

5-1-2006

Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy

Nancy A. McLaughlin

University of Utah S.J. Quinney College of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [Environmental Law Commons](#), [Land Use Law Commons](#), [Legislation Commons](#),
[Litigation Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. Rich. L. Rev. 1031 (2006).

Available at: <https://scholarship.richmond.edu/lawreview/vol40/iss4/3>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

AMENDING PERPETUAL CONSERVATION
EASEMENTS: A CASE STUDY OF THE MYRTLE GROVE
CONTROVERSY

Nancy A. McLaughlin *

Table of Contents

I.	Introduction.....	1032
II.	The Charitable Trust Rules in a Nutshell.....	1036
III.	The Myrtle Grove Controversy.....	1041
	A. The Easement Donation	1041
	B. The Millers' Purchase of the Encumbered Land	1044
	C. The Concept Approval Letter	1046
	D. The Controversy.....	1050
	E. The National Trust's Initial Defense of the Amendments.....	1052
	F. The National Trust's Withdrawal of its Conceptual Approval.....	1054
	G. The Litigation	1055
	H. The Settlement	1062
	I. The National Trust's Adoption of Amendment Policies and Procedures	1063
IV.	What Can Be Learned From the Myrtle Grove Controversy?.....	1064

* Professor of Law, University of Utah S.J. Quinney College of Law; J.D., University of Virginia. The author would like to thank Paul W. Edmondson, Vice President & General Counsel of the National Trust for Historic Preservation; Shaun P.K. Fenlon, Assistant Attorney General, Office of the Attorney General for the State of Maryland; Tom Mayes, Deputy General Counsel of the National Trust for Historic Preservation; and Stefan Nagel, former Assistant General Counsel of the National Trust for Historic Preservation, for their assistance with this article. This article also benefited greatly from comments received from Federico Cheever, Professor of Law, University of Denver Sturm College of Law; John H. Langbein, Sterling Professor of Law and Legal History, Yale Law School; Darby Bradley; K. King Burnett; Jeff Pidot; Ann Schwing; and Steve Swartz. Special thanks to James A. McLaughlin for his tireless support and assistance.

- A. Factors Contributing to the National Trust’s Mistake and the Relevant Law 1064
- B. Private Benefit 1070
- C. Amending Perpetual Easements Within the Charitable Trust Framework..... 1072
 - 1. Express Power to Amend 1072
 - 2. Implied Power to Amend 1074
 - 3. Public Oversight of Amendments..... 1077
 - 4. Shaping the Development of the Law 1078
 - 5. Standing 1079
- D. Assessing the Proposed Amendments in Myrtle Grove in the Charitable Trust Framework..... 1081
 - 1. The National Trust’s Amendment Discretion 1081
 - 2. Assessing the Likelihood of Court Approval of the Proposed Amendments..... 1082
 - 3. Negotiating for Neutral or Enhancing Amendments..... 1086
- V. Easements Outside of the Donation Context 1088
- VI. Conclusion 1092
- VII. Epilogue 1094

I. INTRODUCTION

Over the past quarter century there has been an explosive growth in the use of conservation easements as a land protection tool. A conservation easement is a deed transferred by the owner of the land encumbered by the easement to the holder of the easement (generally a government agency or a charitable conservation organization referred to as a “land trust”) that restricts the development and use of the land to achieve certain conservation goals, such as the preservation of open space, wildlife habitat, agricultural land, or an historic site.¹ The vast majority of conservation easements are granted “in perpetuity” because government agencies and land trusts generally acquire only perpetual ease-

1. Conservation easements also can encumber historic structures, requiring that the structures be maintained to a certain standard and prohibiting activities inconsistent with the preservation of the structures. See ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 210–37 (Land Trust Alliance, 2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK].

ments, and landowners donating easements are eligible for the various federal and state tax incentives only if the easements are perpetual.²

A number of factors have led the government at all levels and the nonprofit sector to increasingly rely on conservation easements to accomplish land protection goals, including mounting development pressures, a growing understanding of the need to incorporate privately owned land into conservation efforts, and a perceived inability to protect that land through regulatory measures. In addition, Congress and state legislatures across the nation, have encouraged and facilitated easement conveyances through the enactment of easement enabling legislation in all fifty states and the District of Columbia,³ the provision of generous federal and state tax benefits to easement donors,⁴ and the appropriation of significant public funds for easement purchase programs.⁵

In 1980, only 128,001 acres were encumbered by conservation easements held by the nation's local, state and regional land trusts, and by 2003 that number had grown to over five million.⁶ Similar growth in the use of conservation easements also has occurred in the Chesapeake Bay watershed.⁷ For example, the Vir-

2. See *id.* at 21; see also I.R.C. § 170(h)(1)(C), (5)(A) (providing that the conservation purposes of a tax-deductible conservation easement must be "protected in perpetuity").

3. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426 & n.13 and accompanying text (2005) [hereinafter *Rethinking*].

4. See Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1 (2004) (discussing the federal and state tax incentives) [hereinafter *Tax Incentives*].

5. See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 9 ("Over the last decade, more and more public agencies have established easement purchase programs and have funded the programs through a variety of financing mechanisms."); USDA Forest Service, Forest Legacy Update, available at http://www.na.fs.fed.us/legacy/liibrary/newsletters/pdf/fslegacy_july%202005.pdf (last visited Apr. 9, 2006) (noting that the Forest Legacy Program, through which the United States Forest Service provides federal funding for the purchase of conservation easements encumbering privately owned forest land, has contributed to the protection of over one million acres through \$207,900,966 of federal appropriations).

6. See *Rethinking*, *supra* note 3, at 423 & n.4 (noting that these figures do not include easements held by federal, state, and local government agencies, or by land trusts operating on the national level, such as The Nature Conservancy, which held conservation easements protecting 1.8 million acres as of the fall of 2003).

7. The Chesapeake Bay watershed covers 64,000 square miles and includes the District of Columbia and parts of six states—New York, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia. See U.S. Gov't Accountability Office, Chesapeake Bay Program: Improved Strategies are Needed to Better Assess, Report, and Manage Restoration

ginia Department of Conservation and Recreation reports that, as of June 2005, 274,358 acres in Virginia's portion of the Bay watershed were protected by perpetual conservation easements (up from 140,608 acres as of July 2000),⁸ and the Maryland Department of Natural Resources reports that, as of June 2005, 466,146 acres in Maryland's portion of the Bay watershed were protected primarily by conservation easements.⁹ Moreover, the use of and reliance on conservation easements to protect land both in the Bay watershed and nationwide is likely only to increase in the future.¹⁰

The growing use of and reliance on conservation easements to protect land raises a number of important questions. Federal and state legislators have encouraged and facilitated the creation of conservation easements because they expect such easements to provide benefits to the public over the long term. Whether conservation easements will live up to this expectation will depend upon a number of factors, including the significance and resilience of the conservation values of the encumbered land, the strength of the easement documents, the commitment and resources of the easement holders, and—perhaps most importantly—the nature of the legal framework supporting and governing conservation easements over time. I have addressed the issue of outright termination of conservation easements elsewhere,¹¹ and in this article I will employ a real-world case study to explore the related issue of easement amendments.

Progress 7–8 (Oct. 2005), available at <http://www.gao.gov/new.items/d0696.pdf> [hereinafter *GAO Report*].

8. E-mail attachment from David Boyd, Conservation Lands GIS Planner of VA-DCR, Division of Natural Heritage, to Nancy McLaughlin (Mar. 7, 2006) (on file with author).

9. E-mail from Kevin Boone, Acting Director of the Watershed Information Center, Maryland Department of Natural Resources, to Nancy McLaughlin (Mar. 13, 2006) (on file with author).

10. See, e.g., Rand Wentworth, President's Column, *Conservation Easements at Risk*, EXCHANGE: NAT'L J. LAND CONSERVATION, Summer 2005, at 3 ("The use of conservation easements is growing rapidly. In just five years, from 1998 to 2003, land trusts *tripled* the land area protected by easements to over five million acres. The Department of the Interior now holds over 12 million acres of easements, and, using Farm Bill funding, the Department of Agriculture is rapidly expanding its acquisition of easements."); *GAO Report*, *supra* note 7, at 31, 48 (noting that in their most recent agreement, *Chesapeake 2000*, Maryland, Pennsylvania, Virginia, the District of Columbia, the Chesapeake Bay Commission, and the EPA committed to "[p]ermanently preserve from development 20 percent of the land area in the [Bay] watershed by 2010" and "[p]rovide financial assistance or new revenue sources to expand the use of voluntary and market-based mechanisms such as easements").

11. See *Rethinking*, *supra* note 3.

Given that change is inevitable and predicting the future is impossible, it is clear that conservation easements need to be able to evolve over time so that they can continue to provide the conservation benefits for which they were acquired. But who should be entitled to make the decision to amend a "perpetual" easement, and what standards should be applied in determining whether and when such amendments are appropriate? Can the holder of a perpetual conservation easement and the owner of the encumbered land simply agree to amend the easement? Or is some form of public oversight required to ensure that appropriate consideration is accorded to both the intent of the easement grantor and the interests of the public?

This article explores the issue of amending perpetual conservation easements by examining the Myrtle Grove controversy, in which the National Trust for Historic Preservation in the United States (the "National Trust")¹² "conceptually approved" a request made by a successor owner of land encumbered by a perpetual conservation easement to substantially amend the easement. Several months later, as a result of public opposition to the amendments and a reassessment of its position, the National Trust withdrew that approval. The owner of the encumbered land subsequently filed a suit for breach of contract, and the National Trust and the Attorney General of Maryland defended the easement primarily on the ground that the easement constitutes a charitable trust and could not be amended as proposed without court approval in a *cy pres* proceeding.

The land protected by the Myrtle Grove easement is located on Maryland's Eastern Shore in the Chesapeake Bay watershed, so the controversy is close to home for proponents of protection and restoration of the Bay. The Myrtle Grove controversy has broader significance, however, in that it involved the approval by a well-intentioned easement holder of amendments that, in retrospect, seem clearly contrary to both the intent of the donor and the interests of the public. That a well-intentioned easement holder made what, in hindsight (and as it later acknowledged), was so

12. The National Trust is a congressionally-chartered private, nonprofit membership organization dedicated to saving historic places and revitalizing America's communities. See About the Trust at National Trust for Historic Preservation, http://www.nationaltrust.org/about_the_trust/ (last visited Apr. 9, 2006); Comments from Paul Edmondson, Vice President & General Counsel of National Trust for Historic Preservation 2 (Mar. 3, 2006) [hereinafter Edmondson March 3, 2006 Comments] (on file with author).

obviously a mistake dramatizes the need to clarify the legal framework within which decisions to amend perpetual conservation easements can be made.

To provide the necessary background, Part II of this article briefly describes the equitable rules that govern a charitable trustee's use and disposition of trust assets, including a trustee's express and implied powers and the doctrines of administrative deviation and *cy pres* (the "charitable trust rules"). Part III describes the Myrtle Grove controversy. Part IV discusses the lessons that can be learned from the Myrtle Grove controversy and the manner in which easements may be amended within the charitable trust framework. Part V discusses the application of charitable trust rules to conservation easements acquired outside of the donation context. Part VI concludes, noting that charitable trust rules operate as the ultimate backstop, permitting state attorneys general (and, when state attorneys general decline to become involved or are ineffective, parties with a "special interest") to object when the holder of a perpetual conservation easement agrees to modify or terminate the easement in contravention of its stated purposes and the public interest. Part VI also recommends that the agencies and organizations acquiring perpetual conservation easements proactively address the issue of amending those easements in manners consistent with their stated purposes, and consult with all potentially interested parties with regard to amendments that are likely to be controversial or are arguably inconsistent with the stated purpose of an easement.

