CONSERVATION EASEMENTS AS CHARITABLE PROPERTY: FIDUCIARY DUTIES AND THE LIMITS OF CHARITABLE SELF-REGULATION

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I. INTRODUCTION

Suppose that Landowner purchased a twenty-acre parcel that is subject to a perpetual conservation easement that limits development to one residential structure. Donor's objectives in granting the easement were to preserve open space, swampland, and a lake located on the parcel. Greenacres, a nonprofit charitable corporation with 501(c)(3) status, owns the right to enforce the easement. Donor claimed a charitable income tax deduction for the easement.

Developer owns land contiguous to Landowner's parcel and has plans to develop a shopping mall. Developer offers to purchase two acres of Landowner's protected parcel for the purpose of constructing an entryway to the mall and access roads, and conditions the offer on Greenacres' release of the easement over those two acres. Developer offers to donate a conservation easement over two acres on Developer's parcel in exchange. Greenacres' Executive Director and board view the proposed transaction as a "win-win"—they believe it will foster good relations with Landowner and Developer without harming the charity. The board approves the transaction.

Did the board act appropriately in terminating the easement in exchange for an easement over other land? There has been a lively debate over whether state law or the Internal Revenue Code (IRC) constrains a charity's ability to terminate a perpetual easement.[1] Many commentators view the question as settled under both state law and the IRC. Under state law, they argue, perpetual conservation easements are restricted charitable gifts to which charitable trust law applies. It

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[1] *See* LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 23 (2007) (noting that this issue is the subject of controversy in the land trust community).

follows that the only avenue for terminating a perpetual easement is to obtain judicial authorization under the doctrine of *cy pres*, which authorizes courts to terminate or reform gift restrictions if Donor's original purpose can no longer be accomplished.[2] If Donor took an income or estate tax deduction for the value of the easement, these commentators view the IRC as imposing additional constraints: The IRC clearly requires that conservation easements for which a tax deduction is claimed be perpetual[3] and allows for extinguishment only if a court determines that changed conditions have rendered the accomplishment of the conservation purpose impossible or impractical.[4] The Internal Revenue Service (IRS) has determined

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[2] *See* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 677–84 (2007); Ann Taylor Schwing, *Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. (2013). At common law, still in force in many states, the charity must also establish that the donor had a general charitable intent. If the court determines that the donor had a specific charitable intent—an intent to accomplish the specific objectives articulated in the trust—but no broader, general charitable intent, then the gift will fail, and the property will be returned to the donor or the donor's estate. *See In re* Estate of Crawshaw, 819 P.2d 613, 620 (Kan. 1991); Nelson v. Kring, 592 P.2d 438, 443 (Kan. 1979); *In re* Estate of Coleman, 584 P.2d 1255, 1261 (Kan. App. 1978); *In re* Application of Syracuse Univ., 148 N.E.2d 671, 673 (N.Y. 1958) (holding that upon frustration of the conditions, the gift reverted to the donor's heirs regardless of whether the donor had expressly retained a reversion).

The Uniform Trust Code (UTC), which to date has been enacted in some form in 25 states (two states have introduced legislation to adopt the UTC in 2013, *Trust Code*, UNIF. LAWS COMM'N, http://uniformlaws.org/Act.aspx?title=Trust Code) (last visited Oct. 27, 2013), eliminates this implied reversion in donor or donor's heirs by creating a conclusive presumption that the donor had a general charitable intent. UTC section 413(a) reads:

> (a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:
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> (1) the trust does not fail, in whole or in part;
>
> (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
>
> (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

UNIF. TRUST CODE § 413(a) (2010).

[3] I.R.C. 170(h)(5)(A) (2006).

[4] 26 C.F.R. § 1.170A-14(g)(1), (g)(6)(i) (2012). Reading in part:

> If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in

that a conservation easement is protected in perpetuity if it is subject to "legally enforceable restrictions that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation,"[5] and cannot be terminated or swapped by the parties.[6]

The argument that state law and the IRC authorize termination only pursuant to a judicial finding of impossibility seems well supported by the logic and the text of relevant statutes.[7] Yet other commentators suggest the law is ambiguous. Some point to language in state conservation enabling acts that suggests the creation, modification, and termination of conservation easements can be handled by agreement between the parties, just like any other easement.[8] They also suggest

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> perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds . . . from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

Id. § 1.170A-14(g)(6)(i) (2012); *see also* Kaufman v. Comm'r, 136 T.C. 294, 307 (2011), *rev'd on other grounds*, 687 F.3d 21 (1st Cir. 2012) (stating that the regulation "appears to be a regulatory version of the doctrine of cy pres to deal with unexpected changes that make the continued use of the property for conservation purposes impossible or impractical").

[5] INTERNAL REVENUE SERV., GENERAL INFORMATION LETTER NO. 2012-0017, at 2 (Mar. 5, 2012), *available at* http://www.irs.gov/pub/irs-wd/12-0017.pdf.

[6] Consistent with this, courts have upheld the IRS's denial of a charitable deduction when the conservation easement deed expressly allows the parties to swap or terminate the easement without judicial approval. *See* Carpenter v. Comm'r, 103 T.C.M. (CCH) 1001, 1005 (T.C. 2012) (holding that an easement which, by its terms could be extinguished by mutual agreement of the parties was not perpetual under the Code and was therefore not tax deductible); Belk v Comm'r, 140 T.C. 1, 14–15 (2013) (finding that a conservation easement was not perpetual because the easement's terms allowed swaps).

[7] This position is consistent with the RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000). The Restatement treats conservation easements differently than ordinary easements, and expressly provides that conservation easements can be terminated only through a judicial cy pres proceeding. *See also* Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment after* Carpenter*,* Simmons*, and* Kaufman, 13 FLA. TAX REV. 217, 245–50 (2012) (arguing that an easement for which a deduction was claimed can be extinguished only pursuant to the judicial proceeding required by the regulations).

[8] For instance, the Uniform Conservation Easement Act provides that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements." *See* UNIF. CONSERVATION EASEMENT ACT § 2(a), 12 U.L.A. 179 (2008). In 2007, the comments to the Act were amended to make it clear that the language in 2(a) was not intended to displace or override state charitable trust law, to the extent it applies. *See* McLaughlin, *supra* note 2, at 684–85. Notwithstanding that, Jessica Jay suggests that a "plain reading" of the Act allows termination by the parties because the drafters could have incorporated

that a perpetual easement for which a tax deduction was taken can later be swapped,[9] and that because the IRC does not grant the IRS authority to challenge the tax deductibility of an easement once the three-year statute of limitations has passed, charities may be free to terminate easements after that time.[10] Although these arguments are analytically weak, they appear to hold some currency in the land trust community.

