

CONSERVATION EASEMENT ENABLING STATUTES:
PERSPECTIVES ON REFORM

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I. INTRODUCTION

By now, the public has invested billions of dollars in many tens of thousands of conservation easements. With the widespread use of the conservation easement as a land protection tool have come increasingly sophisticated and thorny issues and challenges. This Article focuses on state conservation easement enabling statutes and related reforms. It is presented as an exchange of ideas between the two Authors who come to the table with different backgrounds but a shared commitment to, and understanding of, the importance of land conservation. The goal is to provide food for thought to landowners, land conservation professionals,

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policymakers, federal and state regulators, and the public when considering possible reforms.

Professor McLaughlin has written numerous articles discussing the laws that may impact conservation easements, including federal tax law,¹ condemnation law,² the doctrine of merger,³ and the laws governing charities and the administration of charitable gifts.⁴ She represented conservation easement donors while in private practice; has served as a member of the board of directors or on the advisory board of a number of land trusts; and consults with landowners, land trusts, and regulators on conservation easement-related issues.

During his tenure as Chief of the Natural Resources Division at the Maine Attorney General's Office, Jeff Pidot worked on large-scale conservation easements. In 2004, he took a year's leave from that position to be a visiting fellow at the Lincoln Institute of Land Policy in Cambridge, Massachusetts, where he worked on conservation easement legal reform and authored a report on the topic.⁵

¹ See, e.g., Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment after Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194014 [hereinafter McLaughlin, *Protecting the Federal Investment*]; Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 1, The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743204 [hereinafter McLaughlin, *National Perpetuity Standards, Part 1*]; Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2, Comparison to State Law*, 46 REAL PROP. TR. & EST. L.J. 1 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888689 [hereinafter McLaughlin, *National Perpetuity Standards, Part 2*]; Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=776645.

² Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136963.

³ Nancy A. McLaughlin, *Conservation Easements and The Doctrine of Merger*, 74 DUKE J.L. & CONTEMP. PROBS. 279 (2011), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1653&context=lcp>.

⁴ See, e.g., Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903845 [hereinafter *Myrtle Grove Controversy*]; Nancy A. McLaughlin & W. William Weeks, *Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542648 [hereinafter *Setting the Record Straight*]; McLaughlin, *Protecting the Federal Investment*, *supra* note 1, at 229–41.

⁵ JEFF PIDOT, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* (2005), available at http://www.lincolninst.edu/pubs/dl/1051_Cons%20Easements%20PFR013.pdf.

In 2007, as an outgrowth of that work and following a year of study by Maine's land trust community, the Maine legislature enacted major reforms of Maine's conservation easement enabling statute,⁶ and those reforms have since been adopted in substantial part in Rhode Island.⁷ Mr. Pidot played a key role in the development of Maine's reforms and conducted and reported on a follow-up survey to assess how those reforms are working.⁸ He concluded that, while there still is room for improvement, the reforms have been successful and are strongly supported by the State's conservation community. Mr. Pidot has also served on the board of directors and as president of a land trust in Maine, working on conservation easements from that perspective as well.

Rather than addressing proposed conservation easement enabling statute reforms in order of importance (a subject on which reasonable people might disagree), the Authors' ideas are addressed roughly in the order in which the issue might be encountered in the life of a conservation easement. Reforms that may be addressed outside of an enabling statute are discussed in a separate section.

II. ENABLING STATUTE REFORMS

A. Standardization

Pidot's Perspective:

Conservation easement advocates are quick to praise the nearly infinite adaptability of this legal tool to the unique attributes of each property and objectives of the landowner and holder. However, this blessing is also a curse: easements can become impenetrably nuanced and compromised, not only in their substantive terms but even in their supposed legal boilerplate. Can one imagine the chaos in real estate markets if the terms and even the quality of deeds to homes and commercial properties varied from one transaction to the next? The subtle variations and sheer density of highly negotiated and nuanced conservation easements will not serve coming generations well as they struggle to interpret and enforce easement terms, and this will disserve holders, donors, landowners, and the public far into the future.

As happened long ago with fee simple deeds, the time has come for conservation easements to mature to a reasonable level of uniformity, including standardized boilerplate provisions that are simply too important to the long term durability of easements to be subject to case-by-case negotiation and nuanced terminology. Absent standardization of legal terms, lawyers eager to promote the interests of their clients will always feel driven to negotiate adjustments to even the most fundamental provisions, as if they are dealing with short term contracts rather

⁶ See ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C (2012).

⁷ See R.I. GEN. LAWS § 34-39-5(c) (2012).

⁸ Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 DUKE J.L. & CONTEMP. PROBS. 1 (2011), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1643&context=lcp>.

than permanent real estate interests. Massachusetts addresses this problem by generally mandating use of its state-adopted boilerplate in the approval process required for every conservation easement, a system appreciated by land trusts in that State.⁹ While the conservation legal community in Maine works to devise “best practice” forms, a better long-term solution would be to develop statutory forms for easement boilerplate following the example of those for fee-simple deeds in many states.

McLaughlin’s Perspective:

Many conservation easements are conveyed in whole or in part as charitable gifts for which the grantor intends to claim a federal charitable income tax deduction under Internal Revenue Code § 170(h). To be eligible for that deduction, numerous federal requirements must be satisfied, including that the conservation easement must be “granted in perpetuity”¹⁰ and its conservation purpose “protected in perpetuity.”¹¹ The Treasury Regulations interpreting § 170(h) impose additional detailed requirements, including the “restriction on transfer” requirement¹² and the “extinguishment” and “division of proceeds” requirements.¹³

⁹ See DIV. OF CONSERVATION SERV., OFFICE OF ENERGY & ENVTL. AFFAIRS, COMMW. OF MASS., THE MASSACHUSETTS CONSERVATION RESTRICTION HANDBOOK (1991), available at <http://atfiles.org/files/pdf/MAconsrestrict08.pdf>; PIDOT, *supra* note 5, at 11.

¹⁰ I.R.C. § 170(h)(2)(C) (2006).

¹¹ *Id.* § 170(h)(5)(A).

¹² Treas. Reg. § 1.170A-14(c)(2) (2009) (requiring that the instrument of conveyance prohibit the transfer of the easement except to another “eligible donee” that agrees to continue to carry out the conservation purposes of the easement); *id.* § 1.170A-14(c)(1) (defining “eligible donee” as a “qualified organization” that has “a commitment to protect the conservation purposes of the donation, and . . . the resources to enforce the restrictions”); I.R.C. § 170(h)(3)(C) (defining “qualified organization” to include government entities and publicly-supported charities and satellites thereof).

¹³ Treas. Reg. § 1.170A-14(g)(6)(i) (authorizing extinguishment in the event “a subsequent unexpected change in the conditions surrounding the property . . . make[s] impossible or impractical the continued use of the property for conservation purposes” in a judicial proceeding and with the payment of proceeds (calculated as provided in Treas. Reg. § 1.170A-14(g)(6)(ii)) to the holder to be used “in a manner consistent with the conservation purposes of the original contribution”); *id.* § 1.170A-14(g)(6)(ii) (mandating that (a) the donor must agree that the donation “gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the [easement] at the time of the gift, bears to the value of the property as a whole at that time”; (b) the proportionate value of the donee’s property rights shall remain constant; and (c) when a change in conditions give rise to an extinguishment pursuant to Treas. Reg. § 1.170A-14(g)(6)(i), the donee, 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, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the easement). For interpretation of the extinguishment regulation, see *Carpenter v. Comm’r*, 106 T.C.M. (CCH) 62 (2013), *denying reconsideration of and supplementing* 103 T.C.M. (CCH) 1001 (2012).

Given that the federal requirements apply to all tax-deductible conservation easements, regardless of the state of conveyance, standardization must, to some extent, begin at the federal level. Accordingly, the Treasury Department should issue (or bless) standardized provisions that satisfy certain of the federal requirements, including the restriction on transfer, extinguishment, and division of proceeds requirements. Standardization of certain key provisions of tax-deductible easements would greatly facilitate not only taxpayer compliance with the requirements of § 170(h) and the Treasury Regulations, but also IRS and court review of easement donation transactions. Standardization would also promote consistency in the interpretation and enforcement of tax-deductible easements over the long term across the fifty states (e.g., such easements would not be more easily lifted off the properties they protect in some states than in others), and would help to reduce the enormous expenditure of administrative and judicial resources on resolving these issues.¹⁴ States could then include the federally mandated

(extinguishment by judicial proceedings is mandatory); I.R.S. Info. Letter 2013-0014 (Sept. 18, 2012), *available at* http://f.datasrvr.com/fr1/513/49712/2013-0014_Qualified_Consevation_Contribution_.pdf (explaining that, while state law may provide a means for extinguishing a conservation easement for state law purposes, the requirements of § 170(h) and the Treasury Regulations must be satisfied for a contribution to be deductible). On the subject of “swaps,” which involve partial extinguishments, see *B.V. Belk v. Comm’r*, 140 T.C. 1 (2013), *motion for reconsideration denied and opinion supplemented*, 105 T.C.M. (CCH) 1878 (2013) (conservation easement permitting removal and replacement of the land under easement—“substitutions” or “swaps”—even though subject to certain limitations, was not deductible); I.R.S. Info. Letter 2012-0017 (Mar. 5, 2012), *available at* <http://www.irs.gov/pub/irs-wd/12-0017.pdf> (explaining that conservation easements authorizing swaps other than in accordance with the Treasury Regulations’ extinguishment and division of proceeds requirements are not deductible).

¹⁴ For cases since 2006 involving interpretation of the requirements of § 170(h) and the Treasury Regulations, see *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012), *vacating and remanding in part*, 136 T.C. 294 (2011), and 134 T.C. 182 (2010); *Trout Ranch v. Comm’r*, 493 F. App’x. 944, 2012 U.S. App. LEXIS 17198 (10th Cir. 2012) (unpublished), *aff’g*, 100 T.C.M. (CCH) 581 (2010); *Turner v. Comm’r*, 126 T.C. 299 (2006); *Comm’r v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011), *aff’g*, *Simmons v. Comm’r*, 98 T.C.M. (CCH) 211 (2009); *Glass v. Comm’r*, 471 F.3d 698 (6th Cir. 2006), *aff’g*, 124 T.C. 258 (2005); *Belk v. Comm’r*, 105 T.C.M. (CCH) 1878 (2013), *denying reconsideration of and supplementing* 140 T.C. 1 (2013); *Graev v. Comm’r*, 140 T.C. No. 17 (2013); *Carpenter v. Comm’r*, 106 T.C.M. (CCH) 62 (2013), *denying reconsideration of and supplementing* 103 T.C.M. (CCH) 1001 (2012); *Butler v. Comm’r*, 103 T.C.M. (CCH) 1359 (2012); *Mitchell v. Comm’r*, 106 T.C.M. (CCH) 215 (2013), *denying reconsideration and supplementing* 138 T.C. 324 (2012); *Wall v. Comm’r*, 103 T.C.M. (CCH) 1906 (2012); *RP Golf, LLC v. Comm’r*, 104 T.C.M. (CCH) 413 (2012); *Whitehouse Hotel, LP v. Comm’r*, 139 T.C. 304 (2012), *on remand from* 615 F.3d 321 (5th Cir. 2010), *vacating and remanding* 131 T.C. 112 (2008); *Irby v. Comm’r*, 139 T.C. 371 (2012); *1982 East LLC v. Comm’r*, 101 T.C.M. (CCH) 1380 (2011); *Friedberg v. Comm’r*, 106 T.C.M. (CCH) 360 (2013), *reconsidering, reversing in part, and supplementing* 102 T.C.M. (CCH) 356 (2011); *Minnick v. Comm’r*, 104 T.C.M. (CCH) 755 (2012); *Herman v. Comm’r*, 98 T.C.M. (CCH) 197 (2009); *Gorra*

provisions in their state-adopted boilerplate for tax-deductible conservation easements.