Part VII contains a brief epilogue describing the status of the Myrtle Grove property and easement since the controversy.

II. THE CHARITABLE TRUST RULES IN A NUTSHELL

When a gift is made to a charitable organization without restrictions on its use or disposition, the organization may use the gift in whatever manner it sees fit, subject only to the general federal and state law requirements applicable to charitable organizations (including the requirement that the organization use its assets in accordance with its charitable mission and avoid conferring benefit on private individuals).¹³ Alternatively, when a gift

13. See *Rethinking*, *supra* note 3, at 431, 437-38.

is made to a charitable organization for a specified charitable purpose, the weight of authority indicates that, except to the extent granted the discretion either expressly or impliedly in the instrument of conveyance, the organization may not deviate from the administrative terms or charitable purpose of the gift without receiving judicial approval therefor under the doctrine of administrative deviation or *cy pres*—and that principle holds true whether the donor is treated as having created a charitable trust or merely as having made a restricted charitable gift (sometimes referred to as a “quasi-trust”) under state law.¹⁴ In addition, in many cases similar rules are applied to gifts made for specified charitable purposes to states as well as cities, towns, counties, and other municipalities (hereinafter, “government agencies”).¹⁵

14. See *Rethinking*, *supra* note 3, at 431–32 (and the cases cited therein).

15. See, e.g., *Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) (“It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of trust.”); *In re Estate of Heil v. Nevada*, 259 Cal. Rptr. 28, 29, 32 (Cal. Ct. App. 1989) (holding that provision in a California decedent’s will directing that the residue of his estate be “given to the State of Nevada for the preservation of the wild horses in Nevada” created a charitable trust and imposed an “imperative obligation” on the state); *State v. Rand*, 366 A.2d. 183, 186, 199 (Me. 1976) (holding that land deeded to a city to be “forever held and maintained . . . as a public park” created a charitable trust, and when the land was taken by eminent domain the court applied the doctrine of *cy pres* and directed that the compensation paid for the taking be used to establish a similar park in a nearby location); *City of Salem v. Att’y Gen.*, 183 N.E.2d 859, 860, 862 (Mass. 1962) (determining that a devise of a tract of land to a city “to be used forever as Public Grounds” was a devise of the tract in trust for use as a public park, and acceptance by the city of the devise created a contract, the obligation of which would be unconstitutionally impaired by a subsequently enacted statute authorizing use of a portion of the land for the erection of a public school building); *Nickols v. Comm’rs of Middlesex County*, 166 N.E.2d 911, 914, 916 (Mass. 1960) (holding that gift of shore and woodlands surrounding Walden Pond to the Commonwealth of Massachusetts “to aid the Commonwealth in preserving the Walden of Emerson and Thoreau” imposed a trust or obligation on the Commonwealth to use the shore and woodlands for that stated purpose and to refrain from taking actions contrary to that purpose); *City of Reno v. Goldwater*, 558 P.2d 532, 533–34 (Nev. 1976) (holding that acceptance by the city of a gift of land to be used “as a public park and playground” created a contract obligating the city to hold the land in trust for the people of the city to enjoy as a park and playground, and “that obligation could not later be impaired by legislative enactment”); *Lewis v. Bd. of County Comm’rs*, 128 N.E.2d 818, 819–20 (Ohio Ct. App. 1954) (holding that devise of testator’s residence and residue of his estate to a county “for the purpose of being kept, maintained and operated as a home for old ladies” created a charitable trust); see also Kevin A. Bowman, *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. CIN. L. REV. 595, 608 (1997) (noting that “[m]any courts, following a modern trend, have viewed a dedication of land to a municipality for park purposes as an expression of intent to create a [charitable] trust . . . [where] the municipality act[s] as trustee[] and the general public as beneficiary,” and that other courts have applied charitable trust principles to accomplish the same ends without directly finding that a charitable trust existed because trust principles provide the best means of enforcing the intent of the grantor). This article addresses conservation

Charitable trustees have "such powers as are conferred on them in specific words by the terms of the trust [i.e., express powers] or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust [i.e., implied powers]."¹⁶ For these purposes, the "terms of the trust" are not limited to the express provisions of the trust instrument, and include "whatever may be gathered as to the intention of the settlor from the trust instrument as interpreted in light of all the circumstances, and any other indication of the intention of the settlor which is admissible in evidence."¹⁷

Courts today are more apt to find that the settlor intended to confer broad powers on a trustee.¹⁸ In addition, the "fact that a charitable trust may continue for an indefinite period may have the effect of giving the trustees more extensive powers than they have in the case of a private trust, which is of limited duration."¹⁹ However,

[b]ecause of the [traditional] reluctance of many courts to find that the trustee has powers that are not clearly expressed in the trust instrument, and because of the resulting doubts that arise as to the existence of certain powers, it is customary in well-drawn trust instruments to make provisions in express words conferring upon the trustee powers that are or may become necessary or appropriate for the efficient administration of the trust.²⁰

"[T]o promote the proper administration of trusts and make it unnecessary to insert elaborate provisions as to the powers of the

easements conveyed to charitable organizations and state and local governmental units or agencies. The laws applicable to conservation easements conveyed to federal agencies are beyond the scope of this article.

16. See AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 380, at 320 (4th ed. 1989); see also *id.* § 186, at 9 (noting, for example, that "if the trustee is directed or authorized to raise a particular sum of money he will be impliedly authorized to do what is necessary to raise the money, by leasing the property, perhaps by selling it, and possibly by mortgaging it. Whether one or more of these powers is included will depend on the circumstances.").

17. SCOTT & FRATCHER, *supra* note 16, § 186, at 6-7; see also *id.* § 164.1, at 255 (noting that "evidence of the circumstances at the time of the execution of the instrument is admissible to determine the intention of the settlor as to matters not expressly and unequivocally covered by the trust instrument").

18. See SCOTT & FRATCHER, *supra* note 16, § 186, at 7; see also GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 551, at 47 (rev. 2d ed. 1980) (noting that "a great variety of implied powers have been found in trust instruments which occasioned litigation" and citing to a variety of cases).

19. See SCOTT & FRATCHER, *supra* note 16, § 380, at 320.

20. See SCOTT & FRATCHER, *supra* note 16, § 186, at 10.

trustee [in the trust instrument],” many states have enacted statutes that grant trustees “extensive administrative powers . . . unless the settlor expressly provided otherwise” in the trust instrument.²¹

Under the traditional formulation of the doctrine of administrative deviation, a court will authorize a trustee to deviate from an administrative term (as opposed to the charitable purpose) of a gift or trust if it appears that compliance with the term is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him, compliance with such term would defeat or substantially impair the accomplishment of the purposes of the gift or trust.²² The modern tendency, however, has been to permit a trustee to deviate from an administrative term of a charitable gift or trust in situations where continued compliance with the term is deemed to be “undesirable,” “inexpedient,” or “inappropriate,” and regardless of whether the settlor had foreseen the circumstances.²³

21. See SCOTT & FRATCHER, *supra* note 16, § 186, at 10; BOGERT & BOGERT, *supra* note 18, § 551, at 8; see also *id.* § 511, at 9–10 (noting that the Uniform Trustees’ Powers Act, which as of 2004 had been adopted in twelve states, provides that a trustee has the power, without court authorization, to perform every act that a prudent man would perform for the purposes of the trust including, but not limited to, the powers listed in the Act); DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 777–78 (7th ed. 2005) [hereinafter DUKEMINIER] (noting that the Uniform Trust Code, approved in 2000, “takes the strategy of empowering the trustee to its logical conclusion” in § 815, which authorizes the trustee to, inter alia, “exercise . . . any . . . powers appropriate to achieve the proper investment, management, and distribution of the trust property,” and the comment thereto, which states that § 815 “is intended to grant trustees the broadest possible powers”).

22. See RESTATEMENT (SECOND) OF TRUSTS § 167 (1959).

23. See SCOTT & FRATCHER, *supra* note 16, § 381, at 330 n.13; see also BOGERT & BOGERT, *supra* note 18, § 396, at 328–29 (noting that “[i]n some states court decisions or statutes authorize deviation whenever the settlor’s method of administration is found to be an ‘inexpedient,’ ‘impracticable,’ or ‘inappropriate’ means of carrying out the charitable purpose without regard to whether the change in circumstances was or could have been foreseen by the settler”); Report of Committee on Charitable Trusts and Foundations, American Bar Association, *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391, at 403 (1973) [hereinafter Report of Committee on Charitable Trusts] (noting that “[t]he decided cases, especially the more recent ones, suggest that the doctrine of deviation as set forth in the *Restatement* reflects neither what the law is nor what it should be. Even in the absence of changed circumstances, the tendency is to authorize deviation where literal compliance with the instrument has become impossible, impracticable, or inexpedient . . . [and] . . . it seems to be a rare case where the court dwells on whether changed circumstances were unforeseen by the grantor.”). For a classic example of the application of the doctrine of administrative deviation, see *In re Pulitzer*, 249 N.Y.S. 87 (Sup. Ct. 1931), *aff’d mem.*, 260 N.Y.S. 975 (App. Div. 1932), in which Mr. Pulitzer created a trust for the benefit of his descendants, funded it with stock in a corporation that published a newspaper, and forbade the trustees from selling the stock. *Id.* at

Under the doctrine of *cy pres*, if the purpose of a restricted charitable gift or charitable trust becomes “impossible or impracticable” due to changed conditions and the donor is determined to have had a “general charitable intent,” a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is “as close [] as possible” to the original purpose specified by the donor.²⁴ The doctrines of administrative deviation and *cy pres* are distinct in that the former applies to a modification of the *administrative terms* of a charitable gift or trust, and the latter applies to a modification of *charitable purpose* of a charitable gift or trust, although, in practice, the line between the two doctrines is less than precise.²⁵

Deference is accorded to the intent of charitable donors under the doctrines of administrative deviation and *cy pres* due to a deeply rooted tradition in our culture of respecting an individual’s right to control the use and disposition of his or her property, and a concern that failing to honor the wishes of charitable donors would chill future charitable donations.²⁶ However, because of so-

92. When the newspaper became unprofitable, the trustees sought and received judicial approval to sell the stock pursuant to the doctrine of administrative deviation. *See id.* at 94 (noting that “[t]he dominant purpose of Mr. Pulitzer must have been the maintenance of fair income for his children and the ultimate reception of an unimpaired corpus by the remaindermen”).

24. BOGERT & BOGERT, *supra* note 18, § 431, at 95; SCOTT & FRATCHER, *supra* note 16, § 399.2, at 489–90. For a classic example of the application of the doctrine of *cy pres*, see *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867) (when a trust created to promote the abolition of slavery became “impossible or impracticable” as a result of the adoption of the Thirteenth Amendment to the Constitution, the court applied the doctrine of *cy pres* and instructed the trustees to use the trust assets to aid former slaves and assist necessitous persons of African descent). *See also Rethinking*, *supra* note 3, at 479–80 (noting that “courts almost invariably find that the donor had a general charitable intent if the gift or trust fails after it has been in existence for some period of time . . . [and] . . . [a]t least seven states now apply a presumption of general charitable intent . . . and two—Delaware and Pennsylvania—have eliminated the requirement entirely”) (citing MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 177 (2004)).

25. *See, e.g.*, Report of Committee on Charitable Trusts, *supra* note 23, at 400 (1973) (noting that “in those cases where . . . application of one doctrine would lead to a result different from the use of the other, it is probable that the result which the court feels is equitable will control the court’s choice of doctrine”).

