment,” provides:

If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can none-

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<sup>33</sup> *Id.* § 1.170A-14(c)(2), (g)(2)-(6).

<sup>34</sup> *Id.* § 1.170A-14(g).

<sup>35</sup> *Id.* § 1.170A-14(g)(2).

<sup>36</sup> *Id.* § 1.170A-14(g)(4).

<sup>37</sup> *Id.* § 1.170A-14(g)(5).

<sup>38</sup> *Id.* § 1.170A-14(g)(3).

<sup>39</sup> *See id.* § 1.170A-14(c)(2).

<sup>40</sup> *Id.* § 1.170A-14(g)(6).

<sup>41</sup> *See id.*

theless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.<sup>42</sup>

And the next subsection, "Proceeds," reads:

Accordingly, [w]hen a change in conditions give [sic] rise to the extinguishment of a perpetual conservation restriction under paragraph (g)(6)(i) of this section, the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.<sup>43</sup>

As written, the circumstances under which a perpetual easement can be terminated seem fairly straightforward: if changes surrounding the property that were unexpected at the time of the easement donation make it impossible or impractical to achieve the easement's conservation purposes, the easement can be terminated.<sup>44</sup> The Regulations describe no intermediate step, such as amendment, between the changed circumstances and the easement's termination.<sup>45</sup> One might surmise that, because nothing in the Regulations expressly prohibits it, amendment would be permitted.<sup>46</sup> However, termination as a response to changed conditions, without mention of amendment, would be typical of the traditional application of the changed-conditions doctrine at the time of the Regulations' drafting.<sup>47</sup> If an easement's original

<sup>42</sup> *Id.* § 1.170A-14(g)(6)(i).

<sup>43</sup> *Id.* § 1.170A-14(g)(6)(ii).

<sup>44</sup> *Id.* § 1.170A-14(g)(6)(i).

<sup>45</sup> *Id.*

<sup>46</sup> *See id.*; *see also* Letter from Stephen J. Small, Esq., to author 4 (Jan. 17, 2011) (on file with author) (describing that amendment of perpetual conservation easements is neither contemplated nor prohibited by the Regulations).

<sup>47</sup> *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 cmt. a (2000) ("The changed-conditions rule has traditionally been used to terminate servitudes, rather than to modify them, but the less drastic step should be taken if modification would permit the servitude to continue to serve the purpose for which it was designed to an extent that is worthwhile."). The reporter for the previous statement points out that in 1982, the changed-conditions doctrine was typically used to terminate servitudes:

The changed conditions doctrine provides courts with a mechanism for refusing to enforce servitudes that have become obsolete or unreasonably burdensome. It is normally applied to lift restrictions when the character of the area surrounding the burdened property has changed so radically that the original benefit can no longer be gained from continued enforcement. The doctrine thus operates to protect the specified use . . . until the time that the neighborhood becomes unsuitable for the . . . original purposes.

purposes became impossible or impractical to accomplish, pursuant to the traditional application of the changed-conditions doctrine, the easement would be terminated — not amended to adjust to the changing circumstance or to substitute purposes. The changed-conditions doctrine has since adapted to allow for an easement’s modification prior to its termination to accomplish the original or new purposes.<sup>48</sup>

One might read the Regulations to imply that other purposes should be substituted through amendment prior to an easement’s termination. The Regulations state that, if changed conditions surrounding the property make impossible or impractical the “continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity.”<sup>49</sup> This could be read as providing that, if continued use of the property for any conservation purpose is no longer possible, the easement could be terminated, implying that other purposes ought to be substituted prior to termination. An interpretation allowing for easement modification prior to termination certainly would afford more flexible easements over time. This interpretation is in accord with the modern changed-conditions and cy pres doctrines the Restatement describes.<sup>50</sup> However, the

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Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1300 (1982) (footnotes omitted); see also *id.* at 1269 (“There is nothing comparable to the ‘changed conditions’ doctrine of equitable servitudes which terminates a restraint where neighborhood conditions have changed so that the restriction no longer accomplishes the purpose intended by the original parties.” (footnotes omitted)).

<sup>48</sup> See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (2000).

<sup>49</sup> Treas. Reg. § 1.170A-14(g)(6)(i) (emphasis added). “Impractical” as used in the Regulations is a notable step down from the Restatement’s higher standard of “impracticable.” See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000); see also *infra* Part II.B.

<sup>50</sup> See *infra* Part II.B; see also Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements As Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 128–49 (2002) (providing a detailed discussion of the possible evolution and potential drawbacks of the application of the charitable trust doctrine to perpetual conservation easement processes of amendment and termination); Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 39–42 (1989) (concluding that although there are sound arguments for and against applying the traditional changed-conditions doctrine to conservation easements, the balance of interests tips in favor of not applying the traditional doctrine); French, *supra* note 4, at 253 (noting the limitations of the changed-conditions and charitable trust cy pres doctrines in addressing “better” uses for land protected by conservation easements); Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 105–10 (2006) (describing the debate between UCEA drafters surrounding use of the charitable trust and changed-conditions doctrines); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 482–94 (1984) (noting that applying the changed-conditions doctrine to perpetual conservation easements differs from applying it to other servitudes due to the consideration of public interests involved with conservation easements); McLaughlin, *Rethinking*, *supra* note 4, at 508–09 (arguing that an easement donated for federal tax benefits may be considered for substitution of its original purpose through application of the charitable trust doctrine of cy pres and its attendant judicial processes). In *Kaufman II*, Judge Halpern states that the Regulations essentially require a cy pres proceeding: “The drafters of [Regulations] section 170A-14 . . . understood that forever is a long time and provided what appears to be a regulatory version of cy pres to deal with unexpected changes that make the continued use of the property for conservation purposes impossible or impractical.” 136 T.C. 294, 306–07 (2011). Judge Haines

absence of any language further describing this intermediate step, paired with statements by the Regulations' drafters that they did not contemplate amendment at the time the Regulations were drafted,<sup>51</sup> makes this interpretation less likely and the issue a good candidate for IRS guidance. Ideally, the IRS would either make an individual private letter ruling regarding the basis of amending an easement prior to termination or revise the Regulations to specifically address amendments to easement conditions.<sup>52</sup>

The Regulations may seem unequivocal in describing the process for termination as "judicial" in the phrase "if the restrictions are extinguished by *judicial* proceeding . . . ."<sup>53</sup> Yet this clause also has been read to imply a broader range of possibilities, with the judicial process interpreted as a "safe harbor," or one option that "can" be used in termination to ensure compliance with the Code and Regulations.<sup>54</sup> The key word "can" in the phrase "*can* nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding"<sup>55</sup> has been read to suggest that there may be other processes available for termination, perhaps as created by state law.<sup>56</sup> A tax court judge recently endorsed this exact interpretation by explicitly refusing to create a bright line rule requiring a judicial proceeding and finding instead that the extinguishment clause of the Regulations "provides taxpayers with a guide, a *safe harbor*, by which to create the necessary restrictions to guarantee protection of the conservation purpose in perpetuity."<sup>57</sup>

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later rejects this interpretation of the Regulations and application of *cy pres* to a conservation easement in *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 11–13 (2012).

<sup>51</sup> Letter from Stephen J. Small, Esq., to author, *supra* note 46, at 4 (describing how amendment of perpetual conservation easements was not even considered when the Regulations were drafted).

<sup>52</sup> See *infra* Part III.

<sup>53</sup> Treas. Reg. § 1.170A-14(g)(6)(i) (emphasis added).

<sup>54</sup> ANDREW C. DANA, COMMENTARY TO THE MODEL MONTANA CONSERVATION EASEMENT AMENDMENT POLICY 19 n.7 (2011). According to the Commentary,

[Regulations section] 1.170A-14(g)(6)(i) is sometimes assumed to *require* judicial termination or reform — and *only* judicial termination or reform — [sic] of conservation easements in the event of changed circumstances. This understanding is not accurate. The Regulation actually says that in the event of changed circumstances, the conservation purpose *can* nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding . . . . The plain language of the Regulation does not mandate termination or reformation by the courts if the conservation purposes have become impossible or impractical to accomplish. The Regulation simply states that judicial termination is one option open to land trusts — a safe harbor — but it leaves open the door for other methods of protecting perpetuity in easement extinguishment situations.

*Id.* The *Carpenter* interpretation of the Regulations' extinguishment clause allowing judicial proceedings as a "safe harbor," *Carpenter*, T.C. Memo 2012-1, at 18, implies that other state processes for termination, perhaps such as Vermont's proposed administrative process for reviewing proposed perpetual easement amendment and termination, discussed *infra* Section II.B.4, may be acceptable.

<sup>55</sup> Treas. Reg. § 1.170A-14(g)(6)(i) (emphasis added).

<sup>56</sup> DANA, *supra* note 54, at 19 n.7.

<sup>57</sup> *Carpenter*, T.C. Memo 2012-1, at 18 (citing *Kaufman II*, 136 T.C. 294, 307 n.7 (2011)).

That the Regulations might defer to state law for processes other than a judicial process as a safe harbor would not be so surprising; the Regulations defer to state law in other contexts — for example, in dealing with distribution of proceeds in proportion to the easement’s value “unless *state law* provides that the donor is entitled to the full proceeds . . . .”<sup>58</sup> Further, the phrase “judicial proceeding” itself likely refers to a state court implementing state law for termination.<sup>59</sup> Whether a judicial process is required by the Regulations or is a safe harbor could be further clarified with IRS guidance, either through an individual private letter ruling proposing a non-judicial process for termination or by a revision to the Regulations specifically addressing deference to state law and other processes, among other options.<sup>60</sup>

In summary, the plainest interpretation of the Regulations’ language for perpetual easement termination would be: if circumstances change surrounding the property, making the continued use of the property for its protected conservation purpose impossible or impractical, the easement can be extinguished by judicial proceeding. If all of the proceeds later received by the donee are used in a manner consistent with the purposes of the original contribution, the easement is treated as protected in perpetuity, even though it has been terminated.<sup>61</sup> This interpretation emphasizes simply that when the *original purpose* of the conservation easement is impossible or nearly impossible to achieve, the easement *can be allowed* to be terminated. Because the judicial process itself is not further defined, however, this section of the Regulations remains open to interpretation. It would seem that parties to an easement could walk into a court and ask for an easement’s release or termination based on changed conditions that make its purposes impossible or impractical to accomplish.<sup>62</sup> In fact, the Walters and the Otero County Land Trust purported to do just this.<sup>63</sup>

Even if the IRS, as the Code’s enforcement agency, disagreed with this or any other interpretation of the Regulations, it might struggle to reach any of the involved parties to hold them accountable. Barring fraud, the IRS’s only way to reach beyond the three-year statute of limitations for donors claiming a tax deduction would be to explore actions through the easement holder’s reporting, which, if the holder is a tax-exempt nonprofit entity, in-

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<sup>58</sup> Treas. Reg. § 1.170A-14(g)(6)(ii) (emphasis added).

<sup>59</sup> *Id.* § 1.170A-14(g)(6)(i). In fact, the court in *Carpenter* does just this when it defers to Colorado state law in order to determine the effect of the conservation easement deeds at issue and, more specifically, how conservation easements may be extinguished, because “state law determines the nature of the property rights at issue.” *Carpenter*, T.C. Memo 2012-1, at 11.

<sup>60</sup> See *infra* Part III.

<sup>61</sup> IRS Priv. Ltr. Rul. 08-36-014 (June 3, 2008).

<sup>62</sup> Parties to an easement could seek to end the easement in a variety of ways, including requesting termination or extinguishment of the easement deed or release from the terms of the easement. See UNIFORM CONSERVATION EASEMENT ACT § 2(a) (2007).

<sup>63</sup> See *infra* Part II.A.2.

cludes annual federal tax returns documenting the easements it holds and their disposition, including modification and termination.<sup>64</sup>

Though the Regulations are silent as to easement amendment, the IRS still is interested to know if holders and taxpayers are modifying or terminating their easements, largely because of the substantial public investment in donated perpetual easements through tax subsidy. The IRS recently issued revised Tax Form 990 and instructions for tax-exempt organizations that essentially require easement holders to demonstrate that they are committed to and capable of enforcing and defending the conservation easements they hold.<sup>65</sup> Land trusts need to prove that they keep adequate records, maintain easement endowments, and enforce their easements.<sup>66</sup> The new form also requires an account of the “[n]umber of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year.”<sup>67</sup> It is not clear exactly why the IRS requires this information, what an inappropriate response might be, or what the reaction would be to an inappropriate number. The IRS evaluates transactions based on whether they comply with the Code or are abusive or fraudulent.<sup>68</sup> Possibly the IRS might audit the holder to determine why easements were amended or terminated pursuant to its Form 990 reporting as a tax-exempt Code section 501(c)(3) entity.<sup>69</sup> It might find that, by failing to protect conservation purposes in perpetuity, the holder does not constitute a “qualified organization” or “eligible donee” as defined by Code section 170(h)(3) and Regulations section 1.170A-14(c)(1), respectively.<sup>70</sup> Or the IRS might sanction the holder for participating knowingly in an excess benefit transaction, or find it not to be operating in furtherance of its exempt purpose, and revoke its tax-

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<sup>64</sup> It may be possible to audit the tax return of an easement holder who reports the amendment or termination of an easement it holds within the audit period for that return, even long after an easement’s grant and the donor’s own audit period has expired.

<sup>65</sup> IRS Form 990, pt. IV, 1.7, *available at* <http://www.irs.gov/pub/irs-pdf/f990.pdf>; IRS Form 990 Schedule D, pt. II, *available at* <http://www.irs.gov/pub/irs-pdf/f990sd.pdf>.

<sup>66</sup> IRS Form 990 Schedule D requires the following information:

3. Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year; 4. Number of states where property subject to conservation easement is located; 5. Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds?; 6. Staff and volunteer hours devoted to monitoring, inspecting, and enforcing easements during the year; 7. Amount of expenses incurred in monitoring, inspecting, and enforcing easements during the year.

*Id.* pt. II, 1s.3–7. For general guidance and discussion of the law applicable to tax-exempt organizations, see BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* (10th ed. 2011).

<sup>67</sup> IRS Form 990 Schedule D, pt. II, 1.3.

<sup>68</sup> *See* Letter from Stephen J. Small, Esq., to author, *supra* note 46, at 11.

<sup>69</sup> IRS Form 990 Schedule D, pt. II, 1.3.

<sup>70</sup> 26 U.S.C. § 170(h)(3) (2006); Treas. Reg. § 1.170A-14(c)(1) (as amended in 2009).

exempt status pursuant to Code section 501(c)(3) and intermediate sanctions outlined at Code section 4958.<sup>71</sup>

Tax-exempt organizations created pursuant to Code section 501(c)(3) must be organized and operated exclusively in furtherance of their exempt purpose to serve public, and not private, interests.<sup>72</sup> They therefore are barred from transferring assets to a private individual without adequate compensation because of that individual's relationship with the organization, or from allowing more than an insubstantial benefit to accrue to private individuals or organizations.<sup>73</sup> Such transactions create private inurement for insiders or private benefit for non-insiders, respectively, depending on the beneficiary.<sup>74</sup> The IRS response in these cases may be either the proverbial "death sentence" (to strip that organization of its tax-exempt status), or in cases of private inurement and excess benefit, perhaps the more lenient intermediate step of imposing excise taxes and penalties on persons and organizations who engaged in the excess benefit transactions.<sup>75</sup>

An individual may be given an impermissible private benefit through amendment or termination of a conservation easement on his property. For example, the holder might return to the landowner relinquished development rights, change the easement's boundary lines, swap protected land for unprotected land, decline to enforce easement violations, or release land from an easement. If the IRS determines that these actions create an impermissible private benefit, and the land trust's overall operation substantially serves a purpose that is not its exempt purpose, the IRS could revoke the organization's tax-exempt status.<sup>76</sup> If these actions benefit an insider to the organiza-

<sup>71</sup> IRS, COMPLIANCE GUIDE FOR 501(C)(3) PUBLIC CHARITIES 2-3 (2009), available at <http://www.irs.gov/pub/irs-pdf/p4221pc.pdf>.

<sup>72</sup> Treas. Reg. § 1.501(c)(3)-1(d)(ii).

<sup>73</sup> See *Id.* § 1.501(c)(3)-1(c)(2) (requiring that no part of a tax-exempt organization's net earnings may "inure to the benefit of any private shareholders or individuals").

<sup>74</sup> *Id.*; see IRS, *supra* note 71, at 2-3 ("No part of an organization's net earning may inure to the benefit of an insider. An insider is a person who has a personal or private interest in the activities of the organization such as an officer, director, or a key employee.").

<sup>75</sup> Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1311, 110 Stat. 1452, 1475-79 (1996) (codified at 26 U.S.C. § 4958) (amended in 2006); see also Bill Silberstein & Jessica Jay, *Staying Within the Bounds of the Income Tax Code and Public Perception: Private Inurement and Private Benefit*, LAND TRUST ALLIANCE EXCHANGE, Spring 1999 at 22-23, available at <http://www.conservationlaw.org/publications/09-PrivateBenefitandInurement.pdf> (discussing the then newly enacted Code provision for excess benefit transactions in the context of its effect on land trusts actions in creating private benefit, inurement, and conflict of interest).

<sup>76</sup> See 26 U.S.C. § 501(c)(3) (2006). It would be difficult to conceive of a tax-exempt organization losing its exempt status on the basis of one arguably poor choice or judgment in decision-making regarding amendment or termination. The language of Code section 501(c)(3) and its Regulations seems to focus on whether an organization's overall operation is substantially for a non-exempt purpose. See *id.* Two conservation organizations lost their tax-exempt status in December 2010: the Panhandle Land Conservancy, Inc. in Florida and the Chesapeake Wildlife Sanctuary in Maryland. See IRS, *Recent Revocations of 501(c)(3) Determinations*, <http://www.irs.gov/charities/charitable/article/0,,id=141466,00.html> (last visited Feb. 1, 2012) (on file with the Harvard Law School Library). The Maryland case involved failures to file the Form 990 annual reports, record-keeping violations, and misappropriation of funds, the last of which resulted in jail time. See Ernesto Londoño, *Head of Wildlife Sanctuary Strikes Plea Deal: Woman Was Accused of Diverting Funds*, WASH. POST, Aug. 23, 2007,

tion, the IRS could also revoke the organization's tax-exempt status, or impose on the insider and organization sanctions and excise taxes on the benefit received.<sup>77</sup>

From the taxpayer standpoint, the IRS might treat an amendment or termination that returned substantial and valuable rights to the taxpayer as creating a tax benefit and apply the inclusionary version of the tax benefit doctrine.<sup>78</sup> The tax benefit doctrine provides that the later recovery of amounts deducted in previous years must be included as taxable income for the later year, especially if the event giving rise to the recovery is "fundamentally inconsistent" with the premise upon which the earlier deduction was based.<sup>79</sup> This doctrine might extend to granting a perpetual conservation easement to obtain a tax deduction, and then regaining the rights bound by that conservation easement in a later year through amendment or termination. It is unlikely, however, that pursuant to this doctrine, the actions of a subsequent landowner to unwind a conservation easement would be treated the same as similar actions of the original donor, who benefited from the tax deduction. In light of the IRS's scrutiny of these transactions and the potential consequences of that scrutiny, it is crucial that both tax-exempt easement holders and conservation easement donors strive to make their actions consistent with the Code and Regulations when amending and terminating perpetual easements.

At least one reported IRS case, *Strasburg v. Commissioner*,<sup>80</sup> has broached the subject of amendment. That case mainly concerned issues of valuation. In *Strasburg*, the IRS determined tax return deficiencies were owed for the overvaluation of a conservation easement a landowner had granted to the Montana Land Reliance, as well as the overvaluation of the easement's later amendment, in which the landowner gave up additional rights.<sup>81</sup> The basic issues before the Tax Court were whether the conserva-

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<http://www.washingtonpost.com/wpdyn/content/article/2007/08/22/AR2007082202576.html>. The IRS also recently denied a conservation organization's application for tax exemption, in part because the entity's two conservation easements allowed the entity to terminate the easements by conveying the easements back to the landowners if circumstances arising in the future made the purposes of the easements impossible to accomplish. IRS Redacted Proposed Adverse Determination Ltr. at 1-2 (Mar. 16, 2010), available at <http://www.irs.gov/pub/irs-wd/1048045.pdf>. The IRS stated that these provisions "contravene the apparent intent of Congress that qualified conservation easements be 'granted in perpetuity.'" *Id.* at 12 (citing 26 U.S.C. § 170(h)(2)(C) (2006)). In *Carpenter*, Judge Haines agrees, determining that the ability of the easement donor and holder to mutually agree to terminate a perpetual easement defeats the easement's qualification for a federal tax deduction because the easement is not enforceable in perpetuity. *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 18-19 (2012).

<sup>77</sup> 26 U.S.C. § 4958(a)-(b), (d)(2) (2006). The IRS could impose on the insider a 25% excise tax on the benefit received or payment of an additional 200% of the benefit should the excess benefit not be corrected within the taxable period. *Id.* § 4958(a)-(b). Additionally, the IRS may impose a tax of 10% of the excess benefit, up to a maximum of \$20,000 per transaction, on the organization manager who participated in the excess benefit transaction. *Id.* § 4958(a)(2), (d)(2).

<sup>78</sup> *Hillsboro Nat'l Bank v. Comm'r*, 460 U.S. 370, 372 (1983).

<sup>79</sup> *Id.*; see also 26 U.S.C. § 111 (2006).

<sup>80</sup> 79 T.C.M. (CCH) 1697, 2000 Tax Ct. Memo LEXIS 107 (2000).

<sup>81</sup> *Id.* at \*1-2.

tion easement was worth \$1,080,000 and whether the later amendment to the easement was worth \$290,000.<sup>82</sup> The court held that the easement was worth \$800,000 and that the amendment was worth \$290,000.<sup>83</sup> This decision showed two important principles: first, it demonstrated that amendments to conservation easements can occur and be consistent with the Code and Regulations; second, it showed that amendments giving up value can create *new* charitable gifts. A logical extension of this holding is that amendments that increase protected conservation values or an easement's monetary value, such as those adding acres or increasing limitations on development, will also qualify for additional tax benefits. In the absence of further case law, guidance, private letter rulings, or Regulation revisions related to perpetual easement amendments, however, this proposition remains only speculative.

### B. *Restatement (Third) of Property: Servitudes*

Restatements of Law distill legal doctrines of judge-made common law to inform judges and attorneys about general legal principles.<sup>84</sup> Though a Restatement of Law is not binding legal authority, it is persuasive, because it is thought to be reflective of the legal community's consensus as to what the law is, or in this case, what the law should be or should become.<sup>85</sup>

The drafters of the Restatement (Third) of Property: Servitudes make clear that section 7.10 addresses traditional easements only and not perpetual conservation easements, which are addressed in section 7.11.<sup>86</sup> Section 7.10 therefore defines traditional easements and the circumstances for their modification and termination.<sup>87</sup> Its definition applied the changed-conditions doctrine and is nearly identical to the Regulations' language regarding perpetual

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at \*32–33.

<sup>84</sup> See *ALI Overview: How ALI Works*, AM. LAW INST. <http://www.ali.org/index.cfm?fuseaction=about.instituteworks> (last visited Feb. 1, 2012) (on file with the Harvard Law School Library).