States are, of course, free to develop their own rules and procedures to govern conservation easements that are not intended to be eligible for federal tax incentives or other federal subsidies. As discussed in Part II.G. below, however, care should be taken to clearly distinguish between perpetual and other forms of conservation easements and to ensure transparency and accountability regarding the transfer, amendment, and extinguishment of all easements.

B. Registration and Tracking

Pidot's Perspective:

In the absence of a public registration system, over the intended perpetual duration of conservation easements, some—or perhaps many—will inevitably be lost. Recording at the local registry of deeds is sufficient to put prospective owners of a particular property on notice of pre-existing servitudes, but this traditional recording system is wholly inadequate to keep track of conservation easements for public purposes or to enable responsible parties to take over if the easement holder goes out of business or fails in its duties.

Every state should have a registration system at least as comprehensive as that in Maine, where under its 2007 legal reforms all conservation easements must be registered with the State, regardless of the holder (whether land trust or federal, state, or local government), and regardless of when the easement was created (whether before or after the enactment of the registration law).¹⁵ Maine's system requires all easement holders to register online annually, thereby maintaining a continuously updated database reflecting current information on easement holders, landowners, amendments, terminations, assignments, and monitoring. The state registration office is required to report to the Attorney General any failure of an easement holder disclosed by the registration information or otherwise known to the office (e.g., dissolution of a holder, a holder's failure to register or annually update, or a holder's failure to monitor, enforce, or otherwise properly administer the easements it holds). A modest (\$30) fee is assessed per registrant (regardless of

v. Comm'r, T.C.M. (RIA) 2013-254; see also McLaughlin, *Protecting the Federal Investment*, *supra* note 1 (discussing the need for clear rules to protect the federal investment in tax-deductible conservation easements and the conservation values they are intended to protect in perpetuity for the benefit of the public); McLaughlin, *supra* note 4 (discussing state court litigation involving a nonprofit's attempted agreement to amend a tax-deductible perpetual conservation easement to allow a seven-lot upscale residential development on the property at the request of new owners of the land); McLaughlin & Weeks, *Setting the Record Straight*, *supra* note 4 (discussing state court litigation involving a County's attempted termination of a tax-deductible perpetual conservation easement at the request of new owners of the land).

¹⁵ ME. REV. STAT. ANN. tit. 33, § 479-C (2012); see also Pidot, *supra* note 8, at 11.

the number of easements registered) to defray the State's costs associated with maintaining the registry.

Although this registration system places modest administrative and financial burdens on easement holders, Maine's law has won praise among its land trust community, which appreciates the protection afforded to the State's large population of conservation easements and land trusts.¹⁶ Even so, Maine's program would be further strengthened by applying a modestly graduated fee structure or other system for encouraging on-time registrations, especially among municipal holders, which often have the lowest compliance record. Another improvement would be to require easement locations to be reported using a uniform and readily accessible GIS system.

While there may be more ingenious or technologically advanced systems for maintaining information about conservation easements,¹⁷ there is no excuse for states to continuously increase their inventories of these easements with no regard for how vital information concerning their locations, holders, terms, and enforcement will be secured for the future.

McLaughlin's Perspective:

There are a variety of reasons why some sort of registry or other tracking of conservation easements in the states is appropriate, including enabling the federal government as well as states and localities to take into account easement-protected lands when developing land use, infrastructure, and conservation policies and plans; assisting state attorneys general and other public officials or agencies charged with ensuring that conservation easements are properly administered and enforced on behalf of the public; and facilitating an accurate assessment of the type of land and number of acres encumbered by conservation easements in the states and nationwide for research purposes.

States considering the creation of a registry or other tracking system should seek to minimize the administrative and financial burdens on holders (by, for example, using easily updatable online registries), but at the same time ensure that sufficient useful information is obtained and either disseminated or made available to appropriate parties. States desiring to require that notice of proposed transfers, material amendments, and terminations be provided to the state attorney general or other public official or agency could outfit the registry or other tracking system to accommodate such notices and streamline reporting.¹⁸

¹⁶ See Pidot, *supra* note 8, at 10.

¹⁷ See, e.g., James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 DUKE J.L. & CONTEMP. PROBS. 51 (2011), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1645&context=lcp>; *What is the NCED?*, NAT'L CONSERVATION EASEMENT DATABASE, <http://nced.conservationregistry.org> (last updated Sept. 2013).

¹⁸ See *infra* Parts II.C, G (discussing such notices).

*C. Holder Stewardship Standards**Pidot's Perspective:*

Conservation easements are of little long-term value in the absence of their holders' continuous efforts at stewardship, including monitoring, documentation, landowner relations, and enforcement. This considerable work requires annual expenses in perpetuity, some of which (in connection with enforcement) can be budget-busting, but such efforts lack the fundraising glamor of capital drives for acquisition.¹⁹ Although this fact of conservation easement life is well known to land trusts and other holders, many irresponsibly fail to set aside and invest the resources needed to assure that these responsibilities will be executed in perpetuity. While the Land Trust Alliance, which is the umbrella organization for the nation's land trusts, has devised an accreditation program for its members based upon what they consider to be best practices, the program is purely voluntary for land trusts and not generally available to government holders, which can be the most irresponsible easement holders when it comes to stewardship.

In sum, virtually nowhere are meaningful performance standards legally imposed upon easement holders. For donated easements resulting in tax deductions, holders are required by federal law to have the commitment, resources, and baseline documentation necessary to do the job, but these are generalized requirements often neglected by holders, particularly because such requirements apply to the deductibility of easement donations but are not directly enforceable against easement holders.²⁰ No state imposes broad-based requirements that easement holders be accredited or demonstrate the financial and institutional capacity to carry out their responsibilities. Precious few states impose any monitoring or other meaningful requirements on holders. The result is that holders vary considerably in terms of their capacity and commitment to undertake monitoring, recordkeeping, and other stewardship duties that they know to be essential to maintain the integrity of conservation easements.

Maine stands alone in imposing monitoring requirements (modest though they be) on all conservation easement holders, which are obliged to monitor the condition of the easement property at least once every three years and to permanently maintain monitoring reports.²¹ Maine's annual conservation easement registration system requires holders to indicate when they last monitored each property. However, in the view of even many land trusts affected by it, the three-year interval between required monitoring is too long, in contrast to the annual monitoring recommended by the Land Trust Alliance's *Land Trust Standards and Practices*.²² Moreover, beyond its skeletal requirements for monitoring, like other

¹⁹ See *Pidot*, *supra* note 8, at 11–13.

²⁰ *Id.* at 12.

²¹ ME. REV. STAT. ANN. tit. 33, § 477-A(3) (2012).

²² See *Pidot*, *supra* note 8, at 13; LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES (2004), available at <http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>.

states, Maine imposes no legal standards for baseline documentation, minimum holder financial resources, or other stewardship duties, no sanctions for failure, and no auditing to assure reasonable compliance.

While few land trusts would argue with the idea that stewardship is their foremost responsibility, the lack of legal standards for executing these functions, even as portfolios of conservation easements continuously multiply, is perhaps the most glaring failure of conservation easement laws around the nation. Every state should enact revisions to its conservation easement enabling statute to fill this void.

McLaughlin's Perspective:

Stewardship undoubtedly is, or soon will be, the biggest challenge facing many government and nonprofit holders of conservation easements. The Land Trust Alliance has taken a number of steps to assist its member land trusts in developing the capacity and resources that will be needed to appropriately monitor, enforce, and otherwise steward the conservation easements they hold. Those steps include (i) creation of the *Land Trust Standards and Practices*, which are ethical and technical guidelines for the responsible operation of land trusts;²³ (ii) creation of the Land Trust Accreditation Commission, which is a supporting organization of the Land Trust Alliance that consists of several staff members and a board of volunteer commissioners from the conservation community who assess whether land trusts are carrying out certain of the *Land Trust Standards and Practices*;²⁴ and (iii) creation of a program intended to insure participating land trusts against certain costs associated with defending conservation easements when they are violated or otherwise threatened.²⁵

However, neither adherence to the *Land Trust Standards and Practices* nor participation in the accreditation and insurance programs is mandatory for land trusts, and most local, state, and federal government entities do not participate in such programs.²⁶ Moreover, the *Land Trust Standards and Practices* reflect the

²³ See *id.* To become a member of the Land Trust Alliance, a land trust must provide the Alliance with a board resolution reflecting adoption of the *Land Trust Standards and Practices*. See *Land Trust Membership*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/join/land-trust-membership/land-trust#-br-land-trust-member-dues--amp--eligibility> (last visited Dec. 8, 2013).

²⁴ See *Land Trust Accreditation*, LAND TRUST ACCREDITATION COMM'N, <http://www.landtrustaccreditation.org> (last visited July 21, 2013). The Land Trust Alliance's member land trusts and board of directors control the content of the *Land Trust Standards and Practices* and the Alliance's board of directors selects the practices that must be met for accreditation purposes and approves the individuals who serve as commissioners.

²⁵ See *Conservation Defense Insurance*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-insurance> (last visited July 20, 2013).

²⁶ See *Frequently Asked Questions on Getting Accredited*, LAND TRUST ACCREDITATION COMM'N, <http://www.landtrustaccreditation.org/why-accreditation-matters/faqs?start=1> (last visited July 20, 2013) (“[Only q]uasi-governmental organizations that

views of the Alliance's land trust members and those members do not always agree on best practices or the interpretation of relevant legal requirements. Absent clear legal requirements, it is difficult for self-regulatory bodies to demand adherence to high standards of conduct.²⁷

Accordingly, states should consider adopting legal stewardship requirements as well as sanctions for noncompliance. Such requirements might include minimum financial and institutional resource requirements for eligible holders, a restricted stewardship endowment of a certain (perhaps variable) amount for each easement, baseline documentation for each easement that must be periodically updated, annual monitoring of the subject properties for compliance, maintenance of written monitoring reports, and reporting to the state attorney general or other appropriate public official or agency on proposed transfers, material modifications, terminations, and other actions that may negatively impact the public interest or investment in the easements.²⁸

actively acquire or steward conservation land or conservation easements, have been incorporated for at least two years, and have completed at least two direct land or easement acquisition projects are eligible to participate in the accreditation program.”); *FAQ*, TERRAFIRMA, <http://terrafirma.org/faq#question13> (last visited Dec. 8, 2013) (“[O]nly land trusts and quasi-governmental organizations that operate exclusively for a conservation purpose are covered.”).