26. The modern tendency of courts to be more lenient in permitting trustees to deviate from the administrative terms (as opposed to the charitable purpose) of a gift or trust presumably is due to a recognition that permitting deviation from an administrative term is less likely to chill future donations than permitting deviation from the grantor’s charitable purpose. *See BOGERT & BOGERT, supra* note 18, § 561, at 227 (“The terms of the trust having to do with the manner in which the trustee should act in order to obtain the primary objectives are not on the same level of importance but are rather minor and auxiliary. The jurisdiction of equity to enforce trusts should and does include the power to vary the details of administration which the settlor has prescribed in order to secure the more impor-

ciety's interest in ensuring that assets perpetually devoted to specific charitable purposes continue to provide benefits to the public, those doctrines do place limits on a donor's ability to exercise control over charitable gift or trust assets. When an individual donates property to a government agency or charitable organization for a specified charitable purpose, the individual essentially strikes a bargain with the public—the individual is permitted to exercise control over the use of the property, but only so long as the prescribed use of the property continues to provide an appropriate level of benefit to the public.²⁷

The standards that must be met before a court will apply the doctrine of administrative deviation or *cy pres*, the representation of the interests of the public in such proceedings by the state attorney general,²⁸ and the vesting of ultimate decision-making authority in an independent arbiter—a judge—all help to ensure that in deviating from the terms or stated purposes of a restricted charitable gift or charitable trust, appropriate consideration is accorded to both the intent of the donor and the interests of the public.

III. THE MYRTLE GROVE CONTROVERSY

A. *The Easement Donation*

In 1975, Margaret Donoho ("Donoho") donated a perpetual conservation easement encumbering Myrtle Grove to the National Trust.²⁹ Myrtle Grove is an historic 160-acre tobacco plantation located at the confluence of the Miles River and Goldsborough Creek on Maryland's eastern shore.³⁰ As indicated in Appendix A,

tant result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have.").

27. See *Rethinking*, *supra* note 3, at 459–60 (citing Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114–15 (1993)).

28. See SCOTT & FRATCHER, *supra* note 16, § 391, at 357, 360–61 (noting that in administrative deviation and *cy pres* proceedings, the interests of the public, as beneficiary of the charitable gift or trust assets, are represented by the state attorney general, who is generally a necessary party to any such proceeding).

29. See Deed of Easement by Margaret Henry Donoho, Grantor, and the National Trust for Historic Preservation in the United States, Grantee 2 (Dec. 13, 1975) [hereinafter *Myrtle Grove Easement*] (on file with author).

30. See Motion to Intervene ¶ 3, at 2, Ex. B, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Nov. 4, 1998) [hereinafter *Motion to Intervene*] (on file with author).

much of the Myrtle Grove acreage fronts on Goldsborough Creek, which flows into the Miles River, a tributary of the Chesapeake Bay.³¹

Myrtle Grove is the original homesite of the Goldsborough family, of whom Donoho was a direct descendant.³² Its historic buildings, including a manor house and law office, were constructed by the Goldsborough family in the 1700s, and are considered excellent examples of 18th century Maryland architecture.³³ The oldest portion of the manor house was built about 1734 by Robert Goldsborough for his son, Robert Goldsborough II.³⁴ Judge Robert Goldsborough III later built the tiny law office that stands close to the manor house and is considered to be the oldest law office in the United States.³⁵ The Myrtle Grove manor house, law office, outbuildings, and formal grounds are listed on the National Register of Historic Places.³⁶

Myrtle Grove remained in the Goldsborough family through the 19th and most of the 20th century.³⁷ Donoho's father, Robert Goldsborough Henry, took title to the original Myrtle Grove property in 1927.³⁸ When he died in 1963, Donoho received approximately 160 acres of the property, including the manor house and law office, and Donoho's brother received the remaining 425 acres.³⁹ Shortly thereafter Donoho's brother sold his share of the property for development into five-acre residential lots, known as

31. *See id.*, Ex. B.

32. *See* Complaint for Declaratory Relief at 3, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Jul. 9, 1998) [hereinafter Attorney General's Complaint] (on file with author).

33. *See* Answer and Cross-Claim of Defendant The National Trust, ¶ 9, at 5, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Jul. 24, 1998) [hereinafter National Trust's Answer and Cross-Claim] (on file with author). *See also* Maryland Historical Trust, <http://www.marylandhistoricaltrust.net/nr/NRDetail.asp?HDID=247&FROM=NRMapTA.html> (last visited Apr. 9, 2006) (describing the property and including a picture of the manor house).

34. *See* Memorandum in Support of Motion of Defendant Trustees Miller, Smolen and Reiner to Dismiss or, in the Alternative, to Stay and Enter into Court-Supervised Mediation at 5 n.3, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Oct. 5, 1998) [hereinafter Miller's Memorandum in Support of Motion to Dismiss or Mediate] (on file with author).

35. *See id.*

36. *See id.* at 5.

37. *See* Memorandum of Law in Support of Attorney General's Motion for Summary Judgment at 4, 8-9, *State v. Miller*, No. 98-003486 (Md. Cir. Ct. Oct. 20, 1998) [hereinafter Attorney General's Memorandum in Support of Summary Judgment] (on file with author).

38. *See id.* at 4.

39. *See id.*

the "Bantry subdivision."⁴⁰ Donoho deeply resented the Bantry subdivision because she felt it destroyed that land's open space character, and she was determined to protect her portion of the original Myrtle Grove property from similar development.⁴¹ After meeting with a representative of the National Trust, who informed her in a letter that "[t]his easement is perpetual and applies to future owners as well . . . A landowner who gives an easement can enjoy the feeling of knowing that his land will be forever protected from the pressure of destructive change," Donoho decided that she could best protect Myrtle Grove from undesirable development by donating a perpetual conservation easement to the National Trust.⁴²

The deed of easement encumbering Myrtle Grove states that the Grantor (Donoho) "desires to preserve the Myrtle Grove main dwelling and its surrounding site comprising some 160 acres . . . in substantially its present condition," and that the purpose of the easement is "preserving . . . protecting and maintaining the historic, architectural, cultural and scenic values of said land and the improvements thereon for the continuing benefit of the people of the State of Maryland and the United States of America."⁴³ The deed also states that by the conveyance and acceptance of the easement, the Grantor and the Grantee "evidenced their common purpose of preserving the historical and natural values of the land . . . and . . . improvements thereon . . . and preventing the use and development thereof in any manner in conflict with the preservation of such values."⁴⁴

The deed of easement prohibits certain activities, including: (i) subdivision of the land, except for one tract of not less than five acres that may be selected by a descendant of Donoho for the erection and maintenance of a single private residence (the "Heir's Lot"), (ii) the construction or maintenance of buildings or structures on the land other than the manor house, the law office, and outbuildings adjacent thereto; outbuildings commonly or ap-

40. *See id.* The location of the Bantry subdivision is indicated in Appendix A.

41. *See id.* at 4; Letter from Sally Griffen, Margaret Donoho's daughter, to Mr. Richard Moe, President, National Trust for Historic Preservation 1 (June 21, 1994) [hereinafter *Daughter's Letter # 2*] (on file with author).

42. Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 4-5; *Daughter's Letter # 2*, *supra* note 41, at 1-2.

43. Myrtle Grove Easement, *supra* note 29.

44. *Id.* at 2.

propriately incidental to a farming operation, including a caretaker's house; and the private residence on the Heir's lot; (iii) any alteration of the existing structures not in keeping with the historic character of the manor house and its setting, and (iv) any activities, actions, or uses detrimental or adverse to water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation.⁴⁵ The deed provides that the easement restricts the use of the land and improvements thereon "in perpetuity," and "run[s] as a binding servitude in perpetuity with the land."⁴⁶ There is no provision in the deed addressing its amendment.

Donoho claimed a federal charitable income tax deduction with respect to the donation.⁴⁷

B. *The Millers' Purchase of the Encumbered Land*

Donoho died in 1988. In 1989, Donoho's heirs, who apparently were unable to afford the inheritance taxes on Myrtle Grove, sold the property for \$3 million to a private trust established by a prominent Washington, D.C. developer, Herbert Miller, for the benefit of his wife (the "Miller Trust").⁴⁸ Shortly before and as a condition to the sale, Donoho's heirs exercised their right to subdivide the property and created a 45-acre "Heir's Lot," and both the Heir's Lot and the remaining 115 acres were sold to the Miller Trust subject to the easement.⁴⁹ However, Donoho's heirs agreed to the sale only after receiving written confirmation from the National Trust that the restrictions on the development and use of the property in the easement would be binding on all future owners of the land.⁵⁰ Before the sale was consummated, the attorney for Donoho's estate, who was assisting the heirs with the sale, asked Mr. Bierce, an historic architect who was then employed by the National Trust and responsible for administering its ease-

45. *See id.* at 3-4.

46. *Id.* at 2.

47. *See* Memorandum of Grounds and Authorities in Support of Defendant, The National Trust for Historic Preservation's Motion for Realignment as a Plaintiff at 2, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Jul. 24, 1998) (on file with author).

48. *See* Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 8-9.

49. *See id.* at 9.

50. *See id.*

ment program, how confident the heirs could be that the easement could “not be broken legally and that its restrictions will not dissolve over time . . . making possible previously prohibited activities or outright subdivision by a later purchaser.”⁵¹ Mr. Bierce responded that easement restrictions “never ‘dissolve’ over time;” that “any unauthorized subdivision can be enjoined and, effectively, reversed by the National Trust;” and that “the National Trust is committed to continuing the protection of the property.”⁵²

In 1990, the Miller Trust purchased a twenty-acre wood lot adjacent to Myrtle Grove’s main entrance drive from J. McKenny Willis, Jr. (the “Willis Parcel”).⁵³ The Willis Parcel, which was not encumbered by a conservation easement, had the potential to be developed into four or five residential lots.⁵⁴

Upon purchasing Myrtle Grove, and with the review and approval of the National Trust as required by the easement, the Miller Trust made substantial improvements to the property.⁵⁵ Those improvements included “restoration of the historic buildings, structural improvements to the manor house, removal of dilapidated structures, landscaping and tree reinforcement, installation of an entrance gate and fencing,” rebuilding and graveling of roads, and construction of a caretaker’s house, barn, pond, guest cottage, pool, pool house, tennis court, and garage apart-

51. See Letter from T. Hughlett Henry, Jr., Attorney for the Estate of Margaret Henry Donoho, to Mr. C. Richard Bierce, AIA, National Trust for Historic Preservation 1 (Jan. 3, 1989) (on file with author); see also Affidavit of Charles Richard Bierce ¶¶ 4, 6–7, *Miller v. The Nat’l Trust for Historic Pres.*, No. 00787-97 (D.C. Sup. Ct. Sept. 11, 1997) [hereinafter *Bierce Affidavit*] (on file with author). Mr. Bierce stated that he worked for the National Trust from 1980–89, that one of his responsibilities was to administer the easement program, and that in carrying out his easement responsibilities, he dealt with a number of different issues relating to the Myrtle Grove property and visited the property and met with Donoho on several occasions. *Id.*

52. See Letter from C. Richard Bierce, Director of Technical Services, Stewardship of Historic Properties, National Trust for Historic Preservation, to Mr. T. Hughlett Henry, Jr. 2–3 (Jan. 17, 1989) [hereinafter *Bierce Letter*] (on file with author).

53. See Complaint ¶ 5, at 3, *Miller v. The Nat’l Trust for Historic Pres.*, No. 00787-97, (D.C. Sup. Ct. Feb. 3, 1997) [hereinafter *Miller’s Complaint*] (on file with author); National Trust’s Answer and Cross-Claim, *supra* note 33, ¶ 13, at 7. The location of the Willis Parcel is indicated in Appendix A.