<sup>85</sup> See *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises: Intro to Restatements*, HARVARD LAW SCH., <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> (last visited Feb. 1, 2012) (on file with the Harvard Law School Library) (“The [American Law Institute’s] aim is to distill the ‘black letter law’ from cases to indicate trends in common law, and occasionally to recommend what a rule of law should be. In essence, they restate existing common law into a series of principles or rules.”). The American Law Institute is comprised of law professors, practicing attorneys, and judges. *ALI Overview*, AM. LAW. INST., <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Feb. 1, 2012) (on file with the Harvard Law School Library).

<sup>86</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10(3) (2000).

<sup>87</sup> *Id.* § 7.10(1). The Restatement provides that:

When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.

*Id.*

donated easement termination: “impossible” and “as a practical matter” are synonymous with “impossible or impractical;” “a change [having] taken place” is likewise synonymous with “because of changed conditions.”<sup>88</sup> The only variations are the Regulations’ focus on changes *surrounding* the property and its provision of termination as the seemingly only remedy, as opposed to the Restatement’s focus on changes *on or around* the property, and its allowance of amendment prior to termination.<sup>89</sup>

The Restatement drafters’ comments to section 7.10 relate that the remedy for changed conditions evolved over time beyond one of plain termination, as expressed in the Regulations, to one of modification in lieu of, and in advance of, termination, with termination now being the method of last resort:

When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, *a court may modify the servitude to permit the purpose to be accomplished*. If modification is not practicable, or would not be effective, a court may terminate the servitude. . . . If the purpose of a servitude can be accomplished, but because of changed conditions the [property] is no longer suitable for uses permitted by the servitude, *a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude*.<sup>90</sup>

The drafters explain that they expanded the changed-conditions doctrine to allow amendment in order to further an easement’s original purpose: “[t]he changed-conditions rule has traditionally been used to terminate servitudes, rather than to modify them, but the less drastic step should be taken if modification would permit the servitude to continue to serve the purpose for which it was designed to an extent that is worthwhile.”<sup>91</sup> As with the Regulations, the Restatement’s application of the changed-conditions doctrine focuses on perpetuating the document’s original purpose, but instead of terminating an easement in the face of changed conditions, the Restatement drafters recommend modifying the easement, so that its purpose might continue to be furthered.<sup>92</sup> The drafters therefore set the bar high for termination, cautioning that it be used selectively and only after amendment has been deemed infeasible:

The test is stringent: relief is granted only if the purpose of the servitude can no longer be accomplished. When . . . it is . . . clear that the continuance of the servitude would serve no useful pur-

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<sup>88</sup> Compare *id.* § 7.10(1), with Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009).

<sup>89</sup> Compare RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (2000), with Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009).

<sup>90</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10(1)–(2) (2000) (emphasis added).

<sup>91</sup> *Id.* § 7.10 cmt. a.

<sup>92</sup> *Id.*

pose and would create unnecessary harm[,] . . . [i]f modification is not appropriate, the servitude may be terminated.<sup>93</sup>

According to the Restatement drafters, termination reflects the public policy of seeking fair and judicious treatment of parties to an easement which has become impractical or impossible to accomplish due to changed conditions; it permits such easements to be dealt with at law, and not to continue to unfairly burden the land and landowners.<sup>94</sup>

The drafters created section 7.11 of the Restatement specifically to address conservation and preservation servitudes, setting them apart from the traditional servitudes addressed by section 7.10.<sup>95</sup> Section 7.11, like section 7.10, sets the bar high for termination, at the impossibility of accomplishing *any* conservation purpose.<sup>96</sup> Also like section 7.10, it requires attempting an amendment to substitute purpose prior to termination when the original purpose becomes impossible or “impracticable.”<sup>97</sup> But instead of relying on the language of the changed-conditions doctrine alone, section 7.11 relies additionally on the charitable trust doctrine of *cy pres*.<sup>98</sup> The drafters explain that their reason for incorporating *cy pres* into section 7.11 is to allow the continuation of a conservation easement by substituting a new purpose for a purpose no longer possible to achieve.<sup>99</sup>

It is somewhat surprising that the Restatement’s drafters did not adopt the changed-conditions doctrine alone for application to perpetual conservation easements in section 7.11, especially given that the language used by the Regulations seems evocative of that doctrine.<sup>100</sup> Moreover, relying on the changed-conditions doctrine would have been consistent with the direction of the common law’s evolution over many years to address real property encumbrances, such as conservation easements, with real property doctrines,

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *Id.* § 7.11 cmt. a.

<sup>96</sup> *Id.* § 7.11(2). This section also relies on the changed-conditions doctrine, with certain limitations.

<sup>97</sup> *Id.* § 7.11(1). The Restatement’s “impracticable” is a notably higher standard than the Regulations’ “impractical,” with impracticable akin to impossible, and impractical akin to unreasonably difficult.

<sup>98</sup> *Id.* § 7.11 cmt. b. *Cy pres* derives from the French phrase for “as near as possible” and is defined as the “equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.” BLACK’S LAW DICTIONARY 444 (9th ed. 2009).

<sup>99</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. b (2000). The drafter’s comment:

If the particular purpose for which the servitude was created can no longer be accomplished, but the servitude is adaptable for other conservation or preservation purposes, the servitude should be continued for those other purposes unless the document that created the servitude provides otherwise. When change makes it impossible or impracticable to accomplish the particular purpose, [the document should be modified] to permit use of the servitude for other conservation or preservation purposes, applying the *cy pres* doctrine of charitable-trust law.

*Id.*

<sup>100</sup> Treas. Reg. § 1.170A-14(g)(4) (as amended in 2009).

such as that of changed-conditions.<sup>101</sup> Instead, the drafters of section 7.11 blended together aspects of the changed conditions doctrine with the charitable trust doctrine of *cy pres* to afford what they believed was better protection of perpetual conservation easements than the changed-conditions doctrine alone could afford.<sup>102</sup>

The drafters of the Restatement section 7.11 identify the reason behind this shift as owing to the strong public interests and investments made in conservation easements and the need to ensure the continued availability of easement-protected properties.<sup>103</sup> The drafters used the trust doctrine to focus perpetual conservation easement amendment and termination on the public's investment and interest, as well as on perpetuation of the conservation easement document itself and, by extension, protection of the land it encumbers, as opposed to perpetuation of an easement's original purpose, perhaps on other land:

A conservation servitude held by a governmental body or conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows:

- (1) If the particular *purpose* for which the servitude was created *becomes impracticable, the servitude may be modified to permit its use for other purposes* selected in accordance with the *cy pres* doctrine, except as otherwise provided by the document that created the servitude.
- (2) If the servitude *can no longer be used to accomplish any conservation purpose, it may be terminated* on payment of appropriate damages and restitution.<sup>104</sup>

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<sup>101</sup> At least one state, however, does embrace this doctrine's application to modification and termination of conservation easements. Alabama's conservation easement enabling act, loosely based on the UCEA, specifically includes the changed-conditions doctrine in its legislative guidance for a court's power to modify or terminate a conservation easement, stating that actions affecting a conservation easement "[do] not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity applicable to other easements *and specifically including the doctrine of changed conditions.*" ALA. CODE § 35-18-3 (1997) (emphasis added).

<sup>102</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmts. a-c (2000). One comment explains:

The primary difference between applying the changed-conditions doctrine under § 7.10 and terminating a conservation servitude under the rule stated in this section is the entitlement to damages. . . . There are two reasons for this difference in treatment. The first is a difference in the likely expectations of the parties to the servitudes. . . . [C]onservation servitudes are usually made on the premise that there will be change and that legally enforceable measures are necessary to prevent undesired change on the servient estate, even as surrounding properties change in use. *The second reason is the strong public interest in the continued availability of property devoted to conservation purposes and in avoiding loss of public investments made in such property. These interests should be protected if the servitude is terminated.*

*Id.* § 7.11 cmt. c (emphasis added).

<sup>103</sup> *Id.* § 7.11 cmts. a, d.

<sup>104</sup> *Id.* § 7.11(1)-(2) (emphasis added).

The drafters' broad interpretation of a donor's intent also allows new easement purposes to be substituted if the original purpose becomes impossible to achieve.<sup>105</sup> Thus, a conservation easement can be responsive to the public's interest, with substitution of other purposes in the public's benefit.<sup>106</sup> A flexible document therefore is achieved with the goal that *it last*, or have the potential to last, forever, in permanent protection of the land upon which it originally was placed.

Though the drafters reason that perpetual conservation easements ought to be given more protection than the standard changed-conditions doctrine can afford, they also allow the changed-conditions doctrine to still apply in some situations:

Under the rules stated in [section 7.11], the changed-conditions doctrine has very limited scope. It can be used only in two instances: (1) if the servitude cannot be used for the particular conservation purpose contemplated, the scope of the servitude may be expanded to include other conservation purposes; and (2) if the servitude cannot possibly accomplish a conservation purpose, it may be terminated. It cannot be used to modify the servitude to permit additional uses or development of the servient estate.<sup>107</sup>

This explanation for when and how the changed-conditions doctrine is used in the context of perpetual easement amendment and termination is somewhat perplexing, given the fact that the first of the two reasons provided for application of the changed-conditions doctrine is also the reason proffered for the use of the *cy pres* doctrine in section 7.11(1): "If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the *cy pres* doctrine . . ." <sup>108</sup> Reading the language of the Restatement section 7.11(1) together with the statement in comment d demonstrates that the Restatement applies both the changed-conditions and *cy pres* doctrines to perpetual easement amendment and a limited form of the changed-conditions doctrine to easement termination.<sup>109</sup>

When paired with the changed-conditions doctrine, the *cy pres* doctrine allows for the selection of other purposes during easement amendment, ex-

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<sup>105</sup> Whereas the Regulations establish that termination shall occur because of changed conditions, the Restatement section 7.11 establishes a general rule that amendment or termination shall not occur because of changed conditions but then creates an exception that swallows the general rule: if the purpose becomes impracticable, the easement shall be modified to substitute purpose, and when impossible for any purpose, the easement shall be terminated. *See id.*

<sup>106</sup> The Restatement justifies substitution of purpose through a broad interpretation of grantor's intent: "Because conservation servitudes are usually intended to be 'perpetual,' finding that the grantor's intent was broad enough to encompass a more general conservation or preservation purpose than the particular use specified in the instrument will ordinarily be justified absent a contrary provision in the document creating the servitude." *Id.* § 7.11 cmt. b.

<sup>107</sup> *Id.* § 7.11 cmt. d.

<sup>108</sup> *Id.* § 7.11(1).

<sup>109</sup> *See id.* § 7.11(1) cmt. d.

cluding development of the land burdened by the easement.<sup>110</sup> In the case that no other purpose is available to continue the easement, the changed-conditions doctrine applies to terminate the easement, with payment of damages and restitution for the easement's loss.<sup>111</sup>

The drafters' concern over the public investment and interest in perpetual conservation easements, which prompted the use of trust doctrine, could have been met by directing consideration of public interest and investment factors, as well as consideration of the donor's intent, in an expanded application of the changed-conditions doctrine. This changed-conditions "plus" public interest and investment analysis could have been, and could be, required for perpetual conservation easements' amendment or termination. Such a requirement would be consistent with both the language of the Regulations and their focus on perpetuating original conservation purposes.<sup>112</sup> This application of the changed-conditions "plus" doctrine could permit alteration to benefit the easement's original purposes and thereby obviate the need for substitution of a new purpose using the *cy pres* doctrine.<sup>113</sup> The modified doctrine also could include prohibitions on changes in use or development of the landowner's property, as are provided in comment d.<sup>114</sup>

Rather than adapt the changed-conditions doctrine to protect the public interest and investment in perpetual conservation easements, prohibit self-serving amendments, and include the payment of damages and restitution upon termination, the drafters instead made a conscious shift to include the trust doctrine of *cy pres*.<sup>115</sup> In so doing, the drafters made not a *restatement* of law, but a normative *statement* of law relating to perpetual conservation easement amendment and termination.<sup>116</sup>

To afford the added protection they felt was required by the perpetual nature of conservation easements, the drafters reached into the wholly separate area of trust law and doctrine.<sup>117</sup> By hybridizing the section to apply

<sup>110</sup> *Id.* The changed-conditions doctrine allows the modification of the easement and the *cy pres* doctrine allows the selection and substitution of other purposes.

<sup>111</sup> *Id.* § 7.11(2).

<sup>112</sup> See *supra* Part I.A (describing the Regulations' apparent use of the traditional changed-conditions doctrine as evidenced by the word choice describing the appropriate circumstances for extinguishment).

<sup>113</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10(1)–(2) (2000).

<sup>114</sup> *Id.* § 7.11 cmt. d.

<sup>115</sup> See French, *supra* note 4, at 2532 ("To protect the public interest in maintaining the utility of conservation servitudes, the Restatement adopts the *cy pres* doctrine from charitable trusts . . .").

<sup>116</sup> See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000) (indicating that servitudes may be modified in accordance with the *cy pres* doctrine). The reporters of Restatements are encouraged to devise recommendations for what the law should be as "principles," and to reserve statements of what the law is for "restatements." AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2005), available at <http://www.ali.org/doc/stylemanual.pdf>. One might imagine it would be difficult to state the law as it is in a Restatement, when so little common law exists from which to extrapolate, and thus understand why it would be easier, or make more sense, to express the law as it should be, from the perspective of the reporter and drafters.

<sup>117</sup> See French, *supra* note 4, at 2532.

both trust and real property doctrines to conservation easements,<sup>118</sup> the drafters arguably disconnected section 7.11 from hundreds of years of real property law.<sup>119</sup> The dual reliance on trust and real property law places decision-makers in the difficult position of determining when and how to apply real property law, typically reserved for real property servitudes, and trust law, typically reserved for charitable trusts, to conservation easements.<sup>120</sup> This

<sup>118</sup> See *id.*

<sup>119</sup> See *supra* Part I.A (regarding similarities between the language of changed conditions and that of the Regulations). This shift to reliance on trust doctrine and law created confusion within the conservation community, with some believing that conservation easements are creatures of real property law to be evaluated principally within that domain. See generally DARB Y BRADLEY, LINCOLN INST. OF LAND POLICY, AMENDING PERPETUAL CONSERVATION EASEMENTS, CONFRONTING THE DILEMMAS OF CHANGE: A PRACTITIONER'S VIEW 5–8 (2009); CONSERVATION LAW CLINIC, IND. UNIV. SCH. OF LAW, LEGAL CONSIDERATIONS REGARDING AMENDMENT TO CONSERVATION EASEMENTS (2007), available at [http://learningcenter.lta.org/attached-files/0/65/6536/CLC\\_Legal\\_Considerations\\_Amending\\_Conservation\\_Easement\\_final.pdf](http://learningcenter.lta.org/attached-files/0/65/6536/CLC_Legal_Considerations_Amending_Conservation_Easement_final.pdf); LESLIE RATLEY-BEACH, LAND TRUST ALLIANCE, MANAGING CONSERVATION EASEMENTS IN PERPETUITY 147–212 (2009) (discussing elements of amending conservation easements over time in the context of real property law); C. Timothy Lindstrom, *Conservation Easements and the Charitable Trust Doctrine in Wyoming: A Response*, WYO. LAW., Aug. 2010, at 44, 44–46 [hereinafter Lindstrom, *Charitable Trust Doctrine in Wyoming*], available at <http://digital.ipcprintservices.com/publication/?i=43501>; C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?* 8 WYO. L. REV. 25, 77–82 (2008) [hereinafter Lindstrom, *Hicks v. Dowd*] (asserting that charitable trust doctrine is ill-fitting for use in Wyoming, in the *Hicks v. Dowd* case, and for evaluation of conservation easement amendment generally); Andrew C. Dana, *Conservation Easement Amendments: A View From the Field* 6–18 (Apr. 10, 2006) (unpublished manuscript) (underscoring that conservation easements arise from state property law and thus it is often a mistake, as well as completely unnecessary, to graft charitable trust principles on to them).

Others assert that conservation easements are creatures of trust law, for which trust doctrine provides superior protection and representation of the donor's and the public interest. See JEFF PIDOT, LINCOLN INST. OF LAND POLICY, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (2005), available at [http://learningcenter.lta.org/attached-files/0/53/5367/Rally\\_2005\\_C19\\_1.pdf](http://learningcenter.lta.org/attached-files/0/53/5367/Rally_2005_C19_1.pdf); Arpad, *supra* note 50, at 128–49 (addressing application of charitable trust doctrine to perpetual conservation easement processes of amendment and termination and recognizing the utility of applying that doctrine); French, *supra* note 4, at 2523–33 (applying the charitable trust cy pres doctrine to allow “better” uses for land protected by conservation easement); Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 DUKE J.L. & CONTEMP. PROBS. 279, 283 (2011) [hereinafter McLaughlin, *Doctrine of Merger*] (asserting that the state-law principles governing the administration of charitable gifts should apply to such easements); Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673 (2007); McLaughlin, *Rethinking*, *supra* note 4; Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010) [hereinafter McLaughlin & Weeks, *Hicks v. Dowd*]; Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to ‘The End of Perpetuity’*, 9 WYO. L. REV. 1 (2009) [hereinafter McLaughlin & Weeks, *In Defense*]; Nancy A. McLaughlin & W. William Weeks, *Salzburg v. Dowd: Another Look*, WYO. LAW., June 2010, at 50 [hereinafter McLaughlin & Weeks, *Salzburg v. Dowd*], available at <http://digital.ipcprintservices.com/publication/?i=39573>.

<sup>120</sup> At least one judge appears to have applied the Restatement's blended doctrines to a partial termination of a conservation easement. In *Tennessee Environmental Council v. Bright Par 3 Associates*, the judge concluded as a matter of law that the purposes of a conservation easement had “become, in part, impossible or impracticable to enforce” due to the development of a road across the easement property, and thereby justified the easement's partial termination, with the substitution of additional land to replace the lost acres. Final Order at 5-7,

contributes to ambiguity about how, when, and by what means amendment and termination of perpetual conservation easements should occur.<sup>121</sup>

The concept of cy pres substitution of purpose during amendment in lieu of termination arguably advances the public benefit of conservation easements by instilling flexibility, responsiveness, and durability in the easement to ensure its permanence, while also renewing the easement's relevance through new purposes when the prior purposes become impossible to achieve. Restatement section 7.11 intends to protect the distinguishing features of conservation easements — their perpetual nature, public benefits, public interest, support, and subsidization — by perpetuating the deed of the conservation easement, as opposed to perpetuating the easement's original purposes and terminating the easement itself.

By contrast, the Regulations go to great lengths to define qualifying conservation purposes and require that the original purpose be honored for perpetuity, without plainly allowing for substitution.<sup>122</sup> Substitution of purpose in lieu of termination raises important questions for an easement's holder, because the current landowner may not be amenable to changing purposes. A new purpose may be objectionable to the current landowner, who perceives it to contravene the donor's intent and the easement's original purpose. If, for example, the original purpose is to protect agricultural open space pursuant to clearly delineated governmental conservation policies, and agricultural use of the land becomes impracticable, should the holder attempt to substitute another purpose, such as natural habitat protection, for the original purpose in order to perpetuate the land's protection for some conservation purpose? If the proposed purpose removes more of the land's economic value, imposes stricter use restrictions, and creates hardships for the landowner, should the holder still attempt to adopt a new purpose in furtherance of the public's benefit and investment in the easement on that particular land?

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Tenn. Env'tl. Council v. Bright Par 3 Assocs., L.P., No. 03-0775 (Tenn. Ch. Ct., Dec. 19, 2006). The judge does not acknowledge this, but appears to use Restatement section 7.11's application of the cy pres and changed-conditions doctrines and remedies when dedicating additional acres and monetary damages towards new land conservation as a substitute for the land lost, and accounting for the public interests and investments in the conserved land. *Id.* at 7-8. By contrast, after thoroughly examining the Restatements of Law for Property and Trusts, two judges in separate, more recent, judicial decisions rejected applying charitable trust doctrines to perpetual conservation easements. See *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 12 (2012); *Long Green Valley Ass'n v. Bellevalle Farms*, No. 0228, 2011 WL 5975081, at \*16-22 (Md. Ct. Spec. App. 2011).

<sup>121</sup> This disagreement underscores the general confusion surrounding the applicable doctrine and when and how it applies to conservation easements. While one commentator reasons pursuant to trust law that the presence of a negotiated amendment clause in a conservation easement should exclude that easement from charitable trust proceedings if its amendment is consistent with the easement purposes, another queries why and how the mere presence of an amendment clause would remove the conservation easement from charitable trust proceedings altogether. Compare *McLaughlin & Weeks, Salzburg v. Dowd*, *supra* note 119, at 51, with *Lindstrom, Charitable Trust Doctrine in Wyoming*, *supra* note 119, at 45.

<sup>122</sup> See *supra* Part I.A (relating to the Regulations' perpetuation of purpose over the deed through the dedication of proceeds to the same purpose elsewhere).

The Restatement's use of the cy pres doctrine allows such a substitution of purpose so that an easement of some beneficial public purpose continues on the land, whereas the Regulations would require a termination of the easement and reinvestment of the proceeds toward the same purpose elsewhere.<sup>123</sup> Suppose an easement's original purpose to protect wildlife habitat for a particular species becomes impossible due to climate change because the species moves away from the encumbered land.<sup>124</sup> The Regulations presumably would allow the easement to be terminated with proceeds directed towards protection of the species' new habitat elsewhere.<sup>125</sup> Would the Restatement have the parties to the easement forego termination and dedication of proceeds to the new habitat in favor of instituting a new purpose for the easement on the same property? If so, who makes this determination?

Whether a court makes determinations of purpose substitution pursuant to the Restatement is not readily apparent. Although section 7.11 and the drafters' comments provide that substitution of purposes shall occur using the cy pres process, they do not state that the process itself must be judicial.<sup>126</sup> When addressing termination following from the impossibility of accomplishing any purpose, however, the drafters specifically stated that a court may terminate.<sup>127</sup> Does this mean a judicial process is required for easement amendment to substitute purpose? The answer is probably: if the

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<sup>123</sup> Compare RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11(1) (2000), with Treas. Reg. § 1.170A-14(g)(6). See also Nancy McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) [hereinafter McLaughlin, *Myrtle Grove*] ("When an individual donates property to a government agency or charitable organization for a specified charitable purpose, the individual essentially strikes a bargain with the public — the individual is permitted to exercise control over the use of the property, but only so long as the prescribed use of the property continues to provide an appropriate level of benefit to the public." (emphasis added) (footnote omitted)); McLaughlin, *Doctrine of Merger*, *supra* note 119, at 283 (noting that the Restatement creates special cy pres rules to govern conservation easement amendment and termination).

<sup>124</sup> For discussion of efforts to design perpetual conservation easements to address changing ecological conditions and perpetual conservation easements' difficulty in addressing such conditions, see Adena R. Rissman et al., *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 716–17 (2007); Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, 63 RANGELAND ECOLOGY & MGMT. 167, 174 (2010); Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145 (2011); W. William Weeks, *A Tradable Conservation Easement for Vulnerable Conservation Objectives*, 74 LAW & CONTEMP. PROBS. 229 (2011).

<sup>125</sup> See Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009).

<sup>126</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11(1) & cmt. b (2000).

<sup>127</sup> *Id.* § 7.11 cmt. a. At least one scholar has noted that judicial intervention in parties' private negotiations over conservation easement termination undermines the integrity of conservation easements, and that a better alternative is a legislative response:

If there are parties able to bargain over ending [conservation easements], that ought to end any need for judicial intervention. If the need is great enough, legislatures will respond. Eminent domain is available. Any greater judicial intervention will destabilize the conservation easement. Security of property rights in conservation easements is as much in the public interest as any other.