²⁷ See, e.g., Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHIC.-KENT L. REV. 479, 501 n.125 (2010) (noting the shortcomings of self-regulation and providing, as an example, that the “Council on Foundations . . . is an important membership organization that requires its members to subscribe to and follow a set of Principles and Practices . . . but membership is voluntary, the Principles and Practices . . . are not legally enforceable, and the Council on Foundations rarely sanctions its members for failure to comply with such standards”); NAT’L CTR. ON PHILANTHROPY & THE LAW, DRAFT STUDY ON MODELS OF SELF-REGULATION IN THE NONPROFIT SECTOR (2005) (“Probably the single most significant factor contributing to the effectiveness of any self-regulatory model is legal enforceability of its standards.”).

²⁸ As a starting point, helpful resources may include: ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C (2012) (Maine’s revised state enabling statute); PAUL DOSCHER ET AL., CTR. FOR LAND CONSERVATION ASSISTANCE, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS (2010), available at http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guide_lines.pdf; OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., EVALUATION REPORT: CONSERVATION EASEMENTS (2013), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/coneas.pdf>; OFFICE OF THE STATE AUDITOR, STATE OF COLO., CONSERVATION EASEMENT TAX CREDIT PERFORMANCE AUDIT (2012), available at [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/5F733A628FCF979A87257A94007374E8/\\$FILE/2171%20ConserEasemTaxCredit%20092612%20KM.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/5F733A628FCF979A87257A94007374E8/$FILE/2171%20ConserEasemTaxCredit%20092612%20KM.pdf). See also COLO. REV. STAT. § 38-30.5-104(2) (2012) (requiring a nonprofit to be operating for two years before accepting conservation easements); VA. CODE ANN. § 10.1-1010(C) (2012) (requiring a nonprofit to be operating for five years before accepting conservation easements).

In crafting state law stewardship requirements, relevant federal rules and reporting requirements should also be considered. For example, the Treasury Regulations interpreting § 170(h) provide that an “eligible donee” of tax-deductible conservation easements must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions,” although the precise meaning of these requirements is unclear.²⁹ In addition, land trusts are required to report annually on their monitoring, inspection, and enforcement policies and activities, as well as on their previous year’s easement transfer, modification, and termination activities on Schedule D to IRS Form 990, the instructions to which provide that “[f]or purposes of maintaining its tax exemption, the recipient tax exempt organization must protect the perpetuity requirement of the conservation easements it holds” and “[t]ax exemption may be undermined by the modification, transfer, release, extinguishment, or termination of an easement.”³⁰

However, the annual reporting on the Form 990 is of limited usefulness in preventing improper transfers, modifications, or terminations for a number of reasons, including that, by the time the Form 990 is filed, the action, whether permissible or not, has already been taken, and the IRS lacks the authority to declare an improper transfer, modification, or termination null and void—that is the province of state courts.³¹ To help ensure the protection of the federal investment in perpetual conservation easements and the conservation values they are intended to preserve for the benefit of the public, the Administration has, in the past, considered imposing penalties on charities that fail to properly administer and enforce the easements.³²

D. Backup Enforcement

Pidot’s Perspective:

All would agree that conservation easements require a permanent enforcement presence. Yet, in a day when we know that large, seemingly robust corporations

²⁹ Treas. Reg. § 1.170A-14(c)(1) (2009). The regulation further provides that a conservation group organized or operated primarily or substantially for one of the conservation purposes specified in § 170(h) will be considered to have the requisite commitment and that a qualified organization need not set aside funds to enforce the restrictions that are the subject of the contribution. *Id.*

³⁰ See IRS, DEP’T OF THE TREASURY, 2013 INSTRUCTIONS FOR SCHEDULE D (FORM 990), available at <http://www.irs.gov/pub/irs-pdf/i990sd.pdf>.

³¹ See McLaughlin, *National Perpetuity Standards, Part 1*, *supra* note 1, at 524 n.183.

³² See, e.g., JOINT COMM. ON TAXATION, 109TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2006 BUDGET PROPOSAL 239–41 (Comm. Print 2005), available at <https://www.jct.gov/publications.html?func=start+down&id=1523> (detailing proposal to impose significant penalties on any charity that removes, fails to enforce, or inappropriately modifies a tax-deductible conservation easement, or transfers such an easement without ensuring that the conservation purposes will be protected in perpetuity).

can face extinction, who would be so foolish to suggest that land trusts, often small and undercapitalized, will have magical durability over the perpetual time of conservation easements? In the absence of a backup holder or secondary enforcer, some, and perhaps many, conservation easements will fail over time because the land trust or other holder goes out of existence or otherwise falters. Even otherwise viable land trusts may be frequently deterred from proper easement stewardship by the overwhelming legal costs of enforcement, capacity limitations, and abiding desire not to rock the boat of positive landowner relations.

Few states provide a clear answer to the question of who steps in when the land trust or other holder fails. In Virginia, there are statutory provisions for automatic transfer of conservation easements to a quasi-public agency (represented by the State's Attorney General) when the holder has gone out of business without assigning its easements,³³ but in the absence of a periodic registration or other oversight system, how can one know? Most state enabling statutes (including those based upon the Uniform Conservation Easement Act³⁴) simply do not address the issue of backup enforcement.

Into this void, Maine's conservation easement reform law serves as a model for other states by providing detailed direction concerning the role of the State's Attorney General in backup enforcement. Under the statute, the Attorney General is specifically authorized to initiate enforcement of any conservation easement when the holder (1) is no longer in existence, (2) is bankrupt or insolvent, (3) cannot be contacted after reasonable diligence, or (4) has failed to take reasonable action to bring about compliance after ninety days' notice.³⁵ To make the application of this power practicable, Maine's annual easement registration system calls for the Attorney General to be informed of holders that may be noncompliant, including holders that fail to annually update their registrations or monitor at least once every three years. The Attorney General's legal authorization to intercede when the holder otherwise fails is supported by Maine's large land trust community, since it fortifies the durability of easements and assuages concerns of easement donors about the potential impermanence or lack of resources or capacity of land trust donees.³⁶

One shortcoming of Maine's law is that it does not specify a default holder of easements when the original holder goes out of business. Even if the Attorney General acts to enforce such an easement, the absence of a designated backup holder means there will be no monitoring or other institutional presence on the ground. To fill this gap, the law should designate, as it does in Virginia, a government agency, municipality, or statewide land trust as the automatic backup holder of otherwise orphaned conservation easements.

³³ VA. CODE ANN. § 10.1-1015 (2012).

³⁴ UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 185 (2008).

³⁵ ME. REV. STAT. ANN. tit. 33, § 478(1) (2012).

³⁶ See Pidot, *supra* note 8, at 15.

McLaughlin's Perspective:

It is helpful to consider “backup enforcement” of perpetual conservation easements as involving two separate issues: (i) who can or should be able to file suit directly against a person violating or threatening to violate a conservation easement if the holder is bankrupt or otherwise defunct, and (ii) who can or should be able to file suit directly against a person violating or threatening to violate a conservation easement if an otherwise viable holder fails to enforce the easement.

With regard to the first issue, it is appropriate to grant the state attorney general the right to file suit directly against a person violating or threatening to violate a conservation easement if the holder is bankrupt or otherwise defunct. In most cases, such a grant would be a confirmation of the attorney general’s existing right to protect assets devoted to charitable or public purposes on behalf of the public. However, attorney general administration of conservation easements is not a viable long-term solution. Accordingly, states should consider revising their enabling statutes not only to confirm the right of the state attorney general to enforce conservation easements in the event of a defunct holder, but also to specify the process by which the defunct holder’s orphaned easements may be transferred to other qualified governmental or nonprofit holders for purposes of ongoing monitoring and other administration.

In developing such a transfer process, states should consider (i) the federal and state laws applicable to the distribution of the assets of a nonprofit upon dissolution; (ii) any relevant requirements that must be met for easement grantors to be eligible for federal subsidies, such as the “restriction on transfer” requirement that must be met for the donation of a conservation easement to be eligible for a federal charitable income tax deduction;³⁷ (iii) whether the transfer process specified in the statute should be a default rule that yields to contrary terms in an easement deed;³⁸ and (iv) the justifiable reluctance of government and nonprofit entities to assume responsibility for conservation easements that may not be consistent with their conservation missions, drafted in accordance with their standards, or accompanied by funding for stewardship.

With regard to the second issue—who can or should be able to file suit directly against a person violating or threatening to violate a conservation easement if an otherwise viable holder fails to enforce the easement—the Maine statute provides that the Attorney General may initiate an action seeking enforcement only if the parties designated as having the right to do so under the terms of the easement have failed to take reasonable action to bring about

³⁷ See *supra* note 12.

³⁸ If the transfer process in the statute is not a default rule, it could potentially render easements created in the state ineligible for federal benefits and run afoul of constitutional limits on retroactive application of new laws to existing arrangements. See, e.g., Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 87–91 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1332225 (discussing constitutional limitations on the ability to alter the terms of existing charitable gifts).

compliance with the easement after ninety days' prior written notice by the Attorney General of the nature of the asserted failure. This is a useful provision, since, in its absence, it is not clear that an attorney general would have the right to file suit directly against a violator in this circumstance. In some jurisdictions, the attorney general may be limited to seeking enforcement indirectly by filing an action against the holder for breach of its fiduciary duties in failing to enforce the easement on behalf of the public.³⁹

The ninety day waiting period was presumably included in the Maine statute to signal that the holder and any third party granted a right of enforcement in the easement deed have the primary obligation to enforce the easement, and the Attorney General serves only as a backup enforcer. The ninety day waiting period may be troublesome in some contexts, however, as it may prevent the Attorney General from acting quickly when necessary to prevent irreparable harm, such as the landowner's cutting of timber or razing of an historic building. If the chainsaws are buzzing or the wrecking ball is swinging, and the holder is not seeking to enforce the easement due to lack of capacity, resources, or for some other reason, the Attorney General should have the right to initiate an action seeking enforcement without waiting the ninety day period.

The benefits of granting the attorney general the right to file suit directly against a person violating or threatening to violate a conservation easement include the following: (i) it helps to ensure the continued enforcement of conservation easements despite the failures of holders, (ii) it can serve as a powerful deterrent to landowners and third parties considering violation of a conservation easement, and (iii) it can operate to prevent irreparable harm to conservation or historic values, particularly if the attorney general is granted the right to seek enforcement immediately upon the threat of such harm. At least seven States expressly grant the attorney general some form of direct enforcement rights, and there is no indication that such rights have been abused or chilled conservation easement donations.⁴⁰

A detailed examination of the advantages and disadvantages of granting other persons the right to file suit directly against a person violating or threatening to violate a conservation easement is beyond the scope of this short Article. A variety

³⁹ The authority on the ability of attorneys general to bring suits directly against third parties on behalf of charities is mixed. *See, e.g.,* *Bothelo v. Griffin*, 25 P.3d 689 (Alaska 2001) (holding Attorney General had authority to bring a direct suit against professional fundraisers on behalf of charities); *Lefkowitz v. Lebensfeld*, 415 N.E.2d 919 (N.Y. 1980) (holding Attorney General had no authority to bring a direct suit against third parties on behalf of charities).