This debate, while important, neglects consideration of other critical legal issues. The law governing the termination and tax deductibility of conservation easements is not the only law the charitable board must consider when making a decision to terminate a conservation easement. A charity's right to enforce a conservation easement is a property right, and both state law and the IRC impose a variety of constraints on the management of charitable property. Under state law, a charity's board of directors and executives are fiduciaries who owe legal duties to donors and the public at large. The IRC imposes limits on management of charitable property as a condition for granting tax-exempt status. A charitable board that authorizes the termination or swap of an easement without carefully considering state law and the Code more broadly may put the health of the charity at risk, endanger the charity's tax-exempt status, and expose individual board members to the risk of personal liability.

Unfortunately, a board like Greenacres might approve termination of a perpetual easement without adequate consideration of these broader legal rules.

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trust law directly into the text of the statute but did not. *See* Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1, 26–27 (2012).

[9] In *Carpenter*, the tax court held that an easement that was by its terms extinguishable by agreement of the parties, did not meet the Code's definition of "perpetual." *Carpenter*, 103 T.C.M. (CCH) at 1005. In *Belk*, the tax court held that a conservation easement was not perpetual when the easement's terms allowed swaps. *Belk*, 140 T.C.M. at 14–15. From this, some have drawn the dubious conclusion that an easement that purports to be perpetual and is silent as to termination can later be terminated without adverse tax consequences. Others use these cases to support the argument that the judicial approval regulation merely creates a "safe harbor" and does not rule out other means of termination. *See* Jay, *supra* note 8, at 11. The Tax Court has specifically rejected these arguments. *See* Carpenter v. Comm'r, 106 T.C.M. (CCH) 62 (2013), *denying reconsideration of and supplementing* 103 T.C.M. (CCH) 1001 (2012) ("To make our position clear, extinguishment by judicial proceedings is mandatory . . . . we reject petitioners' argument that section 1.170A-14(g)(6), Income Tax Regs., contemplates any alternative to judicial extinguishment."); Mitchell v. Comm'r, 108 T.C.M. (CCH) 215 (2013), *denying reconsideration and supplementing* 138 T.C. 24 (2012) ("the specific provisions of section 1.170A-14(g), Income Tax Regs., such as paragraph (g)(6), are mandatory and may not be ignored"); B.V. Belk v. Comm'r, 105 T.C.M. (CCH) 1878 (2013), *denying reconsideration of and supplementing* 140 T.C. 1 (2013) (reiterating that a conservation easement that authorizes swaps is not eligible for a deduction).

[10] Jay, *supra* note 8, at 12–13.

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Nonprofit charities operate in a unique environment that can generate poor decision-making procedures. Charitable boards are immune from the pressures of the marketplace that for-profit entities face. Moreover, they are often staffed with volunteers who do not perceive themselves as responsible for monitoring the Executive Director and other board members. As a consequence, directors may fail to obtain full information about the proposed transaction and applicable legal principles. In this setting, groupthink may occur—directors may simply acquiesce in the course of action that the dominant board member or Executive Director proposes. When groupthink is triggered, good people can make bad decisions.

The following essay will explain the state and federal law principles that constrain a nonprofit's management of charitable property, and the impact of the broader law on a board's decision to terminate a perpetual conservation easement. It also explains how board dynamics can lead well-meaning boards to make decisions that run afoul of these legal constraints.

II. CONSERVATION EASEMENTS AS CHARITABLE PROPERTY

The right to enforce a charitable easement is a property right under state law. The holder of the enforcement right must manage that right as it would any other charitable asset. Both state law and federal tax law place constraints on a charity's ability to manage charitable property. Sections A and B explain those constraints. Section C considers how those legal rules are relevant to the question of whether to terminate a conservation easement.

A. State Law Restraints on the Management of Charitable Property: Fiduciary Duties

Under state law, boards of directors and executives (the charity's fiduciaries) owe duties to the charity and to the public at large. These duties require the charity's fiduciaries to manage charitable property to promote the best interests of the charity, to accomplish the charity's charitable mission, and to refrain from placing private interests ahead of the best interests of the charity. The following sections explain the fiduciary duties of care, obedience, and loyalty.

1. The Fiduciary Duties of Care and Obedience

In every state, a charitable board owes a duty of care to the charity and the public at large. The duty of care requires directors to act in good faith and to exercise reasonable care while making key decisions, managing the charity's activities, and supervising the charity's executives.[11] Directors must ensure that the

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[11] *See, e.g.*, CAL. CORP. CODE § 5231 (West 2011) (requiring a director to perform duties "in good faith, in a manner such director believes to be in the best interest of the

charity's activities further the accomplishment of the charitable mission.[12] This specific directive is sometimes characterized separately as the duty of obedience.[13] Most courts that have considered the issue have determined that directors owe a duty of care regardless of whether they are paid.[14]

In determining whether a charity's directors have breached their duty of care, many courts have extended the protection of the business judgment rule, which applies to for-profit corporations, and to nonprofit directors.[15] Under this standard, a director who was informed, acted in good faith, and without a conflict of interest will not be held liable for breach of duty.[16] The party challenging a transaction has the burden to prove that the presumption of the business judgment rule should not apply by showing that the director was not informed, did not consciously make a decision or exercise judgment, or that the transaction or activity involved a conflict of interest.[17] Alternatively, the challenger may establish that the director did not rationally believe the decision was in the best interests of the charity.[18]

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corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances"); N.Y. NOT-FOR-PROFIT CORP. LAW § 717 (McKinney 2013) (directing that directors shall discharge their duties "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances"); REVISED MODEL NONPROFIT CORP. ACT § 8.30(a)–(b) (2008) (requiring that a director discharge his or her duties in good faith, "with the care that a person in a like position would reasonably believe appropriate under similar circumstances" and "in a manner the director reasonably believes to be in the best interests of the nonprofit corporation"); *see also* MARION FREEMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 201–07 (2004) (explaining the common law duty of care applicable to nonprofit corporations, and establishing that forty-three states have codified the duty of care).

[12] Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575, 593 (N.Y. Sup. Ct. 1999).