Richard B. Collins, *Alienation of Conservation Easements*, 73 DENV. U. L. REV. 1103, 1106 (1996).

drafters had intended that amendments to substitute purpose take place outside of a courtroom, they likely would not have used the terminology “cy pres” and “charitable trust,” both of which involve well-known judicial processes. The assumption, therefore, is that both easement amendment and termination require judicial oversight, with an intriguing question remaining — whether parties to an easement may themselves amend to substitute purpose without additional oversight. Parties seeking to comply with the Regulations, on the other hand, know they could terminate an easement using a judicial process, but whether they should use the same process for amendments is not clear.

The most important distinction between the Regulations and Restatement section 7.11 is that the Regulations’ extinguishment section seeks to protect in perpetuity original conservation purposes (while allowing an easement’s termination and protection of the original purpose elsewhere), whereas the Restatement’s section 7.11 seeks to protect in perpetuity the conservation easement itself and the land it encumbers (without necessarily preserving the easement’s original purposes).<sup>128</sup> Reconciling the Regulations’ permanent purposes (and terminable deed) with the Restatement’s changeable purposes (and permanent deed) is challenging, but not impossible. One possibility is to interpret the Regulations’ use of the plural “purposes” to imply that all purposes be exhausted before an easement is terminated, allowing for amendment to substitute new purposes for defunct ones. Another possibility is that the Regulations implicitly defer to state law, which could include a changed-conditions “plus” process or a charitable cy pres process. All things being equal, these two processes are not very different. If you remove the differences between the changed-conditions “plus” and cy pres analyses, what remains is that both set the bar for termination essentially at impossibility, both require amendment prior to termination, and both take public interest and investment into account.<sup>129</sup> The end result of either analysis is the same: protection of a perpetual conservation easement through modification, either of content or purpose, until it is no longer possible to protect a publicly beneficial conservation purpose.

Courts, state legislatures, and the IRS can stand on the common ground between these doctrines, then, and clarify the ambiguities of these legal regimes, to recognize an intermediate step of amendment prior to termination

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<sup>128</sup> Compare Treas. Reg. § 1.170A-14(g)(6)(i), with RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000). If the Restatement’s conservation easement is a taxicab, the taxicab drives through time with protected purposes as passengers; when the passengers can go no further, they are removed and substituted with new passengers. When the Regulations’ conservation easement taxicab drives through time with its protected purposes as passengers, and its passengers can go no further, the taxicab puts them in a new taxicab, and drives itself off a cliff (so the purposes continue through time, but the conservation easement taxicab terminates). By contrast, as seen in Part I.C, the UCEA provides the least protection of the easement or its purposes with its conservation easement taxicab driving its passenger purposes through time, and then potentially driving itself off a cliff or to a junkyard with the passengers inside, by allowing termination of both the conservation easement and its purposes.

<sup>129</sup> See generally RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 7.10, 7.11 (2000).

of a perpetual conservation easement. The IRS could create guidance interpreting the Regulations, or revise the Regulations, to expressly address amendment. State lawmakers and courts could create new or modify existing legislation and issue rulings to expressly address amendment, while being cognizant of and deferential to the Regulations so as not to defeat donor qualifications for federal tax deductions. State law could resolve whether substitution of purpose or modification of easement terms to promote the original purpose is permissible in lieu of termination, and whether easements can be amended by the parties alone without further oversight. Amending existing state conservation enabling acts, approximately half of which are, to some degree, based on the UCEA, also might resolve these issues.<sup>130</sup>

### C. *Uniform Conservation Easement Act*

The National Conference of Commissioners of Uniform State Laws creates uniform acts as recommendations for state legislation that, when adopted by a state, become law. The commissioners study existing state law to determine which areas should be uniform between the states, and then propose legislation.<sup>131</sup> The commissioners created the UCEA, therefore, to provide uniformity of legislation and application of conservation law in all states, and to remove common law impediments to conservation easements.<sup>132</sup> The drafters emphasized the UCEA's other purpose of "sweeping away certain common law impediments which might otherwise undermine the conservation easements' validity."<sup>133</sup> In practice, states have adopted the UCEA neither uniformly nor wholly, with near-complete adoption apparently in only three states, and partial adoption in approximately twenty-four states and the District of Columbia.<sup>134</sup>

In contrast to the Restatement and the Regulations, the UCEA allows perpetual conservation easements to be amended and terminated in the same manner as other easements, potentially without any other process or oversight. Section 2(a) reads: "[e]xcept as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."<sup>135</sup> The UCEA section 3(b) also leaves unfettered a court's ability to "modify or terminate a conservation easement in

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<sup>130</sup> See ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING ACT STATUTES 7 (2010), available at <http://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf> (noting that as of January 2009 approximately twenty-seven states and the District of Columbia have based their acts on the UCEA).

<sup>131</sup> See Nat'l Conference of Comm'rs of Unif. State Laws, *About the ULC*, UNIFORM LAW COMM'N, [http://www.nccusl.org/Narrative.aspx?title=about the ULC](http://www.nccusl.org/Narrative.aspx?title=about%20the%20ULC) (last visited Feb. 1, 2012) (on file with the Harvard Law School Library).

<sup>132</sup> UNIFORM CONSERVATION EASEMENT ACT § 6, prefatory note (2007).

<sup>133</sup> *Id.* at prefatory note.

<sup>134</sup> LEVIN, *supra* note 130, at 7.

<sup>135</sup> UNIFORM CONSERVATION EASEMENT ACT § 2(a) (2007).

accordance with principles of law or equity,” which principles might include a state’s charitable trust or real property law, though this is unclear without reading the comments.<sup>136</sup> The plain reading of these provisions may not adequately, or even at all, protect the public interest and investment made in perpetual conservation easements,<sup>137</sup> the very reason posited by the Restatement drafters to justify applying trust doctrine to conservation easements.<sup>138</sup>

The UCEA, however, like the Restatement (and citing to that document), attempts to rely on the *cy pres* doctrine to guide easement amendment and termination, without actually incorporating that doctrine into the language of the Act itself. Rather, emphasis on trust doctrine is placed around the periphery of the Act, in the drafters’ comments and rationale, which encircle the Act’s traditional real property language with recommendations that charitable trust principles be applied to conservation easements.<sup>139</sup> The drafters presumably could have incorporated trust doctrine directly into the Act during its 2007 amendment, but did not — leaving intact the real property principles that conservation easements may be conveyed, modified, and terminated in the same manner as any other easement and that a court’s power to terminate or modify conservation easements remains unaffected.<sup>140</sup> These two sections, therefore, are notable for what is not stated.

The drafters explained that they did not imbed trust principles directly in the Act or *require* that trust principles be applied to conservation easements because the Act’s purpose and philosophy were to be placed in the real property law of its adopting states, and charitable trust law would not fit within that domain.<sup>141</sup> The drafters recognized that relying on trust doctrine

<sup>136</sup> *Id.* § 3(b).

<sup>137</sup> Section 2(a) “reflects the Act’s overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act’s purposes given the adopting state’s existing common law and statutory framework.” *Id.* § 2 cmt.

<sup>138</sup> *See id.* §§ 2 cmt., 3 cmt. The comment to UCEA section 3 explains that because the Act is intended for a state’s real property law, it cannot require charitable trust principles to be incorporated as a part of that law, so the same are not included within the recommended statutory language. *Id.* § 3 cmt.

<sup>139</sup> *See generally id.* §§ 2 cmt., 3 cmt.

<sup>140</sup> *Id.* § 2. One might surmise it would have been counterproductive to revise the language of a statute meant to unify state laws, when over half the states had already adopted portions of the Act’s existing language. See King & Fairfax, *supra* note 50, at 65, for a detailed discussion of the debates surrounding the UCEA’s enactment and later revisions.

<sup>141</sup> *See* UNIFORM CONSERVATION EASEMENT ACT prefatory note (2007); *id.* § 3 cmt. The comment to section 3 of the UCEA further clarifies:

The Act does not directly address the application of charitable trust principles in conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement’s validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee’s charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes.

*Id.*

to ensure conservation easement permanence may be inconsistent with a state's own real property laws and, therefore, may be inappropriate to incorporate into the Act's model language. Because the drafters recommend uniform statutory language, they must be mindful of incompatibility with other state laws. The drafters instead surround the Act's language of traditional real property law with comments and rationale that trust law may (or should) apply to conservation easements.<sup>142</sup>

Specifically, the drafters reason that, because conservation easements are conveyed to be held and enforced for specific charitable purposes of protection of the land for one or more conservation purposes, "the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts *should* apply to conservation easements."<sup>143</sup> The drafters state that, even though conservation easements can be amended and terminated just like other easements, a conservation easement still could be a charitable trust, requiring court approval for certain amendments and for all terminations, in a *cy pres* or other trust proceeding.<sup>144</sup> As with the Restatement, the UCEA essentially points to both traditional real property law and charitable trust laws when considering conservation easement amendment or termination, without clear guidance as to which might control in a given situation.<sup>145</sup> The invitation to apply both trust and traditional real property doctrine creates ambiguity in the standard for easement holders applying UCEA language to amendment and termination of perpetual conservation easements. On the one hand, there is the idea that a conservation easement can be amended or terminated as with any other real property easement; but on the other hand, there is the idea that one should nonetheless be mindful of charitable trust doctrines when amending or terminating perpetual easements.<sup>146</sup>

Questions growing out of the ambiguity include: can one truly amend or terminate a perpetual conservation easement in the same manner as other

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (emphasis added).

<sup>144</sup> *Id.* ("The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts."). Thus, although the UCEA provides that a conservation easement may be modified or terminated "in the same manner as other easements," *id.* § 2(a), the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.

<sup>145</sup> See *supra* Part II.B.

<sup>146</sup> The drafters recognized the dichotomy they had created, although without giving significant guidance:

[C]ommittee member K. King Burnett wrote the following concerns to Committee reporters Brenneman and Costonis in 1981: 'Modification and termination still bother me. I remain of the view that what we've said in Section 2 . . . is enough, i.e., that these easements can be modified or terminated as other easements . . . . I thought the Committee wanted [to take] no position at all on whether the adopting state should choose to apply the cases relating to termination of equitable servitudes, the stricter rule that some have applied to easements, or, by analogy or otherwise, the *cy pres* doctrine.'

easements, or not? And is there any role for the changed-conditions doctrine in amending or terminating conservation easements as there might be with other easements, or do only trust doctrines apply to easement amendment and termination?

The drafters point out that, although the real property changed-conditions doctrine is applied in all states, its application to conservation easements is “problematic” in many states.<sup>147</sup> The drafters do not explain why the changed-conditions doctrine is problematic. Though similar in many ways to the changed-conditions doctrine, the *cy pres* doctrine is not similarly characterized as “problematic.”<sup>148</sup> This raises another intriguing question: if trust doctrines define and guide how certain perpetual conservation easements are enforced, transferred, amended, or terminated, do the UCEA and enabling acts define and guide only those perpetual conservation easements that are not charitable trusts, or held by charities or charitable trusts? Put differently, what is the point of the UCEA beyond sweeping away the common law impediments to perpetual easements, if all decisions relating to perpetual easements are guided by common law trust doctrines?

The UCEA comments and rationale suggesting that charitable trust principles apply to conservation easements complement the Uniform Trust Code comments and rationale that “the creation . . . of [a conservation easement] will frequently create a charitable trust.”<sup>149</sup> The recently approved

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Arpad, *supra* note 50, at 121 (citing Letter from K. King Burnett, Uniform Conservation Easement Act Drafting Comm. Member, to Russell Brenneman and John Costonis, Co-reporters for the Uniform Conservation Easement Act (Apr. 7, 1981)).

<sup>147</sup> The comments accompanying section 3 of the UCEA state:

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of *changed conditions* and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries.

Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court’s order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. *The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.*

UNIFORM CONSERVATION EASEMENT ACT § 3 cmt. (2007) (emphasis added).

<sup>148</sup> *See id.*

<sup>149</sup> UNIFORM TRUST CODE § 414 cmt. (amended 2005). Section 414, Modification or Termination of Uneconomic Trust, does not apply to conservation easements, as explained in the comment:

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

draft of the Model Protection of Charitable Assets Act also applies trust doctrine to conservation easements.<sup>150</sup> This act seeks treatment of conservation easements held by nonprofit land trusts and other charities as charitable assets, with potential oversight of their amendment and termination by states' attorneys general.<sup>151</sup> The model act defines "persons" to include nonprofit charities and defines conservation easements as "charitable assets."<sup>152</sup> Changes to charitable assets or their holders would require attorney general notice, leading to the potential enforcement and oversight of easement amendment and termination by attorneys general through the application of this law, charitable trust law, or in connection with the Uniform Prudent Management of Institutional Funds Act ("UPMIFA").<sup>153</sup> The act's draft commentary requires that notice be provided to a state's attorney general of "significant events . . . in the life of a charity" which raise the opportunity for misapplication of charitable assets, in order that the attorney general can monitor and prevent or correct problems relating to such events.<sup>154</sup> The draft commentary goes on to note that conservation easement amendments might trigger concerns of breach of the charitable trust doctrine or (mis)application of the cy pres doctrine.<sup>155</sup> The requirement of notice to a state's attorney general to afford him or her the opportunity to monitor, prevent, and correct problems associated with conservation easement amendment or termination creates the potential for attorney general participation in a wide range of related proceedings, leading to a potential level of involvement that may be beyond the capacity of a particular state's attorney general office.<sup>156</sup>

The UCEA, Regulations, and Restatement serve three different purposes and present three different legal frameworks for perpetual conservation easements. All three share common ground, such as seeking to protect the integrity of perpetual easements by protecting the public's investment in them, as well as inconsistencies, such as appearing to rely on trust or real property doctrines, or both. Even though two of the legal regimes establish processes for easement amendment and three for termination, the legal re-

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*breach of trust. . . . Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged.*

*Id.* (emphasis added).

<sup>150</sup> See NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, DRAFT PROTECTION OF CHARITABLE ASSETS ACT § 2 cmt. (2011) [hereinafter DRAFT CHARITABLE ASSETS ACT], available at [http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011am\\_draft.htm](http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011am_draft.htm).

<sup>151</sup> See *id.*

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

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

<sup>154</sup> *Id.* § 6 cmt. The commentary on section 7 notes that if notice to a state's attorney general of such changes is already required, the provision of the act requiring such notice should be removed as duplicative. *Id.* § 7 cmt.

<sup>155</sup> *Id.* § 6 cmt. (noting New Hampshire's requirement of notice to its attorney general of certain proposed amendments to conservation easements regarding such concerns). The comment cites UPMIFA section 6 as an example for notice to the attorney general "before a charity modifies a donor-imposed restriction or asks a court to modify a restriction." *Id.*

<sup>156</sup> *Id.* § 7 cmt. (noting in particular that the level of involvement by a state's attorney general represented by New Hampshire's model may not be feasible due to funding constraints); see also *infra* Part II.B.3.

gimes do not provide specific guidance for *how* an easement holder is to evaluate and decide requests for amendment or termination while giving due deference to state law and the language of the conservation easement itself. The LTA intends to provide such guidance in its Standards and Practices<sup>157</sup> and in its Amendment Report and Principles.<sup>158</sup>

*D. Land Trust Alliance Standards and Practices and  
Amendment Report and Principles*

The LTA provides the Standards and Practices for its member land trusts, which the members must adopt to renew their membership and to be nationally accredited.<sup>159</sup> The document contains twelve general standards, each with enumerated practices. The Standards and Practices discusses easement amendment and termination within the existing legal frameworks in light of a land trust's own guiding policies, private benefit and inurement, and impacts on protected conservation purposes.<sup>160</sup>

Standard 10 addresses tax benefits for land transactions involving gifts of land or conservation easements.<sup>161</sup> It recommends that the land trust "work diligently to see that every charitable gift of land or easement meets federal and state tax law requirements."<sup>162</sup> The listed practices encourage land trusts to notify potential donors that they may qualify for federal income tax benefits if they comply with the requirements of the Code and Regulations<sup>163</sup> but caution land trusts to make no assurances to landowners that a conservation easement gift will be tax deductible.<sup>164</sup>

Standard 11 focuses on conservation easement stewardship, and requires that land trusts have a program of responsible stewardship for their easements, including practices for amendment and termination.<sup>165</sup> Within this standard, practices I and K specifically address easement amendment and termination with a focus on land trust process and potential jeopardy relating to impermissible private benefit and inurement. In both cases, the Standards and Practices suggests that the potential amendment or termina-

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<sup>157</sup> STANDARDS AND PRACTICES, *supra* note 14, at 13–14.

<sup>158</sup> LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 7–8 (2007) [hereinafter AMENDMENT REPORT], available at <http://www.landprotect.com/files/38688428.pdf>.

<sup>159</sup> *Steps to Adopt Land Trust Standards and Practices*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/training/sp/steps-to-adopt-land-trust-standards-and-practices> (last visited Feb. 1, 2012) (on file with the Harvard Law School Library); *Eligibility and Requirements*, LAND TRUST ACCREDITATION COMM'N, <http://www.landtrustaccreditation.org/the-process/requirements> (last visited Feb. 1, 2012) (on file with the Harvard Law School Library). To continue the metaphor of the conservation easement as taxicab and its passengers as easement purposes, the Standards and Practices are the roadmap used by the conservation travelers to guide their decisions.

<sup>160</sup> See generally STANDARDS AND PRACTICES, *supra* note 14.

<sup>161</sup> *Id.* at 12.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 13–14.

tion be examined in light of its impacts on the conservation values the easement protects, recommending that “[t]he land trust ha[ve] a written policy or procedure . . . that . . . contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome”<sup>166</sup> and explaining that, in the rare cases when it may be necessary to extinguish an easement, in whole or in part, the land trust work diligently to “prevent a net loss of important conservation values.”<sup>167</sup>

The practices within standard 11 mention no external process or third-party approval of easement amendment (foreshadowing why additional reporting and guidance would be sought) but do comment on the termination process.<sup>168</sup> When practice 11K states that “it may be necessary to extinguish, or a court may order the extinguishment of an easement in whole or in part,” this implies there exist two processes: one seemingly private, two-party process between the easement holder and landowner when it becomes “necessary to extinguish” and another process in which a judge orders an easement’s extinguishment, possibly at the request of the parties, or as a result of some other independent factors.<sup>169</sup>

The LTA’s background material explaining the reasoning behind the Standards and Practices sheds additional light on these processes.<sup>170</sup> The background for the amendment practice (practice 11I) focuses on the importance of possessing an amendment policy and points to other standards and practices for further guidance, including standards 1, 4, 6, 8, and 9, and practice 3F, which are designed to assist a land trust in making good decisions regarding amendment, without much guidance as to the process itself.<sup>171</sup> The background for the extinguishment practice (practice 11K) elaborates on the process, allowing that semi-spontaneous termination might occur when a land trust comes to own both a property’s fee and its easement interest, thereby merging the easement out of existence. This practice also

<sup>166</sup> *Id.* at 14.

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* (providing that, in cases of extinguishment, “the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements”).

<sup>169</sup> *Id.* (emphasis added). By not requiring judicial oversight, the first process would seem to treat the Regulations’ reference to judicial process as a safe harbor and the Restatement’s reference to judicial oversight as a recommendation, and would be consistent with the UCEA’s allowance for termination of conservation easements in the same manner as any other easement. The second process alluding to judicial oversight would be consistent with all three regimes. *See* Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000); UNIFORM CONSERVATION EASEMENT ACT § 2 (2007).

<sup>170</sup> *See generally* LAND TRUST ALLIANCE, BACKGROUND TO THE 2004 REVISIONS OF LAND TRUSTS STANDARDS AND PRACTICES (2004), available at <http://www.landtrustalliance.org/training/sp/standards-and-practices-bkg.pdf>.

<sup>171</sup> *See id.* at 2 (“Standard 1: Mission”); *id.* at 6 (“Standard 4: Conflicts of Interest”); *id.* at 9 (“Standard 6: Financial and Asset Management”); *id.* at 13 (“Standard 8: Evaluating and Selecting Conservation Projects”); *id.* at 16 (“Standard 9: Ensuring Sound Transactions”). Standard 3, practice F encourages land trust boards to review and approve every land transaction, which one might surmise includes proposed easement amendments. *See id.* at 3.

describes that, in some states, termination must be court-ordered or court-approved.<sup>172</sup> The background encourages land trusts to seek protection of the conservation purposes on the land no longer protected by an easement through “additional conservation action” and entreats easement holders to view termination as an action of last resort and not to jeopardize the conservation easement tool or public perception of it through abuse of termination.<sup>173</sup> Both the amendment and termination practices offer a framework for the basic issues related to these important decisions and leave difficult issues of evaluating and resolving easement amendment requests to the LTA’s Amendment Report and Principles.<sup>174</sup>

The LTA convened land trust experts including practitioners, professionals, and academics to perform an in-depth examination of the issues surrounding perpetual conservation easement amendment and termination and asked them to craft “Amendment Principles” to provide guidance for easement holders confronting these issues.<sup>175</sup> The experts recommended that all easement amendments meet its Amendment Principles, which assist a holder in evaluating proposed amendments and termination:

AMENDMENT PRINCIPLES. *A conservation easement amendment should meet all of the following principles:*

1. Clearly serve the public interest and be consistent with the land trust’s mission.
2. Comply with all applicable federal, state and local laws.
3. Not jeopardize the land trust’s tax-exempt status or status as a charitable organization under federal or state law.
4. Not result in private inurement or confer impermissible private benefit.
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.<sup>176</sup>

The Amendment Principles provide helpful guidelines for holders considering requests for easement amendment or termination, and at least one state, New Hampshire, has directly incorporated them into its guidelines for easement amendment and termination.<sup>177</sup> The LTA could provide even more

<sup>172</sup> *Id.* at 23.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> AMENDMENT REPORT, *supra* note 158, at 7. An in-depth treatment of this research and its challenges is beyond the scope of this Article.

<sup>176</sup> *Id.* at 17.

<sup>177</sup> N.H. REV. STAT. ANN. §§ 7:19–:32-a (2010); PAUL DOSCHER, TERRY M. KNOWLES, & NANCY A. McLAUGHLIN, SOC’Y FOR THE PROT. OF N.H. FORESTS, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS:

guidance by revising its Standards and Practices to adopt the Amendment Principles, in part or in whole.

## II. THE EMERGENCE OF COMMON LAW AND EVOLUTION OF STATUTORY LAW

The evolution of common and statutory law surrounding perpetual easement amendment and termination shows that, in the midst of the different legal regimes with their different guidelines, state courts, administrators, regulators, and legislatures create their own guidance through common law, policy, regulations, and legislation.

### A. Common Law

Few courts to date have confronted issues of perpetual conservation easement amendment or termination. The courts that have addressed easement modification and termination have blended aspects of the legal regimes to interpret and apply law to specific factual situations and legal questions. This is shown by the few known decisions to date, reported or otherwise, addressing easement modification, such as *Bjork v. Draper*,<sup>178</sup> or easement termination, such as *Hicks v. Dowd*<sup>179</sup> and *Walters and Otero County Land Trust*.<sup>180</sup>

#### 1. Amendment

One of the only reported cases dealing with perpetual conservation easement amendment, *Bjork v. Draper*, involved a conservation easement

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GUIDELINES FOR NEW HAMPSHIRE EASEMENT HOLDERS 2 (2010), available at <http://clca.forest.society.org/pdf/amending-or-terminating-conservation-easements.pdf>.