⁴⁰ CONN. GEN. STAT. ANN. § 47-42c (2012); 765 ILL. COMP. STAT. 120/4 (2012); ME. REV. STAT. ANN. tit. 33, § 478(1)(D) (2012); MISS. CODE ANN. § 89-19-7(1) (2012); R.I. GEN. LAWS § 34-39-3(f)(4) (2012); TENN. CODE ANN. § 66-9-307(a)(4) (2012); VA. CODE ANN. § 10.1-1013 (2012); *see also* THE MASSACHUSETTS CONSERVATION RESTRICTION HANDBOOK, *supra* note 9 (“The Attorney General has the authority to enforce conservation restrictions held by governmental entities as well as those held by private entities.”).

of other persons are, however, granted such rights in the enabling statutes of some States,⁴¹ and those rights have been exercised to protect the public interest and investment in conservation easements on occasion. For example, in one case, a suit filed by a watchful neighbor prevented the improper amendment and partial termination of a conservation easement.⁴² In another case, a suit filed by a citizen and two nonprofit groups led to a settlement remedying the substantial violation of a conservation easement.⁴³

In all cases of enabling statute reform, care must be taken not to compromise and, preferably, to confirm the state attorney general's right to bring suit against a holder on behalf of the public for the holder's failure to enforce a conservation easement or other breach of its fiduciary duties. Cases and controversies to date involving holders agreeing to improperly modify or terminate conservation easements, or turning a blind eye to violations, starkly illustrate that there must be a means by which government and nonprofit holders can be held accountable for failing to properly administer and enforce the conservation easements they hold on behalf of the public.⁴⁴

⁴¹ See, e.g., 765 ILL. COMP. STAT. 120/4 (providing that a conservation right may be enforced by the United States or any agency of the federal government, the State of Illinois, or any unit of local government; any not-for-profit corporation or trust which owns the conservation right; or the owner of any real property abutting or within 500 feet of the real property subject to the conservation right); MISS. CODE ANN. § 89-19-7 (providing that an action to enforce a conservation easement may be brought by, among others, the Mississippi Attorney General; the Mississippi Department of Wildlife, Fisheries and Parks; or a person otherwise authorized and empowered by law); VA. CODE ANN. § 10.1-1013 (providing that an action affecting a conservation easement may be brought by, among others, the Virginia Outdoors Foundation; the Virginia Historic Landmarks Board; the local government in which the real property is located; or any other governmental agency or person with standing under other statutes or common law). Standing might also be sought and granted on other grounds. For example, Massachusetts, by statute, grants "ten taxpayers" the right, with the leave of the court, to enforce the terms or purpose of a gift made to a county, city, town, or other subdivision of the State, whether in trust or otherwise. See MASS. GEN. LAWS ch. 214, § 3(10) (2012). The Attorney General must be given notice of such action and can intervene at any stage of the proceedings. *Id.*

⁴² See *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008); see also McLaughlin, *National Perpetuity Standards, Part 2, supra* note 1, at 30–31 (discussing *Bjork v. Draper*).

⁴³ See Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673, 695–700 (2007) (discussing the Wal-Mart controversy), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032346.

⁴⁴ See, e.g., McLaughlin, *National Perpetuity Standards, Part 2, supra* note 1, at 28–31, 36–37, 39–42 (describing *Salzburg v. Dowd*, *Bjork v. Draper*, the Myrtle Grove controversy, and the Wal-Mart controversy).

*E. Remedies for Violations**McLaughlin's Perspective:*

Owners of conservation easement-encumbered land are in a position to degrade or destroy the often fragile conservation or historic values protected by the easements and to require government entities and land trusts to expend significant public or charitable resources to defend and enforce the easements on behalf of the public.⁴⁵ These owners also are unlikely to be discouraged from engaging in such behavior by the threat of monetary damages alone, particularly if those damages compensate the public for only the value of the conservation easement (or certain of the easement's restrictions). Conservation easements would be singularly ineffective land protection tools if they could be effectively modified or terminated through violation and payment to the holder of the resulting increase in the market value of the encumbered land (i.e., through efficient breaches). Moreover, there is no guarantee that such money damages would be sufficient to enable the holder to replace the often unique and irreplaceable conservation or historic values lost as a result of a violation. Accordingly, to appropriately protect the public interest and investment in conservation easements, and to reduce the amount of resources expended enforcing such easements, remedies for conservation easement violations, whether caused by the owner of the land or a third party (such as an adjacent landowner), should be (i) coercive, (ii) designed to give full effect to the purpose of a conservation easement when possible (i.e., include restoration), and (iii) designed to deter future violations.⁴⁶

Connecticut has a particularly progressive statute in this regard that should serve as a model for similar statutes in other states. The Connecticut statute provides that the owner of conservation easement-encumbered land, the holder of the easement, and the State's Attorney General can bring an action against any person who "encroaches" upon land subject to the easement (i.e., who, without legal authorization, causes damage or alteration to the land or vegetation or other features thereon, by, for example, erecting buildings or other structures; constructing roads or driveways; cutting trees or other vegetation; or storing or

⁴⁵ Numerous cases illustrate the willingness of some property owners to violate the unambiguous terms of conservation easements and engage in expensive and time-consuming litigation to defend their actions. *See, e.g.*, *United States v. Peterson*, No. 2:08-MJ-16, 2008 WL 4922413 (D. N.D. 2008), *aff'd*, 632 F.3d 1038 (8th Cir. 2011) (repeated violation of conservation easement protecting wetlands serving as migratory waterfowl habitat); *State v. Quaker Valley Farms*, No. HNT-C-14007-08 (N.J. Sup. Ct. Aug. 9, 2012) (destruction of prime preserved farmland); *Weston Forest & Trail Ass'n v. Fishman*, 849 N.E.2d 916 (Mass. App. Ct. 2006) (construction of barn in restricted area).

⁴⁶ *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 cmt. a (2000); *see also* Treas. Reg. § 1.170A-14(g)(5)(ii) (2009) (requiring that a conservation easement grant the donee the right to enforce the easement by appropriate legal proceedings, including the right to require the restoration of the property to its condition at the time of the donation).

depositing vehicles, materials, or debris).⁴⁷ The statute also authorizes a court to order restoration of the land, award the costs of restoration to the landowner (if the damage was caused by a third party), award reasonable attorney's fees and costs and such injunctive or equitable relief as the court deems appropriate, and award damages of up to five times the cost of restoration.⁴⁸ In determining the amount of the award, the statute instructs the court to consider the willfulness of the violator; the extent of damage done to natural resources; the appraised value of any trees or shrubs cut, damaged, or carried away; the economic gain realized by the violator; and any other relevant factors.⁴⁹

Pidot's Perspective

In every case of a material violation of a conservation easement, equitable relief in the form of both an injunction and an affirmative order to repair and restore should be available as a primary remedy, without need to demonstrate the inadequacy of monetary damages. In addition to broad equitable relief, damages should be available to compensate for any harm caused by the violation, and to reimburse the holder (and the attorney general if that office has to be involved) for any expenses of enforcement, including attorney's fees and other costs, as well as to otherwise make the holder whole as to any costs it has had to incur to remediate the violation. These forms of relief, as well as any others that are appropriate, should be specifically provided in the legal boilerplate of every conservation easement instrument. All the better to have these remedies expressly made available by statute as well.

These points further emphasize the need for standardization of easement forms. The availability of the full array of enforcement tools should never be subject to the legal skills, bargaining power, and other vagaries of the parties to a particular transaction, especially if the attorney general has to bring an action as backup enforcer. The public's investment and stake is too great to allow compromises in the integrity of easement enforcement.

F. Rules of Construction, Laches, Estoppel, Waiver, Adverse Possession, and Prescription

McLaughlin's Perspective:

In the past, interpreting land use restrictions in favor of the free use of land was considered to be in the public interest because land use restrictions were viewed as constraining socially productive uses of the land (i.e., residential, commercial, recreational, and industrial development).⁵⁰ There has, however, been a fundamental shift in our attitude toward land use restrictions, particularly in the

⁴⁷ CONN. GEN. STAT. ANN. § 52-560a (West 2013).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (explaining the history of the "antirestrictions policy").

land conservation context.⁵¹ It is now recognized that imposing long-term restrictions on the development and use of land to protect conservation and historic resources can provide significant benefits to the public and, thus, is in the public interest. In other words, it is now recognized that land conservation is itself a socially productive use of land.⁵² Accordingly, the land use restrictions contained in a conservation easement should not be construed in favor of free use of land. Rather, such restrictions should be construed in favor of carrying out the conservation purposes of the easement and the intent of federal and state legislatures in encouraging and subsidizing the easement's creation—that is, to protect significant conservation and historic values on behalf of the public.

Two state enabling statutes currently provide that, notwithstanding any law to the contrary, conservation easements shall be liberally construed in favor of the grants contained therein to effect the purposes of the easements and the policy and purpose of the statute.⁵³ These statutes also include a statement of purpose, in which the legislature acknowledges the importance and significant public benefit of conservation easements in the state's efforts to protect its natural, historic, agricultural, open-space, and scenic resources.⁵⁴ Other states should add similar provisions to their enabling statutes to ensure that the public interest and investment in conservation easements are not undermined by application of the traditional rule of construction in favor of free use of land.

At least one state has also removed the equitable defenses of laches, estoppel, and waiver as a barrier to the enforcement of a conservation easement.⁵⁵ This, too, seems appropriate and should serve as a model for other states. Government entities, land trusts, state attorneys general, and others seeking to enforce conservation easements are acting on behalf of the public to safeguard important public interests. The public should not be deprived of its vital interests by application of rules designed for private disputes. In particular, individuals or entities that have no authority to dispose of property held for the benefit of the public should not be allowed by their actions or inactions to forfeit valuable public

⁵¹ See *id.* § 3.1 cmt. a, ch. 4 intro. note, § 4.1 cmt. a.

⁵² The best evidence of this is the enactment of some form of conservation easement enabling statute in each of the fifty states and the District of Columbia and the significant public investment in such easements through purchase and tax incentive programs; see also *id.* § 4.1(1) cmt. a (expressly rejecting the old “strict construction doctrine” in favor of the modern approach, whereby if the terms of the servitude are ambiguous, the “servitude should be interpreted to give effect to the intention of the parties . . . and to carry out the purpose for which it was created”).

⁵³ 32 PA. CONS. STAT. ANN. 5055(c)(2) (West 2012); W. VA. CODE § 20-12-5(b) (1995); see also CAL. CIV. CODE § 816 (West 2012).

⁵⁴ 32 PA. CONS. STAT. ANN. § 5052 (West 2001); W. VA. CODE § 20-12-2 (1995); see also CAL. CIV. CODE § 815 (West 2012).

⁵⁵ N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney 1984) (“Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel or waiver.”).

rights, except perhaps in the most extreme of circumstances.⁵⁶ For the same reasons, serious consideration should be given to providing statutory protections preventing the termination of conservation easements by adverse possession or prescription.⁵⁷

Pidot's Perspective:

These are issues that went unaddressed in Maine's conservation easement reform statute.⁵⁸ State enabling laws should subordinate common law rules of construction and defenses to the overriding need for interpreting and enforcing conservation easements to uphold their public and conservation purposes.

The simple point is that every conservation easement represents an investment by the public for the benefit of the public, which is the justification for the laws enabling these instruments to exist in derogation of the common law, as well as for the tax and other public subsidies of conservation easements. Accordingly, no common law principles should stand in the way of protection of that public investment. For example, in the case of the doctrine of laches, the fact that an easement holder, perhaps intimidated by the greater financial resources of a landowner, may delay taking action to abate an easement violation should not act as an impediment to subsequent enforcement of the easement by the holder or the attorney general, representing the public interest.