[13] *See, e.g.*, Queen of Angels Hospital v. Younger, 66 Cal. App. 3d 359 (1977); Brown v. Memorial National Home, 329 P. 2d 118 (Cal. App. 1958); Consumers Union of U.S., Inc. v. State, 806 N.Y.S.2d 99, 112 (N.Y. 2005); Manhattan Eye, Ear & Throat Hosp., 715 N.Y.S.2d at 592–97.

[14] *See* FREEMONT-SMITH, *supra* note 11, at 204.

[15] *See, e.g.*, Beard v. Achenbach Memorial Hosp., 170 F.2d 859, 862–63 (10th Cir. 1948); Janssen v. Best & Flanagan, 662 N.W.2d 876, 883 (Minn. 2003); Mahan v. Avera St. Luke's, 621 N.W. 2d 150, 154–56 (S.D. 2001). In the nonprofit context, courts and commentators sometimes refer to this standard of review as the "best judgment rule." JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS, CASES AND MATERIALS 152–53 (4th ed. 2010).

[16] *See* FREEMONT-SMITH, *supra* note 11, at 209–10.

[17] *See id.*; *see also* FISHMAN & SCHWARZ, *supra* note 15, at 151.

[18] FREEMONT-SMITH, *supra* note 11, at 209–11. Freemont-Smith states that the question whether the business judgment rule should apply to charitable boards is not settled in all states, including New York.

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The State Attorney General, who represents the public interest, has the authority to intervene when boards breach their fiduciary duties.[19] In theory at least, directors who breach their fiduciary duties may be held personally liable to the charity or removed.[20]

2. The Duty of Loyalty

The defining characteristic of the nonprofit corporation is the "nondistribution constraint"—the promise that profits shall not be distributed to owners, but will be applied toward accomplishing the charity's mission.[21] This concept is expressed in the fiduciary duty of loyalty. The duty of loyalty requires charitable fiduciaries to refrain from placing self-interest ahead of the charity's best interests, and to ensure that transactions involving conflicts of interest are handled responsibly and in a way that is fair to the charity.[22] If a court determines that a transaction was unfair to the charity, the transaction may be voided. The court may also assess damages and other remedies against individual board members[23] or remove them from the board.[24]

If a transaction is challenged, most courts will presume the deal was fair to the charity if (1) the conflicted directors establish that they both disclosed the conflict and the material terms of the deal to the board (or a committee of the board), and

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[19] *See id.* at 305–14, 324–28 (discussing development of rule allowing Attorney General to enforce fiduciary duties); FISHMAN & SCHWARZ, *supra* note 15, at 226–31.

[20] In fact, directors are rarely held personally liable, for a few reasons: first, because a lawsuit alleging mismanagement by charitable directors can damage or destroy the charity, most cases settle or are resolved even before formal proceedings are filed. Second, many states have indemnification statutes that allow charities to indemnify officers found liable for breach of duty. FREEMONT-SMITH, *supra* note 11, at 227–29.

[21] *See* Henry Hansmann, *The Role of the Nonprofit Enterprise*, 89 YALE L.J. 835, 838–42 (1980).

[22] *See, e.g.*, CAL. CORP. CODE § 5233(d)(2)–(3) (West 2011) (providing that directors must obtain advance approval after full disclosure of conflict of interest transactions to avoid liability); REVISED MODEL NONPROFIT CORP. ACT §§ 8.31, 8.33(a) (2008) (stating that a conflict of interest "is a transaction with the corporation in which a director of the corporation has a direct or indirect interest" and that a director shall not be personally liable for authorizing such a transaction if the transaction was fair at the time it was entered into or approved in advance by a disinterested board and providing that a director who assents to a transaction that violates the duty of loyalty shall be held personally liable to the corporation "for the amount of the distribution that exceeds what could have been distributed without violating this act"). *See generally* FREEMONT-SMITH, *supra* note 11, at 219–20 (2004).

[23] *See supra* note 11 and accompanying text; *see also* FREEMONT-SMITH, *supra* note 11, at 219–225.

[24] FISHMAN & SCHWARZ, *supra* note 15, at 185–86 (discussing several cases wherein courts held charitable directors personally liable for millions of dollars in damages).

(2) the transaction was approved by a vote of the majority of disinterested directors.[25] If the directors cannot meet this burden, then they most prove that the terms of the conflict of interest transaction were fair to the charity and advanced its best interests.[26]

Courts come down hard on conflicts of interest and can be quite expansive in determining whether a conflict of interest exists. For example, in *In re Estate of Rothko*,[27] the court held the three executors of painter Mark Rothko's estate personally liable for selling and consigning many of Rothko's paintings to an art gallery in which the executors had a personal interest. One executor, Reis, was a director, secretary, and treasurer of the gallery, and so the court's determination that Reis operated under a conflict was fairly uncontroversial. But the court determined that a second executor, Stamos, was also was under a conflict of interest, even though Stamos was not employed by or affiliated with the purchasing entity. Because Stamos was a "not-too-successful artist, financially," it was in his interest to curry favor with the gallery.[28] In fact, Stamos later sold some of his paintings to the gallery. Thus, Stamos's decision to go along with the transfers to the gallery was a violation of his duty of loyalty because he placed his personal interests ahead of the best interests of Rothko's estate. The trial court found Stamos and Reis liable for more than $9 million dollars in damages. Although the third executor, Levine, was not operating under a conflict of interest, the court found that his failure to object to the transactions constituted a violation of his duty of care and found him liable for more than $6 million.[29]

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[25] *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 715 (McKinney 2013) (providing that a transaction involving a conflict of interest is not voidable solely because of the conflict if the material facts were disclosed to the board in advance of the vote to authorize the transaction and was approved by a majority of the independent directors or a majority of the independent committee members who voted on the transaction); REVISED MODEL NONPROFIT CORP. ACT § 8.31 (2008) (same).

[26] The 1987 version of the Revised Model Nonprofit Corporation Act provides that a conflict of interest transaction is not void or the basis for imposing liability if it is either (1) fair to the corporation; or (2) was approved by a majority of the disinterested directors, or a committee of the board, after full disclosure, and the voting board members "in good faith reasonably believed" that the transaction was fair. REVISED MODEL NONPROFIT CORP. ACT § 8.31.

[27] 372 N.E.2d 291 (N.Y. 1977).

[28] *Id.* at 294.