54. Defendant Trustees Miller, Smolen and Reiner’s Answer and Defenses to the National Trust’s Cross-Claim and Counterclaim Against the National Trust, ¶ 8, at 11, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Oct. 2, 1998) [hereinafter *Miller’s Answer to Cross-Claim and Counterclaim*] (on file with author).

55. See Attorney General’s Memorandum in Support of Summary Judgment, *supra* note 37, at 10; Miller’s Memorandum in Support of Motion to Dismiss or Mediate, *supra* note 34, at 6–7, n.4.

ment.⁵⁶ According to the Millers, the improvements cost over \$2.5 million.⁵⁷ The restoration of Myrtle Grove won the American Institute of Architects' 1993 Award for Excellence⁵⁸ and 1994 Washington Chapter Washingtonian Award.⁵⁹

In 1992, the Miller Trust attempted to sell the newly restored Myrtle Grove (along with the Willis Parcel) for \$6.5 million.⁶⁰ The Millers claimed that they wanted to sell the property because it cost more to maintain than they had anticipated.⁶¹ The property did not sell, even after the asking price was reduced to \$5.5 million, and the realtor who was working for the Miller Trust suggested that the property be subdivided, noting that he "thought it was the only way you could sell it" because "there aren't many people around who would spend \$6-1/2 million."⁶² At Mr. Miller's request the realtor prepared preliminary sketches of various subdivision options.⁶³

C. *The Concept Approval Letter*

In 1993, representatives of the Miller Trust approached the National Trust with a request to amend the easement to allow

56. See Miller's Memorandum in Support of Motion to Dismiss or Mediate, *supra* note 34, at 6-7, n.4; Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 10.

57. See Miller's Memorandum in Support of Motion to Dismiss or Mediate, *supra* note 34, at 7.

58. See *id.* at 7.

59. See Outerbridge Horsey Association Awards, <http://www.outerbridgehorsey.com/PAGES/Awards.html> (last visited Apr. 9, 2006) (noting the awards); see also Myrtle Grove, <http://www.outerbridgehorsey.com/PAGES/mrtlgrv.html> (last visited Apr. 9, 2006) (providing pictures and a description of the restored property).

60. See Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 11.

61. See *id.*

62. See *id.*

63. See *id.* at 11-12 (noting that the realtor estimated that the various subdivision options could net the Miller trust anywhere from \$4.2 million to \$4.6 million); see also Plaintiff The National Trust's Memorandum of Grounds and Authorities in Support of its Motion for Summary Judgment as to Defendant's Counterclaim and the National Trust's First and Second Cross-Claims Ex. 3, at 87-88, State v. Miller, No. 20-C-98-003486 (Md. Cir. Ct. Nov. 16, 1998) [hereinafter National Trust's Memorandum in Support of its Motion for Summary Judgment] (on file with author). Mr. Miller testified that the Millers had intended to sell the Heir's Lot in 1989 for \$700,000 to \$750,000, but they decided to wait until the work on Myrtle Grove was completed, and, in hindsight, they probably should have sold the lot in 1989 because the market was very strong then, and the "market crashed in '90, so there was no market by the time the work was completed on Myrtle Grove." See *id.*

the property outside of the formal grounds surrounding the manor house (i.e., outside the historic core) to be subdivided into a total of six residential lots.⁶⁴ The Millers contended that the amendments would “mitigate the financial burden of maintaining the Myrtle Grove property outside the historic core, ensure the long-term stability of the entire property, and permit the Miller Trust to convey portions of the property to the Miller children or others.”⁶⁵

In February of 1994, after discussions and exchange of correspondence between representatives of the Miller Trust and the National Trust, the National Trust provided the Millers with a “Concept Approval Letter” that confirmed and documented the terms and conditions on which the National Trust would consent to the amendment of the easement.⁶⁶ The Concept Approval Letter, which was signed by the President of the National Trust, provided, *inter alia*, that

- the easement would be amended to confine its original terms to a forty-seven acre “Historic Core” (which included the manor house, law office, outbuildings, and formal grounds);
- the easement would be further amended to permit the Heir’s Lot to be subdivided into three residential lots, each of which would be of roughly equal size and have a designated driveway and house site, but the design of the single family residence and the construction of ancillary structures permitted on each of the lots would not be subject to the approval of the National Trust;⁶⁷

64. Miller’s Complaint, *supra* note 53, ¶ 7, at 4; National Trust’s Answer and Cross-Claim, *supra* note 33, ¶ 14, at 7; Attorney General’s Memorandum in Support of Summary Judgment, *supra* note 37, at 12. As indicated in Appendix A, the Historic Core is located at the confluence of the Miles River and Goldsborough Creek.

65. Miller’s Answer to Cross-Claim and Counterclaim, *supra* note 54, ¶ 9, at 11–12. See also Edmondson March 3, 2006 Comments, *supra* note 12, at 9.

66. See Attorney General’s Memorandum in Support of Summary Judgment, *supra* note 37, at 12; Letter from Richard Moe, President, National Trust for Historic Preservation in the United States, to Mr. and Mrs. Herbert S. Miller 1 (Feb. 7, 1994) [hereinafter Concept Approval Letter] (on file with author).

67. According to Stefan Nagel, former Assistant General Counsel of the National Trust, the National Trust was not concerned about the design of the residences and construction of ancillary structures on these three lots because they were screened from the remainder of the Myrtle Grove property by a swale that was part of an adjacent lot, and the easement that would encumber the adjacent lot would require maintenance of the trees and underbrush in the swale that provided the screen. Telephone Interview with Stefan Nagel (Dec. 12, 2005) [hereinafter Nagel Interview].

- the remaining Myrtle Grove acreage (roughly sixty acres) would be subdivided into three additional residential lots following existing field boundaries, and each of those lots would be subject to conservation easements of their own that, *inter alia*, would require the National Trust's approval of the design, site, and screening of the single family residence and ancillary structures permitted on each of the lots;⁶⁸ and
- a one hundred foot strip running along the entrance drive to Myrtle Grove, which the Concept Approval Letter indicated was primarily part of the unprotected Willis Parcel, would be subject to an "open space buffer zone easement" restricting the cutting of trees and clearing of underbrush in the buffer zone, but no further building restrictions would be placed on the Willis Parcel (although the Willis Parcel could not be accessed from the Myrtle Grove entrance drive).⁶⁹

As illustrated in Appendix B, the amendments would have permitted the Myrtle Grove property (currently two lots) to be subdivided into a total of seven lots, each with its own single family residence and ancillary structures (such as pools, pool houses, and tennis courts).⁷⁰ The Millers would have retained the right to subdivide the Willis Parcel into four or five residential lots, subject to the restriction that the Willis Parcel could not be accessed from the Myrtle Grove entrance drive.

The Concept Approval Letter also provided that the National Trust was to receive a total of \$68,700 from the Millers, consist-

68. According to Mr. Nagel, the easements on these three lots would have been based on the National Trust's then current open space easement form, and would have, *inter alia*, prohibited fencing and included affirmative maintenance obligations. Comments from Stefan Nagel, former Assistant General Counsel of the National Trust for Historic Preservation 8 (Jan. 16, 2006) [hereinafter Nagel Comments] (on file with author).

69. See Edmondson March 3, 2006 Comments, *supra* note 12, at 10 (noting that the National Trust's assumption in the Concept Approval Letter that the open space buffer zone easement would protect land not already covered by the Myrtle Grove easement—a point later emphasized as one of the conservation benefits of the proposed amendments—proved to be mistaken; the land adjacent to the entrance drive, to a depth of 200 feet, was already protected by the Myrtle Grove easement; and this mistake was later cited by the National Trust in its defense against the breach of contract claim brought by the Millers).

70. Three of the residences to be built on the lots carved out of the Myrtle Grove property would be new (i.e., the three residences on the Heir's Lot); three would be converted from existing or previously approved structures (i.e., the caretaker's house, an unbuilt guest house, and the guest cottage); and the seventh would be the manor house in the Historic Core. See National Trust's Answer and Cross-Claim, *supra* note 33, ¶ 14, at 7; Edmondson March 3, 2006 Comments, *supra* note 12, at 11.

ing of: (i) a \$2,100 “easement amendment evaluation and closing fee” payable by the Millers upon their acceptance of the agreement outlined in the letter, (ii) a \$21,600 “easement endowment and enforcement fee” to provide the National Trust with funding to monitor and enforce the various easements, and (iii) \$15,000 from the sale of each of the three lots carved out of the Heir’s Lot.⁷¹

According to Stefan Nagel, who was the Assistant General Counsel of the National Trust during the negotiations,⁷² the National Trust viewed the proposed amendments as an opportunity to strengthen the easement by imposing affirmative obligations on the owners of the encumbered land to maintain both the historic structures and the surrounding grounds in a condition appropriate for property listed on the National Register of Historic Places.⁷³ Mr. Nagel also noted that, at the time the Concept Approval Letter was drafted, no one at the National Trust considered the possibility that the easement might constitute a charitable trust and, thus, that the National Trust might not have the legal authority to agree to the amendments without first receiving court approval in the context of an administrative deviation or *cy pres* proceeding.⁷⁴ According to Mr. Nagel, the National Trust relied on the Maryland easement enabling statute, which provides, in part, that a conservation or preservation easement “may be extinguished or released, in whole or in part, in the same

71. See Concept Approval Letter, *supra* note 66, at 5–6.

72. Mr. Nagel is now in private practice and specializes in the protection of environmentally and culturally significant properties nationwide.

73. Nagel Interview, *supra* note 67. According to Mr. Nagel: (i) at the time the Concept Approval Letter was drafted, the Myrtle Grove property outside the historic core was in “terrible shape,” in that it had become overgrown and there were a number of unfinished building foundations of cinderblocks and cement dotting the property, and the National Trust was concerned because nothing in the existing easement compelled the clean up of the property, and (ii) the proposed amendments would have required each of the residences other than those permitted on the Heir’s Lot to be located on the site of an unfinished foundation or an existing house. *Id.*; Nagel Comments, *supra* note 68, at 8. *But see* Bierce Affidavit, *supra* note 51, ¶ 17 (containing a statement in which Mr. Bierce, who had approved of a number of changes to the Myrtle Grove property after its purchase by the Millers on behalf of the National Trust, noted that “[i]t was not my intention in approving new structures on the property in 1989 to facilitate later subdivision of the property, or to permit those structures to serve as stand-alone residences,” and that, “[i]nstead, it was my intent to approve a limited number of new structures that would be subordinate (in both scale, siting, and purpose) to the main dwelling at Myrtle Grove, which had been the dominant structure on the property since the mid-Eighteenth Century”).