Especially in the absence of remedial legislation in this regard, these points should always be dealt with in easement drafting. All conservation easements

⁵⁶ See, e.g., *Weston Forest & Trail Ass'n v. Fishman*, 849 N.E.2d 916 (Mass. App. Ct. 2006) (holding land trust immune from the defenses of laches and estoppel where it seeks to enforce a conservation easement because it is enforcing public rights or protecting the public interest); see also *United States v. California*, 332 U.S. 19 (1947) (“[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”); *Feduniak v. Cal. Coastal Comm’n*, 148 Cal. App. 4th 1346 (2007) (holding neither laches nor estoppel barred commission from enforcing conservation easement on behalf of public despite failure to enforce easement for almost two decades). *But see* *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984) (“[W]e are hesitant . . . to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.”); Annotation, *Applicability of Doctrine of Estoppel Against Government and Its Governmental Agencies*, 1 A.L.R.2d 338 (1949) (“Where strictly public rights are involved the courts are not disposed to hold the municipality estopped except under special circumstances which would make it highly inequitable or oppressive to enforce such public rights.”).

⁵⁷ See *supra* note 55; see also Michael A. Wolf, *Conservation Easements and the “Term Creep” Problem*, 2013 UTAH L. REV. 787, 33 UTAH ENVTL. L. REV. 101 (2013) (manuscript at Part III.A) (discussing problem areas if conservation easements are treated as traditional easements).

⁵⁸ See *Pidot, supra* note 8, at 23–24.

should include (as all quality easements do) terms expressly providing for liberal construction of the easement's terms in favor of its conservation purposes, as well as landowner waiver of laches, estoppel, prescription, and other equitable defenses to enforcement.

G. Amendment and Termination

Pidot's Perspective:

No aspect of conservation easement law has spawned as much controversy as the procedural and substantive standards that attend amendment and termination. Amidst the debate, the most compelling argument is that perpetual conservation easements are held in trust for the benefit of the public. This means that termination or amendment of such easements in ways materially contrary to their stated purposes should require court approval and a finding that continuing to protect the land's conservation values has become impossible or impractical, paralleling provisions in the Treasury Regulations applicable to tax-deductible, donated easements.⁵⁹

That said, since protracted debate on the subject has caused confusion among practitioners, the best approach is for states to express in their laws precise procedures for amendment and termination of perpetual conservation easements in a fashion consistent with the charitable trust doctrine and the parallel provisions in the Treasury Regulations. Where enactment of clear statutory direction is impossible, practitioners should prudently follow the time-tested dictates of the charitable trust doctrine.

To create a clear statutory path for easement amendment and termination, Maine's conservation easement reform law incorporates three key requirements: (1) every conservation easement must contain a statement setting out the holder's power to amend the easement consistent with the statute's requirements; (2) conservation easement termination, or any amendment that materially detracts from the conservation values intended for protection, must be approved by a court in an action in which the Attorney General is made a party to represent the public interest; and (3) any increase in value of the landowner's estate caused by an amendment or termination must be paid over to the easement holder to be used to protect comparable land.⁶⁰ Maine's law thus effectively conforms to charitable trust principles, and wins praise among land trusts by eliminating any financial

⁵⁹ See *supra* note 13; see also UNIF. CONSERVATION EASEMENT ACT § 3 cmt., 12 U.L.A. 185 (2008); UNIF. TRUST CODE § 414 cmt., 7C U.L.A. 362 (2010); DOSCHER ET AL., *supra* note 28; LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 10 (2007); Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, 23 PROB. & PROP. 52 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461159.

⁶⁰ ME. REV. STAT. ANN. tit. 33, § 477-A(2) (2012); see also R.I. GEN. LAWS §§ 34-39-5(c) (2012).

incentive for the landowner to materially amend or extinguish an easement.⁶¹ It also enables easement grantors to comply with the requirements for the federal charitable income tax deduction for donated conservation easements.

However, Maine's statutory process is not perfect. The State's system could be improved to allow parties to seek formal Attorney General sign-off (whether in the form of an approval or a "no action" letter) of proposed amendments believed not to require court approval because they do not materially detract from the conservation values intended for protection. This kind of procedure would enable the parties to such an amendment to proceed without fear that another party might later assert that the amendment required court approval.

While statutory reform along these lines provides the most helpful approach to conservation easement amendment and termination, in states where statutory reform is unobtainable, practitioners should always pursue the prudent course of seeking court approval of easement termination and material amendment, lest the attorney general or a third party (i.e., the original easement donor, a neighbor, the IRS, or a title examiner) later object to the manner in which the easement was altered.

McLaughlin's Perspective:

The topic of amendment and termination is too broad and complex to be addressed comprehensively in this short Article. Accordingly, my comments focus on the distinction between perpetual and other types of conservation easements, some of the difficulties associated with amendments, the need for transparency and accountability, and the climate change red herring.

Perpetual conservation easements are intended to be very special, very powerful *permanent* land protection tools. They are intended to protect the conservation values of the land they encumber "in perpetuity," or for as long as continuing to protect those values remains possible or practicable. They also are intended to be both difficult to terminate and substantially immune from the short-term and often short-sighted economic and political pressures that plague land use planning processes and may be brought to bear on government and nonprofit holders. Accordingly, there should be a very high bar for the termination of perpetual conservation easements—that is, they should be terminable only through condemnation or if it can be established to the satisfaction of a court that continuing to carry out the purpose of the easement has, due to changed circumstances, become impossible or impractical. This is consistent with the requirements applicable to perpetual conservation easements eligible for federal tax benefits⁶² and the representations land trusts and government entities make to prospective easement grantors, funders, communities, and other members of the

⁶¹ See Pidot, *supra* note 8, at 18.

⁶² See *supra* notes 12–13; see also McLaughlin, *Protecting the Federal Investment*, *supra* note 1, at 260–61 (discussing the reasons for the Treasury Regulation requirements).

public regarding the nature of a perpetual conservation easement.⁶³ This is also consistent with the comments to the Uniform Conservation Easement Act and the Uniform Trust Code⁶⁴ and the recommendation of the American Law Institute in the Restatement (Third) Property: Servitudes.⁶⁵

In many states, conservation easements are not required to be perpetual.⁶⁶ Parties in such states are free to create “term” easements, which automatically

⁶³ See, e.g., LITTLE TRAVERSE CONSERVANCY, THE CONSERVATION EASEMENT AS A LAND PROTECTION AND FINANCIAL PLANNING TOOL 4 (1993), available at <http://www.landtrust.org/ProtectingLand/ConsEaseGuidebook.pdf> (“The Conservancy accepts the easement with the understanding that it must enforce the terms of the easement in perpetuity A conservation easement ensures that property will be protected and cared for forever, regardless of who owns the land in the future.”); *Conservation Easements*, DEP’T OF ENVTL. CONSERVATION, N.Y. STATE, <http://www.dec.ny.gov/lands/41156.html> (last visited July 10, 2013) (“When the state accepts and holds a conservation easement it takes on the responsibility to monitor and enforce the terms of the easement in perpetuity (forever)”); *Conservation Easement Overview*, MD. ENVTL. TRUST, MD. STATE, http://www.dnr.state.md.us/met/land_conservation.asp (last visited July 10, 2013) (“[T]he land is protected **forever**”) (emphasis in original); *Conserve Your Land*, JACKSON HOLE LAND TRUST, <http://jhlandtrust.org/land-protection/conserves-your-land/> (last visited July 10, 2013) (“Easements are donated or sold by the landowner to the land trust, which then has the authority and obligation to enforce the terms of the easement in perpetuity. When a parcel of land is placed under easement, the landowner still owns the property, which remains freely transferable, but the easement stays with the land forever.”); *Stewardship*, MINN. LAND TRUST, <http://www.mnland.org/stewardship/> (last visited July 10, 2013) (“Conservation easements are forever.”); *Stewardship: A Perpetual Commitment to Conservation*, VT. LAND TRUST, <http://www.vlt.org/land-stewardship> (last visited July 10, 2013) (“[W]e have promised to look after, or steward, the conservation protections placed on this land forever.”).

⁶⁴ UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 185 (2008) (leaving “intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts” and explaining that “while Section 2(a) provides that a conservation easement may be modified or terminated ‘in the same manner as other easements,’ the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding”); UNIF. TRUST CODE § 414 cmt., 7C U.L.A. 362 (2010) (explaining that because of the fiduciary obligation imposed, the termination or substantial modification of an easement by the holder could constitute a breach of trust).

⁶⁵ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. a (2000) (recommending termination of perpetual conservation easements according to special rules based on the doctrine of *cy pres* and explaining that, “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes”).

⁶⁶ See, e.g., UNIF. CONSERVATION EASEMENT ACT, § 2(c) (providing that a conservation easement is unlimited in duration unless the instrument creating it otherwise provides).

expire after a specified term. Parties in such states are also free to create “terminable” easements, which are terminable, despite their continued protection of important conservation values, upon the satisfaction of one or more conditions, such as agreement of the parties, approval of a public official or administrative board, or the meeting of a standard, such as a finding that termination is “essential to the orderly development of the locality” or “necessary to the public interest.” Term and terminable conservation easements are not intended to protect the conservation values of the land they encumber in perpetuity. Rather, they are intended to protect those values only for the designated term or until the conditions specified for termination are met. To ensure that perpetual conservation easements remain effective *permanent* land protection tools, terminable conservation easements should not be referred to as perpetual, and perpetual conservation easements should not be terminated unless it can be shown that continuing to carry out the purpose of the easement is no longer possible or practicable.

Because perpetual conservation easements are intended to endure in perpetuity, some of these instruments will need to be amended to adapt to changing conditions. To provide flexibility and at the same time ensure the continued protection of the conservation values of the land (and not run afoul of the requirements of federal tax law), many easements include a limited “amendment clause” expressly granting the holder and landowner the right to agree to amendments that are consistent with the conservation purpose of the easement.⁶⁷ However, determining when an amendment furthers or is consistent with the conservation purpose of an easement, or adversely impacts or changes that purpose, can be difficult.⁶⁸ The potential for private benefit or private inurement

⁶⁷ THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 164 (Janet Diehl & Thomas S. Barrett eds., 1988), provides the following as a model amendment clause:

Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code . . . and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of _____ County, [State].

⁶⁸ See, e.g., STAFF OF S. COMM. ON FIN., 109TH CONG., REP. OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY, at exec. summary, 9 (Comm. Print 2005), available at <http://www.finance.senate.gov/imo/media/doc/tnccontents.pdf> (“Modifications 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.”); *id.* Part II, at 5 (expressing concern about “trade-off” amendments, which both negatively impact and further the conservation purpose of an

and loss of the federal or state investment in an easement is particularly high in the context of amendments.⁶⁹ Some perpetual conservation easements (particularly older easements) are silent regarding amendment. There currently is little guidance regarding the types of amendments that are and are not permissible, the proper process for amendments (e.g., when appraisals, conservation impact assessments, and third-party oversight are necessary), or the consequences to a holder that agrees to an amendment that is contrary to the conservation purpose of an easement or confers impermissible benefits on the landowner. In addition, the current lack of transparency and accountability associated with amendments in most jurisdictions makes amendments susceptible to abuse.