<sup>178</sup> 886 N.E.2d 564 (Ill. App. Ct. 2008) (*Bjork I*); 936 N.E.2d 763 (Ill. App. Ct. 2010) (*Bjork II*).

<sup>179</sup> 157 P.3d 914 (Wyo. 2007).

<sup>180</sup> Order, *Walters and Otero Cnty. Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005). Several other cases bear mentioning, but, due to the fact that they ended in settlements, provide little precedential weight. See *Salzburg v. Dowd*, No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 10, 2010); *Maryland v. Miller (Myrtle Grove)*, No. 20-C-98-003486 (Md. Cir. Ct. Apr. 21, 1999). Nevertheless, scholars frequently cite *Miller* and *Dowd* as examples for a state attorney general's role in conservation easement amendment and termination cases. See Arpad, *supra* note 50, at 94 (describing the instrumental role of the Maryland Attorney General in applying charitable trust principles in *Miller*); Attorney General's Motion in Support of Motion for Summary Judgment, *Salzburg v. Dowd*, No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 10, 2010) (providing the Wyoming Attorney General's arguments on the processes and the interaction of common law, state statutes, and the role of the attorney general in perpetual easement termination in Wyoming); see also *infra* Part II.A.2. For further discussion of *Myrtle Grove*, see generally Arpad, *supra* note 50, at 94, 122, 143–46; King & Fairfax, *supra* note 50, at 117–25; McLaughlin, *Myrtle Grove*, *supra* note 123; Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, PROB. & PROP., July-Aug. 2009, at 52. Regarding *Salzburg*, see generally Lindstrom, *Charitable Trust Doctrine in Wyoming*, *supra* note 119; Lindstrom, *Hicks v. Dowd*, *supra* note 119; McLaughlin & Weeks, *Hicks v. Dowd*, *supra* note 119; McLaughlin & Weeks, *Salzburg v. Dowd*, *supra* note 119.

donated by the Drapers' predecessors-in-interest to the Lake Forest Open Lands Association ("LFOLA") to protect a historic home and its openness to public view.<sup>181</sup> The Drapers proposed several changes to the property upon their purchase, including a new addition to the house and a new driveway, to which LFOLA agreed.<sup>182</sup> The parties amended the easement to allow these changes in exchange for (1) protection of the same amount of impacted square footage elsewhere on the property; (2) removal of certain of the home's modernizations, such as aluminum siding; and (3) a landscaping plan reopening the property to public view.<sup>183</sup>

The Bjorks, neighbors living within 500 feet of the easement-protected property, objected to these amendments and had standing to enforce the conservation easement pursuant to Illinois' easement statute.<sup>184</sup> They sued the Drapers and LFOLA claiming, first, that the amendments were violations of the easement and Illinois' easement statute, which did not permit amendment; and second, that the defendants effectively terminated the easement without the required judicial oversight.<sup>185</sup> They asked the court for either specific performance of the pre-amendment easement to require removal of the addition and driveway or, in the alternative, for the easement's termination.<sup>186</sup>

Like the Regulations, Illinois' easement act is silent regarding amendments and addresses only termination.<sup>187</sup> The lower court relied instead on deed and contract law to reason that, although nothing in Illinois' enabling act expressly permitted amendment, the permissibility of termination under the act implied that amendment was permissible as a lesser right.<sup>188</sup> Further, because nothing in Illinois law prohibited it, amendment could be by agreement between the parties, without judicial oversight. The lower court allowed the amendments for the addition and new driveway, finding that, in light of their public invisibility, these features did not contradict the easement's purpose.<sup>189</sup> After personally inspecting the property however, the court found the landscaping plan to contravene the easement's purpose by obstructing the public's view of the property and disallowed it.<sup>190</sup>

<sup>181</sup> *Bjork I*, 886 N.E.2d at 565–68.

<sup>182</sup> *Id.* at 568.

<sup>183</sup> *See id.* at 568–70.

<sup>184</sup> *Id.*; *see also* 765 ILL. COMP. STAT. ANN. 120/1(b) (2000).

<sup>185</sup> *Bjork I*, 886 N.E.2d at 568–69.

<sup>186</sup> *Id.* at 569.

<sup>187</sup> Illinois' easement act states:

Conservation rights shall be construed and enforced in accordance with their terms, and shall be transferable and transferred, recorded and indexed, in the same manner as fee simple interests in real property . . . . Conservation rights may be released by the holder of such rights to the holder of the fee even though the holder of the fee may not be an agency of the State, a unit of local government or a not-for-profit corporation or trust.

765 ILL. COMP. STAT. ANN. 120/1(b) (2000).

<sup>188</sup> *Bjork I*, 886 N.E.2d at 563, 569.

<sup>189</sup> *Id.* at 570–71.

<sup>190</sup> *Id.* at 570.

On appeal, the court agreed that amendment was permitted per se, placing weight not on the state enabling act, but on the fact that the easement itself contained an amendment provision.<sup>191</sup> Consistent with the Regulations, the court reasoned that use of the term “perpetual” in the conservation easement applied to the conservation *purposes* of the easement, and not the *easement* itself, thereby allowing the easement to be amended over time:

[T]hese references refer to the property’s “conservation values” being protected in perpetuity. The conservation values of the property are not synonymous with the language of the easement. Thus, although the easement sets forth that the conservation values of the property are to be protected in perpetuity, it does not logically follow that the language of the easement could never be amended to allow that to occur. Indeed, it is conceivable that the easement could be amended to add land to the easement. Such an amendment would most likely enhance the conservation values of the property.<sup>192</sup>

The court then questioned the amendments because they modified a contrary provision of the easement prohibiting building any improvement on the subject property.<sup>193</sup> The court reasoned that amendments are prohibited if they contradict existing easement language, thereby shifting focus away from the important questions of whether an amendment increases or has neutral impact on the easement’s protected purposes, honors the grantor’s intent, or creates impermissible private benefit.<sup>194</sup> The court remanded the case to the lower court to balance the equities and decide whether removal of the driveway was necessary, consistent with its ruling.<sup>195</sup> Both parties appealed.<sup>196</sup> The Illinois Supreme Court declined to review the case on any grounds, preserving the appellate court’s rulings and remand for a new trial.<sup>197</sup>

In the new trial, the lower court ordered the landowners to remove the driveway turnaround and trees blocking the public view of the conserved property, but did not require removal of the house addition.<sup>198</sup> The parties again appealed.<sup>199</sup> The appellate court affirmed the judgment of the trial court, allowing the Drapers to keep the addition to the house.<sup>200</sup> The appellate court deferred to the lower court’s determination that, whereas the trees, vegetation, and driveway encroaching upon the easement could be removed easily, the house addition would be difficult to remove and did not impact

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<sup>191</sup> *Id.* at 572.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 573–75.

<sup>194</sup> *Id.* at 574.

<sup>195</sup> *Id.* at 575.

<sup>196</sup> *Bjork v. Draper*, 897 N.E.2d 249 (Ill. 2008).

<sup>197</sup> *Id.*

<sup>198</sup> *Bjork II*, 936 N.E.2d 763, 766 (Ill. App. Ct. 2010).

<sup>199</sup> *Id.* at 763.

<sup>200</sup> *Id.*

the public's view of the house and thus, the addition's removal would be greatly disproportionate to any minimal enhancement of the easement's purpose.<sup>201</sup>

The appellate court's opinion in this case highlights four important points. First, in the absence of amendment language in the easement enabling act, the court recognized amendment as a lesser right to termination, allowable between the parties without judicial oversight and consistent with, and not contradicted by, other state law. Second, the court deferred to the authority to amend established by the easement itself, which carried weight in the absence of applicable law. Third, the court initially questioned amendments that contradicted existing easement terms, which could present a significant challenge for parties attempting to amend easements, and shift focus away from other important inquiries. Fourth, the court reasoned that conservation purposes, and not the easement's language, are to be protected in perpetuity, and allowed the easement to be amended instead of terminated to further its purposes. This reasoning is consistent with the Regulations because it emphasizes the continuation of the easement's purposes and expressly allows amendment to further those purposes. However, it allows amendment by the parties without judicial oversight, which might be inconsistent with the Restatement. It is important to note that the parties to the easement in *Bjork* did not willingly seek court approval of their easement amendments; the court oversaw the amendments only because a third-party with standing was challenging the amendments. This case illustrates the complexity of interpreting easement language in the context of applicable law that provides little guidance for easement holders and judges managing perpetual easement amendment requests.

## 2. Termination

In at least two instances, landowners have attempted to remove perpetual conservation easements from their land through termination. The subject of much controversy from its inception, *Hicks v. Dowd*<sup>202</sup> involved the termination of a conservation easement granted by the Dowd's predecessors-in-interest to the Scenic Preserve Trust ("SPT") on the Meadowood Ranch in Johnson County, Wyoming.<sup>203</sup> The SPT is a quasi-governmental, charitable organization for which the Johnson County Commissioners serve as the board of trustees.<sup>204</sup> The reason promoted for termination was the threat of coal-bed methane development on the ranch, a use that preceded the easement in time and right, but which the Dowds claimed was "unpreventable,

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<sup>201</sup> *Id.*

<sup>202</sup> 157 P.3d 914 (Wyo. 2007).

<sup>203</sup> *Id.* at 915, 917.

<sup>204</sup> *Id.* at 916.

unanticipated, and inconsistent with the terms of the conservation easement.”<sup>205</sup>

Hicks, a Johnson County citizen infuriated by the easement’s termination, asserted that, as a citizen, the termination damaged his public benefit and investment in the conservation easement.<sup>206</sup> The district court originally recognized Hicks’s standing in the case based on the charitable trust doctrine, by interpreting the SPT to be a charitable trust and Hicks to be a qualified beneficiary authorized to enforce that trust.<sup>207</sup> The court did so after instructing the parties to notify Wyoming’s Attorney General of the action to afford him the opportunity to intervene on the public’s behalf.<sup>208</sup> The Attorney General declined to participate in the action, citing the court’s recognition of Hicks’s role as adequate representation of the public.<sup>209</sup> The lower court subsequently dismissed the case for Hicks’s failure to exhaust all of his administrative options with Johnson County prior to initiating the action.<sup>210</sup>

Hicks appealed to the Wyoming Supreme Court, which held that Hicks lacked standing to challenge the easement’s termination under Wyoming’s statutory or common law relating to charitable trusts.<sup>211</sup> The court again invited the Attorney General to bring the case on the public’s behalf.<sup>212</sup> This time, the Attorney General did file a complaint with the district court, initiating the successor case, *Salzburg v. Dowd*,<sup>213</sup> based on the Attorney General’s own authority to enforce a charitable trust.<sup>214</sup> The Attorney General reasserted Hicks’ claims that the SPT was a charitable trust holding assets in the form of conservation easements for the benefit of Johnson County citizens and that the SPT destroyed its assets and failed its fiduciary duties by terminating the easement.<sup>215</sup> He also asserted violations of the Wyoming Constitution stemming from use of public funds for private purposes, which, in the most general sense, amounted to an argument that the SPT conferred some private benefit on the Dowds.<sup>216</sup> Specifically, because Wyoming’s government entities are constitutionally barred from dedicating public money to private individuals or endeavors, when the SPT terminated the Dowds’ conservation easement (which was argued to be worth over one million dollars) without receiving anything from the Dowds in exchange, the SPT essentially

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<sup>205</sup> *Id.* at 917; see also Brief of Appellees Dowd at 9–10, *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007) (No. 06-2), 2006 WL 45866350, at \*62–64.

<sup>206</sup> *In Land Conservation, ‘Forever’ May Not Last*, ALL THINGS CONSIDERED (Mar. 11, 2008), <http://www.npr.org/templates/story/story.php?storyId=88038482>.

<sup>207</sup> *Hicks*, 157 P.3d at 918–19.

<sup>208</sup> *Id.* at 918.

<sup>209</sup> *Id.* at 921.

<sup>210</sup> *Id.* at 915.

<sup>211</sup> *Id.* at 921.

<sup>212</sup> *Id.*

<sup>213</sup> No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 10, 2010).

<sup>214</sup> Complaint for Declaratory Judgment Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties and Violation of Constitutional Provisions at 1, *Salzburg v. Dowd*, No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 10, 2010).

<sup>215</sup> *Id.* at 8.

<sup>216</sup> See *id.* at 11–13.

gave the Dowds one million dollars of value.<sup>217</sup> The Attorney General asserted that the easement could not be terminated without court approval in a cy pres proceeding.<sup>218</sup>

The judge approved a settlement through stipulated judgment in which all parties agreed that the SPT's termination of the easement on the Dowds' ranch was null and void.<sup>219</sup> The court reinstated the easement in full force and effect, with amendments.<sup>220</sup> The amendments acknowledged the Dowds' lack of control over or liability for mineral extraction and permitted direct transfer of the easement to another holder if SPT was not able to continue as its holder.<sup>221</sup> The court made no statements about the Attorney General's standing, the charitable trust doctrine's application to conservation easements and easement holders in Wyoming, or the basis for the easement's reinstatement. One presumption is that the court granted standing based on the Attorney General's representation of the public's interest in a charitable trust, and that the charitable trust doctrine may apply to Wyoming's holders of donated easements, so that easement termination must be approved by the court in an action to which the Attorney General is made a party.<sup>222</sup> Another presumption is that the stipulated settlement should not be read as recognizing standing in the Attorney General because it represented only the parties to the easement's mutual agreement to nullify SPT's termination of the conservation easement.<sup>223</sup> Although the case appears to have reached a just result, the legal basis upon which that result rests remains unclear.<sup>224</sup>

Wyoming's enabling act mimics the UCEA in several important respects: conservation easements can be terminated in the same manner as other easements, third parties can initiate judicial action only if identified in the easement, and the court retains its existing powers to modify or terminate

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<sup>217</sup> See *id.* at 12.

<sup>218</sup> *Salzburg*, No. CV-2008-0079, at 3.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 4.

<sup>222</sup> See McLaughlin & Weeks, *Salzburg v. Dowd*, *supra* note 119, at 52.

<sup>223</sup> See Lindstrom, *Charitable Trust Doctrine in Wyoming*, *supra* note 119, at 45–46 (noting that allowing standing for attorneys general as a rule is troublesome because “there is no guarantee that all persons holding [the] office will share that support” for conservation easements).

<sup>224</sup> For a spirited debate concerning the legal analysis, interpretation, and impact of this case, see Lindstrom, *Charitable Trust Doctrine in Wyoming*, *supra* note 119, at 44; C. Timothy Lindstrom, *Conservation Easements: Good News and Bad News*, *ADVOCATE*, May 2011, at 39–41; Lindstrom, *Hicks v. Dowd*, *supra* note 119, at 73–77; Nancy A. McLaughlin, *Conservation Easements: Federal Tax Incentives and the Meaning of Perpetuity*, Address at the ALI-ABA Conference on Sophisticated Estate Planning Techniques (Sept. 11, 2009), in *SOPHISTICATED ESTATE PLANNING TECHNIQUES* 345 (2009); Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements*, 46 *REAL PROP. TR. & EST. L.J.* 1 (2011); [hereinafter McLaughlin, *National Perpetuity*]; McLaughlin & Weeks, *In Defense*, *supra* note 119, at 3 n.3; McLaughlin & Weeks, *Hicks v. Dowd*, *supra* note 119; McLaughlin & Weeks, *Salzburg v. Dowd*, *supra* note 119, at 50–52; McLaughlin & Machlis, *supra* note 180; Andrew M. Wayment & C. Timothy Lindstrom, *Conservation Easements: Forever Is A Very Long Time*, *ADVOCATE (IDAHO)*, Aug. 2009, at 20 (2009).

an easement.<sup>225</sup> This case began and progressed on the path of charitable law, with two different third parties, Hicks and the Attorney General, seeking standing to reinstate the easement on the basis of their status as qualified beneficiaries. This would seem inconsistent with the enabling act's allowance of third party enforcement only when the third party is identified in the conservation easement. The court's involvement is consistent with the statute's provision allowing a court to modify or terminate an easement, but reinstating the easement seems inconsistent with the provision allowing conservation easements to be terminated in the same manner as other easements, which presumably could be between two parties without judicial approval. If courts, attorneys general, and qualified beneficiaries apply charitable trust doctrines to conservation easements, their holders, and landowners in states with UCEA-based enabling legislation, is the state enabling act supplanted by or blended with trust law? Are enabling acts narrowly purposed only to define a state's conservation easement interest at law and to guide non-charitable trust conveyances of conservation easement interests, if granted expressly as unrestricted gifts, to non-charitable trust holders? Courts will have to continue to examine these questions to shed light on whether and how to blend the charitable trust principles with state enabling acts.

Like *Hicks*, Colorado's *Walters and Otero County Land Trust*<sup>226</sup> also involved the holder and landowners' mutual agreement to terminate a conservation easement — this time, with judicial approval. This case was so low profile that Colorado's conservation community did not even know it had occurred until after its resolution. The Walter family donated conservation easements in the sparsely developed southeast part of Colorado, with the intent to qualify for federal tax deductions and, by extension, transferable Colorado gross conservation income tax credits.<sup>227</sup> The easement purposes were preservation of scenic and agricultural open space and wildlife habitat. The Walters gave the easements to the Otero County Land Trust ("OCLT"), an agency-created nonprofit corporation similar to the SPT in *Hicks*.<sup>228</sup> The court found the Walters' appraised easement values to be grossly overstated when subsequently re-appraised, which proportionately reduced the value of their tax credits. The Walters did not attempt to sell the

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<sup>225</sup> WYO. STAT. ANN. § 34-1-202(a) (2011) ("[A] conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements."); *id.* § 34-1-203 (providing that judicial actions involving a conservation easement may be brought only by the owner of the property subject to the easement, the holder of the conservation easement, and a person named in the conservation easement as having a third-party right of enforcement; and that a court's power to modify or terminate a conservation easement in accordance with the principles of law and equity are not affected by this section of the act).

<sup>226</sup> Order, *Walters and Otero Cnty. Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005).

<sup>227</sup> Joint Petition for Declaratory Judgment and Order at 1–2, *Walters and Otero Cnty. Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. June 21, 2005); *see also* COLO. REV. STAT. § 39-22-522 (2000) (allowing for a gross-conservation income-tax credit).

<sup>228</sup> Joint Petition for Declaratory Judgment and Order, *supra* note 227, at 1–2.

re-valued, nearly worthless tax credits, and thereby avoided a conundrum of inflated credits later faced by other sellers.<sup>229</sup>

Knowing that their easements did not generate the tax credit values they were seeking, the Walters, in concert with the easements' holder, sought to terminate the easements by court order, under the easement provisions permitting termination due to changed conditions.<sup>230</sup> Drafted to be consistent with the Regulations, the easement agreements permitted termination by judicial process "[i]f it is determined that conditions on or surrounding the Property change so much that it becomes impossible to fulfill its conservation purposes."<sup>231</sup> The request for declaratory judgment sought termination by joint petition to the court of proper jurisdiction, the Otero County District Court, based on changed conditions on or surrounding the property burdened by the conservation easement.<sup>232</sup>

The joint petitioners attached an order for the judge's signature to their petition requesting that the two easements be terminated under the circumstances of changed conditions, even though no physical changes in conditions took place on or surrounding the easement properties. The petitioners persuasively worded their petition to resemble the Regulations' language of the easements' termination clauses, characterizing their changed conditions not as surrounding the property, but as surrounding the grant of easement: "Petitioners and Co-Petitioners are in agreement that conditions *surrounding the grant* of the conservation easements by Petitioners are such that Petitioners are unable to fulfill the conservation purposes they had for the property."<sup>233</sup>

The order itself recognized that "[u]nder these circumstances, this Court may, pursuant to C.R.C.P. 57, enter a declaratory judgment terminating the easement grants."<sup>234</sup> The changed condition in all likelihood was not that a physical change on or surrounding the subject properties made the easements' conservation purposes impossible to fulfill, but rather that the donors did not realize their expectations of tax benefits.<sup>235</sup> However, even when cast in the most favorable light — that changed conditions surround-

<sup>229</sup> See *infra* Part II.B.5.

<sup>230</sup> Joint Petition for Declaratory Judgment and Order, *supra* note 227, at 3.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (emphasis added). The language of the petition, citing the actual easement language, mimics the Regulations:

In accordance with Section 21 of the respective Conservation Easement Agreements, there is an allowance for the termination of the easement agreement by joint petition to a Court of proper jurisdiction *if it is determined that conditions on or surrounding the property change so much that it becomes impossible to fulfill its conservation purposes.*

*Id.* (emphasis added); see also Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009).

<sup>234</sup> Order at 2, Walters and Otero Cnty. Land Trust, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005) (emphasis added).

<sup>235</sup> See ROB LEVIN, LAND TRUST ALLIANCE, LAND CONSERVATION CASE LAW SUMMARIES 78–79 (2010), available at [http://learningcenter.lta.org/attached-files/1/108/10859/Land\\_Con-servation\\_Case\\_Law\\_Summaries\\_November\\_2010.pdf](http://learningcenter.lta.org/attached-files/1/108/10859/Land_Con-servation_Case_Law_Summaries_November_2010.pdf).

ing the property could include unrealized expectations of easement value — these conditions do not cause the easements' conservation purposes to become impossible to accomplish.

The court granted the joint petition for declaratory judgment and signed the order terminating the two conservation easements.<sup>236</sup> This likely was due to the lack of publicity or public knowledge of the action and the uncontested nature of the litigation mutually initiated by the parties and mutually proposing a resolution. Also, although this result seems inconsistent with the Regulations' changed-conditions language, it is not inconsistent with Colorado's enabling act. Colorado's easement statute, like Illinois's statute and the Regulations, is silent as to easement amendment, but allows conservation easements to be "released, terminated, extinguished, or abandoned by merger . . . or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned."<sup>237</sup> Termination in the manner of other easements likely includes joint petition for termination to a court of competent jurisdiction by the parties to the easement.

Colorado's rules regarding declaratory judgment, however, potentially provide for interested or affected parties' participation in an easement's termination: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."<sup>238</sup> Given that many easements in Colorado are granted for the public's benefit to protect conservation purposes in perpetuity in exchange for publicly subsidized federal and state tax benefits, it would be appropriate for the public or the Attorney General on the public's behalf to be alerted of such an action and afforded the opportunity to participate. Going forward, termination actions could, and likely should, provide for public notice with an opportunity to participate in the proceedings.<sup>239</sup> Otherwise, the public dollars subsidizing the protection of land with perpetual conservation easements will be lost if easements are terminated and their purposes not continued through the reinvestment of proceeds.

It remains to be seen whether the landowners will direct proceeds from the subsequent sale or conversion of their now unprotected properties to the former easement holder in proportion to the original easement values, and if so whether the former holder will reinvest those proceeds in a manner consistent with the easements' purposes of scenic and agricultural open space protection, pursuant to the Regulations.<sup>240</sup> Tracking the proceeds meant to perpetuate the original conservation purpose and the public benefit will be

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<sup>236</sup> Order, Walters and Otero Cnty. Land Trust, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005).

<sup>237</sup> COLO. REV. STAT. § 38-30.5-107 (2010).

<sup>238</sup> COLO. R. CIV. P. 57(J).

<sup>239</sup> See *infra* Part II.B.5 for information on Colorado's regulatory oversight program and involvement of the state Attorney General in resolving instances of abuse.