[29] *Id.* at 291.

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B. Internal Revenue Code Constraints on the Management of Charitable Property: Proscriptions on Private Benefit, Private Inurement, and Excess Benefit Transactions

Although the IRS is not explicitly authorized to challenge the tax-deductibility of a conservation easement that has been terminated after the expiration of the statute of limitations,[30] they can invoke other IRC provisions to challenge the charity's actions. The IRC contains several provisions that mirror the state law duty of loyalty and it conditions tax-exempt status on a charity's compliance with those provisions. Like the fiduciary duty of loyalty, these rules are designed to ensure that charitable assets are used consistently with the charity's mission and not to benefit individuals.

Specifically, the IRC requires that a charity be operated exclusively in furtherance of a charitable purpose and not for a private benefit.[31] It also authorizes the IRS to levy tax penalties when a charitable transaction generates "excess benefits" for insiders.[32] If a nonprofit regularly engages in these types of transactions, the IRS can revoke its tax-exempt status on the grounds that it is operated for private inurement.[33]

C. The Right to Enforce as Charitable Property

Let us return to the Greenacres example in the introduction. How should state law and the IRC affect the board's decision-making process? The following sections explain.

1. The Duties of Care and Obedience

A decision by Greenacres' board to release or swap the easement might violate the duty of care, imperil Greenacres' ability to be the recipient of

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[30] Jay, *supra* note 8, at 12–13 (noting the difficulties the IRS would have in enforcing the perpetuity requirement after the expiration of the statute of limitations).

[31] The private benefit doctrine requires charities to abstain from conferring more than an incidental private benefit on individuals other than insiders. I.R.C. § 501(c)(3) (LexisNexis 2013); Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii) (2012).

[32] I.R.C. § 4958(a)–(c) (2006) (imposing penalties on "disqualified persons" who engage in "excess benefit" transactions, and the manager that approves them, and defining "excess benefit transaction" as "any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit").

[33] I.R.C. § 501(c)(3) prohibits charities from engaging in transactions that result in inurement of charitable funds to insiders. *See* I.R.C. § 501(c)(3) (LexisNexis 2013); Treas. Reg. § 1.501(c)(3)–1(c)(2) (2012).

conservation easements in the future (especially donations for which Donor seeks a deduction), and jeopardize Greenacres' tax exempt status. This section will first analyze the issue assuming that the current landowner purchased the land when it was already subject to the easement. Second, it will explore how the analysis might change if the current landowner had donated the easement but is now in favor of an exchange or termination.

First, consider the hypothetical transaction assuming that Landowner did not donate the easement, but purchased the land subject to it. It is clear that the IRS might challenge the validity of Donor's tax deduction if the statute of limitations for such a challenge has not yet run. This would put Donor (or Donor's executor or heirs, if Donor is deceased) in the unenviable position of having to defend the charity's actions. This casual disregard for Donor's best interests is arguably a breach of the charity's duty of care. Moreover, authorizing the swap might cause financial and reputational damage to the charity. If the terms of the deal become known, the fact that Greenacres is willing to put the tax deductibility of a donated easement at risk might chill future donations. Given that the charity will be required to report this transaction on its annual Form 990, it is not inconceivable that prospective donors will become aware of the relinquishment.[34]

Second, because there is a strong likelihood that state law might conceptualize the conservation easement as a restricted gift,[35] the swap might catch the eye of the state Attorney General, who could argue that the restriction cannot be terminated—even pursuant to a swap—unless the charity can meet the requirements of *cy pres*. Greenacres would lose this argument because it would not be able to establish that compliance with the terms of the perpetual easement was impossible or impracticable. Even if it could, a court would be unlikely to terminate the easement

[34] *See* IRS, INSTRUCTIONS FOR SCHEDULE D (2012), *available at* http://www.irs.gov/pub/irs-pdf/i990sd.pdf.

[35] Jurisdictions differ over whether the act of making a charitable donation with restrictions creates an actual charitable trust. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003) (stating that an unrestricted gift to a charity does not create a trust while a gift made for a specific purpose does), *and* Chattowah Open Land Trust v. Jones, 636 S.E.2d 523, 525–27 (Ga. 2006) (holding that devise of land to be used for qualified conservation purposes as described in Section 170(h) created a charitable trust, even though the testator did not use the terms "trust" or "trustee"), *with* N.Y. NOT-FOR-PROFIT CORP. LAW § 513 (providing that a donee of a restricted gift is not a trustee). Nonetheless, courts that have considered whether a charity can deviate from a donor's restrictions uniformly hold that the cy pres standard applies when a charity seeks relief from a donor's restrictions. *See, e.g.*, St. Joseph's Hosp. v. Bennett, 22 N.E.2d 305, 306–10 (N.Y. 1939) (holding that a charitable corporation must abide by gift restrictions unless it obtains *cy pres* relief from the court); Georgia O'Keeffe Found. (Museum) v. Fisk Univ., 312 S.W.3d 1, 15–20 (Tenn. Ct. App. 2009); *see also* John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 708–09 (explaining that restricted gifts impose upon the charitable donee a trust-like duty to abide by the terms of the gift); McLaughlin, *supra* note 7, at 231–33.

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if it could modify it to better accomplish Donor's conservation purpose. Therefore, the board's decision to terminate the easement threatens to place Greenacres on the losing side of a conflict with the Attorney General. Because engaging in this conflict will require Greenacres to divert resources away from accomplishment of its mission, it is inconsistent with the board's duties of care and obedience.

In addition to attracting attention from the Attorney General's office, Greenacres might also find itself the target of protests from the executor or heirs of Donor's estate. Although historically, only the Attorney General has standing to enforce a donor's restricted gift, courts have made exceptions, especially where the Attorney General has declined to enforce.[36] Moreover, the Uniform Trust Code changes centuries-old law to provide that creators of charitable trusts have standing to enforce the trust's terms.[37] Although it is not clear whether a court would extend this provision to restricted gifts not held in trust, or to actions by Donor's estate or heirs, the possibility exists.