74. Nagel Interview, *supra* note 67.

manner as other easements,” as the underlying authority for its decision to proceed with the amendments.⁷⁵

However, not everyone at the National Trust appears to have shared the view that modifying the easement would be simply a private contractual matter between the National Trust and the owner of the encumbered land. Five years before the drafting of the Concept Approval Letter, Mr. Bierce (the historic architect who was then employed by the National Trust and responsible for administering its easement program) wrote in a letter to the attorney representing Donoho's heirs with regard to the sale of Myrtle Grove that conservation easement restrictions “never ‘dissolve’ over time;” that “[i]f there are substantial unforeseeable changes in the condition of the property, the property owner may petition a court for modification of the restrictions;” and that “[a]ny possibility of modifying the easement terms is so remote as to be negligible.”⁷⁶

The Millers accepted the terms and conditions set forth in the Concept Approval Letter by signing the letter and returning it, along with a check for \$2,100, to the National Trust.⁷⁷ In later court pleadings, the Millers alleged that they then spent a substantial amount of money taking preliminary steps to implement the agreement outlined in the letter, including engaging engineers and lawyers to prepare subdivision plans, making landscaping improvements, and submitting a proposed subdivision plan to the Talbot County Planning Commission.⁷⁸

D. *The Controversy*

The decision by the National Trust to agree to amend the easement and permit the subdivision of Myrtle Grove touched off a storm of protest from Donoho's family and conservation and preservation groups.⁷⁹ Donoho's daughter wrote to the National

75. MD. CODE ANN., REAL PROP. § 2-118(d) (LexisNexis 2003); Nagel Comments, *supra* note 68, at 2, 5.

76. See Bierce Letter, *supra* note 52, at 2.

77. See Miller's Complaint, *supra* note 53, ¶ 10, at 6.

78. See *id.*

79. See, e.g., Peter S. Goodman, *In Maryland, Fighting to Save a "Way of Life"; Family in Court to Protect Land, Fulfill Matriarch's Wishes*, WASH. POST., Mar. 20, 1998, at C1. (“[W]hen Donoho's relatives found out about the deal, they were outraged. They rallied a group of environmental organizations that saw matters similarly.”)

Trust to express her “sense of outrage and betrayal” at the proposed subdivision.⁸⁰ In a second, longer letter, she noted that:

The distinction the [National] Trust now makes between a “historic core” and the rest of the property would have made no sense to [Donoho] and makes no sense to my sister and me. Had [Donoho] been primarily preoccupied with architecture—with the eighteenth century buildings at Myrtle Grove—she could have kept the right to sell some of the farmlands and thus insured herself a much easier old age than she had. She was not a rich woman but chose to deny herself in order to preserve the land.

....

Those who have given easements to the Trust or are thinking of doing so will surely be horrified to find out about the transfer of development rights which a preservationist like my mother sacrificed for herself and her heirs to the next and current owner of Myrtle Grove. Under the proposed amendment, the family of a Washington real estate developer will reap the profits from sale of two-thirds of the farm, a profit which my mother had denied to her own family for the sake of historic preservation. I doubt that such a transfer of development rights is what Congress and the American taxpayer think they are supporting in their appropriations to the Trust.⁸¹

In a letter to the editor of the *Baltimore Sun*, Tyler Gearhart, the executive director of Preservation Maryland, Maryland’s oldest nonprofit historic preservation organization,⁸² noted that, upon learning in 1994 of the plans to subdivide Myrtle Grove, the organization “immediately began working to persuade the National Trust to withdraw from the agreement since it clearly conflicted with the easement it held on the property and potentially threatened the sanctity of preservation and conservation easements in Maryland.”⁸³ Other conservation and preservation organizations also objected to the proposed amendments.⁸⁴

80. Letter from Sally Griffen, to Richard Moe, President, National Trust for Historic Preservation 1 (June 16, 1994) (on file with author).

81. Daughter’s Letter # 2, *supra* note 41, at 1–3. Although Donoho claimed a federal charitable income tax deduction for the donation of the easement, it is unlikely that the resulting tax savings compensated her for more than a modest percentage of the reduction in the market value of the land that resulted from placing permanent restrictions on its development and use. *See Tax Incentives, supra* note 4, at 40.

82. *See* Preservation Maryland—About Us, <http://www.preservemd.org/html/aboutus.html> (last visited Apr. 4, 2006) (describing Preservation Maryland, founded in 1931).

83. Tyler Gearhart, Executive Director, Preservation Maryland, Letter to the Editor, *Easements a Valuable Tool for Protecting Heritage*, *BALT. SUN*, Jul. 27, 1998, at 8A.

84. *See, e.g.*, John Bernstein, Director, Maryland Environmental Trust, Letter to the

On June 1, 1994 (approximately four months after the National Trust sent the Concept Approval Letter to the Millers), the Talbot County Planning Commission tabled any further consideration of the Myrtle Grove subdivision proposal pending a determination as to whether the National Trust and the Millers had the legal authority to amend the easement.⁸⁵

E. *The National Trust's Initial Defense of the Amendments*

The National Trust initially defended its decision to agree to the amendments outlined in the Concept Approval Letter. In a June 6, 1994, letter written in response to an inquiry from Preservation Maryland, the Vice President of the National Trust outlined the factors that the National Trust had considered in deciding that the amendments were both "warranted and appropriate."⁸⁶ The letter first notes that Myrtle Grove had been listed on the National Register of Historic Places in 1974 "because of the significance of its manor house and immediate outbuildings (its 'historic core')," and that the other grounds, although extensive, were not included in the National Register nomination.⁸⁷ The letter also notes that, at the time the Millers acquired the property in 1989 (fourteen years after the donation of the easement), the property, and in particular, the manor house and law office were "in need of committed, affirmative maintenance to a degree that could not be required under the existing easement," and the Millers undertook that work and a number of other pro-

Editor, *To Preserve a Piece of the Eighteenth Century*, WASH. POST, Apr. 11, 1998, at A14 (noting that the Maryland Environmental Trust was one of the strongest objectors to the proposed amendments to the easement); Thomas J. Stolman, Chairman, Talbot County Historic Preservation Commission, Letter to the Editor, *To Preserve a Piece of the Eighteenth Century*, WASH. POST, Apr. 11, 1988, at A14 (noting the commission's involvement in fighting the 1994 attempt of the National Trust to agree to subdivide Myrtle Grove). See generally About MET, <http://www.dnr.state.md.us/met/aboutmet.html> (last visited Apr. 9, 2006) (describing Maryland Environmental Trust as a statewide land trust that works to preserve open land, such as farmland, forest land, and significant natural resources, primarily through the acquisition of conservation easements); Talbot County Historic Preservation Commission, <http://www.talbgov.org/pz/historic/historic.html> (last visited Apr. 9, 2006) (indicating that the commission was established in 1976 to preserve structures in the county that have historic value together with their environmental settings to, among other things, safeguard the heritage of the county and foster rural and civic beauty).

85. National Trust's Answer and Cross-Claim, *supra* note 33, ¶ 17, at 8-9.

86. Letter from Frank E. Sanchis, Vice President, Stewardship of Historic Properties, National Trust for Historic Preservation, to David Chase, Executive Director, Preservation Maryland 1 (June 6, 1994) [hereinafter Sanchis Letter] (on file with author).

87. *Id.*

jects that had enhanced the property.⁸⁸ The letter describes the benefits that would be gained from amending the easement, including:

- The addition of nearly .4 mile of scenic protection along the entrance drive leading to the historic core of Myrtle Grove through the encumbrance of the Willis Parcel with an open space buffer easement.⁸⁹
- New natural vegetation screening would be required between Myrtle Grove and the Bantry subdivision, which would better isolate Myrtle Grove from that incompatible development.⁹⁰
- The financial burdens associated with the management of the property would not be concentrated in one property owner, thus enhancing the ability of the owner of the historic core to devote funds and resources to the stewardship of that property.⁹¹
- All housing would be screened from the entrance road to enhance the visual experience of entering Myrtle Grove.⁹²
- The easements would reflect the latest developments in easement drafting, and vague and ambiguous language in the original easement would be clarified.⁹³
- The easements would impose affirmative maintenance obligations on the owners of the encumbered land that were not included in the original easement.⁹⁴

88. *Id.* According to Mr. Nagel, before the Millers purchased the Myrtle Grove property, a potential purchaser had backed out of a purchase deal because of the existence of the conservation easement. Nagel Interview, *supra* note 67. Mr. Nagel indicated that the Millers may have become comfortable with the idea of purchasing Myrtle Grove despite the easement because their attorney had formerly been an attorney with the National Trust and was comfortable dealing with the National Trust. *Id.*

89. Sanchis Letter, *supra* note 86, at 2; *see also supra* note 69 (noting that the National Trust's assumption in the Concept Approval Letter that the open space buffer zone easement would protect land not already covered by the Myrtle Grove easement proved to be mistaken).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1-3.

94. *Id.* at 2. In the context of the ensuing litigation, Mr. Nagel testified that staff of the National Trust had determined that the original deed of easement contained flaws that undermined the protection of Myrtle Grove. In particular, he noted that there was little in the deed requiring the owners of the encumbered land to maintain the property to a certain standard. *See Defendants' Opposition to Motions of Attorney General and Na-*

- Critical funds would be provided to the National Trust to monitor and enforce the easements.⁹⁵

The letter also offers the following as further justifications for the National Trust's decision to agree to amend the easement:

- Principles of contract and easement law recognize that amendments to agreements may be made by the parties thereto or their successors in interest.⁹⁶
- Contemporary preservation principles "recognize that properties need to be able to evolve provided their core significance is not qualified."⁹⁷
- The proposed amendments would not provide precedent for the amendment of other perpetual conservation easements because the proposed amendments involved a unique set of financial, property management, and property preservation circumstances.⁹⁸
- Other land trusts have been amending their easements pursuant to a policy that permits amendments if the net effect is either positive or neutral, and the proposed amendments would satisfy that standard because they would result in better protection of the characteristics of the property that make it historically significant and worthy of preservation.⁹⁹

F. *The National Trust's Withdrawal of its Conceptual Approval*

Shortly after the explanatory letter was issued, and with criticism continuing from a number of sources—including the National Trust's traditional partner organizations, such as Preser-

tional Trust for Summary Judgment at 14–16, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Dec. 1, 1998) (on file with author); Nagel Comments, *supra* note 68, at 13; *see also* Edmondson March 3, 2006 Comments, *supra* note 12, at 14 (noting that the easement required that the manor house and the law office be maintained and preserved in their condition at the time the easement was granted in 1975, which condition was good, but the proposed amendments would have provided more detailed maintenance standards at a higher level of condition).

95. Sanchis letter, *supra* note 86, at 3.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 4. At the time of the donation of the Myrtle Grove easement in 1975, the National Trust did not have formal amendment policies and procedures. *See infra* Part III.I (discussing the National Trust's adoption of amendment policies and procedures in May of 1995); note 171 and accompanying text (discussing amendment policies and procedures).

vation Maryland—Richard Moe, President of the National Trust, asked then general counsel David Doheny to commence a detailed investigation of the matter.¹⁰⁰ After conducting the investigation and meeting with a number of interested parties at the site, Mr. Doheny concluded that the National Trust had not considered its “fiduciary responsibility with respect to the easement” or “the intent of the donor” in approving the amendments.¹⁰¹

In a letter to the Millers dated June 27, 1994, Mr. Doheny stated that, after a careful review of the terms of the easement and the National Trust’s public purposes and fiduciary responsibilities, “it is clear that our concept approval to this proposed subdivision and easement amendment . . . was improvidently granted, and must now be withdrawn.”¹⁰² The letter notes that “the specific language of the easement itself flatly and unequivocally prohibits any further subdivision of the property,” and that “if easements, whether for the preservation of buildings or open space, may be amended by subsequent owners contrary to the intent of the grantor, the integrity of the entire Maryland easement program may be damaged.”¹⁰³

G. *The Litigation*

In February of 1997, the Miller Trust filed suit against the National Trust in the Superior Court for the District of Columbia for breach of contract seeking specific performance of the terms of the Concept Approval Letter or, in the alternative, damages in an amount to be proven at trial, but estimated to be not less than \$250,000.¹⁰⁴ In its defense against this suit, the National Trust argued, inter alia, that: (i) the Concept Approval Letter was “an agreement to agree” and, therefore, was not a binding contract, (ii) the conceptual approval of the amendments was procured on the basis of a mutual mistake of a material fact (i.e., the assump-

100. See Edmondson March 3, 2006 Comments, *supra* note 12, at 15; see also Melody Simmons, *Maryland Sues on Plan for Farm on Shore; Group had Decided to Allow Development of Protected Land*, BALT. SUN, July 10, 1998, at 1B.