<sup>240</sup> See 26 C.F.R. § 1.170A-14(d)(4) (2009) (requiring a donation to "yield a significant public benefit" pursuant to governmental conservation policy or for scenic enjoyment of the general public).

challenging, but important nonetheless, especially in a state where other problems exist with perpetual conservation easements.

Appraisals grossly overstating easement values were commonplace during the early years of Colorado's powerful gross conservation income tax credit incentive. These appraisals prompted the IRS to investigate easement donations in the state.<sup>241</sup> Allegedly, hundreds of easements were granted to suspect holders based on inflated values, generating inflated tax credits<sup>242</sup> which were in turn sold to hundreds more buyers, who submitted them as payment for their state taxes.<sup>243</sup> The State Department of Revenue has disallowed many of the inflated tax credits, creating a group of tax credit buyers and sellers who, until the passage of legislation designed to address these taxpayers, sought amnesty from debts to the state.<sup>244</sup> Colorado's conservation community and legislature have since implemented regulatory oversight of easement holders and have adopted a process to guide these troubled easements' resolution.<sup>245</sup> Colorado's conservation community and legislature might also rely on the newly instituted regulatory structure for oversight and processes for other perpetual easements' amendment and termination going forward, or might revisit Colorado's enabling act to consider providing additional guidance for proposed perpetual easement amendment or termination, as several other states recently have done.<sup>246</sup>

*B. Legislation, Statutory Law, and Policy: Existing, Amended, Interpreted, and Prospective*

To address differences among the legal regimes and provide guidance to courts, easement holders, and landowners, states should consider crafting new or modifying existing legislation, policies, or regulations to address easement termination and amendment.<sup>247</sup> Massachusetts's existing act,

<sup>241</sup> Jessica Fender, *Conservation Easements: Preliminary Audit Will Scrutinize Easement Tax Collections*, DENV. POST, Nov. 9, 2010, available at [http://www.denverpost.com/politics/ci\\_16560363#ixzz14nu99kqL](http://www.denverpost.com/politics/ci_16560363#ixzz14nu99kqL).

<sup>242</sup> *Id.*; see also Steven K. Paulson, *Changes Proposed for Colorado Conservation Easements*, ASSOCIATED PRESS, Jan. 21, 2011, available at <http://xslt12.finance.sp2.yahoo.com/news/Changes-proposed-for-Colo-apf-1830364758.html?x=0>.

<sup>243</sup> Paulson, *supra* note 242.

<sup>244</sup> *Id.* At least two lawsuits have been initiated and one already appealed by individuals and entities affected by their treatment as or relationship to conservation easement donors, tax credit sellers, or tax credit buyers. See *Land Owners United v. Waters*, No. 10CA1006, 2011 WL 3616176, at \*14 (Colo. App. Aug. 18, 2011) (affirming a requirement that Colorado release documents pertaining to proceedings investigating appraisers and allegations of abuse of Colorado's conservation easement program); *Complaint for Relief at 7–10, TDX L.P. v. Yankee Girl Props., Inc.*, No. 2009CV120 (Colo. Jud. Dist. Ct. Jul. 15, 2011) (seeking recovery through foreclosure of title to land used by purchaser to generate tax credits sold on the basis of conservation easements granted on the land with liens and mortgages held by plaintiff).

<sup>245</sup> See *infra* Part II.B.5.

<sup>246</sup> See *infra* Part II.B.2–4 regarding Maine, Rhode Island, Montana, and Vermont.

<sup>247</sup> See Collins, *supra* note 127, at 1106 (positing that legislatures will respond if the need is great enough to guide private negotiations surrounding termination of conservation easements); Korngold, *supra* note 50, at 493 (arguing that termination of conservation easements should be guided by statute).

Maine's amended act, New Hampshire's administrative policy, Montana's policy of self-regulation, and Vermont's potential legislation all address perpetual easement amendment and termination, and Colorado's regulatory framework creates the opportunity to do the same. These approaches bear mention and examination because they represent states that have addressed perpetual easement amendment and termination beyond the aforementioned legal regimes' provisions, with a focus on protecting conservation easements, the land they encumber, *and* their conservation purposes. The states' approaches are distinct, but they all incorporate various aspects of the legal doctrines and frameworks set out by the legal regimes; involve the public either directly or by proxy; and consider public interests, benefits, and investment in perpetual conservation easements.

### 1. *Existing Law: Massachusetts*

Massachusetts's conservation easement enabling act, in effect since 1956, requires government approval for all proposed conservation easements, as well as for partial and total easement termination.<sup>248</sup> All proposed conservation easements are approved by the Massachusetts Executive Office of Energy and Environmental Affairs, and easements proposed to be held by charitable entities are further approved by the local governing body.<sup>249</sup> The same standard is used for both the creation and the termination of perpetual easements: consideration of the public interest in the land's conservation, any program in furtherance thereof, any comprehensive land use or development plan affecting the land, and any known governmental proposal for the land's use.<sup>250</sup> However, government and charitable entities have the discretion to terminate easements in whole or in part, only after public hearing and relevant administrator approval, taking into account the public's interest.<sup>251</sup>

Agricultural preservation easements similarly may only be terminated if the land they protect is no longer "deemed suitable for agricultural or horticultural purposes" or if two-thirds of both general-court branches vote to terminate "*for the public good.*"<sup>252</sup> The statute implies there is to be some

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<sup>248</sup> See MASS. GEN. LAWS ch. 184, § 32 (2008); see also Jay *supra* note 3, at 471; King & Fairfax, *supra* note 50, at 71–72.

<sup>249</sup> See Bray *supra* note 4, at 155; see also LEVIN *supra* note 130, at 12.

<sup>250</sup> MASS. GEN. LAWS ch. 184, § 32.

<sup>251</sup> *Id.* Nebraska similarly allows its holders to modify and terminate their conservation easements with appropriate government-entity approval. NEB. REV. STAT. ANN. § 76-2,113(1) (2011). Nebraska also requires government approval of proposed conservation easements prior to their acceptance "in order to minimize conflicts with land-use planning goals." *Id.* § 76-2,112(3). Finally, Nebraska requires judicial oversight of easement modification and termination when the same is not guided by language within the conservation easement itself and allows modification or termination upon petitioner's proof either that the easement is no longer in the public interest or no longer substantially achieves its purposes. See *id.* § 76-2,114. This language, like Rhode Island's legislation, discussed *infra* note 266, also begs the question of what might be the legal and practical difference between a release and a termination of a perpetual easement.

<sup>252</sup> MASS. GEN. LAWS ch. 184, § 32 (emphasis added).

payment for an easement's termination, and requires full repayment for state-purchased easements at the land's unencumbered fair market value, with proceeds directed back to the original funding sources or, if that is not possible, to other similar interests in land.<sup>253</sup> Such public review and strict guidelines for perpetual easement termination are unsurprising in a state that long has involved the public, through its governmental representation, in its approval of proposed perpetual easements.<sup>254</sup> Putting the approval of partial or total easement termination in front of the public for review adds an additional layer of scrutiny and proof to the public benefit aspect of the standard.

The statute also indirectly creates a process for easement amendment through its "partial release" language.<sup>255</sup> Partial release occurs when an easement is terminated in part through the release of some, but not all, of the land from the easement. The remainder of the land continues to be encumbered by the easement. An amendment might effect a partial release by changing an easement's boundaries, swapping unencumbered for encumbered land, or expanding or moving reserved rights or building sites within an easement. Massachusetts, in re-examining its enabling act, could provide even more guidance to courts, landowners, and easement holders by directly addressing amendments to perpetual conservation easements beyond those that arguably create a partial release. Unlike the Regulations, Restatement, or UCEA, the Massachusetts act involves the public directly in partial and total easement termination decisions because these decisions affect public interests.<sup>256</sup> This sets a high bar for termination, permitting it only after both public involvement and accounting for public interests and investment by the parties. Maine's legislature also recently incorporated consideration of the public interest and benefit into its enabling act, though without directly involving the public.<sup>257</sup>

## 2. *Amendment of Existing Law: Maine*

Maine's legislature revised its conservation easement enabling act in 2007, moving away from UCEA language to create standards and processes for easement amendment and termination.<sup>258</sup> The amended law requires that

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<sup>253</sup> *Id.*

<sup>254</sup> According to Mary Ann King and Sally K. Fairfax:

Massachusetts . . . assured CE reliability early on — it became the first to adopt state legislation in 1956. Amended many times since then, the initial Massachusetts statute, called the Conservation Restriction Statute, allowed only government entities to hold CEs. That stricture was lifted in 1969. However, Massachusetts law continues to require that state officials approve *every* CE before it can be recorded with the deed.

King & Fairfax, *supra* note 50, at 71–72.

<sup>255</sup> MASS. GEN. LAWS ch. 184, §§ 31–33.

<sup>256</sup> *Id.* § 32.

<sup>257</sup> ME. REV. STAT. ANN. tit. 33, §§ 412(2), 477(2), 477-A(4) (2007).

<sup>258</sup> *Id.* Prior to the 2007 revision, Maine's conservation easement enabling act provided that "a conservation easement may be created, conveyed, recorded, assigned, released, modi-

a judge determine when changed circumstances render an easement no longer in the public interest.<sup>259</sup> It also requires that, going forward, every easement state its conservation purposes with specificity, listing the resulting public benefit from their protection by the conservation easement.<sup>260</sup> The act also provides that all new easements include a statement of the holder's power to agree to amendment and termination.<sup>261</sup>

Courts must approve easement termination or amendment that materially detracts from the easement's protected purposes and thus must consider the easement's purposes and the public interest before giving any approval in an action involving the Attorney General.<sup>262</sup> The court calculates proceeds based on any increase in the value of the easement-encumbered land due to the easement's amendment or termination, and directs them to the holder or to an entity the court designates immediately, not upon future conveyance or sale of the property.<sup>263</sup> Proceeds are to be used for the protection of other lands consistent with the affected easement's stated publicly beneficial conservation purposes.<sup>264</sup>

This approach requires judicial analysis of public interest and conservation purposes and the public's representation by the Attorney General. A court reviewing an amendment or termination proposal that materially detracts from an easement's protected purposes and the public interest need not examine changed conditions on or around the property or the easement donor's intent.<sup>265</sup> Rather, the focus is on the impacts of the proposed amendment or termination on the conservation purposes, emphasizing the public

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fied, terminated, or otherwise altered or affected in the same manner as other easements created by written instrument." ME. REV. STAT. ANN. tit. 33, § 477(1) (2006). For an in-depth discussion of the effect of Maine's reform act and whether it should be used as a model for other states endeavoring to provide clarity as to when and how perpetual conservation easements can be amended and terminated, see Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 DUKE J.L. & CONTEMP. PROBS 1 (2011). Pidot recommends that the nation should follow as Maine goes. See *id.* at 27.

<sup>259</sup> ME. REV. STAT. ANN. tit. 33, § 477(3)(B) (2007).

<sup>260</sup> *Id.* § 477-A(1).

<sup>261</sup> *Id.* §§ 477-A(2)(A), 479(C). The State Planning Office also now maintains a mandatory statewide registry for all conservation easements held in Maine. See James Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 DUKE J.L. & CONTEMP. PROBS 51, 70 (2011); Pidot, *supra* note 258, at 9–11.

<sup>262</sup> ME. REV. STAT. ANN. tit. 33, § 477-A(4)(2)(B). Maine's Attorney General is also involved in easement enforcement and is allowed to intervene in an existing enforcement action or initiate a new enforcement action if the other parties designated to do so are not willing, available, able, or in existence to do so themselves. *Id.* § 478(1)(D).

<sup>263</sup> This is in contrast to the Regulations, which require the dedication of proceeds subsequent to an easement's termination only upon the unburdened property's sale, exchange, or conversion. See Treas. Reg. § 1.170A-14(g)(6)(ii).

<sup>264</sup> ME. REV. STAT. ANN. tit. 33, § 477-A(2)(B).

<sup>265</sup> *Id.* In what is a useful application of the changed-conditions "plus" analysis to easement enforcement, a court is only allowed to deny equitable enforcement of an easement—such as injunctive relief—if it finds changed circumstances have rendered the easement no longer in the public interest, or no longer serving the easement's purposes for the public's benefit. *Id.* § 478(3). The public interest or benefit is not to be determined on the basis of comparative economics. *Id.* § 478(4).

benefit. In substantially revising its act to create judicial oversight of perpetual easement amendment and termination, Maine's legislature gives much needed guidance to its courts, perpetual easement donors, and holders beyond that offered by the UCEA, and consistent with the Restatement and Regulations. Maine's act has been held up as a model reform act for other states to follow.<sup>266</sup>

### 3. *Interpretation of Existing Law to Formulate Policy: New Hampshire and Montana*

New Hampshire's Attorney General and its Director of Charitable Trusts (collectively, the "A.G.") recently collaborated with several prominent easement holders within the state to establish its administrative role and provide written guidelines ("Guidelines") for perpetual easement amendment and termination.<sup>267</sup> The A.G. interpreted existing law to vest it with all common law and statutory rights, duties, and powers over charitable trusts, charitable solicitations, and charitable sales promotions within the state, including supervisory, administrative, and enforcement powers to review and approve perpetual easement amendment and termination.<sup>268</sup> Citing state common law and statutory adoption of the Uniform Trust Act, conservation easements in New Hampshire therefore are subject to charitable trust principles and A.G. oversight.<sup>269</sup>

The A.G. defined any perpetual conservation easement given for specific charitable purposes to a charitable organization or a government entity to constitute a charitable trust.<sup>270</sup> The Guidelines' drafters reason that, because non-donated and donated perpetual easements are both perpetual, requests to amend or terminate them should comply with charitable trust principles, regardless of how the easements are acquired — including by purchase, mitigation, or exaction.<sup>271</sup> Accordingly, the A.G. oversees nearly all proposed easement amendments, is notified of abandoned or non-monitored easements, and is a party to judicial *cy pres* proceedings for partial or total easement termination.<sup>272</sup> The A.G. oversees easement amendment in proportion to the amendment's risk level, whether the easement has an amendment provision, and whether the amendment complies with the LTA

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<sup>266</sup> See Pidot, *supra* note 258, at 27. Rhode Island recently adopted nearly identical legislation to Maine's except for one significant change — the holder must consent to the amendment proposal. See R.I. GEN. LAWS § 34-39-5(c) (2011) ("No such approval [of termination or amendment] may be sought except with the consent of the holder."). However, Rhode Island's code still mimics the UCEA by referring to "release," *id.* § 34-39-5(a)-(b), presenting a possible conflict between "releasing" and "terminating" a conservation easement, similar to the discussion raised with Nebraska's enabling act, *supra* note 251.

<sup>267</sup> N.H. REV. STAT. ANN. §§ 7:19-7:32-a (2010); DOSCHER ET AL., *supra* note 177.

<sup>268</sup> See N.H. REV. STAT. ANN. §§ 7:19-7:32-i.

<sup>269</sup> DOSCHER ET AL., *supra* note 177, at 2.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> See generally *id.* at 3-11.

Amendment Report and Principles.<sup>273</sup> Easements with amendment provisions giving the holder discretion to amend consistent with an easement's purpose, however, receive little or no A.G. scrutiny.<sup>274</sup>

Amendments are categorized as "low," "more," or "high" risk.<sup>275</sup> Low risk is defined as being clearly consistent with an easement's conservation purpose, with a landowner receiving nothing other than additional income tax benefits based on the value of a new donation.<sup>276</sup> More risk is defined as being more complicated, presenting potential problems involving tradeoffs of restrictions, private benefit, or a violation of charitable trust law or federal tax perpetuity requirements.<sup>277</sup> High risk is defined as being most complex, with issues involving "trade offs of restrictions, possible harm to the conservation purposes of the easement, or removal of more than a *de minimis* portion of the land from the easement," constituting a partial termination of the easement.<sup>278</sup>

The A.G. reviews all high-risk amendments, regardless of the existence of an amendment provision within the easement.<sup>279</sup> High-risk amendments also require review and approval by the probate court under either the doctrine of deviation or the doctrine of cy pres.<sup>280</sup> The A.G. might not need to approve low- and more-risk requests if the easement includes an amendment provision and the amendment is consistent with that provision, the LTA's Amendment Principles, and the holder's amendment policy.<sup>281</sup> But the parties still must notify the A.G. of the amendment, outline why A.G. approval is not necessary, and include copies of the easement and amendment with the notice.<sup>282</sup> If the easement does not contain an amendment provision and the holder believes it should qualify as low risk, the holder must provide thirty days' notice to the A.G. and show compliance with the Amendment Principles, low-risk qualification, and consistency with the holder's amendment policy.<sup>283</sup> If the amendment is more risk, the holder must add to the notice why it is more risk, and any indications of support by the original

<sup>273</sup> *Id.* at 3–4.

<sup>274</sup> *Id.* at 10. Because easements without amendment provisions by default receive the most scrutiny by the A.G. and potentially a court, it is in a holder's best interest to have amendment provisions in all easements. At least one commentator finds that the fact that the placement of an amendment clause within a perpetual conservation easement excludes that easement from certain charitable trust oversight to be somewhat disingenuous to the idea that decision-making related to perpetual conservation easement amendment and termination needs the additional oversight and scrutiny afforded by charitable trust doctrine. *See* Lindstrom, *Charitable Trust Doctrine in Wyoming*, *supra* note 119, at 45. ("If application of the [charitable trust] doctrine is so essential, as McLaughlin strenuously argues in a number of her writings, why should a land trust be allowed to avoid its application by the simple expedient of an amendment clause?").

<sup>275</sup> *DOCsher ET AL.*, *supra* note 177, at 5–10.

<sup>276</sup> *Id.* at 5–6.

<sup>277</sup> *Id.* at 6–7.

<sup>278</sup> *Id.* at 8.

<sup>279</sup> *Id.* at 11.

<sup>280</sup> *Id.* at 8.

<sup>281</sup> *Id.* at 10.

<sup>282</sup> *Id.* at 11.

<sup>283</sup> *Id.* at 6.

grantor, heirs or assigns of the grantor, funders, back-up holders, and public entities.<sup>284</sup> The A.G., in response, may determine an amendment to be low risk and send the holder a “no-action” letter, may recommend certain changes requiring resubmission, or may determine there exist “significant [legal] issues” related to restricted charitable gifts and charitable trusts, and recommend probate court approval as a petition for instructions, deviation, or cy pres.<sup>285</sup>

Amendments that are inconsistent with the easement’s original purpose or that remove more than a small portion of the land from the easement also require court approval in a cy pres proceeding with the A.G. as a party.<sup>286</sup> The Guidelines encourage holders in doubt to submit amendment requests to the A.G.<sup>287</sup> The Guidelines remind that, under any circumstance, the A.G. can petition a court to invalidate an amendment after the fact.<sup>288</sup>

Leaving aside whether this approach might be authorized in other states, many state attorneys general may not have the capacity, time, or resources to orchestrate such widespread oversight as the New Hampshire A.G., nor want such authority.<sup>289</sup> A state’s own charitable trust common and statutory law, attorney general authorizing statutes, and other common and statutory law also need to be evaluated for whether attorneys general elect to, are able to, or are required to take on this oversight.

New Hampshire’s policy focuses on protection of land for the perpetual conservation purposes specified in an easement by examining proposals in light of their impacts on the protected purposes, like Maine, and by using judicial charitable trust proceedings with A.G. involvement for certain easement modifications and likely all easement terminations.<sup>290</sup> Also like Maine’s act, the policy adopts aspects of the Regulations and Restatement to provide tangible guidance beyond the UCEA.<sup>291</sup> Montana’s easement holders also recently developed a policy to guide land trust holders’ decision-making for perpetual easement amendments in instances of changed circumstances, which process, by contrast, does not rely on government or judicial oversight.<sup>292</sup>

Montana’s easement holders, through the Montana Association of Land Trusts (“MALT”), developed the Model Montana Conservation Easement Amendment Policy (the “Model Policy”)<sup>293</sup> as guidance “tailored to address unique aspects of Montana law.”<sup>294</sup> The Model Policy is intended to guide

<sup>284</sup> *Id.* at 7–8.

<sup>285</sup> *Id.* at 8.

<sup>286</sup> *Id.* at 10, 12.

<sup>287</sup> *Id.* at 12.

<sup>288</sup> *Id.*

<sup>289</sup> See DRAFT CHARITABLE ASSETS ACT § 7 cmt. (2011) (noting that a lack of resources might present a barrier to attorney general participation in such oversight).

<sup>290</sup> See *supra* Part II.B.2–3 (describing Maine’s and New Hampshire’s approaches).

<sup>291</sup> See *supra* Part II.B.2 (describing Maine’s approach).

<sup>292</sup> See *supra* Part II.B.3 (describing New Hampshire’s approach).

<sup>293</sup> MONT. ASS’N OF LAND TRUSTS, MODEL MONTANA CONSERVATION EASEMENT AMENDMENT POLICY (2011) [hereinafter MONTANA MODEL POLICY].

<sup>294</sup> DANA, *supra* note 54, at 1.

MALT members and other easement holders in interpreting the enabling act and developing their own policies for easement amendment and termination.<sup>295</sup>

Montana's enabling act anticipates the possibility that perpetual conservation easements may be "converted" or "diverted" from dedicated open-space land, but only when "necessary to the public interest;" consistent with local comprehensive planning; and permitted by the conservation easement, its acquisition agreement, or governing body resolution.<sup>296</sup> If these conditions are met and a conservation easement is "converted" or "diverted" from open-space land, the enabling act requires that other lands of equal financial and conservation value be acquired by the easement holder within three years, so there is no net loss of conservation value to the public.<sup>297</sup>

The Model Policy interprets the plain language of Montana's enabling act and its legislative history to set forth two central tenets. First, conservation easements created under Montana's enabling act are property rights held perpetually for the public's benefit, not restricted gifts in the nature of charitable trusts.<sup>298</sup> Second, when "necessary to the public interest," land trusts may substantively modify conservation easements to ensure that the easements continue to provide public benefits,<sup>299</sup> and may so do with minimal public review,<sup>300</sup> and without administrative hearings or attorney general or judicial supervision.<sup>301</sup>

The Model Policy first summarizes circumstances under which MALT members may choose to amend conservation easements for required, technical, or administrative purposes, or when the original purposes of the easement prove to be impossible to meet.<sup>302</sup> The Model Policy suggests that

<sup>295</sup> MONTANA MODEL POLICY, *supra* note 293, at 1 n.1.

<sup>296</sup> MONT. CODE ANN. § 76-6-107(1) (2011). The Model Policy's drafters reason that the substitute property rule does not apply to amendments, however, because during amendment there is no cessation of public benefits. *See* DANA, *supra* note 54, at 15 n.5.

<sup>297</sup> MONT. CODE ANN. § 76-6-107(2) ("Other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land must be substituted within a reasonable period not exceeding 3 years for any real property converted or diverted from open-space land use.").

<sup>298</sup> DANA, *supra* note 54, at 3. Of course, charitable trust doctrine applies if the original grantor expressly intends to create a charitable trust. MONTANA MODEL POLICY, *supra* note 293, at 5.

<sup>299</sup> MONT. CODE ANN. § 76-6-107(1)(a).

<sup>300</sup> *Id.* § 76-6-206 (requiring that substantive changes to conservation easements must be submitted to local planning authorities for comment to "minimize conflict" with local comprehensive planning, but that "[s]uch comments will not be binding on the proposed grantor or grantee but shall be merely advisory in nature").