Given the significant public interest and investment in conservation easements, states should consider following the lead of Maine and Rhode Island and revise their general enabling statutes to address the issues of amendment and termination. The goal should be to eliminate confusion and litigation and protect the public interest and investment by drawing clear distinctions between term, terminable, and perpetual conservation easements and providing clear rules regarding the amendment and termination of these different instruments.

When considering such revisions, states should keep a number of factors in mind. First, states that wish to continue to allow their citizens to be eligible for the subsidies provided through federal tax incentive or easement purchase programs will need to ensure that the enabling statute permits easement grantors to create conservation easements that comply with all applicable federal requirements, including those specifying the circumstances under which the easements may be permissibly transferred, amended, or extinguished.⁷⁰ Second, retroactive application of a revised statute intended to make it easier to substantially amend or terminate existing perpetual conservation easements may violate prohibitions on

easement but on balance are arguably either neutral with respect to or enhance such purpose, because of the difficulty associated with weighing increases and decreases in conservation benefits as well as private benefit concerns); *see also* McLaughlin, *National Perpetuity Standards, Part 2, supra* note 1, at Part III.B. (discussing cases involving holders' improper amendment of conservation easements).

⁶⁹ *See, e.g.,* STAFF OF S. COMM. ON FINANCE, *supra* note 68, at Part II, at 5 (“[T]he private benefit prohibition aspect of the [amendment] procedure can be a subjective inquiry, with no bright lines available to make the determination.”).

⁷⁰ *See, e.g., supra* notes 12–13. For example, the terms included in a federally deductible conservation easement to satisfy the restriction on transfer, extinguishment, and division of proceeds requirements must be enforceable under state law and apply in addition to any other conditions or limitations imposed on such actions under state law (such as the holding of public hearing or approval of a public official). On the enforceability of easement terms under state law, *see, e.g.,* *Carpenter v. Comm’r, T.C.M. (CCH) 1, 6 (2012), reconsideration denied and opinion supplemented in 106 T.C.M. (CCH) 62 (2013)* (finding tax-deductible conservation easements at issue were “restricted [charitable] gifts,” or “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations”); *see also* McLaughlin, *Protecting the Federal Investment, supra* note 1, at Part II (discussing restricted gifts).

retrospective laws or other constitutional principles.⁷¹ Third, appropriate limits on, and procedures for, amendments—as well as appropriate limits on the ability of holders to agree to make changes to an easement through other processes, such as discretionary approvals or the granting of temporary licenses or permitted use agreements—should be considered.⁷² Lastly, to help ensure proper management of easements over the long term, as well as transparency and accountability, states should consider requiring holders to provide notice to the state attorney general or other appropriate public official or agency of proposed transfers, material amendments, and terminations.⁷³

Finally, the assertion in some circles that climate change necessitates lowering or eliminating the barriers to the termination of perpetual conservation easements is unpersuasive. There is little indication that climate change will render scores of easement-encumbered properties environmental wastelands.⁷⁴ In addition, to the extent climate change does make the continued use of certain easement-encumbered properties for conservation purposes impossible or impractical, the easements can be extinguished in a court proceeding and the proceeds used by the holders to replace the lost conservation values in some other location. Furthermore, parties interested in retaining more flexibility than is provided by a perpetual conservation easement are free to utilize more temporary land protection tools.

H. Merger, Tax Foreclosure, and Marketable Title Acts

Pidot's Perspective:

Intolerable to anyone interested in the durability of conservation easements are laws and legal doctrines that may have the consequence of easement termination as a mere happenstance. The fact that a landowner stops paying real estate taxes or that the easement holder later comes into ownership of the fee should not be permitted to result in easement termination. Professor McLaughlin makes a compelling argument that the common law doctrine of merger should never imperil a conservation easement.⁷⁵ Likewise, extinguishment of the

⁷¹ See *supra* note 38.

⁷² For example, discretionary approvals should be permitted only if they are consistent with the conservation purposes of the easement.

⁷³ See *supra* notes 29–32 and accompanying text (discussing federal efforts attempting to promote transparency and accountability).

⁷⁴ See, e.g., Jonathan R. Hiley et al., *Protected Areas Act as Establishment Centres for Species Colonizing the UK*, 280 PROC. OF THE ROYAL SOC'Y BIOLOGICAL SCI. 1 (2013), available at <http://dx.doi.org/10.1098/rspb.2012.2310> (discussing the conservation value of static protected areas in a time of climate change).

⁷⁵ See McLaughlin, *supra* note 3 (arguing conservation easements generally should not be extinguished pursuant to the doctrine of merger if the government or nonprofit holder acquires title to the subject land because the required “unity of ownership” will not be present; the two estates would be “in the same person at the same time,” but generally would not be held “in the same right”); see also Advisory Opinion from Kenneth T. Cuccinelli, II, the Attorney General, Va., to Thomas Davis Rust, Member, House of

easement should never be the unintended consequence of tax foreclosure of the fee. To avoid such catastrophic results with certainty, states should enact statutory provisions that assure conservation easement survival in both situations.

Maine's 2007 statutory reforms do exactly that, saving easements in instances of both fee merger and tax foreclosure.⁷⁶ These legal protections enjoy universal approval of land trusts and other easement holders in Maine.⁷⁷ In the case of merger, the Maine statute goes a step further. To deal with concerns with how easement monitoring and amendment can effectively work if the landowner and easement holder become the same, the statute invites easement holders in such instances to replace the easement with a declaration of trust or a new easement held by another party. Failing this, the integrity of easement monitoring and enforcement will be problematic whenever the easement holder becomes the landowner. States should enact requirements that a third-party holder be appointed to oversee these duties when the landowner and easement holder have become the same.

McLaughlin's Perspective:

In addition to expressly providing that a conservation easement shall not be extinguished pursuant to the doctrine of merger or as a result of a tax lien foreclosure, states that have a marketable title act⁷⁸ should expressly provide that extinguishment shall not occur as a result of the application of that act.⁷⁹ In each of the three circumstances (the holder's acquisition of the fee, tax lien foreclosure, and the holder's failure to rerecord the easement), termination of the easement would be contrary to public policy because it would occur even though the easement continues to protect unique or otherwise significant conservation values on behalf of the public. Termination as a result of a tax lien foreclosure or marketable title act could also result in a loss of the public's investment in the easement and a windfall to the owner of the subject land. And termination through merger would permit nonprofit and government holders to avoid the restrictions on the transfer, release, modification, and termination of conservation easements that are imposed by state enabling statutes, federal tax law, and the laws governing the

Delegates, Va. (Aug. 31, 2012), *available at* <http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/2012opns/11-140%20Rust.pdf> (“[A] conservation easement . . . is not extinguished by application of the common law doctrine of merger . . .”).

⁷⁶ ME. REV. STAT. ANN. tit. 33, § 479(9), (10) (2007).

⁷⁷ *See* Pidot, *supra* note 8, at 21.

⁷⁸ Marketable title acts require the rerecording of property interests after the passage of a period of time ranging from twenty to fifty years depending on the jurisdiction. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.16 (2000) (recommending exemption of conservation servitudes from the application of marketable title acts).

⁷⁹ *See, e.g.,* CAL. CIV. CODE § 880.240(d) (West 2012); 765 ILL. COMP. STAT. 120/1(b) (2000); MASS. GEN. LAWS ANN. ch. 184, § 26 (West 2005); WIS. STAT. § 893.33(6m) (2010).

administration of charitable gifts and operate to safeguard the public interest and investment in such easements.⁸⁰

I. Public Participation

Pidot's Perspective:

Of the serious conservation easement reform ideas advanced over the years, none evoke more vigorous negative reaction in much of the land trust community than enabling public participation in the process of easement creation. Many fear that public involvement or transparency will seriously undermine the willingness of landowners to grant easements.⁸¹

These fears seem badly overblown, while the benefits of giving the public an opportunity to participate in the process are undervalued. These benefits include (i) creating public awareness and support of easements that will affect the community and landscape, (ii) better assuring that public investments in easements (whether by use of public funding or through tax subsidy) yield sufficient public benefits, (iii) coordinating easements with public planning processes, and (iv) making for better quality easements.

On this last point, from my own experience with easements that have gone through a public review process (because they were publicly funded or part of a permitting process), public comment on proposed conservation easements almost always results in significant improvements in both their form and substance.⁸² Likewise, in Massachusetts, where for over four decades *all* conservation easements have been required to undergo government approval and hearing processes,⁸³ the result is community support for easements as well as needed conformity to state requirements for consistent easement terms.⁸⁴ Contrary to theoretical views expressed elsewhere that such a government process would create a drag on easement formation, Massachusetts boasts among the highest populations of both conservation easements and land trusts in the nation, and the land trust community appears to be supportive of the state review process.

⁸⁰ See McLaughlin, *supra* note 3, at 289; see also Wolf, *supra* note 57, at 115 (manuscript), noting:

There seems to be little logic and a lot of bad public policy behind application of [the doctrine of merger] to easements designed to be perpetual and in the public interest . . . It would be unfortunate if the intent of a grantor were frustrated by a government or nonprofit holder that had the good fortune of being the beneficiary of a partial interest in year one, and in year twenty the underlying fee, particularly if that entity, which would now own the property free of restrictions, sought to sell it for development, trade it for another property, or otherwise use it for nonconservation purposes.

⁸¹ See Pidot, *supra* note 8, at 24.

⁸² *Id.* at 24.

⁸³ See THE MASSACHUSETTS CONSERVATION RESTRICTION HANDBOOK, *supra* note 9.

⁸⁴ See PIDOT, *supra* note 5, at 11, 17.

Moreover, not all forms of public participation in easement creation need embrace a full-blown government approval process like that in Massachusetts. Virginia requires that easements conform to local comprehensive plans and requires state review of easements qualifying for certain state income tax credits.⁸⁵ A minimally intrusive system could be devised in most states that allows the public an opportunity to provide written comments, perhaps online, prior to easement terms being cast in stone. The simple point is that the public ought to have *some* opportunity to be informed and have an opportunity to be heard concerning conservation easements that will have such a potentially profound and permanent effect on the future of their communities. As an added bonus, providing an opportunity for public input will help create better quality easements.

McLaughlin's Perspective:

In drafting the Uniform Conservation Easement Act (UCEA), which was adopted by the Uniform Law Commission (ULC) in 1981, the ULC considered and rejected the idea of requiring public agency approval of conservation easements, citing “both practical and philosophical reasons.”⁸⁶ Those reasons were:

1. the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine the validity of conservation easements;
2. the requirement of public agency approval would add a layer of complexity that might discourage easement conveyances because organizations and property owners might be reluctant to become involved in the bureaucratic, and sometimes political, process that public agency approval entails;
3. placing such a requirement in the Act might dissuade a state from enacting it because of the administrative and fiscal burdens associated with operating a public agency approval program;
4. controls in the Act help to ensure that the Act will serve the public interest, including the requirement that holders of conservation easements be limited to governmental agencies and charitable organizations, neither of which is likely to accept such easements on an indiscriminate basis;
5. controls in other state and federal legislation afford further assurance that the Act will serve the public interest, for example, federal tax statutes and regulations “rigorously define the circumstances under which easement donations qualify for favorable tax treatment;” and

⁸⁵ VA. CODE ANN. §§ 10.1-1010(E), 58.1-512 (2012). Other states with some form of public review or approval include Montana, Nebraska, and Oregon. MONT. CODE ANN. § 76-6-206 (2010); NEB. REV. STAT. § 76-2,112 (2012); OR. REV. STAT. § 271.735 (2007).