101. See Attorney General’s Memorandum in Support of Summary Judgment, *supra* note 37, at 14 (internal quotations omitted).

102. Letter from David A. Doheny, Vice President and General Counsel, National Trust for Historic Preservation, to Thomas A. Coughlin 2 (June 27, 1994) (on file with author).

103. *Id.*

104. See Miller’s Complaint, *supra* note 53, at 2, 12.

tion that additional land would be protected through the open space buffer zone easement running along the Myrtle Grove entrance drive); and (iii) specific performance was not available in any event, since a forced amendment of the easement would violate public policy by forcing the National Trust to breach its charitable trust obligation to comply with the easement's prohibition against subdivision.¹⁰⁵

Following extensive discovery proceedings, and well over a year of litigation in the District of Columbia court,¹⁰⁶ the National Trust decided to expand its defense of the easement by pressing its charitable trust argument in a Maryland court.¹⁰⁷ According to Paul Edmondson, Vice President and General Counsel of the National Trust, the National Trust considered filing a separate, collateral suit in Maryland naming the Attorney General of Maryland as a necessary party, and asserting that the easement constituted a charitable trust and could not be amended as set forth in the Concept Approval Letter without receiving court approval in the context of a *cy pres* proceeding.¹⁰⁸ Mr. Edmondson states that the National Trust approached the Attorney General's office to discuss the National Trust's filing of the collateral suit, and the Attorney General eventually decided to bring a collateral suit directly, which was welcomed by the National Trust as enhancing its charitable trust defense.¹⁰⁹

On July 9, 1998, the Attorney General filed the collateral suit in Maryland, naming the Miller Trust and the National Trust as defendants, asserting that Donoho's donation of the easement created a charitable trust for the benefit of the people of Maryland, and asking the court to enforce the terms of the charitable trust.¹¹⁰ According to Mr. Edmondson, the naming of the National Trust as a defendant in the suit was a mere technicality since it was already defending the easement, and the National Trust was

105. See Edmondson March 3, 2006 Comments, *supra* note 12, at 16; see also *supra* note 69 (noting the mistake with regard to the open space buffer zone easement).

106. Despite the fact that the Myrtle Grove property is located in Maryland, the District of Columbia court had jurisdiction over the breach of contract claim because both parties were residents of the District and the alleged contract was entered into in that jurisdiction. See Edmondson March 3, 2006 Comments, *supra* note 12, at 16.

107. See *id.*

108. See *id.*

109. See *id.*

110. See Attorney General's Complaint, *supra* note 32.

immediately realigned by the court as a plaintiff in the case with the Attorney General's consent.¹¹¹

In its memorandum of law in support of its motion for summary judgment, the Attorney General pointed out that, in 1975, the people of Maryland received a charitable gift from Donoho in the form of a conservation easement preserving the scenic, natural, and historical characteristics of Myrtle Grove (and specifically prohibiting its subdivision) in perpetuity.¹¹² The Attorney General noted that, although, in general, an easement is an agreement that may be modified with the consent of the holder of the easement and the owner of the encumbered land, "Myrtle Grove is not a mere conservation agreement but a gift in perpetuity to a charitable corporation for the benefit of the people of Maryland" and "[a]s such, it is subject to a charitable trust."¹¹³ The Attorney General also pointed out that even though section 2-118(d) of the Maryland easement enabling statute provides that a conservation easement may be extinguished or released, in whole or in part, in the same manner as other easements, "[n]othing in [the] statute or its legislative history . . . indicates the legislature's intent to abrogate application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation."¹¹⁴

The Attorney General noted that "[a] trust exists where property (the 'legal estate') is owned by one person for the beneficial enjoyment of another;" the Myrtle Grove easement was donated by Donoho to the National Trust for the benefit of the people of Maryland; and "[t]he National Trust [thus] owns and holds the legal estate, the easement, for the continuing benefit of the people of the state of Maryland."¹¹⁵ As to whether the donation of the

111. See E-mail from Paul Edmondson, Vice President & General Counsel of National Trust for Historic Preservation, to Nancy McLaughlin (Jan. 23, 2006) (on file with author); Edmondson March 3, 2006 Comments, *supra* note 12, at 16-17; Defendant the National Trust's Motion for Realignment as a Plaintiff, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Jul. 24, 1998) (on file with author).

112. See Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 1.

113. *Id.* at 29-30.

114. *Id.* at 29. The Attorney General noted that the Maryland easement enabling statute "suggests exactly the opposite," because § 2-118(e) of the statute "provides for administration of [conservation easements conveyed for public purposes] under charitable trust laws." See *id.* at 29 n.11.

115. *Id.* at 15-16, 19 (internal quotations omitted); see, e.g., RESTATEMENT (SECOND) OF TRUSTS § 2 (1959) (defining a trust as "a fiduciary relationship with respect to property,

easement was properly characterized as "charitable," the Attorney General noted that

[a] charitable purpose may be found in almost anything that tends to promote the well-doing and well-being of social man . . . [and the] [d]onation of land for the purpose of conservation is a charitable purpose, as recognized by federal and state tax laws, which allow charitable deductions for these contributions, and the policies of the State of Maryland in its land preservation programs.¹¹⁶

As to whether Donoho manifested the requisite intent to create a charitable trust, the Attorney General noted that, even though the easement does not contain the words "charitable trust," the absence of those words is not controlling, and "Donoho's intent can be determined from the [deed] itself and from extrinsic evidence," both of which reflect her intent to preserve her land in perpetuity for the benefit of the people of Maryland.¹¹⁷

The Attorney General acknowledged that a trustee of a charitable trust may have both express powers (which are defined by the terms of the trust instrument) and implied powers (which are incident to the office of trustee).¹¹⁸ The Attorney General asserted,

subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it").

116. Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 21 (citation and internal quotations omitted); *see also* United Church of Christ v. Town of West Hartford, 539 A.2d 573, 578 (Conn. 1988) ("This court has recognized that the 'definition of charitable uses and purposes has expanded with the advancement of civilization and the daily increasing needs of men' . . . [c]harity embraces anything that tends to promote the well-doing and the well-being of social man."); RESTATEMENT (THIRD) PROPERTY: SERVITUDES (2000) § 7.11, cmt. a ("Because of the public interests involved, [conservation easements] are afforded more stringent protection than privately held conservation servitudes . . . and [t]heir importance, underscored by statutory requirements that they be perpetual, will continue to increase as population growth exerts ever-greater pressures on undeveloped land, ecosystems, and wildlife").

117. Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 20-21; *see also, e.g.*, Town of Chelmsford v. Greater Lowell Council Boy Scouts of Am., No. 261762, 2001 Mass LLR Lexis 89, at *21 (Mass. Land Ct. Apr. 26, 2001) ("No magical incantation, e.g., 'in trust,' is required to create a trust.") (quoting Hillman v. Roman Catholic Archbishop of Fall River, 24 Mass. App. Ct. 241, 244 (1987); DUKEMINIER, *supra* note 21, at 498 ("No particular form of words is necessary to create a trust. The words *trust* or *trustee* need not be used. The sole question is whether the grantor manifested an intention to create a trust relationship"); SCOTT & FRATCHER, *supra* note 16, § 2.8, at 50 ("An express trust may be created even though the parties do not call it a trust, and even though they do not understand precisely what a trust is; it is sufficient if what they appear to have in mind is in its essentials what the courts mean when they speak of a trust."); *see also infra* Part IV.A. (discussing the status of conservation easements as restricted charitable gifts or charitable trusts).

118. *See* Attorney General's Memorandum in Support of Summary Judgment, *supra*

however, that, because the easement deed expressly prohibited subdivision of the property (except for the Heir's Lot), the National Trust had neither the express nor implied power to permit further subdivision of the property.¹¹⁹

The Attorney General argued that the National Trust, as trustee, has fiduciary obligations to Donoho and to the people of Maryland to administer the easement in accordance with its terms and stated charitable purposes, and that the proposed subdivision of the property would "frustrate[] the purposes of the . . . charitable trust."¹²⁰ Acknowledging that rigid adherence to the terms and purposes of a charitable trust in perpetuity might, over time, prove contrary to the wishes of the donor and the interests of the public, the Attorney General noted that the charitable trust doctrines of administrative deviation and *cy pres* (with their established standards and requirement of judicial approval) provide the framework within which the National Trust could consider making changes to the easement.¹²¹ The Attorney General concluded by noting that the reason for the proposed subdivision of Myrtle Grove "appears to be pecuniary," and the Miller Trust had not shown that it had become "impossible or impracticable to carry out the terms of the Myrtle Grove charitable trust" (which would be required before a court would authorize deviation from the charitable purpose of the easement under the doctrine of *cy pres*).¹²²

The National Trust filed a memorandum strongly supporting the Attorney General's motion for summary judgment on the grounds stated therein.¹²³ The memorandum asserted that the applicable legal principles of Maryland's charitable trust law required the court to determine both that the donation of the easement created a charitable trust, and that the proposed amendments outlined in the Concept Approval Letter would violate the terms and stated purposes of that trust.¹²⁴ The National Trust

note 37, at 22–23.

119. *See id.* at 22–24.

120. *See id.* at 20–22, 26–28.

121. *See id.* at 30–31.

122. *See id.* at 32.

123. *See* Plaintiff The National Trust's Memorandum of Grounds and Authorities in Support of Plaintiff the Attorney General's Motion for Summary Judgment, at 1, Nat'l Trust v. Miller, No. 20-C-98-003486, (Md. Cir. Ct. Nov. 4, 1998) (on file with the author).

124. *See id.* at 2. The National Trust cited to *Mayor of City of Baltimore v. Peabody Inst. of Baltimore*, 200 A. 375 (Md. 1938), which involved a devise of property to the City of

also filed a memorandum in support of its own motion for summary judgment, in which it emphasized that

while conservation easements may, as a general matter, be extinguished or released in the same manner as other easements under Section 2-118 of the Maryland Code . . . the fiduciary duty owed by the National Trust to the citizens of Maryland and the United States—the duty to follow the donor's intent and purposes associated with the Myrtle Grove Easement—is independent of this statute and must govern the National Trust's conduct.¹²⁵

The National Trust acknowledged that its signing of the Concept Approval Letter had been a mistake and argued that the letter was unenforceable as a contract because the National Trust did not have the legal authority to agree to the subdivision of Myrtle Grove without receiving court approval in the context of a *cy pres* proceeding.¹²⁶ In a later pleading, the National Trust asserted that if the court were to determine that Myrtle Grove should be subdivided, then the full value of the development rights that would be relinquished by the National Trust (estimated at \$1,540,000) should be paid to the National Trust to be used to acquire a replacement easement on land of equal or greater importance pursuant to the doctrine of *cy pres*.¹²⁷

In October of 1998, the Land Trust Alliance,¹²⁸ the Chesapeake Bay Foundation,¹²⁹ Preservation Maryland, and several historic

Baltimore with the direction that the property be sold and the proceeds invested in a public park. The city proposed to use the proceeds to establish several neighborhood playgrounds (rather than a single public park), arguing that it was free to divert the gift to any purpose, charitable or municipal, within its corporate powers. In holding that the city could not use the proceeds for any purpose other than that specified by the donor—i.e., “the purchase, improvement, and equipment of one park . . . with the obligation thereafter to maintain it as a ‘public park’”—the ‘Court of Appeals of Maryland stated that “Courts of Equity within this State . . . have full jurisdiction to enforce trusts for charitable purposes.” *Id.* at 378 (quoting Act of Apr. 17, 1931, ch. 453, sec. 7, 1931 Md. Laws 1143–44).