<sup>301</sup> DANA, *supra* note 54, at 11 ("[T]he changes to the Open-Space Act proposed in HB 341, adopted in 1975, and retained to this day in the Enabling Act, specifically eliminated the requirement that conservation easement 'conversions' and 'diversions' must be 'determined' to be acceptable by a 'public body.'").

<sup>302</sup> MONTANA MODEL POLICY, *supra* note 293, at 3-4. Technical amendments include those made pursuant to express easement amendment terms and express conservation easement language; to correct errors, oversights, or ambiguities; to enhance, or have no adverse effect on, an easement's conservation purposes; to upgrade language to current drafting standards; or, when the original purposes of the parties to an easement prove to be impossible to meet.

conservation easement holders *not* approve conservation easement amendment requests when the amendments would diminish or not serve the public interest; would be inconsistent with express duties or obligations to the public; would cause the easement to be out of compliance with any applicable laws, regulations, or ordinances; would be inconsistent with express rights of easement interest-holding third parties; would not comply with the holder's mission or other organizational policies; would confer impermissible private benefit or private inurement to any party; would jeopardize the holder's tax-exempt status or status as a qualified organization under state or federal law; or would affect the perpetual duration of a holder's conservation easement rights.<sup>303</sup>

The Model Policy most significantly provides guidance to MALT members in cases of substantive easement amendments, particularly those occurring under substantially changed circumstances, and provides direction on how to implement the statutory language authorizing "conversions" and "diversions" of conservation easement land "when necessary to the public interest."<sup>304</sup> Before considering such easement amendments, the Model Policy requires easement holders to determine first that the proposed amendment does not violate general conservation easement amendment principles,<sup>305</sup> and second that the proposed amendment is "necessary to the public interest" by examining whether an easement's original purposes and terms can no longer be achieved or whether the changed circumstances have substantially diminished or impaired an easement's public benefits.<sup>306</sup> Holders may consider whether easement amendment is necessary to preserve the conservation easement rights they hold in order to maintain the flow of conservation benefits to the public from those rights; to ensure an easement remains relevant and responsive to changing laws and public land conservation policies; and to ensure an easement continues to serve its original purposes to provide conservation benefits for the public.<sup>307</sup>

The Model Policy's commentary identifies changing or changed conditions, not dissimilar to those articulated by the Regulations and Restatement, as the impetus for substantive amendment of perpetual conservation easements, including changes in protected natural resources, public interest or public values, applicable land conservation laws, and other changes that undermine an easement's original conservation purposes.<sup>308</sup> It is important to note that the act also identifies changes in public interest or values as

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<sup>303</sup> *Id.* at 2.

<sup>304</sup> *Id.* at 6 (citing MONT. CODE ANN. § 76-6-107(1)(a)).

<sup>305</sup> See MONTANA MODEL POLICY, *supra* note 293, at 1–2.

<sup>306</sup> *Id.* at 6–7.

<sup>307</sup> *Id.* at 3–4. The Model Policy states that "conservation easement reform under [MONT. CODE ANN. § 76-6-107], is not ever deemed 'necessary' by the [easement holder] — and such reform is therefore not authorized by statute or permitted under this [Model Policy] — if the original purposes and terms of the conservation easement may be enforced or achieved, unless the public benefits provided by the easement are substantially diminished or impaired." *Id.* at 6–7.

<sup>308</sup> DANA, *supra* note 54, at 2.

changed conditions, as distinct from physical changes surrounding or on a subject conservation easement property. The enabling act's legislative history places conservation easements within Montana's real property law, treats conservation easements as private property rights, and directs that, except for the laws of condemnation and eminent domain, the act preempts all other laws that may conflict with it.<sup>309</sup> The Model Policy places the authority for holding, administering, and amending perpetual conservation easements for the public interest squarely with easement holders, and not with the attorney general or judiciary.<sup>310</sup>

However, easement holders in Montana are not entirely free from public scrutiny, oversight, or regulation throughout the process of amending perpetual conservation easements. If a Montana land trust approves amendments that do not serve the public interest, such as by creating private benefit or by diminishing an easement's protected conservation values, the attorney general, as supervisor of charitable organizations, has the authority to sanction that land trust.<sup>311</sup> Additionally, when an easement's grantor clearly manifests an intention to create a charitable trust through the terms of the conservation easement, the attorney general could amend the easement through *cy pres* proceedings.<sup>312</sup> Easement holders also may voluntarily seek public input from the attorney general or other governing bodies to ensure consistent interpretation of the public benefits of a proposed amendment.<sup>313</sup> Further, easement amendments that materially change an easement's purposes or terms or that add or subtract land from an easement must be submitted to the local planning authority for review for consistency with local comprehensive planning.<sup>314</sup> Finally, MALT has created the Conservation Easement Reform Advisory Committee, an entity consisting of land trust professionals and former Montana Supreme Court Justices, to ensure protection of the public interest and compliance with terms and purposes of state law and the Model Policy and to review all substantive easement amendments proposed under section 76-6-107 of the Montana Code and the Model Policy.<sup>315</sup> After reviewing proposed amendments, the Advisory Committee makes written recommendations and comments to the easement holder proposing the amendment, as well as to all of MALT's members.<sup>316</sup>

The Model Policy's drafters interpret Montana's state law to require land trusts to act for the public's benefit in the face of changing conditions, public interest, and applicable laws.<sup>317</sup> In relying on holders' sole discretion to re-

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<sup>309</sup> MONT. CODE ANN. § 76-6-105. Standing to enforce conservation easements is limited to easement holders; the attorney general is not granted enforcement authority over specific conservation easements. *See id.* § 76-6-211.

<sup>310</sup> DANA, *supra* note 54, at 21.

<sup>311</sup> *See id.* at 20–21.

<sup>312</sup> *See id.*

<sup>313</sup> *Id.* at 21.

<sup>314</sup> *See id.* at 3.

<sup>315</sup> MONTANA MODEL POLICY, *supra* note 293, at 9 n.3.

<sup>316</sup> *Id.*

<sup>317</sup> DANA, *supra* note 54, at 21; *see also* MONT. CODE ANN. § 76-6-107(1)(a) (2011).

view and determine proposed substantive easement amendments with only limited public, government, or administrative review, the Model Policy anticipates that Montana's land trusts will act responsibly to follow their missions, respect the terms of the easements they hold, and adhere to state law.<sup>318</sup> In much the same way that easement holders in many states (excluding Massachusetts) evaluate at their inception whether proposed conservation easements have significant public benefit and are worthy of protection without government oversight or public involvement, Montana's easement holders also determine whether proposed easement amendments are "necessary to the public interest," without direct government oversight and with limited public review.<sup>319</sup> As uniquely required by its enabling act, the Model Policy focuses on examining easement amendment proposals in light of public benefit, without direct government oversight or public involvement. In this, Montana's approach differs most from the Restatement's apparent requirement for judicial charitable trust and changed conditions proceedings, while still providing much more guidance than the UCEA, and at the same time perhaps fitting into a category of the Regulations' extinguishment clause outside of a safe harbor for judicial proceedings.<sup>320</sup>

#### 4. *Proposed Legislation: Vermont*

Vermont stands out as another state contemplating a mechanism to guide easement amendment and termination that combines aspects of public review with direct public involvement employing a process of administrative review not entirely dissimilar from New Hampshire's basic process.<sup>321</sup> The proposed legislation entered into Vermont's 2012 legislative session in January.<sup>322</sup> The legislation stands on the shoulders of New Hampshire, Maine, and Massachusetts's processes. The purpose of the proposed legislation is to provide clear rules, procedures, and criteria for determining when to allow an easement's amendment or termination, regardless of how the easement is acquired, whether by gift, purchase, bargain-sale, or settlement.<sup>323</sup> It aims to assist holders and landowners confronting circumstances that could not have

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<sup>318</sup> DANA, *supra* note 54, at 21.

<sup>319</sup> *See id.* at 4.

<sup>320</sup> *See supra* Part II.B.2–3 (describing Maine's and New Hampshire's approaches).

<sup>321</sup> *See supra* Part II.B.3 (describing New Hampshire's approach).

<sup>322</sup> The Act has been introduced in both houses of the state legislature as Senate Bill S. 179 and House Bill H.R. 553. H.R. 553, 2011-2012 Leg. (Vt. 2012); S.179, 2011-2012 Leg. (Vt. 2012). Under H.R. 553, conservation easements that are co-held by a State agency and a qualified nonprofit are exempt from the panel's review of amendments or termination, unless the agency waives exemption. H.R. 553 at 9. *But see* S. 179 at 7 (lacking such an exemption). This exemption does not apply to easements that are held solely by a State agency or that are co-held with a municipality, which must use the process described here. *See* H.R. 553 at 9.

<sup>323</sup> *See* H.R. 553 at 1; S.179 at 1; *see also* VT. LAND TR., DRAFT ACT RELATING TO AMENDING PERPETUAL CONSERVATION EASEMENTS 2 (2011) [hereinafter "DRAFT VERMONT LEGISLATION"] (on file with author).

been anticipated when an easement was created.<sup>324</sup> The proposed legislation creates an administrative panel (“Panel”) to determine when easement amendment or termination is appropriate in light of defined criteria; holders have discretion to make some determinations, while the Panel makes others.<sup>325</sup> The Panel has the power to allow parties to enter upon others’ land to inspect and investigate conditions related to a proposal as necessary to verify the information presented to it.<sup>326</sup>

Under the proposed legislation, proposed easement amendments and terminations are examined in light of their impacts on the purposes an easement protects, not unlike New Hampshire and Maine’s processes, and are similarly divided into three categories to be evaluated by the easement holder, attorney general, or Panel. A category 1 amendment has “not more than a de minimis negative effect on the resource values protected by the easement.”<sup>327</sup> The easement holder would “approve a Category 1 amendment without notice to or review by the attorney general or the panel.”<sup>328</sup> Category 1 amendments are intended to prevent the attorney general or Panel from needing to review clerical amendments, or amendments that indisputably increase the protections of the easement.<sup>329</sup> All other amend-

<sup>324</sup> The Enabling Act currently defines the duration of conservation easements for a term of years, unless the easement states that it is perpetual. The proposed legislation would reverse the general rule to recognize easement duration as perpetual, except where limited by its terms to a term of years. *Compare* VT. STAT. ANN. 10. § 6308(b), *with* H.R. 553 at 7, *and* S. 179 at 6. The Enabling Act also currently provides that, if a government easement holder determines that an easement is no longer needed to carry out the land’s conservation, the holder may release it to the owner, thereby terminating it, or transfer it to another public agency, easement-holding entity, or third party. If transferred to a non-public agency or qualified organization, then the original holder is to be paid for the conveyance. The proposed legislation would remove this section of the law entirely. *Compare* VT. STAT. ANN. 10. § 6308(a), *with* H.R. 553 at 7, *and* S. 179 at 5.

<sup>325</sup> *See* H.R. 553 at 8–12; S. 179 at 6–9.

<sup>326</sup> H.R. 553 at 11; S. 179 at 9. The Panel would consist of the chair of the Natural Resources Board; two members of the Land Use Panel of the Natural Resources Board; one member plus an alternate appointed by the governor from a list submitted by land trust qualified organizations; and one member plus an alternate appointed by the governor from a list submitted by the Vermont Housing and Conservation Board (“VHCB”), excluding anyone employed as a staff member or consultant or who served on the VHCB or on the governing board of a qualified organization during the preceding twelve months. H.R. 553 at 9–10; S. 179 at 7–8.

<sup>327</sup> H.R. 553 at 12; S. 179 at 10.

<sup>328</sup> H.R. 553 at 12; S. 179 at 10.

<sup>329</sup> *See* DRAFT VERMONT LEGISLATION, *supra* note 323, at 7. The proposed legislation expressly limits category 1 amendments to the following:

- (1) Placing additional land under the protection of the easement;
- (2) Adding, expanding, or enhancing the easement’s protection of natural or cultural resources existing on the protected property;
- (3) Including a right of first refusal, an option to purchase at agricultural value, or another right to acquire an ownership interest in the property in the future;
- (4) Amending the easement to protect areas that were excluded from the easement or to further restrict rights and uses that were retained by the owner under the existing easement;
- (5) Correcting typographical or clerical errors without altering the intent of or uses permitted under the easement;
- (6) Modernizing or clarifying the language of the easement without changing the intent or uses permitted under the easement; or
- (7) Merging the easements on two or more pro-

ments and terminations in categories 2 and 3 will provide notice to and receive review by the attorney general and the Panel.

A category 2 amendment is an amendment or termination that the holder “reasonably believes will have not more than a de minimis negative impact on the resource values protected by the easement, but which does not clearly meet the definition of a category 1 amendment.”<sup>330</sup> A holder seeking approval of a category 2 amendment submits a request for review to the attorney general and the Panel “together with a copy of the amendment, a description of the protected property and easement, and an explanation of the purpose and effect of the amendment” or termination.<sup>331</sup> The holder certifies that the amendment serves the public interest, is consistent with the easement’s purpose and intent and the donor and any funders’ documented intent, does not create private inurement or impermissible private benefit, and has a net beneficial or neutral effect on the easement’s conservation values.<sup>332</sup> To determine the “net beneficial or neutral effect,” the holder considers the degree to which the amendment will balance the easement’s goals and purposes, and what priority these goals and purposes are given under the easement.<sup>333</sup>

In the event an amendment or termination does not satisfy category 1 amendment criteria, or the holder “has not received a notice from the panel that no further information or approval is required, as provided for in a category 2 amendment,” the holder files a petition for a category 3 amendment.<sup>334</sup> The petition includes copies of the easement and proposed amendment, a map and description of the easement and property, an explanation of the amendment or termination, required certification, and the filing fee.<sup>335</sup> The holder sends this information to the Panel, the attorney general, heads of state agencies, local and regional administrators, and “all persons who conveyed the conservation easement,” unless the easement is more than twenty-five years old or the Panel determines such notification is impracticable.<sup>336</sup> The Panel publishes notice in at least one local newspaper, and sends the petition to the appropriate boards and commissions.<sup>337</sup> The notice sum-

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ted properties into a single easement, provided that the merger does not: reduce the area covered by the easement; add new uses not already permitted under the existing easements; or reduce the existing protections of the resource values on the property.

S. 170 at 10–11; *see also* H.R. 553 at 12–13 (providing slightly different limitations under (6) and (7)).

<sup>330</sup> H.R. 553 at 14; S. 179 at 11.

<sup>331</sup> H.R. 553 at 14; S. 179 at 11.

<sup>332</sup> H.R. 553 at 14–15; S. 179 at 12.

<sup>333</sup> H.R. 553 at 15; S. 179 at 12.

<sup>334</sup> H.R. 553 at 16; S. 179 at 13.

<sup>335</sup> H.R. 553 at 16; S. 179 at 13–14.

<sup>336</sup> H.R. 553 at 17; S. 179 at 14. Agencies receiving notice include the VHCB, the Vermont Agency of Natural Resources, and the Vermont Department of Agriculture, Food and Markets. H.R. 553 at 17; S. 179 at 14.

<sup>337</sup> H.R. 553 at 17–19; S. 179 at 14–16. These include the town selectboard, planning commission, and conservation commission, and the regional planning commission. H.R. 553 at 17–19; S. 179 at 14–16.

marizes the petition and sets a public hearing, at which anyone may speak in support or opposition of the petition through written or oral testimony, without any rules of evidence.<sup>338</sup>

In making its determination regarding a petition, the Panel considers all information relevant to the public interest in upholding or amending the conservation easement, including any material change in circumstances since the easement was conveyed, and evaluation of whether the changed circumstances could reasonably have been anticipated at the time of the easement's grant.<sup>339</sup> The Panel also considers reasonable alternatives to address the changed circumstances, aside from amendment or termination, in what largely amounts to a changed-conditions "plus" analysis.<sup>340</sup>

The Panel's criteria for approval of a category 3 amendment require that an amendment or termination is consistent with the enabling act, is clearly in the public interest, does not create private inurement or impermissible private benefit, adequately compensates the holder if the easement is terminated in part or in whole, and accomplishes one of the following: (1) promotes or enhances the easement's purposes (even if inconsistent with a strict interpretation of the easement's terms); (2) modifies an easement that would otherwise result in significant financial burdens to the holder or landowner with minimal conservation benefit to the public; or (3) promotes or enhances one or more of the easement's purposes by extending the easement's protections to adjacent lands, "even though it may allow the diminution of one or more conservation purposes on the property protected by the original easement."<sup>341</sup> In the case that an easement is partially or wholly terminated, the Panel shall require any monetary compensation to the holder to be dedicated to achieve a conservation purpose similar to that protected by the easement.<sup>342</sup>

The Panel's decision can be appealed to the State Supreme Court within thirty days by the holder, landowner, town, state agencies, attorney general, and, in the case of donated or bargain sale easements, original donor or donor's children.<sup>343</sup> The State Supreme Court can reverse the Panel's decision, however, "only if there has been an abuse of discretion or clear error of law."<sup>344</sup>

<sup>338</sup> H.R. 553 at 18–19; S. 179 at 15–16.

<sup>339</sup> H.R. 553 at 19; S. 179 at 16.

<sup>340</sup> See H.R. 553 at 19 ("Changes in circumstances may include changes in applicable laws or regulations, changes in the native flora or fauna, the development of new technologies, the development of new agricultural and forestry enterprises, and changes in community conditions and needs."); S. 179 at 16 (same).

<sup>341</sup> H.R. 553 at 20–21; S. 179 at 17–18.

<sup>342</sup> H.R. 553 at 21. *But see* S. 179 at 18 (containing no such requirements of the Panel). Both H.R. 553 and S. 179, however, provide that the Panel "may require" holders that received monetary compensation as a result of an approved amendment to "apply the compensation to achieve a conservation purpose similar to that stated in the easement." H.R. 553 at 21; S. 179 at 18.

<sup>343</sup> H.R. 553 at 21–22; S. 179 at 18–19.

<sup>344</sup> H.R. 553 at 22; S. 179 at 19.

The drafters of the potential Vermont law have gone to great lengths to allow an easement to be adapted based on unforeseeable and changed circumstances, with due deference to, and an opportunity to be heard by, the public, the original grantor, and other affected parties, as well as to involve the attorney general and allow for appeal. Like Massachusetts's process of reviewing proposed partial and total terminations, the Vermont law directly involves the public in its process as interested parties, neighbors, and citizens alike. The proposed Vermont law creates an administrative changed-conditions "plus" process arguably equal to and more participatory than a traditional judicial termination process. The process allows non-beneficial easements to be released, and newly purposed or bounded easements to continue. The proposed Vermont legislation shows forethought and consideration of perpetual easements and their amendment and termination, in light of their donors, landowners, land, public investment, and public involvement in decision-making. Although the proposed Vermont legislation does not require a judicial process as is implied by the Restatement, the act should qualify as another equivalent process existing outside of a safe harbor for judicial proceedings created by the Regulation's extinguishment clause. This conclusion is bolstered by the fact that proceeds from a partial or total termination are dedicated to the same purpose elsewhere, consistent with the Regulations' perpetuation of original purpose, nothing else in the act contradicts the Regulations, and the act provides considerably more guidance to landowners and easement holders than the current enabling act or the UCEA.

### 5. *Regulatory Oversight: Colorado*

In contrast to the aforementioned state processes, Colorado initially created its powerful tax credit incentive to operate without much oversight. However, in response to the abusive transactions previously described,<sup>345</sup> Colorado has created a framework for regulatory oversight of easement holders that could lend itself to facilitating review of easement termination, modification, and abandonment. Colorado is home to *Walters and Otero County Land Trust*,<sup>346</sup> one of only two known perpetual easement termination cases in the country.<sup>347</sup> The Walters, landowners in Colorado, petitioned for their easement's termination because their easement appraisals were grossly inflated, and, when re-examined, the actual easement values did not create the gross conservation tax credit value the landowners had anticipated.<sup>348</sup> The Walters were not alone.<sup>349</sup> Many landowners and tax credit

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<sup>345</sup> See *supra* Part II.A.2.

<sup>346</sup> Order, *Walters and Otero Cnty. Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005).

<sup>347</sup> The other termination case was reversed and the easement reinstated. See *Salzburg v. Dowd*, No. CV-2008-0079 (Wyo. Dist. Ct. Feb. 10, 2010).

<sup>348</sup> See Order, *Walters and Otero Cnty. Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005).

<sup>349</sup> Fender, *supra* note 241; see generally COLO. DEP'T OF REVENUE, 2000-2006 GROSS CONSERVATION EASEMENT CREDIT REPORT (2011), available at <http://www.colorado.gov/>

buyers have received notices from the State Department of Revenue advising them that their tax credits have been disallowed or are being reviewed based on the appraised value of their easements.<sup>350</sup> Of the 2847 tax credits the State audited between 2000 and 2008, the State has disallowed or is continuing to challenge at least 541.<sup>351</sup>

After hundreds of seemingly abusive easement transactions were executed to take advantage of valuable tax credits, which resulted in disputes over \$90 million in state tax credits involving at least 355 landowners,<sup>352</sup> Colorado legislators created a process of oversight and regulation of easement holders and appraisers.<sup>353</sup> This new process requires holders to meet certain criteria to be certified with the State to hold easements that will qualify for tax credits<sup>354</sup> and also requires appraisers to meet certain education and licensure requirements to prepare qualified appraisals of easements qualifying for tax credits.<sup>355</sup> A Conservation Easement Oversight Commission (“Commission”) comprised of permanent departmental members and six governor-appointed stakeholders representing different conservation interests provides oversight.<sup>356</sup> The Commission’s appointed stakeholders include a national or statewide land trust, a local land trust, a historic preservation trust, a government open-space program, a landowner, and an appraiser.<sup>357</sup> The Commission meets quarterly to review any issues referred to it by the State’s Division of Real Estate, the Department of Revenue, or any other State agency.<sup>358</sup>

The Commission oversees the certification of easement holders and evaluates appraisals prepared for easements intended to qualify for tax credits.<sup>359</sup> Only certified holders may accept conservation easements that qualify

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cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=ID&blobtable=MungoBlobs&blobwhere=1251731582067&ssbinary=true; see also COLO. DEP’T OF REVENUE, COLORADO GROSS CONSERVATION EASEMENT REPORT (2007-PRESENT) (2011), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=ID&blobtable=MungoBlobs&blobwhere=1251723553758&ssbinary=true>.

<sup>350</sup> See Fender, *supra* note 241.

<sup>351</sup> See *Meeting of the H. Finance Comm.*, 68th Gen. Assemb., 2d Reg. Session (Jan. 25, 2012), <http://www.leg.state.co.us/clics/clics2012A/cslFrontPages.nsf/Audio?OpenPage>; RON KIRK, COLO. LEGISLATIVE COUNCIL STAFF, COLORADO’S CONSERVATION EASEMENT STATE INCOME TAX CREDIT 6 (2010), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=ID&blobtable=MungoBlobs&blobwhere=1251647045997&ssbinary=true>; Debi Brazzale, *Conservation easements: Plan Pending To Let Landowners out of Limbo*, COLO. NEWS AGENCY, Apr. 20, 2011, <http://www.colorado.newsaagency.com/2011/04/20/conservation-easements-plan-pending-to-let-landowners-out-of-limbo>.

<sup>352</sup> See Steven K. Paulson, *Colorado Lawmakers OK Conservation Easement Review*, BLOOMBERG BUSINESSWEEK, Nov. 8, 2010, <http://www.businessweek.com/ap/financialnews/D9JC6KN80.htm>.