⁸⁶ See UNIF. CONSERVATION EASEMENT ACT, at prefatory note, 12 U.L.A. 185 (2008).

6. the American legal system generally regards private ordering of property relationships as sound public policy.⁸⁷

Today—more than three decades following the UCEA’s enactment—most of these reasons no longer carry much weight. The fact that the Act has a relatively narrow purpose or that placing a public agency review requirement in the Act might have dissuaded some states from enacting it due to anticipated administrative and fiscal burdens are not arguments for states failing to consider reforms today, when we have the benefit of more than three decades of on-the-ground experience with conservation easements. In addition, the modest “controls” in the UCEA and the requirements of federal tax law have not prevented abuses or ensured that conservation easements serve the public interest.⁸⁸ Moreover, a strong argument can be made that purely “private ordering” of property relationships that are heavily subsidized by and significantly impact the public is not sound public policy. The use of conservation easements as a land protection tool has grown far beyond what the drafters of the UCEA or the legislators enacting the federal tax incentives appear to have anticipated. Many thousands of conservation easements now encumber an estimated 40 million acres in the U.S. and, in most jurisdictions, there is little or no ability to assess the extent to which these instruments are actually providing benefits to the public.⁸⁹

That said, one of the reasons offered by the drafters of UCEA in support of their rejection of public agency approval of conservation easements continues to have relevance today: some organizations and property owners might be reluctant to become involved in the bureaucratic, and sometimes political, process that public agency participation entails. Although public agency approval does not appear to have chilled conservation easement conveyances in Massachusetts, the same may not be true in other states. Moreover, requiring public agency approval could, in some jurisdictions, import into the conservation easement acquisition process the same short-term and short-sighted economic and political pressures that have plagued land use planning processes and gave rise to the use of the easement as a land protection tool in the first place.⁹⁰ Accordingly, while there clearly can be benefits to a public approval process, and not all forms of public

⁸⁷ See *id.*

⁸⁸ See Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 33 UTAH ENVTL. L. REV. 1 (2013) (discussing developments in this context, including reports of abuse).

⁸⁹ See *What is the NCED?*, NAT’L CONSERVATION EASEMENT DATABASE, <http://nced.conservationsregistry.org> (last updated Sept. 2013) (reporting having gathered data thus far on over 100,000 conservation easements encumbering more than 19 million acres but estimating that 40 million acres are actually encumbered by conservation easements).

⁹⁰ For example, a bill was introduced in Utah that would have prohibited the granting of a conservation easement unless, among other things, the local planning commission recommended it. See H.B. 162, 2013 Gen. Sess. (Utah 2013).

approval need be the same, states should carefully consider whether the potential negative impact on conservation activities could outweigh the potential benefits in a given jurisdiction.⁹¹

III. OTHER REFORMS

A. *Property Taxes*

Pidot's Perspective:

There being no provisions in the UCEA dealing with property taxation, state laws separately provide a variety of methods by which easement-encumbered lands are assessed and taxed. These methods range all the way from entitling the landowner to a diminished assessment due to the effect of the easement's restrictions on land value,⁹² to requiring the assessment of such land at its full development value as if the easement does not exist.⁹³ Some legislators have reportedly threatened to assess and tax the easement itself as a separate bundle of property rights, although to my knowledge no state has enacted laws to do so.

A number of states take a middle road. In Maine, the existence of a conservation easement may result in a formulaic discount (not based upon case-by-case assessment) if the property qualifies for open space valuation, and the discount may be greater if the easement provides public access to the property.⁹⁴ While state law provides broad criteria concerning this valuation process, the landowner must apply for open space assessment to the municipal government, which inevitably exercises a certain degree of discretion, sometimes arbitrarily.

There are evident advantages and disadvantages to each of these systems. While some assert that easements *should* reduce the value of land for real estate tax purposes, others argue that a local government's revenues should not be reduced because of a purely private transaction that has never been subject to public review and may be perceived, at least by the municipal assessors, as having little public benefit. Where conservation easements result in reduced property tax assessment based on periodic case-by-case valuation, there remain troubling issues about how to properly assess the effect of an easement on land value, an impact that, unlike an

⁹¹ A compromise position might be to grant a state entity that has a conservation mission certain review or approval rights with regard to conservation easements based on criteria that relate primarily to the quality of the conservation (rather than economic or political factors). See, e.g., Jeffrey O. Sundberg & Chao Yang, *Do Additional Conservation Easement Credits Create Additional Value?*, 66 STATE TAX NOTES, December 3, 2012, 723 (explaining the Virginia Department of Conservation and Recreation must review easements for which a donor claims a state tax credit of \$ 1 million or more).

⁹² See, e.g., CAL. CIV. CODE § 815.10 (West 2012); N.J. STAT. ANN. § 13:8B-7 (West 2010).

⁹³ See IDAHO CODE ANN. § 55-2109 (2012).

⁹⁴ ME. REV. STAT. tit. 36, § 1106-A (2011).

appraisal of the easement for tax purposes at the time of donation, may be highly dynamic over time.

The best course may be to devise a relatively straightforward reduction formula to assess lands subject to development-foreclosing conservation easements, since in fairness the value of such land has very likely been reduced. Such formulaic discounts, accompanied by additional discounts for easements that provide public access, have obvious advantages in ease of administration and expense for local governments over methods that require periodic and costly assessments of the value of the land as diminished by the particular restrictions of the easement.

McLaughlin's Perspective:

The conveyance of a conservation easement can significantly reduce the value of the property interest retained by the landowner (i.e., the encumbered land). In addition, since all states have enacted conservation easement enabling statutes in recognition of the benefits that such easements can provide to the public, it can be assumed the states wish to encourage easement conveyances. Accordingly, states should be willing to allow the existence of conservation easements to be taken into account for property tax purposes. As noted above, many states have done this through a number of mechanisms, some more formulaic than others.

Rather than recommend any particular method by which to take easements into account for assessment purposes, I will confine my comments to highlighting a few issues that states should consider when addressing this issue. First, in some jurisdictions the duration of conservation easements may vary (some may be term, others terminable, and others perpetual), and these differences have an effect on the extent to which an easement reduces the value of the land it encumbers, both initially and over time. Second, in addition to the fact that the restrictions placed on individual properties will vary, sometimes dramatically, easement restrictions may be modified over time through amendment or other means, such as discretionary approvals or temporary permitted use agreements, and these too may affect the value of the underlying land. Third, as the number of easement-encumbered properties grows and such properties change hands, assessors may be able to develop databases that include the "after-easement" sales prices of such properties, but the extent to which these individual sales will provide useful comparables is questionable given the unique nature of the properties and the easements that encumber them. These factors highlight the administrative and financial burdens associated with valuing easement-encumbered properties on a case-by-case basis and weigh in favor of a more formulaic method of valuation.

Valuation would also be facilitated and more accurate if state law clearly distinguished between term, terminable, and perpetual conservation easements; provided clear rules addressing the amendment and termination of easements, including requiring reporting to appropriate public officials of material amendments and terminations; and mandated the use of standardized easement terms.

*B. Condemnation**Pidot's Perspective:*

Most states have insufficient legal standards governing condemnation of lands encumbered by conservation easements.⁹⁵ Even in states like Maine, where condemnation of a conservation easement appears to require court approval as a form of termination, the law does not include standards geared specifically to condemnation and does not offer special protection to conservation easements or the rights and financial interests of their holders. Indeed, it is highly debatable whether the law should accord special protection to lands under conservation easement when they are needed for public exigencies, especially when the easement has been arranged purely by private parties without public validation. Nonetheless, in most states the lack of clear legal standards to guarantee that the holder receives the full value of the development rights represented by a conservation easement in a condemnation matter gives rise to the prospect that, should easements be considered “worthless” in economic terms, properties subject to easements could become cheap targets of those wielding condemnation powers.

Accordingly, state laws should be written, not to protect conservation easements from condemnation, but to assure that their holders receive the full value of the development rights that the condemned easement foreclosed, and that holders use such compensation to invest in comparable land conservation projects.

McLaughlin's Perspective:

Most conservation easement enabling statutes do not address the circumstances under which a conservation easement can be condemned, whether a conservation easement constitutes a compensable property interest for eminent domain purposes, how a conservation easement should be valued for purposes of providing just compensation to its holder, or the holder's use of such compensation.⁹⁶ In addition, of the statutes that address one or more of these issues, many do so ambiguously or inappropriately.⁹⁷ This is troublesome given the enormous public investment in conservation easements and the fact that conservation easement-encumbered lands are likely to be attractive targets for condemnation.⁹⁸

The following subparts set forth some of the issues that should be taken into account when considering legislation addressing the condemnation of conservation

⁹⁵ See generally McLaughlin, *supra* note 2.

⁹⁶ See *id.* at 1929–1930, 1960–65.

⁹⁷ See *id.* at 1960–65.

⁹⁸ See *id.* at 1905–06 (“If condemning authorities could acquire easement-encumbered land for its value as restricted, such land would be an attractive target for condemnation because it would be less expensive (and, in many cases, much less expensive) to condemn than similar unencumbered land . . . Undeveloped land is already a target for condemnation because of the political difficulties associated with locating public works projects . . . in populated areas.”).

easements. Many of these issues are addressed in a recently enacted California statute that can serve as a model or starting point for similar legislation in other states.⁹⁹ Those interested in enacting similar legislation should also review the history of the legislative process in California (including Governor Arnold Schwarzenegger's veto of the bill in 2009), and the arguments made in support of, and in opposition to, the legislation.¹⁰⁰

1. *Limits on the Exercise of Eminent Domain*

Conservation easements, which are partial interests in land, are already devoted to a public use—the protection of identified conservation values for the benefit of the public, often in perpetuity. They also typically involve a substantial public investment, whether in the form of forgone revenues from tax incentives, appropriations to easement purchase programs, or the granting of development permits, variances, or other approvals in exchange for their creation. In addition, the lands protected by conservation easements are often attractive to condemning authorities because they are substantially undeveloped. For these reasons, consideration should be given to requiring that condemning authorities make some special showing as to why the taking of a conservation easement is appropriate

⁹⁹ See CAL. CIV. PROC. CODE § 1240.055 (2013).