Thus, there might be a strong case that Greenacres' board breached its duty of care when it authorized the transaction. But could Greenacres' directors avoid liability by invoking the protection of the business judgment rule? The answer depends on whether Greenacres' directors made a fully informed, thoughtful decision that they reasonably believed advanced the charity's best interests. For reasons explained in Part III, charities may neglect to engage in informed and thoughtful decision-making processes. If Greenacres' directors rubber-stamped the transaction, they may not be protected. Moreover, because termination of an easement seems to undermine the charity's mission, the directors may have

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[36] *See* Howard v. Adm'rs of the Tulane Educ. Fund, 986 So. 2d 47, 50 (La. Ct. App. 2007) (holding that a "would-be heir or legatee" has standing to enforce a restricted gift); Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (holding that the widow of a donor who contributed ten million dollars to the hospital to establish an alcohol rehabilitation center had standing to enforce intent of the donor where two successive Attorneys General filed certificates of discontinuance). For articles exploring the issue of donor standing, see Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1143–50 (2005); Robert A. Katz, *Can Principal-Agent Models Help Explain Charitable Gifts and Organizations?*, 2000 WIS. L. REV. 1, 22–24 (2000).

[37] The Uniform Trust Code Section 405(c) provides: "The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust." UNIF. TRUST CODE § 405(c), 7C U.L.A. 486. The comments to that section state,

> Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests.

Id.

difficulty establishing that they had a good faith belief that the decision was in the charity's best interests.

Now suppose instead that the current landowner is also the donor of the conservation easement. Landowner is eager to agree to the swap because she will make money from the sale of the two acres to Developer. Landowner has assured Greenacres that she is happy to take responsibility for dealing with the IRS if it challenges the deductibility or the value of her original donation. In this case, the charity might believe that it is justified in releasing the easement over two acres of the larger restricted parcel to maintain a positive relationship with Landowner.

What should the charity have to fear? There is no legal rule that prohibits charities from returning charitable gifts to donors. For example, in 1995, Yale University returned a $20 million gift from alumnus Lee Bass, who had made the gift to fund a program on the study of Western Civilization. Sometime after making the gift, but before Yale implemented the program, Bass demanded control over the hiring of professors who would staff the program. Yale rejected the demand and returned the gift.[38]

Did Yale's decision to return the donation constitute a breach of the fiduciary duties of care and obedience? The decision was risky. It had the potential to irreparably damage Yale's relationship with the Bass family, Yale's second largest donor, who had pledged more than $85 million in donations to that point. It might also have alienated other donors and potential donors who wanted to see the program established.[39] Notwithstanding those concerns, the board's decision did not constitute a breach of its fiduciary duties. There were no allegations that the decision to return the gift was made with inadequate information, deliberation, or care. Moreover, the board could have reasonably believed that the return of the gift was necessary to advance Yale's best interests. Yale's faculty, experts in their respective fields, had the authority to make hiring decisions, and the board could reasonably determine that ceding this authority to a donor with no particular expertise would have undermined, rather than advanced, Yale's ability to accomplish its educational mission. Because the funds were to be used to establish a new program, rather than to fund existing ones, the decision to reject the funds did not financially damage the University.[40]

Now, reconsider our Greenacres example. Would returning the easement over the two acres to Donor in exchange for cash or a new easement be similarly justifiable? Could Greenacres' directors reasonably, and in good faith, believe that

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[38] Barbara Carton, *Yale, Unwilling to Cede Faculty Control, Decides to Return $20 Million Bass Gift*, WALL ST. J., Mar. 15, 1995, at B2.

[39] Ryan E. Smith, *The Bass Grant: Why Yale Gave $20 Million Back*, YALE HERALD, http://www.yaleherald.com/archive/xix/3.24.95/news/bass.html (last visited June 21, 2013) (quoting two alumni who stated that the decision discredited the University and would make alumni less willing to donate).

[40] *Id.* (stating that "returning the money will not make Yale any worse off and will only return it to the 'status quo ante'").

releasing the easement was in the charity's best interests? On one hand, releasing the easement would make the developer (who may be a prominent and influential member of the community) and the landowner (with whom Greenacres will have a continuing relationship, given that she still owns land subject to Greenacres' conservation easement) very happy. But that consideration is not directly relevant to the charity's conservation mission. If the board agrees to terminate the easement for money, it might argue that the infusion of cash will generate funds necessary to meet overhead or purchase land or other easements (although it would have difficulty explaining why violating its mission was a better way to attract funds than simply launching a fundraising campaign). If it agrees to a swap, Greenacres' board would be hard pressed to establish that the decision protects and advances the charity's mission, given that the charity's promise to enforce the restriction in perpetuity was consistent with the very essence of its mission. At the very least, the board must determine that the land it receives pursuant to the swap is at least as valuable, from both a financial and ecological perspective, as the land it is now making available for development.

On the other hand, releasing the easement to enable development could seriously damage the charity's credibility and chill future donations of easements and funds. After all, the organization agreed to enforce the restriction in perpetuity, which allowed Donor to take a tax deduction. Yet, now the board is releasing the easement without obtaining a judicial determination that the easement's objectives are impossible or impracticable to achieve, which is a violation of the Uniform Trust Code's requirements. This practice has the potential to damage the charity's reputation. Again, the charity must report this transaction on its annual Form 990, which prospective easement donors might read.

Most importantly, absent unusual circumstances there is no way the board could credibly argue that termination of the easement was necessary to *advance* Greenacres' charitable mission. Given that, Greenacres' act of approving the transaction renders the charity vulnerable to legal action—the state Attorney General might seek a judicial determination that Greenacres is not qualified under state law to be the recipient of conservation easements on the ground that it is not being operated for a charitable purpose.

Moreover, the transaction could catch the eye of the IRS. The current version of Form 990 requires a charity to report the number of easements it holds, including details about all easements that were exchanged, modified, transferred, or extinguished during the year.[41] The IRS might argue that the transaction violated the IRC's prohibition on private benefit, because the swap generated financial benefits for the landowner.[42] It might also determine that Greenacres is

[41] IRS, *supra* note 34, at 2.

[42] *See* I.R.S. Priv. Ltr. Rul. 201110020 (Mar. 11, 2011) (finding that charity violated the private benefit doctrine when it amended an easement to allow two houses on the land subject to the easement, when the original easement limited development to one home).

not being operated exclusively for exempt purposes, but that its true purpose is to facilitate tax avoidance.[43] The strength of this case would depend on whether Greenacres holds other easements, whether it has engaged in other transactions of this type, and whether it actively polices the land subject to the easements it holds. If the IRS prevails on these points, the donation will lose its tax-exempt status and will no longer be a qualified donee.[44]

Even if the Attorney General or IRS is willing to settle, the very fact that the charity's risky behavior caused it to devote charitable assets to defending the board's actions is problematic. If the charity, knowing of the conflict over whether a perpetual easement can be modified, proceeds without court approval, its behavior may meet the standard of gross negligence that would justify imposing personal liability.