125. National Trust's Memorandum in Support of its Motion for Summary Judgment, *supra* note 63, at 7.

126. *See id.* at 7–12.

127. *See* National Trust's Answer and Cross-Claim, *supra* note 33, ¶ 39 (referring to MD. CODE ANN., EST. & TRUSTS § 14-302 (LexisNexis 2001), which codifies the doctrine of *cy pres*); National Trust's Memorandum in Support of its Motion for Summary Judgment, *supra* note 63, at 20 n.11.

128. The Land Trust Alliance is the umbrella organization for more than 1500 of the nation's land trusts. *See* The Land Trust Alliance: About LTA, www.lta.org/aboutlta/ (last visited Apr. 9, 2006).

129. “The Chesapeake Bay Foundation (CBF) is the largest [nonprofit] conservation organization dedicated solely to saving the Chesapeake Bay Watershed.” Chesapeake Bay Foundation, About Chesapeake Bay Foundation, <http://www.cbf.org/site/PageServer?Page>

preservation organizations operating in Talbot County filed an amicus brief arguing that the easement's unambiguous language and settled Maryland law dictated that the easement constituted a charitable trust.¹³⁰ They noted that section 2-118(d) of the Maryland easement enabling statute, which provides that a conservation easement "may be extinguished or released, in whole or in part, in the same manner as other easements," refers to the procedural requisites for amending conservation easements, but does not and cannot extinguish overriding legal principles governing the circumstances under which amendment may occur.¹³¹ The amicus brief also cautioned that the court's decision on the charitable trust issue would have consequences reaching far beyond Myrtle Grove and that "[o]nly by providing potential and existing [conservation easement] donors with assurance that the protection they place on their land will be, as they intend, permanent can a voluntary conservation program succeed."¹³²

In November of 1998, the Eastern Shore Land Conservancy,¹³³ The Nature Conservancy,¹³⁴ and five landowners who owned land either adjoining or in close proximity to Myrtle Grove filed a motion to intervene asserting, inter alia, that there are significant clusters of preserved lands adjacent to and in the immediate area of Myrtle Grove (including a 500-acre woodland owned by The Nature Conservancy that provides habitat for the endangered Delmarva Fox Squirrel),¹³⁵ the proposed subdivision would have an adverse effect on the natural attributes of the area and on the use, value, and enjoyment of properties adjacent to or near Myrtle Grove; many of the adjacent or nearby landowners had acquired

name=about_index (last visited Apr. 4, 2006).

130. See Memorandum of Amici Curiae on Charitable Trusts and Jurisdiction, at 1, 13, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Oct. 23, 1998) [hereinafter Memorandum of Amici Curiae] (on file with author).

131. See *id.* at 6-7, 7 n.4 (noting, also, that the Uniform Conservation Easement Act, which contains language virtually identical to § 2-118(d), "specifically recognizes the validity of existing charitable trust principles and specifically declines to abrogate existing state law concerning the enforcement of charitable trusts"); see also *infra* note 147 (discussing the Uniform Conservation Easement Act).

132. See Memorandum of Amici Curiae, *supra* note 130, at 2-3.

133. The Eastern Shore Land Conservancy is a land trust dedicated to the preservation of the agricultural and rural areas of the Eastern Shore of Maryland. See About the Eastern Shore Land Conservancy, <http://www.eslc.org/aboutus.html> (last visited Apr. 9, 2006).

134. The Nature Conservancy is a land trust that operates nationally and internationally to protect biodiversity. See About the Nature Conservancy, <http://www.nature.org/aboutus/> (last visited Apr. 9, 2006).

135. The location of those preserved lands is indicated in Appendix A.

their properties and encumbered them with conservation easements in part because of the existence of the Myrtle Grove easement; and the proposed amendment of what the public considered to be a "perpetual" easement would severely compromise the ability of conservation organizations to both solicit future easement donations and raise the funds necessary to continue their operations.¹³⁶

In their memorandum in support of the motion to intervene, the parties noted that the Myrtle Grove easement clearly created a charitable trust, and that "[t]he charitable trust doctrine has as its underpinning not only the desire to further charitable and public purposes by being certain that the gift itself is dedicated to those purposes, but it also serves the purpose of encouraging others to make similar gifts based on the assurance that their wishes will be carried out."¹³⁷ The parties also warned that the Myrtle Grove case would establish "extremely important precedent" because if conservation easements are not enforced according to their terms, it would chill future easement donations and adversely affect the activities and purposes of the Eastern Shore Land Conservancy, The Nature Conservancy, and similar charitable conservation organizations.¹³⁸

H. *The Settlement*

Both the District of Columbia and Maryland cases were settled in December of 1998, with the National Trust agreeing to pay the Miller trust \$225,000, and the parties agreeing that: (i) subdivision of Myrtle Grove is prohibited, (ii) any action contrary to the express terms and stated purposes of the easement is prohibited, and (iii) "amend[ing], releas[ing] (in whole or in part), or extinguish[ing] the Myrtle Grove easement without the express written consent of the Attorney General of Maryland" is prohibited, except that prior written approval of the Attorney General is not required for approvals "carried out pursuant to the ordinary ad-

136. See Motion to Intervene, *supra* note 30, ¶¶ 3, 6-7, 11, 13-14, 18, 23-25, 29-30, 34, 37-38, 42.

137. Memorandum of Law By Eastern Shore Land Conservancy, et al. in Support of Attorney General's Motion for Summary Judgment at 4, 5-6, State v. Miller, No. 20-C-98-003486 (Md. Cir. Ct. Nov. 18, 1998) (on file with author).

138. See *id.* at 6-7.

ministration” of the easement in accordance with its terms.¹³⁹ In a statement released by his office, the President of the National Trust noted that “[w]e regret the circumstances that led to this litigation, but we are satisfied it has ended in a way that fully protects the property and protects the integrity of easements.”¹⁴⁰

I. *The National Trust’s Adoption of Amendment Policies and Procedures*

The Board of Trustees of the National Trust adopted detailed easement amendment policies and procedures in May of 1995 (less than one year following the National Trust’s withdrawal of its “conceptual approval” of the requested amendments).¹⁴¹ In addition, the model conservation easement deed now used by the National Trust includes a “standard” amendment provision granting the National Trust the discretion to agree with the owner of the encumbered land to amend the easement in manners consistent with the stated purpose of the easement, and such a provision is often included in the easement deeds the National Trust acquires.¹⁴²

139. See Consent Judgment at 2–3, *State v. Miller*, No. 20-C-98-003486 (Md. Cir. Ct. Jul. 16, 1999) (on file with author); see also *infra* note 223 and accompanying text (explaining that the easement requires the owner of the encumbered land to obtain the National Trust’s written approval before engaging in certain activities, such as making structural changes to the manor house and law office).

140. See Peter S. Goodman, *Agreement Saves Estate on Maryland’s Eastern Shore; Trust Had Wrongly Approved Subdivision*, WASH. POST, Dec. 11, 1998, at G7.

141. See Edmondson March 3, 2006 Comments, *supra* note 12, at 27. The amendment policies and procedures prohibit easement amendments unless: (1) to correct an obvious error or ambiguity; (2) the amendment is made in accordance with a prior agreement stated in the easement deed and is consistent with the intent and purpose of the original easement; or (3) the amendment is a minor modification that is consistent with the easement’s preservation purpose and either enhances or has a neutral effect on the easement’s preservation goals or contains additional conservation measures that entirely offset any reduction of preservation values. *Id.* Even then, in the case of a donated easement, the amendment must not increase the overall level of development of a property unless it is more than offset by a reduction in the development rights of an adjacent parcel, and no tax deduction is sought for the offset. *Id.* The amendment policy also specifies a detailed review and approval process for amendments. *Id.*

142. See E-mail attachment from Paul Edmondson, Vice President & General Counsel of the National Historic Preservation, to Nancy McLaughlin 2 (Mar. 22, 2006) [hereinafter Edmondson March 22, 2006 E-mail attachment] (on file with author); *infra* Part IV.C.1 (discussing “standard” amendment provisions).

IV. WHAT CAN BE LEARNED FROM THE MYRTLE GROVE CONTROVERSY?

A. *Factors Contributing to the National Trust's Mistake and the Relevant Law*

In hindsight (and as it later concluded), National Trust's decision to simply agree with the Miller Trust to amend the Myrtle Grove easement to permit the subdivision of the property was clearly a mistake. However, the National Trust faced a challenging problem with regard to the Myrtle Grove easement. The easement, which was drafted in 1975, imposed few affirmative obligations on the owners of the encumbered land to maintain the historic structures or the surrounding grounds in a condition appropriate to property listed on the National Register of Historic Places.¹⁴³ In addition, at the time of the donation of the easement, the National Trust did not receive (and did not independently raise) any funds with which to monitor and enforce the easement.¹⁴⁴ Furthermore, although not obligated to do so under the easement, the Millers invested significant funds in an award-winning restoration of the historic structures and formal grounds of Myrtle Grove, and they worked closely and congenially with representatives of the National Trust throughout the course of such restoration.¹⁴⁵ Accordingly, it is understandable that the National Trust, which was primarily focused on protecting the historic structures and their immediate surroundings at Myrtle Grove, would have been interested in working with the Millers to amend the easement in a manner that the National Trust thought would ensure better protection of the historic aspects of the property.¹⁴⁶

143. See *supra* note 94 and accompanying text. Affirmative obligations to maintain the property to a certain standard now are typical in conservation easements encumbering historic structures and sites. See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 332, 338–50.

144. Easement holders now are more aware of the need to obtain stewardship funds to monitor and enforce every easement they acquire. See *id.* at 124–34 (discussing stewardship funding and noting that “[m]any holders are reluctant to accept a donated conservation easement that is not accompanied by a contribution for stewardship”).

145. See *supra* note 59 and accompanying text (describing the awards); Bierce Affidavit, *supra* note 51, at ¶¶ 10–15, Ex.D–F.

146. Tom Mayes, Deputy General Counsel of the National Trust, explains that: prior to Myrtle Grove, . . . many preservation organizations viewed their responsibilities as being somewhat narrowly tied to landmark buildings and

Moreover, the National Trust's assumption that amending a conservation easement was simply a private contractual matter between the holder of the easement and the owner of the encumbered land perhaps also was understandable. At the time of the drafting of the Concept Approval Letter in 1994, no court had yet determined that a conservation easement constitutes a restricted charitable gift or charitable trust, and there was some confusion and uncertainty regarding whether the holder of a conservation easement could simply agree with the owner of the encumbered land to modify or even terminate the easement.¹⁴⁷ Now, however,

their immediate context, without always recognizing the broader relationship between the land and the historic buildings. Similarly, conservation organizations didn't always recognize the relationship between the built environment and agricultural or open space that they seek to protect . . . I think there was a shift in philosophy that occurred at about the same time as the Myrtle Grove case that provides a background to the perspective of the National Trust staff who went along with the Miller's proposal.

E-mail attachment from Paul Edmondson & Tom Mayes, National Trust for Historic Preservation, to Nancy McLaughlin 1 (Jan. 28, 2006) (on file with author); *see also* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 221 (noting that preservation organizations are increasingly recognizing the value of preserving elements that were traditionally considered conservation resources, while conservation organizations are increasingly recognizing the need to preserve historic buildings as a part of their conservation missions).