¹⁰⁰ See, e.g., *Bill Analysis: Eminent Domain: Conservation Easements: Hearing on S.B. 555 Before S. Judiciary Comm.*, 2009–2010 Reg. Sess. (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0551-0600/sb_555_cfa_20090420_12021_2_sen_comm.html; SB 555; *Summary as of June 8: Hearing on S.B. 555 Before S. Judiciary Comm.*, 2009–2010 Reg. Sess. (Cal. 2009), available at <http://www.octa.net/pdf/555.pdf>; *Bill Analysis: Eminent Domain Law: Conservation Easements: Hearing on S.B. 555 Before S. Judiciary Comm.*, 2009–2010 Reg. Sess. (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0551-0600/sb_555_cfa_20090629_11264_5_asm_comm.html; *Bill Analysis: Hearing on S.B. 328*, S. Floor, 2011–2012 Reg. Sess. (Cal. 2011), available at http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0301-0350/sb_328_cfa_20110708_160933_asm_floor.html; *Bill Analysis: Eminent Domain Law: Conservation Easement: Hearing on S.B. 328*, S. Floor, 2011–2012 Reg. Sess. (Cal. 2011), available at http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0301-0350/sb_328_cfa_20110826_162055_sen_floor.html; *Complete Bill History: Eminent Domain Law: Conservation Easement: Hearing on S.B. 328*, 2011–2012 Reg. Sess. (Cal 2011), available at http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0301-0350/sb_328_bill_20111008_history.html; Letter from Peter Buffa, Chairman, Orange Cnty. Transp. Auth., to Kevin de Leon, Chair, Cal. State Assemb. Approps. Comm. (July 7, 2009), available at http://www.octa.net/pdf/555_deleon.pdf; Gov. Arnold Schwarzenegger's Veto Message to S.B. 555 (Oct. 12, 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0551-0600/sb_555_vt_20091012.html; EAST BAY MUN. UTIL. DIST., AGENDA: LEGISLATIVE/HUMAN RESOURCES COMMITTEE (2011), available at http://www.ebmud.com/sites/default/files/030811_lhr_staff_reports_0.pdf; see also Rebecca Tatum, *Chapter 589: Conservation and Condemnation*, 43 MCGEORGE L. REV. 589 (2012).

under the circumstances.¹⁰¹ Such a provision would not prevent the exercise of eminent domain. It would, however, help to level the playing field when it comes to condemnation between lands that have been protected because they have significant conservation values and more developed lands.

2. *Procedural Rights of Holder*

The interests of the holder of a conservation easement may not be aligned (and may be at odds) with the interests of the owner of the encumbered land in a condemnation proceeding. Accordingly, to appropriately represent its interests, the holder of a conservation easement should be granted the same rights and obligations as any other defendant in an eminent domain proceeding.¹⁰² Public entities that helped fund the purchase of a conservation easement or granted permits, variances, or other approvals in exchange for its creation should similarly be provided notice and an opportunity to participate.¹⁰³ Involving the holder and interested public entities early in the process can assist the parties in identifying the potential negative effects of the condemnation on protected conservation values as well as any feasible alternatives or mitigation measures that could lessen those effects.¹⁰⁴

3. *Just Compensation*

Because a conservation easement is a partial interest in real property, the holder of the easement should be entitled to just compensation for the taking of, or damage to, that interest.¹⁰⁵ To preclude any argument to the contrary, state law should confirm that the holder of a conservation easement is the owner of an

¹⁰¹ See, e.g., CAL. CIV. PROC. CODE § 1240.055(a)(3) (requiring that condemning authorities make a special showing of necessity required by § 1240.610 of the Code of Civil Procedure when condemning a conservation easement that qualifies as “property appropriated to public use”—generally a conservation easement held by a public entity, purchased in part with public funds, or acquired as a result of a development approval or permitting process); *id.* § 1240.610 (authorizing the use of eminent domain to acquire “property appropriated to public” use only if the new use is a more necessary public use). There may be a concern that extending this type of protection to other conservation easements (e.g., those donated to nonprofits) would enable parties to create conservation easements at the eleventh hour for the purpose of discouraging or preventing condemnation. This concern could be addressed by requiring that a conservation easement be in place for a certain period of time before qualifying for such protection.

¹⁰² See *id.* § 1240.055(c)–(f).

¹⁰³ See *id.* § 1240.055(c)–(e).

¹⁰⁴ See 2011 Cal. Stat. ch. 589 § 1.

¹⁰⁵ See generally McLaughlin, *supra* note 2 (arguing that conservation easements constitute a compensable form of property under any reasonable interpretation of the Takings Clause of the Fifth Amendment).

interest in property for which it must be compensated.¹⁰⁶ The amount of compensation should generally be determined in the same manner as it is determined with regard to the condemnation of other types of properties where the ownership is divided. For example, if the conservation easement is taken in full, the property should be valued as an unencumbered whole and the total compensation award apportioned between the owner of the land and the holder of the easement in accordance with the value of their respective interests, unless a contract for apportionment provides otherwise.¹⁰⁷ Consideration should also be given to requiring a condemning authority to pay an amount sufficient to replace the lost conservation values if that replacement value exceeds the economic value of the easement or the damage thereto.¹⁰⁸

4. *Holder's Use of Compensation*

To satisfy the Treasury Regulation requirements relating to tax-deductible easements, many easement deeds state that the holder must use the proceeds it receives following extinguishment in a manner consistent with the conservation purposes of the original contribution.¹⁰⁹ State law governing the administration of charitable gifts may similarly require that the holder use any compensation received for the taking of a conservation easement for purposes similar to the original purpose of the gift.¹¹⁰ However, to ensure that funds devoted to the protection of conservation values on behalf of the public are redeployed for similar purposes (as opposed to being added to the nonprofit or government holder's general operating funds), it may be preferable to mandate that the issue be addressed in conservation easement deeds. Consideration should be given to mandating that conservation easements created after the effective date of the statute provide that holders must use the proceeds received upon condemnation,

¹⁰⁶ See CAL. CIV. PROC. CODE § 1240.055(g)(1).

¹⁰⁷ See *id.* § 1240.055(g)(1)(A)–(C); McLaughlin, *supra* note 2, at 1945–54.

¹⁰⁸ If condemning authorities were permitted to provide either replacement value or economic value, rather than the greater of the two, conservation easement-encumbered land could be a target for condemnation because the authorities might be able to find cheap replacement properties in remote areas and thereby obtain the subject properties at a bargain price.

¹⁰⁹ See Treas. Reg. § 1.170A-14(g)(6) (2009).

¹¹⁰ See, e.g., *State v. Rand*, 366 A.2d 183 (Me. 1976) (applying doctrine of *cy pres* to authorize relocation of park to nearby site upon condemnation of property that had been conveyed to city as a charitable gift to be used forever as a public park); UNIF. CONSERVATION EASEMENT ACT § 3 cmt., 12 U.L.A. 185 (2008) (“Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot be carried out because circumstances have changed . . . , courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust.”).

net of any proceeds that must be reimbursed to funders of the project, for purposes similar to the purpose of the easement.¹¹¹

As with the other proposed reforms to state conservation easement enabling statutes, those considering reforms dealing with condemnation should be mindful of the requirements that must be met for easement grantors to be eligible for federal tax incentives and other federal subsidies.

C. State Tax Credits

Pidot's Perspective:

To provide further inducement to the donation of conservation easements, some states provide extraordinary financial incentives in the form of state tax credits that, in some cases, may be sold by landowners to high-income taxpayers.¹¹² A bonanza to selected landowners and land trusts, these incentives have often proved to be a poorly conceived idea. Generous state tax-credit programs, when combined with federal tax incentives, can make a conservation easement “donation” into a profitable transaction, using public money to pay for tax credits that can be traded to highest-bracket taxpayers with an end result sometimes being conservation easements of uncertain quality that encumber whatever lands the investors choose. Needless to say, some states that have entered this arena have encountered serious abuses as well as uncontrolled tax revenue losses. Having learned from this experience, a few tax credit states have begun to impose caps on the number of credits that may be issued each year, as well as state oversight standards for conservation easements financed in this way. However, a deeper issue is whether limited resources available for state financing of land conservation ought to be used for the acquisition of private conservation easements without at least direct public oversight as to the lands to be protected and the terms of that protection. Public money devoted to such unsupervised private land conservation efforts can displace that which would otherwise be available to purchase parks and other public lands that have higher public values for conservation and recreation.

As with most states, to date Maine has wisely chosen not to adopt tax credits for conservation easement donations. Lest one think that this choice undermines land conservation, without this added financial incentive Maine has experienced

¹¹¹ Acceptable uses of a condemnation award might include the protection of land with similar conservation values through the acquisition of conservation easements or fee title, as well as the creation of or addition to a restricted stewardship endowment to be used to defray expenses associated with the administration and enforcement of the replacement property interests.

¹¹² See Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, YALE L.J. ONLINE (Mar. 31, 2008), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/conservation-easement-tax-credits-in-environmental-federalism/>.

extraordinarily high levels of easement donations by generous, conservation-minded landowners.

McLaughlin's Perspective:

States that offer transferable (and other) state tax credits to encourage conservation easement donations have determined that such donations are an important component of land conservation efforts in the state.¹¹³ In addition, over time, states have begun to impose increased conditions and limitations on their tax credit programs to cap the annual revenue loss and reduce abuses.¹¹⁴ Somewhat counterintuitively, the most generous state tax credit programs, which have engendered abuses, may stimulate reforms that will have the salutary effect of raising the standards with regard to easement acquisition and administration in the adopting states generally. Although a great deal of improvement is still needed, the state tax credit programs are relatively new, still evolving, and, because they often involve a significant expenditure of state funds, hopefully will serve as an impetus for much needed reforms.

States investing in conservation easements through tax incentive programs should consider three primary areas of reform. The first are reforms designed to ensure that the easements subsidized through the program protect lands with high conservation value. States should consider applying discriminating selection criteria and providing more credits for conservation easements of greater conservation value. States also should set high standards for prohibited uses and reserved rights in the easements to ensure appropriate protection of the conservation values.

The second set of proposed reforms relate to valuation. To ensure that the easements subsidized through the program are not overvalued, a state should consider implementing both appraisal content and review requirements. For example, requiring appraisers to use a model appraisal report that addresses in an organized fashion all relevant rules and issues would facilitate both compliance with the rules and review by state authorities. And imposition of a modest filing fee based on a percentage of the claimed value of an easement could help defray the cost of the appraisal reviews by state authorities.

The third type of reforms are those designed to ensure that the conservation easements acquired will actually protect the identified conservation values and provide the intended public benefits over the long term. Most of the reforms recommended in this Article fall into this category, including establishing an easement registration or tracking system; standardization of key easement terms, including those relating to transfer, amendment, and termination; imposing stewardship requirements on holders; and precluding the misapplication of common law real property rules and doctrines to easements. It would do little good

¹¹³ See Sundberg & Yang, *supra* note 91 (reporting that as of 2011, fifteen states offered tax credits for easement donations).

¹¹⁴ See *id.*; see also COLORADO TAX CREDIT AUDIT, *supra* note 28 (discussing reforms to the Colorado tax credit program).

to ensure that the protected lands have high conservation value and the easements are accurately valued if the public benefits to be derived from the easements may be lost over time through a variety of means that are relatively easy to guard against.

IV. CONCLUSION

All states have enacted some form of legislation that facilitates the creation of conservation easements. However, these state enabling statutes do not always contain the safeguards necessary to protect the public interest and investment in the easements. This short Article suggests a variety of reforms intended to build needed protections into state law. No longer should the public be willing to invest in conservation easements without assurance that the protected lands have high conservation value, the easements are accurately valued, and the easements will not erode or be lost over time due to, for example, inadequate recordkeeping, holder incapacity or mismanagement, confusion or controversy over applicable laws, misapplication of common law real property doctrines, or other legal infirmities.