In considering whether to accept Landowner's proposal to lift the restriction, the board should consider all of the above issues. If it does not, the board risks losing the protection of the business judgment rule.

In addition, if environmentally-minded groups or individuals become aware of the arrangement, they may attempt to enforce the restrictions. Some state statutes give neighboring landowners standing to enforce a conservation easement.[45] In other states, the plaintiffs would have to convince the court that they have a special interest[46] in enforcing the easement. Key factors courts consider in determining whether to grant special interest standing include: (1) the extraordinary nature of the acts complained of and the remedy sought by the plaintiff; (2) whether there was fraud or misconduct; (3) the effectiveness or availability of the State's Attorney General;[47] and (4) the nature of the benefitted class and its relationship to the charity.[48] Although an unrelated third party or

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[43] *Id.*

[44] Section 170(h)(1)(B) of the IRC stipulates that a conservation easement will be tax deductible only if granted to a "qualified organization," defining a qualified organization as one that meets the requirements of Section 501(c)(3) of the IRC. I.R.C. § 170(h) (2013).

[45] *See, e.g.*, 765 ILL. COMP. STAT. ANN. 120/4-c (West 2001) (granting standing to "the owner of any real property abutting or within 500 feet of the real property subject to the conservation right").

[46] Hicks v. Dowd, 157 P.3d 914, 921 (Wyo. 2007).

[47] For example, in *Hicks*, the Wyoming Supreme Court held that a citizen lacked standing to enforce a conservation easement and "invited" the Wyoming Attorney General to enforce the easement. *Id.* at 921 ("[G]iven our holding that Appellants do not have standing, the Attorney General has the opportunity to reassess his [decision not to participate in the litigation].").

[48] *See* Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 61–78 (1993) (describing factual elements influencing state courts' willingness to allow private parties to sue to enforce charitable obligations); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1191 (2007) (describing how those with a special interest have an interest in filing enforcement actions).

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group might be unable to establish the requisite special interest to bring suit, the bad publicity that any such court action would generate should give the Greenacres board pause.

2. *Conflicts of Interest: the Duty of Loyalty, Private Inurement, and Excess Benefit*

If a proposed transaction involves conflicts of interest, the board who rubber stamps it could find itself in very serious trouble. To illustrate, suppose that Landowner is also on Greenacres' board, or that a Greenacres' director will earn consulting or other fees in connection with the transaction.[49] If the transaction is challenged under state law, Greenacres could not invoke the protection of the business judgment rule, because it does not apply to transactions involving a conflict of interest.[50] This means that the board would have the burden to prove that approval of the transaction was in Greenacres' best interest. Moreover, if the conflicts were not fully disclosed and approved by a majority of the board in advance, the directors might face personal liability if they cannot establish the overall fairness of the transaction. If the transaction catches the eye of the IRS, the IRS might seek to impose financial penalties against the charity and Landowner on the ground that the transaction conferred an excess benefit on Landowner. Worse case, the IRS could allege that the transaction violates the Code's prohibition on private inurement and seek to revoke the organization's tax-exempt status.

As the *Rothko* case teaches, a board must also be alert to conflicts of interest that stop short of direct self-dealing. To illustrate, a conflict would exist if one or more of Greenacres' directors are investors in the developer's project, or even if they have engaged in unrelated business projects with the developer. Or perhaps a Greenacres' director has donated a separate conservation easement to Greenacres, and approves the transaction with the hope that the board will later afford similarly lenient treatment to him if he later wishes to swap or terminate. If any of these conflicts exist, they must be fully disclosed in advance. Ideally, the transaction should be approved in advance by the majority of the independent board members. If the board members fail to take these steps, they risk significant exposure to legal liability.

III. THE LIMITS OF SELF-REGULATION

The first part of this essay establishes that Greenacres' board might violate one or more fiduciary duties if it authorizes the termination of the easement over

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[49] *See* I.R.S. Priv. Ltr. Rul. 201110020 (Mar. 11, 2011) (holding that organization violated the private inurement rule when its President earned consulting fees in the process of modifying an easement).

[50] *See, e.g.*, Scheuer Family Found., Inc., v. 61 Assocs., 582 N.Y.S.2d 662 (N.Y. App. Div. 1992).

two acres of the protected parcel. Yet there is a strong chance that the board will approve the transaction without considering or appreciating the significant legal risks of its course of action. The following section explains the factors that may lead well-intentioned charitable boards to make poor decisions that cause harm to the charity.

The nonprofit charity has unique structural characteristics that render it vulnerable to poor decision-making procedures. First, charities are subject to little to no outside monitoring. This may be especially true of certain land trusts and other charities that have been created for the sole purpose of holding conservation easements and are not dependent upon foundation or government grants. State Attorneys General and the IRS are generally the only significant monitors of these boards. But because those government actors lack sufficient resources to adequately monitor every charity, boards often operate in relative privacy. Second, volunteer boards are more likely to make decisions without adequate information. Finally, board culture may discourage board members from assuming the role of monitor. These three variables can combine and cause the board to engage in groupthink: board members may defer to the views of the dominant board member or Executive Director instead of engaging in informed and independent deliberation. When this occurs, well-intentioned board members can make very poor decisions.

A. Lack of Monitoring

To understand why charities often operate with a great deal of privacy, it is useful to compare the charitable nonprofit to the for-profit corporation. In the for-profit context, there is a clear benchmark for measuring board performance—shareholder value. Thus, share price can serve as a measuring stick for evaluating board performance. For-profit boards are accountable to shareholders. Although individual shareholders may be ineffective monitors, institutional shareholders are not, and individual shareholders may free ride off their efforts. Shareholders who become dissatisfied with the board's performance have a variety of options: they may bring a derivative suit on the corporation's behalf, vote to replace directors, or simply sell their shares. This last option is the one most frequently exercised. If enough shareholders sell, share price declines and the board becomes vulnerable to a takeover. This pressure to keep stock price up and avoid takeovers incentivizes for-profit boards to act to maximize shareholder value.[51] In addition, directors and executives may also be shareholders, which may create additional incentives to maximize corporate value.[52]

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[51] *See* Melanie B. Leslie, *The Wisdom of Crowds? Groupthink and Nonprofit Governance*, 62 FLA. L. REV. 1179, 1186 (2010).