<sup>353</sup> See H.B. 08-1353, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2008) (codified as amended in scattered sections of COLO. REV. STAT.).

<sup>354</sup> See COLO. REV. STAT. § 39-22-522(2), (3) (2011).

<sup>355</sup> See *id.* § 39-22-522(3.3).

<sup>356</sup> See *id.* § 12-61-721(1).

<sup>357</sup> See *id.*

<sup>358</sup> See *id.* § 12-61-721(4).

<sup>359</sup> *Id.* § 12-61-721(3)-(4).

for tax credits.<sup>360</sup> The Commission certifies holders after thorough examination and a demonstration of capacity and commitment to steward, enforce, and defend perpetual conservation easements.<sup>361</sup> Appraisers are required to participate in specific continuing education courses, and to make available with the application for a tax credit affidavits as to the methodology and summaries of valuation for their appraisals, which appraisals are then submitted for initial review to the State's Division of Real Estate before a tax credit is issued.<sup>362</sup> This oversight collectively curtails appraisers' preparation of abusive appraisals, and discourages holders from accepting easements without conservation value or significant public benefit, for fear of revocation of their appraisal license's, failure to be certified, or loss of certification status, respectively.<sup>363</sup>

As a part of its oversight role, the Commission is examining over 600 easements and appraisals potentially giving rise to abusive transactions created in pursuit of tax credits.<sup>364</sup> It is unclear whether the few holders implicated in these abusive transactions intend to monitor or steward the easements they now hold, raising the question of whether hundreds of easements eventually might be "orphaned."<sup>365</sup> Therefore, the regulatory framework for oversight adopted in 2008 is useful in examining and deciding how to address the hundreds of potentially orphaned perpetual conservation easements. In its review of these easements, the Commission reasonably might make recommendations for whether the easements ought to be merged together, transferred, amended, or terminated.<sup>366</sup> The Commission has received 642 appraisals to review related to the arguably abusive tax credit transactions.<sup>367</sup> To date, the Commission has recommended that 52 appraisals and the tax credits be allowed, and that 506 appraisals and their ancillary tax credits be disallowed.<sup>368</sup> Notwithstanding whether these easements' tax

<sup>360</sup> See *id.* § 39-22-522(2), (3).

<sup>361</sup> *Id.* § 12-61-720.

<sup>362</sup> See *id.* § 12-61-719.

<sup>363</sup> See *id.* §§ 12-61-710(2), 12-61-719(6).

<sup>364</sup> Letter from Barbara J. Brohl, Exec. Director, Colo. Dep't of Revenue, to Mary Hodge, Chair, Joint Budget Comm., Colo. Gen. Assembly, et al. (Sept. 30, 2011) (on file with the Harvard Law School Library).

<sup>365</sup> An "orphaned" easement is one whose holder is unable or unwilling to monitor, enforce, or steward, or whose holder goes out of existence, leaving the easement without a "home," so to speak. See LEVIN, *supra* note 130, at 14 (defining orphaned easements as what happens when an easement holder dissolves or otherwise becomes inactive and does not transfer its easements (not to mention its land and other assets) to another entity); see also DOSCHER ET AL., *supra* note 177, at 12 (defining an orphaned conservation easement as arising "when an easement holder abandons its responsibility to monitor the easement or when a land trust organization dissolves without transferring its easements to another party for monitoring and enforcement" and emphasizing such situation should be reported to the state attorney general).

<sup>366</sup> See 4 COLO. CODE REGS. § 725-4(5)(1)(b) (2011) (describing the conservation easement selection, review, and approval processes).

<sup>367</sup> Letter from Barbara J. Brohl, Exec. Director, Colo. Dep't of Revenue, to Mary Hodge, Chair, Joint Budget Comm., Colo. Gen. Assembly, et al., *supra* note 364.

<sup>368</sup> See *id.*

credits are allowed or disallowed, the easements giving rise to the tax credits (or not) remain in place on the properties they encumber.

Several options exist for the group of easements created by these abusive transactions. One option is that the attorney general, possibly as or with a special master, together with the Commission, could triage and present reconciliation, merger, transfer, amendment, and termination options to a judge, who could then modify the easements' terms and recast them accordingly (as did the court in *Salzburg*). Another option might be to allow transfer of all the easements as a group to one qualified holder, who then could independently assess how to manage them. If the State crafts a unilateral remedy such as a large-scale transfer or termination, it will need to be careful to avoid creating private benefit through easement management or distribution. Such a private benefit would contravene the State's constitution, which bars private benefit by the government in much the same way that it limits tax-exempt organizations.<sup>369</sup> Additionally, the easement donors and tax credit buyers could take their individual chances in district court, or appeal to the Department of Revenue, pursuant to expanded administrative and judicial processes created by the passage of House Bill 1300 in May 2011.<sup>370</sup> Although the expanded appeal process may resolve the acute issue of whether individual easements are legitimate or not, it likely will not address the chronic issue of what should happen to all easements on the whole which are deemed to be illegitimate.

The expanded administrative and judicial processes afforded by House Bill 1300 include the option of remaining in an administrative process with the Department of Revenue disputing a notice of disallowance for tax credit, or waiving the administrative process and appealing directly to district court.<sup>371</sup> Of the over 600 cases electing either to move forward to court or stay within the administrative process, the majority of cases have elected to waive their administrative rights and proceed directly to district court.

Colorado law — including this new regulatory framework for oversight of tax credits and appraisers, certifying easement holders, and evaluating these questionable easements — arguably requires no formal regulatory, judicial or administrative process for perpetual easement amendment or termination, because conservation easements in Colorado can be terminated in part or in whole in the same way as other easements, much like under the UCEA.<sup>372</sup> Though Colorado's collection of questionable perpetual easements presents a real conundrum, it also may afford the state the opportunity to

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<sup>369</sup> COLO. CONST. art. 11, § 2; *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1377 (Colo. 1980).

<sup>370</sup> An Act Concerning the Resolution of a Disputed Claim for a State Income Tax Credit for a Donation of a Perpetual Conservation Easement That Includes a Process That Allows a Taxpayer to Waive an Expedited Administrative Hearing for the Purpose of Appealing Directly to a District Court, and Making an Appropriation Therefor, 2011 Colo. Leg. Serv. 193 (West) (to be codified at COLO. STAT. §§ 12-61-721, 39-21-113, 39-22-522), 39-22-522.5.

<sup>371</sup> *Id.* at sec. 1, § 2(a)-(b).

<sup>372</sup> Colorado's enabling act is silent as to easement amendment and states that easements may be terminated, in part or in whole.

rely on its existing regulatory framework to incorporate permanent judicial or attorney general oversight not only to resolve this issue, but also to apply to other general issues concerning amendment and termination of perpetual conservation easements. The existing regulatory framework might be narrowly construed to address only this class of questionable easements, or it might be adaptable for other easement amendments and terminations, perhaps those that terminate in part or affect an easement's original purposes. Colorado could join Massachusetts, Maine, New Hampshire, Montana, and Vermont to establish processes within existing legal regimes for easement amendment and termination oversight or evaluation, and as such provide guidance not only for the troubled easements, but also for all of Colorado's perpetual conservation easements.<sup>373</sup>

### III. NEXT STEPS

In the midst of four legal regimes with different purposes, goals, and foci, as well as scant common or statutory law on point, easement holders face a number of options when confronted with proposed amendment or termination of perpetual conservation easements. They can work within the existing legal frameworks, or create new guidance themselves through policies or state laws; they can ask the legal regimes' creators to resolve regime differences; they can request that the IRS issue guidance, defer to state law, or revise the Regulations specifically to address amendment; or they can do nothing and wait and see how the law unfolds. Each of these is a viable option, given the state of the law, and even in waiting and seeing, there is something to do.

#### A. *Wait and See*

There is always the option for holders to do nothing, and to wait and see. Holders can wait and see if the regime drafters resolve differences among the regimes; if the courts create and sort out the relevant common law; if legislatures create or amend statutes; or if the IRS issues guidance, defers to state law, or revises the Regulations. A wait and see approach, however, necessitates an understanding that any such actions may be a long time coming, and that easement holders and the conservation community as a whole may struggle with a lack of clear guidance in the interim.

An assumption of the wait and see approach is that easement holders can be trusted to weigh conservation values, conservation purposes, public interest, public benefit, private interests, and private benefit not only before accepting an easement, but also with any later modification. Thus, this approach would find support to entrust easement holders with decisions re-

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<sup>373</sup> See *supra* Part II.B.1-4.

garding amendment and termination as at the inception of an easement.<sup>374</sup> Another reason to wait and see might be to allow judges and the common law to sort out the applicable law in response to actual legal challenges involving amendment and termination of perpetual easements. The *Myrtle Grove*,<sup>375</sup> *Long Green Valley Ass'n*,<sup>376</sup> *TEC v. Bright Par 3*,<sup>377</sup> *Walters and Otero County Land Trust*,<sup>378</sup> *Hicks*,<sup>379</sup> and *Bjork*<sup>380</sup> cases demonstrate that this process has already started in Maryland, Tennessee, Colorado, Wyoming, and Illinois. The aforementioned cases demonstrate these challenges present real conundrums relating to amendment and termination of perpetual conservation easements in the states where they have been raised.

Even while waiting and seeing, however, easement holders still can do something. They can understand where they stand in light of applicable state law generally, and in light of the relevant facts of a particular amendment or termination request specifically. By examining amendment and termination provisions of the easement at issue, together with the state's easement enabling act, legislative history, common law, and, for donated easements, the Code and Regulations, holders can arm themselves with accurate information to make decisions on specific amendment and termination requests, and be comfortable in their knowledge of the applicable state law generally. In summary, holders should do the following while they wait and see: (1) determine the applicable law and doctrines; (2) explore oversight requirements for amendment and termination; and (3) research the impact of federal law on amendment and termination.

*Determine the applicable law and doctrines.* Holders should determine: (1) whether a state's enabling act is UCEA-based; (2) whether, according to state law, changed-conditions or charitable trust or other doctrines apply; and (3) whether, based on state law and the specific facts surrounding an easement's grant, easements are defined and treated as charitable trusts or

<sup>374</sup> One ULC Commissioner has suggested:

'If the Committee considers the holder responsible enough to determine in the first instance whether or not it will accept this trust, it should also consider it responsible enough to agree with the owner of the underlying property to a modification of that trust. I think it should be able to do that by a simple agreement, without resorting to any outside agency.'

Arpad, *supra* note 50, at 122. Perhaps the discretion is weighted toward the inception of conservation easement's creation because that is the time when there is clear and consistent guidance for creating and accepting conservation easements, while there is much less guidance, clear, consistent, or otherwise, as to who, how, when, or why a holder might amend or terminate perpetual easements.

<sup>375</sup> *Maryland v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Apr. 21, 1999).

<sup>376</sup> *Long Green Valley Ass'n v. Bellevalle Farms*, No. 0228, 2011 WL 5975081 (Md. Ct. Spec. App. 2011).

<sup>377</sup> *Final Order, Tenn. Env'tl. Council v. Bright Par 3 Assocs., L.P.*, No. 03-0775 (Tenn. Ch. Ct. Dec. 19, 2006).

<sup>378</sup> *Order, Walters and Otero Cnty. Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005).

<sup>379</sup> *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007).

<sup>380</sup> *Bjork I*, 886 N.E.2d 564 (Ill. App. Ct. 2008); *Bjork II*, 936 N.E.2d 763 (Ill. App. Ct. 2010).

as unrestricted gifts of real property interests. Once holders understand how easements are classified, defined, and treated as a matter of state law, they can properly craft easements designed for charitable trust oversight and proceedings by expressly stating that an easement is a restricted gift given for charitable purposes and intended by its donor to create a charitable trust. Conversely, if charitable trust doctrine does not apply, holders can properly craft easements for unrestricted gift oversight and proceedings by expressly stating that an easement is an unrestricted gift of a real property interest given for charitable purposes, but not intended by its donor to create a charitable trust.<sup>381</sup>

*Explore oversight requirements on amendment and termination.* Holders should look to state statutory and common law amendment and termination provisions according to the applicable law and doctrines for oversight requirements. Holders should determine whether judicial proceedings, attorney general involvement, or other regulatory or administrative review is necessary to amend or terminate perpetual easements. Further, holders should confer with the state's attorney general to determine her role in perpetual easement amendment or termination, and the legal bases for the same. Once holders know the proper process for easement amendment or termination oversight within the state, they can direct proposed easement amendments and terminations through that process. Holders can then include amendment and termination clauses articulating oversight processes pursuant to applicable law in their conservation easements.

*Research the impact of federal law on amendment and termination.* Holders should look to determine whether the Code and Regulations tacitly allow for amendment and include a safe harbor for termination by not only judicial but also non-judicial processes. An individual holder or group of holders could seek a private letter ruling from the IRS based on a factual situation either involving an easement's amendment or proposing a non-judicial process for an easement's termination.<sup>382</sup> Once holders understand the current applicable law in the context of the relevant facts, they then can determine whether any further action is necessary to clarify or guide the state's laws, policies, or regulations, or whether it is appropriate to do nothing, and continue to wait and see.

Thus, by understanding the state of the relevant law of the enabling act, easement grant, applicable doctrines, and attendant oversight, easement holders can act lawfully while waiting and seeing how judges, legislatures,

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<sup>381</sup> See *supra* Part II.B.3 (discussing New Hampshire's Guidelines of charitable gifts and Montana's Model Policy for approaches to crafting restricted gifts and unrestricted gifts of real property interests, respectively). For examples of courts trying to determine whether charitable trust doctrines apply to perpetual conservation easements, see Maryland's *Long Green Valley Ass'n* for the holding that charitable trust doctrine does not apply to create standing in third parties seeking a role in easement's amendment, 2011 WL 5975081, at \*9–21, and *Carpenter* for the determination that *cy pres* does not apply to perpetual easements so as to require judicial proceedings as a matter of state law in Colorado, *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 15–18 (2012).

<sup>382</sup> See *infra* Part III.B.3 (discussing pursuit of guidance from the IRS).

and the legal regimes' drafters decide questions of easement termination and amendment. Even with this understanding, however, holders may wait a long time for answers, may struggle without additional guidance, and may experience amendment and termination requests that prompt them to provide guidance in the meantime.

Consider the hypothetical situation of an amendment request made of a long-standing, well-respected regional land trust in a state where the UCEA-based enabling act allows perpetual conservation easements to be amended or terminated in part or in whole the same way as any other easement, without further process or oversight. The successor landowner to the easement donors requests an amendment to swap nearly all of the 100 acres protected by a conservation easement with the adjacent 100 unprotected acres in order to develop the released acreage into a 100-residence community. The easement donors granted the easement to protect their working farm and its scenic open space, reserving one development right to replace the existing farm homestead. The easement provides that termination occur through a judicial process, paraphrasing the language of the Regulations. The donation qualified for, and the donors took, a federal tax deduction. The donors intended to add their remaining 100 acres to the easement, land possessing significant wildlife habitat and abutted on two sides by a public trail; however, they never did. Instead, they eventually sold the entire 200-acre property to the successor landowner, who was intent on developing residences on the easement-protected portion of the property.

The new owner proposes to the easement holder an amendment allowing the swap of the protected land for the adjacent unprotected land, and provides support for the amendment with an appraisal. The appraisal demonstrates significant public benefit and value associated with the physical public access afforded by a new trail through the proposed new easement land, which would connect the two existing abutting trails. The appraisal does not value the private benefit to the successor landowner of developing the protected property into 100 residential lots. The easement holder seeks guidance for evaluating the proposed amendment but finds nothing beyond its state enabling act, which allows amendment and termination of perpetual conservation easements as with any other easement. The holder ultimately approves the amendment after weighing the existing and new conservation purposes with the appraisal, deciding that the balance tipped in favor of the public access and significant wildlife habitat protection offered by the new acres. The new owner is granted development permits and increased density allowances on the now-unencumbered portion of the property, based on the encumbered portion's protection. Though present throughout the land use proceedings, the easement donors are reluctant to discuss their intent in the grant of easement or the easement's original purposes due to breach of contract litigation threatened by the new owner. The former easement property now is platted for the construction of over 100 residences. The new easement property protects significant wildlife habitat and connects a public trail through the property.

The easement amendment, which nearly wholly terminates the original easement, arguably passes muster since the state's UCEA-based enabling act requires no additional oversight of easement amendment or termination beyond that required for other easements.<sup>383</sup> Furthermore, there have been no situations or cases within the state applying charitable trust doctrine to conservation easements, nor has the state's attorney general been involved in any conservation easement amendments or terminations on the basis of charitable trust oversight, oversight of charities, or any other legal bases.

The easement's Regulations-based language requires judicial proceedings for the easement's termination, but because the partial termination was characterized as an amendment only, and not as a termination, either partial or total, the parties did not initiate judicial proceedings pursuant to the easement or the Regulations.<sup>384</sup> If the extinguishment clause is read to create a safe harbor in judicial proceedings, other processes might be permitted outside the safe harbor, provided that they protect the easement purposes in perpetuity, such as by dedicating proceeds from any termination to the same purposes elsewhere.<sup>385</sup> The easement donors are well beyond the reach of the IRS's audit process, with the amendment occurring significantly after they took their tax deduction.<sup>386</sup> Further, because they no longer own the property, the easement donors are not subjected to the tax benefit doctrine by the later recovery of amounts deducted in previous years.<sup>387</sup>

The Restatement's cy pres substitution of purpose in the public's interest and broad interpretation of donor intent, or a changed-conditions "plus" analysis of public investment and benefit, could conceivably be used to determine, as did the holder, that the new purpose and public interest outweigh the easement's original purpose and the donor's intent.<sup>388</sup> But, in all likelihood, a judge, and not the parties, would make these determinations, which would be based on findings of changed conditions making the original purposes impossible to accomplish and rendering other purposes possible for substitution.<sup>389</sup>

The holder faces few consequences of allowing the swap under the existing legal regimes. Although the IRS could review the transaction through the holder's form 990 reporting of the easement's modification, recourse against the holder is unlikely. The IRS is unlikely to levy intermediate sanctions and excess benefit penalty taxes on the holder because the new owner is not an insider. The IRS is unlikely to revoke the holder's tax-exempt status because even though the transaction creates significant private benefit for the new owner, it is not part of a pattern of behavior or alone indicative

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<sup>383</sup> See *supra* Part I.C; see also UNIFORM CONSERVATION EASEMENT ACT §§ 2–3 (2007).

<sup>384</sup> See *supra* Part I.A.

<sup>385</sup> The court in *Carpenter* recently rejected termination by mutual agreement as a process that could perpetually protect the conservation purposes of the easement. See T.C. Memo 2012-1, at 18–19.

<sup>386</sup> See *supra* Part I.A (describing the IRS statute audit of three years).

<sup>387</sup> See *supra* Part I.B (discussing the changed-conditions and cy pres doctrines).

<sup>388</sup> See *supra* Part I.A (discussing the tax-benefit doctrine).

<sup>389</sup> See *supra* Part I.A.

of the holder's failure to further its exempt purpose.<sup>390</sup> For the same reasons, the IRS is unlikely to revoke the holder's tax-exempt status based on this one amendment decision.

Similarly, the LTA is unlikely to deny or revoke the holder's accreditation based on an arguable one-time failure to adhere to the Standards and Practices, or to consider the Amendment Principles, which are not required of an accredited holder or holder seeking accreditation.<sup>391</sup> There are no consequences for failing to adhere to the model language and guidelines established by the UCEA or Restatement unless or until such language and guidelines are adopted by state legislation or incorporated into a state's common law.

By contrast, the proposed amendment would have received rigorous public, judicial, attorney general, advisory, and administrative scrutiny under Massachusetts, Maine, New Hampshire, Montana, and Vermont's (proposed) laws and policies, respectively, and possibly even in Colorado under its new regulatory process for certifying holders of easements qualifying for tax credits.<sup>392</sup> The contravention of donor intent, change of purpose, change in boundaries, and near total termination of the original easement, each and together would have triggered varying levels of review and oversight under these state processes.

The process in Massachusetts would have required a public hearing about the proposal in addition to government and administrator approval, while taking into account the public's interest, before any amendment or termination would be permitted.<sup>393</sup>

Maine's process would have put the issue before a judge, likely with the attorney general as a party, to evaluate whether the amendment materially detracts from the easement's protected purposes. The judge would take into consideration the easement's purposes and the public interest before making any decision.<sup>394</sup>

If the situation occurred in New Hampshire, the holder would have submitted the proposed amendment to review by the attorney general as high risk, because it is inconsistent with the easement's original purpose and removes more than a small portion of the land from the easement, thereby partially extinguishing the easement. This likely would have required court approval in a *cy pres* proceeding with the attorney general as a party.<sup>395</sup>

Like the LTA Accreditation Commission, Colorado's Conservation Easement Oversight Commission would have the opportunity to review the

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<sup>390</sup> See *supra* Part I.A (describing the high bar set for exempt status revocation).

<sup>391</sup> See *supra* Part I.D. (describing accreditation, Standards and Practices, and Amendment Principles).

<sup>392</sup> See *supra* Part II.B.1-5.

<sup>393</sup> See *supra* Part II.B.1.

<sup>394</sup> See *supra* Part II.B.2.

<sup>395</sup> See *supra* Part II.B.3.

holder's decision in light of its holder certification and re-certification processes.<sup>396</sup>

Montana's Model Policy would have allowed the holder to make its amendment decision based on the Model Policy criteria and the public interest, without additional government or judicial oversight or public involvement.<sup>397</sup> If the holder found that the amendment satisfied the criteria and was in the public's interest, the amendment would then have been reviewed by the holders' advisory committee, the local planning authority, and the member land trust community as a whole.<sup>398</sup>

Vermont's potential legislation would have characterized the amendment and partial termination as a category 3 request before its administrative panel.<sup>399</sup> The administrative panel then would have notified the attorney general, heads of agencies, local and regional administrators, and easement grantors. Before deciding whether the amendment was consistent with the enabling act and clearly in the public interest, the panel would have considered all information relevant to the public interest, including whether any changed circumstances could reasonably have been anticipated at the time the easement was granted.<sup>400</sup>

It is impossible to predict with certainty the outcome of each state's process for this hypothetical situation. Pure speculation would have each state preventing the proposed amendment. Whatever the outcome by whatever process, however, the public should believe that each respective state's process would require consideration of all the relevant factors in light of the public's interest and investment in furthering the easement or its purpose in perpetuity.

It also is important to consider whether the analysis changes when considering a variation of this situation where, instead of a land swap, the successor landowner wants to develop just one additional residence on the existing easement property, where no residential building is allowed. Such construction is not in furtherance of the agricultural use of the land. The successor landowner proposes to add the additional unencumbered 100 acres to the existing easement for a total easement size of 200 acres in order to offset any impacts caused by the new residential building. All of the same issues persist in this situation as in the former regarding private and public benefit, donor intent, and easement purpose, but by comparison, here the public benefit is increased through the addition of 100 new acres to the easement, and the private benefit is decreased through the development of only one additional home, as opposed to over 100. The holder agrees to the amendment allowing one additional residential building and 100 additional acres based on the overall increase in the protections of the conservation easement and the public's benefit. The holder reasons, consistent with Stan-

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<sup>396</sup> See *supra* Part II.B.5.

<sup>397</sup> See *supra* Part II.B.3.

<sup>398</sup> See *supra* Part II.B.3.

<sup>399</sup> See *supra* Part II.B.4.