[52] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 8–10, 91 (1991) (noting that in the for-profit context, "[t]he smaller the

Things are very different in the nonprofit context. To begin with, the benchmark for measuring the effectiveness of the charitable board is more nebulous—how can a donor tell if the board is doing an adequate job of accomplishing its charitable mission?[53] Moreover, charitable boards have little accountably because no one has a financial incentive in the enterprise.[54] There are no shareholders to police director behavior. The directors are not accountable to anyone for the bottom line, nor are they called upon to defend declining share price, or the lack of success of the nonprofit's programs. Directorships are generally unpaid, and thus there is no job market pressure. Directors need not fear corporate takeovers. It is unlikely that directors will personally suffer negative financial consequences if the board performs poorly. With occasional exceptions, donors do not generally have standing to sue for breaches of fiduciary duty.[55] In sum, the charitable board's duties extend to an amorphous public, which lacks incentive or standing to enforce the board's fiduciary duties.[56]

Donors are generally ineffective monitors, exerting very little pressure on board performance. Most individual donors donate to charity based on the attractiveness of the cause and the public perception of a charity's effectiveness, which can be based largely on marketing efforts. Some donors may make a cursory investigation prior to donating money—for instance, information readily available online may indicate the percentage of charitable funds that the charity devotes towards overhead.

In the conservation easement context, the monitoring ability of potential donors has been enhanced by recent amendments to the IRS Form 990, which requires land trusts to state the number of easements they hold and provide details about recent amendments, transfers, releases, or extinguishments. Motivated

managers' share in the enterprise, the more the manager's interests diverge from the interests of those who contributed capital").

[53] *See* Leslie, *supra* note 51, at 1186–88; *see also* Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 639 (1998) ("The generality of the [New York] statutory provisions [stating 'a corporation shall be managed by its board of directors'] may create false comfort . . . in many nonprofit directors who assume that a little governance activity and a lot of fundraising will suffice. The generality may also raise unrealistic expectations in state charity regulators or judges, who may take the word 'managed' literally.").

[54] *See* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 616 (1999) ("Any person served by the entity has an interest in seeing that it is run properly, but no one person is likely to have the incentive, the ability, or the information necessary to monitor the charity. Further, beneficiaries are unlikely to have standing to enforce their rights as beneficiaries.").

[55] Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 79–81 (2005).

[56] *See* Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 466–67 (1996).

prospective donors can find the charity's 990 form online with little effort.[57] Whether this knowledge will exert pressure on charitable boards to exercise care in terminating easements depends on their estimation of donors' motives. To the extent that particular boards believe that donors care mostly about receiving the tax deduction, donor monitoring will have little effect. If a charity's donors are comprised of landowners who truly care about perpetual conservation, knowledge that the information about a release may become public may have a monitoring effect.

The market for government, corporate, and foundation grants may discipline not-for-profit fiduciaries. Competition for corporate and private foundation grants is significant, and these entities often require detailed financial disclosure as a condition for repeat giving. These funders often pay close attention to the charity's governance methods and effectiveness.[58] But this pressure may be insufficient to discipline smaller land trusts who do not actively engage in fundraising from foundations or the government.

B. The Culture of the Nonprofit Board

The second factor that can lead to poor decisions is board culture. Board members may not view themselves as monitors and may not fully understand the extent of their fiduciary responsibilities.[59] Directors may join boards out of some mix of altruism and belief in a nonprofits' mission,[60] and a desire for the social

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[57] *See* GUIDESTAR, http://www2.guidestar.org/Home.aspx (last visited June 21, 2013).

[58] The Urban Institute's study shows that the level of a nonprofit's reliance on government funding is positively associated with having an outside audit, a separate audit committee, a conflict of interest policy, and a whistleblower policy. *See* FRANCIE OSTROWER, THE URBAN INST., NONPROFIT GOVERNANCE IN THE UNITED STATES: FINDINGS ON PERFORMANCE AND ACCOUNTABILITY FROM THE FIRST NATIONAL REPRESENTATIVE STUDY 1, 6 (2007), *available at* http://www.urban.org/UploadedPDF/411479_Nonprofit_Governance.pdf.

[59] *See* Leslie, *supra* note 51, at 1198–1201; *see also* FISHMAN & SCHWARZ, *supra* note 15, at 154 (noting that "an active or investigative approach" to governance issues "may be considered out of place in the genteel world of many nonprofit boards").

[60] As Professor Deborah A. DeMott explains,

> [D]irectors' motives and incentives for service on nonprofit boards differ dramatically from motives and incentives in the for-profit environment. . . . Board members often join because they believe in an organization's mission and contribute to it with financial donations. They depend heavily on organization management to set the board's agenda and provide information to the board. Many large nonprofits also have relatively large boards. Some actors in this environment reportedly believe that directors who make financial contributions have a reciprocal entitlement to self-deal.

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connections, prestige, and positive self-image that come with group membership. Because fundraising is a critical need, board members may be recruited for their organizational abilities and contacts. In some organizations, Executive Directors may be instrumental in recruiting board members and choose friends and other sympathetic individuals.[61] Nonprofit directors are more likely to view the board as performing a supportive function.[62] This view might be encouraged by the Executive Director, who may interpret board interest in executive decisions as "meddling." In any event, directors may not feel that intense monitoring is necessary because they view other directors and executives as "good people."

In addition, board members are volunteers who have careers, families, other professional commitments, hobbies, and social lives. Even the most well intentioned board members may find that conflicting demands on their time result in inadequate preparation for, or sporadic attendance at, board meetings.[63] The need to prioritize among conflicting demands can also cause directors to adopt the least costly approach to problem solving.[64] Because board members are generally volunteers, there may be no stigma attached to this behavior.[65]

> Indeed the prospect of self-dealing may entice some directors to serve and to make financial contributions to the organization.

Deborah A. DeMott, *Self-Dealing Transactions in Nonprofit Corporations*, 59 BROOK. L. REV. 131, 140 (1993).

[61] *See* Kathleen Fletcher, *Building Diverse Boards: Lessons From a Case Study of Planned Parenthood Affiliates*, *in* PERSPECTIVES ON NONPROFIT BOARD DIVERSITY 15, 15 (1999), *available at* http://www.transformativegovernance.org/Perspectives%20on%20Nonprofit%20Board%20Diversity.pdf ("First, new board members are typically recruited from among the friends, acquaintances, and business associates of those already on the board. This system, of course, tends to make boards homogeneous.").