<sup>400</sup> See *supra* Part II.B.4.

ards and Practices, that the impact to the easement's protections is either neutral or a net benefit.<sup>401</sup>

One analysis would treat the addition of acres to obtain previously prohibited development rights as no different than the payment of money to the easement holder in proportion to the value of the rights, which should be prohibited as buying the right to build and creating impermissible private benefit. Another analysis would treat the public benefit of the additional conservation values of the new acres as outweighing any incidental private benefit given to the landowner. The fact that decision-makers conceivably could make either determination under the existing legal regimes and UCEA-based enabling acts suggests that it may be prudent for easement holders to consider creating additional guidance for the types of complex decision-making both of these hypotheticals require.

### B. *Do Something*

If waiting and seeing amidst the uncertainty illustrated by these hypotheticals is disconcerting, holders can act individually or collectively to create tangible guidance for their amendment and termination decisions, and to encourage the legal regimes' drafters to balance and make consistent the legal regimes' guidance. Specifically, holders can lobby for new or amended policies, regulations, and laws consistent with state and federal law; encourage reconciliation of the Restatement, UCEA, Regulations, and Standards and Practices; and request that the IRS issue guidance, defer to state law, or revise the Regulations to specifically address perpetual easement amendment.

#### 1. *Create New Guidance Through Policy and Law*

Holders can proactively contribute to the creation of new policies, regulations, or laws or the amendment of the same already in existence, in order to better guide easement amendment and termination decisions. In so doing, holders need to make sure to reconcile new or amended policies and laws with existing common and statutory law and with the Code and Regulations

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<sup>401</sup> Although the Standards and Practices 11.K sets forth this standard, *see supra* Part I.D, McLaughlin and Weeks noted that the Staff of the Senate Finance Committee has cautioned holders generally, and The Nature Conservancy specifically, against attempting such evaluation for easement modifications they deem to be "trade-off amendments": "[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity.'" *See* McLaughlin & Weeks, *In Defense, supra* note 119, at 44 n.159 (quoting STAFF OF S. FINANCE COMMITTEE, 109th Cong., REPORT ON THE NATURE CONSERVANCY, EXECUTIVE SUMMARY 9 (2005), *mirrored on* CIS No. 2005-5362-27 (Cong. Info. Serv.)). The Staff has further cautioned against "trade-off amendments" by asserting they "'may be difficult to measure from a conservation perspective . . . [because] weighing of increases and decreases' in conservation purposes 'is difficult to perform by [The Nature Conservancy] and to assess by the IRS.'" McLaughlin, *Myrtle Grove supra* note 123, at 1073 n.166 (quoting STAFF OF S. FINANCE COMMITTEE, *supra* note 401, at 9 n.20).

for donated easements. A useful policy for holders to adopt is to triage the nature of a requested amendment or termination and its genesis and impact on the easement, conservation purpose, donor's intent, and public benefit in order to determine whether additional oversight of the decision-making is necessary.<sup>402</sup>

Holders should consider a policy to evaluate three classes of amendment requests: (1) those that are technical, administrative, corrective, or add value; (2) those that do not affect easement purpose, donor intent, public benefit, or the perpetual nature of an easement; and (3) those that do not create impermissible private benefit without additional oversight. This policy likely will cover the lion's share of requests, and therefore control and discretion will remain vested in holders most of the time.

The remaining less frequent requests, by contrast, may require some form of oversight or process to guide a holder's decision-making. Holders should consider a policy to address these rarer amendment requests that propose to change an easement's original purposes, contravene the donor's intent, create impermissible private benefit or inurement, or effect near-total or partial termination that is primed for additional guidance and oversight consistent with state and federal law.<sup>403</sup> Such guidance and oversight could take the form of judicial, administrative, attorney general, advisory, regulatory, or public review to complement or guide a holder's decision, as shown by the state approaches discussed here. Holders can seek IRS guidance for or approval of a specific proposed interpretation or policy through a private letter ruling of consistency with the Code and Regulations prior to its implementation.

For proposals of total perpetual easement termination, holders should consider adopting a policy for donated easements given for federal tax deductions that contemplates the Regulations' judicial proceedings as a "safe harbor" or requirement for termination when changed conditions make an easement's purposes impossible or impractical to achieve.<sup>404</sup> The holder can seek judicial oversight, or alternatively treat judicial proceedings as a safe harbor and use other methods for easement termination pursuant to state law, but may consider seeking guidance or a letter ruling from the IRS in support of the interpretation that the state process is also acceptable. Either way, holders should make it a policy to look to state law regarding donated and non-donated easement termination to determine whether easements are treated as charitable trusts or unrestricted gifts of real property interests,

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<sup>402</sup> For guidance designed specifically for the easement-holding practitioner confronting perpetual easement amendment and termination proposals, see BRADLEY, *supra* note 119 and Dana, *supra* note 119.

<sup>403</sup> Partial termination might occur through a change in boundaries, a release of the land from the easement or its restrictions, or a redistribution of relinquished rights back to the landowner.

<sup>404</sup> Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 2009); *see also* Carpenter v. Comm'r, T.C. Memo 2012-1, at 18-19 (2012).

whether the easement itself or its purposes are terminated, and whether oversight beyond the holder and landowner agreement is required.

If the political climate allows, holders can attempt to amend existing laws, as Maine has done; create new legislation, as Vermont and Colorado have done; or interpret existing laws to create policy, as New Hampshire and Montana have done.<sup>405</sup> If oversight is deemed appropriate, holders can encourage the identification or creation of authority for attorneys general, administrators, land trust advisory boards, or courts, making sure to reconcile oversight with the Code and Regulations for donated easements, and for charitable trust doctrines if applicable. In this effort, existing state statutes and policies may serve as examples: the charitable trust doctrine in New Hampshire; public involvement and consideration of public interests and conservation purposes without changed-conditions analysis in Massachusetts and Maine; involvement of the public directly in the changed-conditions “plus” analysis of public interests, conservation values, and investment through an administrative process as is proposed in Vermont; regulatory oversight of holders and the potential for judicial or attorney general oversight of transactions in Colorado; and advisory committee review of holder determinations in Montana.<sup>406</sup>

The aforementioned self-help tactics, all within the reach and control of easement holders and the conservation community, are the best way to address ambiguity within the legal regimes’ guidance until further action by the regimes’ creators.

## 2. *Balance the Existing Guidance: Restatement, UCEA, Standards and Practices, Code, and Regulations*

Easement holders also may be able to collectively or individually influence legal regimes’ creators and drafters, and may seek guidance and resolution of ambiguities within legal regimes directly from them. The creators and drafters of the legal regimes together also can and should clarify the guidance influencing perpetual conservation easements by issuing uniform, clear guidance to easement holders and the conservation community as a whole as to how and when to amend and terminate perpetual easements, and by what means. Holders should request (and the legal regimes’ creators and drafters should consider) the following.

*Balance the UCEA and Restatement.* Holders should request that the Restatement and the UCEA drafters establish common ground and reconcile ambiguities and inconsistencies within the regimes established for the suggested common and statutory laws and make this guidance consistent with the Code and Regulations. When revisiting the text of the UCEA and Restatement, the drafters could incorporate both the changed-conditions “plus” and charitable trust components and analyses to focus on public interest and

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<sup>405</sup> See *supra* Part II.B.1–5.

<sup>406</sup> See *supra* Part II.B.1–5.

public investment in perpetual easements. They also could incorporate public participation and recognize and equally weight administrative and regulatory processes with changed-conditions “plus,” charitable trust, and other judicial processes. They should acknowledge and distill the statutory, policy, and regulatory processes adopted by Massachusetts, Maine, New Hampshire, Colorado, Montana, and (potentially by) Vermont, and examine the evolving common law in Wyoming, Illinois, and Colorado to update and influence consistency between the new or revised versions of these legal frameworks.

*Update the Standards and Practices.* Holders should also request that the LTA revise its Standards and Practices to update the provisions regarding amendment and termination and acknowledge, if not incorporate, the guidelines provided by the Amendment Report and Principles. The Standards and Practices should use the Amendment Principles to establish criteria for evaluating amendment and termination of donated perpetual easements. The Standards and Practices also could be revised to acknowledge different approaches for technical versus substantive amendments and to work with the IRS and the Regulations’ processes for amendment and termination of easements donated for tax deductions.

*IRS Guidance, Deference, and Regulations.* Additionally, holders should request that the IRS issue guidance, defer to state law or other processes, or revise the Regulations to address partial termination and amendment, or all of the above. Through its guidance, the IRS could establish or recognize criteria for itself, easement holders, and easement donors through which to evaluate amendment and termination of donated easements. With criteria established, the IRS then could consider revising the Regulations and deferring to state law or other processes on the basis that requiring criteria to be met as a threshold allows other processes to guide thereafter.

Section 170(h) of the Code and section 1.170A-14 of the Regulations already provide criteria for donated perpetual conservation easements which the IRS readily could extend to those donated easements proposed to be amended or partially terminated. The IRS could require the easements to: (1) continue to protect qualified conservation purposes pursuant to Code section 170(h)(4) and Regulation section 1.170A-14(b) and (c); (2) continue to be enforceable in perpetuity pursuant to Code section 170(h) and Regulation section 1.170A-14(g); (3) continue to be held by qualified organizations or eligible donees with the commitment and the resources to enforce the easement’s terms pursuant to Code section 170(h)(2) and Regulation section 1.170A-14(c)(2); and (4) dedicate any proceeds for partial termination according to Regulation sections 1.170A-14(c)(2) and (g)(6). The IRS also could consider adding two new criteria: (1) that no qualified organization or eligible donee amend, terminate, or partially terminate a conservation easement in a manner that contravenes its commitment to protect and enforce the easement over perpetuity, or create impermissible private benefit or private inurement, whether the qualified organization or eligible donee is a tax-ex-

empt organization or government entity, pursuant to Code sections 170(h)(2) and 501(c)(3), and Regulation sections 1.170A-14(c)(2) and 1.1501(c)(3), for risk of losing its “eligible donee” status; and (2) that any valuation of associated public and private benefit or inurement be made pursuant to section Code section 170(h) and Regulation section 1.170A-14(h). Because any revision to the Regulations would take place within the existing framework of section 1.170A-14, the IRS would only have to issue guidance identifying that the same criteria for the original donation would have to be met for any amendment or partial termination, with the additional consideration of public benefit, impermissible private benefit, and private inurement as factors of a holder’s eligible donee status.

The IRS further could incorporate the existing criteria of the Amendment Principles into the Code and Regulations, such that any amendment or partial termination would need to: (1) clearly serve the public interest; (2) be consistent with the qualified holder’s mission; (3) comply with all applicable federal, state, and local laws; (4) consider the donor’s intent; and (5) have a net beneficial or neutral effect on the conservation values protected by the easement. The IRS could then reveal the criteria through its published guidance.

The IRS has a variety of ways it can issue guidance through published pronouncements, which although not precedential, still demonstrate the IRS’s view on a particular issue.<sup>407</sup> The IRS can respond to individual scenarios presented in private letter requests and narrowly tailor guidance and answers to those individual questions through private letter rulings and determinations or can broadly disseminate information through revenue rulings giving interpretation of tax law as it applies to specific facts of broad application. The IRS Chief Counsel’s Office can provide legal opinions on general topics or regarding particular questions through memoranda, notices, or opinions, such as the Chief Counsel’s Advice. Technical Advice Memoranda can be created in response to specific questions regarding issues already in dispute. Lastly, the IRS can publish Coordinated Issue Papers to identify, coordinate, and resolve industry-wide issues at the agent level, providing guidance to ensure uniform application of law. Although not official pronouncements on the issues, these options allow the IRS to set forth its views on a particular subject. Once criteria have been recognized and established through guidance, the IRS then could consider deferring to state law and processes, and revise the Regulations accordingly.

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<sup>407</sup> See generally *IRS Guidance*, IRS, <http://www.irs.gov/newsroom/article/0,,id=98257,00.html> (last updated May 20, 2011). Another commentator calls on the IRS to issue guidance for this area of law, most recently McLaughlin, *National Perpetuity*, *supra* note 224, at 31–32, 35 (recommending that the IRS issue guidance regarding the satisfactory manner in which perpetuity requirements in Code section 170(h) and the Regulations section 1.170A-14 can be met, and seeking declaration by the IRS in such guidance that it considers perpetual conservation easements donated for tax deductions to be charitable gifts made for a specific charitable purpose to be enforceable under state law, implying that tax-deductible easements are charitable trusts to be evaluated pursuant to a state’s charitable trust laws).

Deferring to state law on amendment or partial termination presents an opportunity for the IRS to be inclusive in recognizing different processes for easement amendment and termination evaluation — including the charitable trust doctrine, changed-conditions “plus” doctrine, attorney general or judicial review, and administrative and regulatory oversight. The benefit of deferring to state law and processes after its criteria have been met is that the Regulations then capture other processes in addition to termination and dedication of proceeds in the face of changed conditions. State law and processes, for example, might perpetuate an easement, or its purposes, to afford long-term, if not perpetual, public benefits.<sup>408</sup>

The Regulations arguably already defer to state law in defining the real property interest giving rise to the charitable contribution,<sup>409</sup> in dealing with distribution of proceeds in proportion to the easement’s value,<sup>410</sup> and likely in the reference to “judicial proceedings” as a state court implementing state law.<sup>411</sup> Furthermore, the U.S. Supreme Court long has recognized that “[s]tate law creates legal interests and rights,” and federal revenue acts, such as the Code, “designate what interests or rights . . . shall be taxed.”<sup>412</sup> State law therefore controls in determining and defining the nature of a legal interest.<sup>413</sup> If determining and defining a legal interest includes how that interest comes into being, is modified, and is terminated, then the Regulations should defer to state processes for conservation easement creation, modification, or termination.

When examining a state conservation easement enabling act in light of a federal tax benefit, the court in *Gibbs v. United States*<sup>414</sup> reiterated this deference to state law.<sup>415</sup> The district court found that under New Jersey law a conservation easement was not a real property interest, but a contract right.<sup>416</sup> The Third Circuit reversed and held that the granting of an easement was not a contract right, but a disposition of real property.<sup>417</sup> The Third Circuit stated that the district court erred in predicating its decision on the manner in which conservation easements were classified under New Jersey law because “[i]t has long been recognized that the [Code] creates ‘no property rights but merely attaches consequences, federally defined, to

<sup>408</sup> As McLaughlin points out, the Code is designed to provide a uniform system of guidance for perpetual conservation easements given as tax deductible gifts, and state law should provide a complement and overlay to that system, particularly in certain cases of amendment. See McLaughlin, *National Perpetuity*, *supra* note 24, at 34–35.

<sup>409</sup> See Treas. Reg. § 1.170A-14(b)(1)(ii)–(b)(2) (as amended in 2009).

<sup>410</sup> *Id.* § 1.170A-14(g)(6)(ii).

<sup>411</sup> See *id.* § 1.170A-14(g)(6)(i).

<sup>412</sup> *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940); see also *Carpenter v. Comm’r, T.C.* Memo 2012-1, at 11 (2012) (“To determine whether the conservation easement deeds comply with requirements for the conservation easement deduction under Federal tax law, we must look to State law to determine the effect of the deeds. . . . Specifically, we must look to State law to determine how conservation easements may be extinguished.”).

<sup>413</sup> See *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 722 (1985).

<sup>414</sup> 161 F.3d 242 (3d Cir. 1998).

<sup>415</sup> *Id.* at 246.

<sup>416</sup> *Gibbs v. United States*, No. 96-685, 1997 WL 882393, at \*4–5 (D.N.J. Aug. 13, 1997).

<sup>417</sup> 161 F.3d at 243, 250.

rights created under law.”<sup>418</sup> The court reasoned that “[i]n applying [the Code], therefore, ‘state law controls in determining the nature of the legal interest which the taxpayer had in the property.’”<sup>419</sup> If deference to state law’s definition of the legal interests of conservation easements extends to the processes guiding the creation, modification, or termination of these interests, the Regulations would defer to applicable state law for perpetual easement amendment and termination. The IRS could issue guidance to this effect, without revising the Regulations and without trying to address all the variations in the state statutory and common law.

In addition to requesting guidance, holders could ask the IRS to revise the Regulations to expressly address amendment, or to defer to state law, or both.<sup>420</sup> Because the Regulations do not plainly address amendment, in order to provide guidance for easements crafted with purposes to last for perpetuity, or as long as conditions allow, the Regulations likely should be modified to adopt an amendment process consistent with, or that defers to, state processes, provided its basic criteria are met. The revision should acknowledge the public’s interest, investment, and benefit provided by conservation easements by allowing certain amendments to continue the easement in order to perpetuate the land’s protection for another or the original purpose. Adding an amendment clause to the Regulations to define when easements might be amended in lieu of termination and to acknowledge state law would be instrumental in guiding donated perpetual conservation easements.

This Article proposes two different revisions for consideration with new language displayed in bold and brackets. The first revision adapts the existing extinguishment language to include amendments prompted by changed conditions on or surrounding the property. State law guides the process for amendment and termination, including judicial proceedings for termination. An easement can be amended or terminated when it can no longer achieve its original purpose, consistent with the existing language of the Regulations, emerging state statutes, and the UCEA, or when its purpose can be substituted, consistent with the Restatement:

REVISION ONE: Original Purpose:

Regulations § 1.170A-14(g)(6)(i): *Extinguishment . . .* In general.

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<sup>418</sup> *Id.* at 246 (emphasis added) (quoting *Nat’l Bank of Commerce*, 472 U.S. at 722).

<sup>419</sup> *Id.* (emphasis added) (quoting *Nat’l Bank of Commerce*, 472 U.S. at 722).

<sup>420</sup> This would not be the first time someone has suggested revising the Regulations to provide clarity as to the amendment process. Dana, in reference to Regulation section 1.170A-(g)(6)(i), argued:

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

Dana, *supra* note 119, at 23 n.60 (quoting Treas. Reg. § 1.170A-(g)(6)(i)).

If a subsequent unexpected change in the conditions [**on or**] surrounding the property that is the subject of a donation under this paragraph [**makes**] impossible or impractical the continued use of the property for [**its original**] conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are [**modified in accordance with state law to achieve perpetual conservation purposes in accordance with section 170(h)(4) or**] extinguished [**in whole or in part**] by judicial proceeding [**or in accordance with state law**] and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.<sup>421</sup>

The second revision replicates the Regulations' existing extinguishment language to address amendments prompted by changed conditions on or surrounding the property that extinguish all or a portion of the conservation easement. State law guides the process for amendment and termination, including judicial proceedings for termination. An easement that can no longer achieve its original purpose is amended to substitute its purpose prior to termination, consistent with the Restatement:

REVISION TWO: New Purpose

Regulations 1.170A-14(g)(6)(i): *Extinguishment . . .* In general.

**[If a subsequent unexpected change in the conditions on or surrounding the property that is the subject of a donation under this paragraph makes impossible or impractical the continued use of some or all of the property for its original conservation purposes, the conservation purposes can nonetheless be treated as protected in perpetuity if the restrictions are modified by judicial proceeding or as in accordance with state law to achieve other perpetual conservation purposes in accordance with section 170(h)(4).]**

If a subsequent unexpected change in the conditions [**on or**] surrounding the property that is the subject of a donation under this paragraph [**makes**] impossible or impractical the continued use of the property for [**any**] conservation purposes, the [**original**] conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding [**or as in accordance with state law,**] and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the

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<sup>421</sup> Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 2009) (indicating proposed revisions with bolded and bracketed text).

donee organization in a manner consistent with the conservation purposes of the original contribution.<sup>422</sup>

Both revisions recognize the intermediate step of modifying an easement prior to termination. In so doing, the revisions offer the opportunity to perpetuate the easement, its original or new purposes, and the land protected by it, through amendment. Both revisions are inclusive of state processes, including: (1) the charitable trust doctrine's cy pres; (2) the changed-conditions "plus" consideration of public interest and investment; and (3) public approval, using regulatory processes or judicial, state attorney general, or administrative review. The revisions address processes after the criteria have been met.

Revising the Regulations to address easement amendments provides specific guidance for taxpayers, auditors, and easement holders, and promotes guided decision-making and precise review and accounting of these amendments based on established criteria. This is beneficial to the IRS's evaluation of whether holders and taxpayers make sound, defensible decisions regarding amendment and termination of easements giving rise to publicly subsidized federal tax deductions. Moreover, the addition of amendment language complements the Form 990 reporting of qualified conservation contributions' modification and termination. Either through direct guidance, letter rulings, or Regulations revisions to address amendment, the IRS can provide clarity to parties endeavoring to perpetually protect publicly beneficial conservation purposes through conservation easements.

#### CONCLUSION

Conservation easements and their protected purposes arguably are designed to be perpetual *and* last forever. If clear, consistent guidance is provided through the different legal regimes for courts, landowners, and easement holders to evaluate and decide requests for easement modification and termination, we can ensure perpetual conservation easements and the purposes they protect will endure, with flexibility, relevance, and integrity over time. State legislatures, administrators, regulators, and courts already are crafting their own guidance for perpetual easement amendment and termination. The architects of the existing legal regimes should expand and stand on the common ground within the regimes, resolve regime differences, and recognize emerging statutory and common law, policy, and regulation, to provide clear, consistent legal guidance for the conservation community.

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<sup>422</sup> *Id.* (indicating proposed revisions with bolded and bracketed text).

APPENDIX: TABLES OF STATE AMENDMENT AND TERMINATION  
OVERSIGHT PROCESSES

TABLE 1: AMENDMENT

State	Judicial	Attorney General	Administrative	Regulatory	Other
Alabama	Yes, changed conditions				
Colorado	Not under Act; possibly under Regulations	Not under Act; possibly under Regulations		Possibly	
Illinois	Silent; but possibly after <i>Bjork</i>	No	No	No	Neighbors right to enforce; <i>Bjork</i>
Massachusetts	No	No	No	No	Government approval of partial termination; public notice; hearing
Maine	Yes	Yes	No	No	
Montana	No	No	No	No	Board Level, Advisory Board
Nebraska	Yes	No	No	No	
New Hampshire	Yes	Yes	No	No	
Rhode Island	Yes	Yes	No	No	
Vermont	No	Yes, involved in process; panel	Yes; panel	No	Public notice
Wyoming	Not according to statute; possibly per <i>Hicks</i>	Not according to statute; possibly per <i>Hicks</i>	No	No	

TABLE 2: TERMINATION

State	Judicial	Attorney General	Administrative	Regulatory	Other
Alabama	Yes, changed conditions	No	No	No	
Colorado	Not under Act; possibly under Regulations, after <i>Otero</i>	Not under Act; possibly under Regulations, after <i>Otero</i>	Possibly with Commission	Possibly	
Illinois	No; possibly after <i>Bjork</i>	No	No	No	Neighbors standing to enforce
Massachusetts	No	No	No	No	Government approval of partial and total termination; notice to public; public hearing
Maine	Yes	Yes	No	No	
Montana	No	No	No	No	Board approval and advisory board approval; possible notice to planning boards
Nebraska	Yes, for termination if not otherwise directed by CE; no for release	No	No	No	Government approval of release or transfer
New Hampshire	Yes	Yes	No	No	
Rhode Island	Yes	Yes	No	No	
Vermont	No	Involved in non-judicial process	Yes, panel	No	
Wyoming	Not according to statute; possibly with common law after <i>Hicks</i>	Not according to statute; possibly with common law after <i>Hicks</i>	No	No	