[62] *See* Felicity Barringer, *Charity Boards Learn to be Skeptical*, N.Y. TIMES, Apr. 19, 1992, at 10 (quoting Daniel L. Kurtz for the proposition that "probing questions by charity board members have been viewed as 'simply bad manners'").

[63] Professor Evelyn Brody writes, "Nonprofit directors devote even less time and attention to their positions. Such affirmative board duties as selecting the chief officer, preparing the budget, and reviewing operations are likely to be carried out haphazardly or by only a few of the board members." Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1445–46 (1998). David Barrett stresses that "unlike for-profits, the board of many nonprofits consists of uncompensated volunteers. These volunteer directors are usually very busy people who hold other full-time jobs and simply do not have as much time to devote to their duties as most inside directors of for-profits." David W. Barrett, *A Call for More Lenient Director Liability Standards for Small, Charitable Nonprofit Corporations*, 71 IND. L.J. 967, 967 (1996); *see also* Goldschmid, *supra* note 53, at 633 (emphasizing that board members who fail to become involved are "corrosive" to nonprofit corporations).

[64] Of those charities responding to the Urban Institute's study, only about half were able to state that their boards were "very active" at financial oversight and fewer than half

C. Susceptibility to Groupthink

Groupthink describes a decision-making process that occurs when members value group cohesion and consensus more than the deliberative process.[66] The desire to be a valued member of the group, and the corresponding and often subconscious fear of the disapproval that might result from challenging the predominant view within the group, can lead group members to adopt views or concur in decisions that contradict their independent judgment, experience, intuition, or perception.[67] Groupthink also leads group members to adopt a "quid pro quo" mentality; the reciprocity norm leads group members to confer reciprocal benefits on one another.[68]

The absence of external monitoring combined with a board that does not take monitoring seriously can create fertile ground for groupthink.[69] Similar to for-profit boards, nonprofit boards are often comprised of people from similar social,

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were "very active" in monitoring the boards' own behavior. OSTROWER, *supra* note 58, at 12.

[65] The Urban Institute's Recent study found that boards which focus board-recruiting efforts on friends and acquaintances of current board members did less well with every aspect of governing except fundraising, where it had no impact. *Id.* at 16.

[66] *See* IRVING L. JANIS, VICTIMS OF GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 5 (2d. ed. 1978); CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 2–8 (2009); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–77 (2000).

[67] Irving Janis explains the studies,

> "Whenever a [group] member says something that sounds out of line with the group's norms, the other members first increase their communication with the deviant. Attempts to influence the nonconformist member to revise or tone down his dissident ideas continue as long as most members of the group feel hopeful about talking him into changing his mind. But if they fail after repeated attempts, the amount of communication they direct toward the deviant decreases markedly. The members begin to exclude him, often quite subtly at first and later more obviously, in order to restore the unity of the group. . . . [Experiments show that] the more cohesive the group and the more relevant the issue to the goals of the group, the greater is the inclination of the members to reject a nonconformist. Just as the members insulate themselves from outside critics who threaten to disrupt the unity and esprit de corps of their group, they take steps, often without being aware of it, to counteract the disruptive influence of inside critics who are attacking the group's norms."

JANIS, *supra* note 66, at 5.

[68] *See* Leslie, *supra* note 51, at 1191.

[69] *Id.* at 1198–1205.

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professional, or economic backgrounds.[70] These commonalities can increase group cohesiveness and the desire to belong, which correspondingly, can also increase the potential for groupthink.[71]

Vulnerability to groupthink also intensifies when individual group members lack sufficient knowledge to make an informed decision. In this instance, the uninformed group members can be strongly influenced by the views of the majority; if several group members share an opinion, other members may interpret that fact both as evidence of the validity of the opinion and as a signal of what the group expects from them.[72]

When groupthink occurs, boards will passively vote to support the vision of the dominant member. When that member seeks to terminate a conservation easement, groupthink may lead the board to disregard the constraints imposed by state fiduciary duty, law, and the IRC.

IV. CONCLUSION

Charitable organizations may occasionally be tempted to terminate conservation easements to appease donors, landowners, or prominent members of the community. Directors may rubber-stamp termination proposals out of a desire to be cooperative and supportive team players. This tendency to abdicate the monitoring role becomes more pronounced if board members lack full information about the terms of the transaction, especially if conflicts of interest are involved.

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[70] The more diverse a board, the less vulnerable it is to groupthink. Perhaps this is why the percentage of ethnic and minority group members is positively associated with having an outside audit, a separate audit committee, a conflict of interest policy, and a whistle blower policy. OSTROWER, *supra* note 58, at 6. The percentage of female board members positively correlates with having conflict of interest and whistleblower policies. *Id.* at 5.

[71] Groupthink is exacerbated by what social psychologists term "ingroup bias"—the tendency of members of a cohesive group to believe that the abilities and opinions of group members are superior to those of nongroup members. Ingroup bias causes group members to favor group members in a variety of ways, for instance when rating performance, assigning financial benefits, or in the willingness to advocate on behalf of other group members.

Individual cognitive limitations can also facilitate groupthink. For example, when faced with complicated issues, people exhibit "confirmation bias." People will seek out information that confirms their beliefs, interpret neutral information as confirming their beliefs, and will fail to seek out and ignore information that challenges their instincts. In group situations, this editing impulse can lead them to turn a blind eye to information that challenges the majority view of the group, and to absorb only that information that supports it. *See* Leslie, *supra* note 51, at 1190–96.

[72] *See* Sunstein, *supra* note 66, at 83 (citing TIMUR KURAN, PRIVATE TRUTH, PUBLIC LIES 4–21 (1995)).

Boards that take governance seriously will understand that termination decisions must be consistent with state law fiduciary duties of care, obedience, and loyalty. Because it is quite possible that a state court will determine that a conservation easement may be terminated only upon a judicial determination that accomplishment of the easement's purpose is impossible or impracticable, authorizing termination of an easement without court approval is a reckless move. Compounding the problem, the transaction might attract unwelcome attention from the IRS, the donor's family, or the public at large, causing the charity to suffer significant damage even if it prevails in litigation or reaches a settlement. There is a strong argument that the charitable board that terminates or swaps a conservation easement without judicial approval has abdicated its responsibilities to the charity.