147. The UNIFORM CONSERVATION EASEMENT ACT ("UCEA"), which was approved by the National Conference of Commissioners on Uniform State Laws in 1981, unfortunately contributed to the confusion. *See* UNIF. CONSERVATION EASEMENT ACT 12 U.L.A. 178 (1981) [hereinafter *UCEA*]. The UCEA does not directly address the application of charitable trust law to conservation easements and, instead, provides that a conservation easement may be modified or terminated "in the same manner as other easements," but "the Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity." *Id.* § 2(a), § 3(b). K. King Burnett, who served on the drafting committee for the UCEA, explains that the drafters intentionally failed to directly address the application of charitable trust law to conservation easements in the UCEA, not because they thought charitable trust law did not or should not apply to conservation easements, but for two very practical reasons. First, the purpose of the UCEA is narrow—i.e., to remove the common law impediments to the creation and long term validity of easements in gross conveyed for conservation purposes—and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge. Second, the UCEA was intended to be placed in the real property law of adopting states, and most states would not permit a second subject, such as charitable trust law, to be included in the real property law provisions of their state code. *See* E-mail from K. King Burnett, member (and 2001-2003 President) of the National Conference of Commissioners on Uniform State Laws, to Nancy McLaughlin (Mar. 6, 2006) (on file with author). According to Mr. Burnett, the drafting committee assumed they had flagged the charitable trust issue for all concerned and sufficiently steered land trusts to that area of the law by providing in the comments to the UCEA that "[t]he Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts" and

there is a growing understanding that the charitable organizations (and, in many cases, government agencies) acquiring perpetual conservation easements hold such easements in trust or quasi-trust for the benefit of the public and, thus, that charitable trust rules apply in addition and as an overlay to the provisions relating to the modification and termination of such easements in state easement enabling statutes.

For example, in *In re Preservation Alliance for Greater Philadelphia*, O.C. No. 759 (Ct. Com. Pl. of Philadelphia June 28, 1999), the court assumed without discussion that a perpetual conservation easement encumbering an historic structure in Philadelphia's Germantown neighborhood constituted a "charitable interest." After determining that the structure had become dilapidated and had no economic use, the court applied the doctrine of *cy pres* to authorize extinguishment of the easement and replacement of the easement with covenants designed to permanently preserve the site of the structure as a park land.¹⁴⁸

The Restatement (Third) of Property: Servitudes (2000) recommends that the modification or termination of conservation easements conveyed to government agencies and charitable organizations be governed by a special set of rules that are based in part on the doctrine of *cy pres*. In making this recommendation, the drafters of the Restatement note that conservation easements conveyed to government agencies and charitable organizations

[u]nder the doctrine of *cy pres*, if the purposes of a charitable trust cannot [be] carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, 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. So, also, in cases where a charitable trustee ceases to exist or cannot carryout its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

UCEA, *supra* note 147, § 3, cmt. (emphasis added).

148. See *Rethinking*, *supra* note 3, at 450-51 (discussing the case in more detail). The Pennsylvania easement enabling statute, like the *UCEA* discussed *supra* note 147, provides that a conservation easement may be modified or terminated "in the same manner as other easements," but the "act shall not affect the power of a court to modify or terminate a conservation or preservation easement in accordance with the principles of law and equity. . . ." See 32 PA. CONST. STAT. ANN. §§ 5054(a), 5055 (c)(1) (West 1997 & Supp. 2006).

should be afforded more stringent protection than privately held conservation servitudes because of the public interest involved.¹⁴⁹

The Uniform Trust Code (2000) provides in comments to section 414 that

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.¹⁵⁰

149. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11, cmts. a, b (2000).

150. UNIF. TRUST CODE § 414 cmt. (amended 2005), 7C U.L.A. 245 (Supp. 2005); see also Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements As Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 149 (2002) (concluding that charitable trust principles can help "ensure that the public interest in conservation easements is protected, . . . not only by invoking the cy pres power of the courts, but also by creating an enforcement right in the Attorney General"); *Rethinking*, supra note 3, at 431–58 (explaining why charitable trust rules should apply in addition and as an overlay to the provisions relating to the modification and termination of conservation easements in the state easement enabling statutes). The land trust community has been aware for some time of the likely application of charitable trust rules to conservation easements. For example, in educational handouts distributed at the Land Trust Alliance's national conference for land trusts in 2000, Karin F. Marchetti, co-author of the 2005 CONSERVATION EASEMENT HANDBOOK, supra note 1, and General Counsel of the Maine Coast Heritage Trust, explains that:

An easement can contain specific language invoking an "express charitable trust." This can be accomplished in some states simply by invoking the words "in trust" in the words of conveyance of the deed. . . . Even in jurisdictions that permit amendment with the consent of the government, including the Attorney General, it is the exclusive province of the courts to terminate or redesign the purposes of an express charitable trust.

Even if the easement deed does not create an express charitable trust . . . it is difficult to eliminate the implication of a quasi-trust or public trust. Often the words, "for the benefit of the public" are included. Moreover, it is unlikely that a conservation easement was granted with the expectation that the land trust might at its pleasure dispose of the easement and apply the proceeds to its general conservation purposes, as with trade lands. It is implicit in a *perpetual* easement that the purposes of the gift, the preservation of that particular parcel of land, will be honored barring unforeseeable or extremely improbable circumstances. State enabling legislation can usually be found to support the notion that the public is the intended beneficiary of conservation easements. Quasi-trusts should be treated in the same manner as express charitable trusts unless applicable case law distinguishes them.

Karin F. Marchetti, Land Conservation Attorney, Planning and Managing Conservation Easements: The Legal Perspective 37 (Oct. 20, 2000) (on file with author).

In a similar educational handout distributed at the Land Trust Alliance's national conference for land trusts in 2002, Ms. Marchetti adds that "The Maryland court supported the Attorney General's argument that conservation easements are trusts in the consent

As the author of this article has noted before:

None of the [easement enabling] statutes . . . expressly precludes the application of charitable trust rules to conservation easements, and it is not clear why the donation of the property interest embodied in a conservation easement to a charitable organization or government agency for a specified charitable purpose should be exempt from the equitable rules that govern the use and disposition of all other types of property interests donated to charitable organizations or government agencies for specified charitable purposes.

The status of the conservation easement as an interest in real property should not set it apart from the universe of all other charitable gifts, particularly when one considers that charitable trust rules are routinely applied to fee simple interests in land that have been donated to government agencies or charitable organizations for specified charitable purposes. In addition, the fact that there are lingering questions regarding the precise nature of the property interest embodied in a conservation easement, and that a conservation easement represents only a partial interest in land (which means that the owner of the encumbered land would be a necessary party to any administrative deviation or *cy pres* action), complicates but should not negate the application of charitable trust rules to donated conservation easements.¹⁵¹

Moreover, the provisions governing the federal charitable deductions offered to conservation easement donors effectively mandate that tax-deductible conservation easements be conveyed as restricted charitable gifts or charitable trusts. Perpetuity is a defining feature of a charitable trust,¹⁵² and since 1980, a landowner making a charitable gift of a conservation easement to a

decree that settled the now famous Myrtle Grove case . . .” Karin F. Marchetti Ponte, *Designing a Conservation Easement Amendment Policy 7* (2002) (on file with author).

151. See *Rethinking*, *supra* note 3, at 448. With regard to charitable trust rules applying in addition and as an overlay to the provisions relating to the modification and termination of conservation easements in state easement enabling statutes, an analogy may be helpful. For example, state law might provide that a person can convey fee title to land by executing, delivering, and recording a deed. That does not mean that a charitable organization or government agency that has received a gift of land pursuant to a deed stating that the land is to be used for a specified charitable purpose in perpetuity (such as a public park) can simply sell the land to a third party by executing, delivering, and recording a deed. Rather, the charitable organization (and, in many cases, government agency) would first have to obtain court approval for the sale in a *cy pres* proceeding (i.e., comply with the overarching charitable trust rules), and then execute, deliver, and record a deed to effectuate the transfer. See, e.g., cases cited *supra* note 15; *Rethinking*, *supra* note 3, at 432 n.30, 481 n.201.

152. See RESTATEMENT (SECOND) OF TRUSTS § 365 (1959); BOGERT & BOGERT, *supra* note 18, § 361, at 3 (noting, as one of the many advantages accorded to a charitable trust, that “the law permits the trust to be perpetual”).

government agency or charitable organization has been eligible for federal charitable income and gift tax deductions only if, inter alia, the conservation purposes of the easement are "protected in perpetuity."¹⁵³ And since 1986, to avoid any possible confusion regarding what "protected in perpetuity" might mean in this context, the Treasury Regulations have required that tax-deductible conservation easements be extinguishable only in the context of what essentially is a *cy pres* proceeding.¹⁵⁴

Finally, attorneys general in states other than Maryland are beginning to recognize that conservation easements donated to charitable organizations (and in some cases government agencies) for specified conservation purposes in perpetuity are restricted charitable gifts or charitable trusts, and that they have the right and the obligation to enforce such easements on behalf of the public. For example, Belinda J. Johns, Senior Assistant Attorney General in the California Attorney General's Office states "It is our position that conservation easements are donor-restricted charitable assets and that modification would be governed by the *cy pres* doctrine."¹⁵⁵

153. See I.R.C. § 170(h)(1)(C), (5)(A); *Tax Incentives*, *supra* note 4, at 10–17 (for a history of the federal tax incentives offered to conservation easement donors). Congress obviously was interested in protecting the public's interest and investment in tax-deductible conservation easements, and by requiring that the conservation purposes of a tax-deductible easement be "protected in perpetuity," Congress prevented the two parties with a significant financial interest (i.e., the owner of the encumbered land and the holder of the easement) from being able to simply agree to substantially modify or terminate the easement.

154. See Treas. Reg. § 1.170A-14(g)(6)(i) (providing that the conservation purpose of an easement will be "protected in perpetuity" if the easement can be extinguished: (i) only in the context of a judicial proceeding, (ii) only if a subsequent unexpected change in conditions makes "impossible or impractical" the continued use of the encumbered property for conservation purposes, and (iii) subject to the requirement that the holder of the easement receive a percentage of the proceeds from the subsequent sale or exchange of the unencumbered property and use such proceeds in a manner consistent with the conservation purposes of the original easement). These provisions track the *cy pres* doctrine (see *supra* note 24 and accompanying text), and are distinguishable from the doctrine of changed conditions under real property law because of the requirement that the holder receive compensation upon extinguishment of the easement and use such compensation for similar conservation purposes. See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000) (noting that in other instances where changed conditions lead to the termination of a servitude, such as in residential subdivisions, there is seldom an entitlement to damages).

155. E-mail from Belinda J. Johns, Senior Assistance Attorney General in the California Attorney General's Office, to Nancy McLaughlin (Mar. 20, 2006) (on file with author). Larry Barth, Senior Deputy Attorney General for the State of Pennsylvania states that conservation easements

The treatment of conservation easements donated to charitable organizations or government agencies in perpetuity as restricted charitable gifts or charitable trusts should come as no surprise. The perpetuity issue is neither new nor unique to charitable donations of conservation easements. As noted above, a defining feature of a charitable trust is that it may exist in perpetuity, and the charitable trust rules were developed and refined over the centuries to deal precisely with the issue presented by perpetual conservation easements—how to adjust when the terms or stated purpose of a charitable gift become obsolete or inappropriate due to changed conditions.

B. *Private Benefit*

Whether the National Trust would have violated the Internal Revenue Code prohibition against “private benefit” by agreeing to

are charitable (IRS Reg. Sect. 1.170A-14) and deductible so we regard them as we would any other charitable trust (albeit in incorporeal form) under Common Law and those of our statutes that give the AG authority over charities and charitable trusts. We have on occasion been asked to review modifications which we do primarily from the perspective of the public interest and secondarily from that of the donor.

Personal Communication with author (Mar. 20, 2006). The Connecticut Attorney General's office reports that Connecticut Attorney General Richard Blumenthal is committed to enforcing conservation easements and has successfully undertaken cases in which he has enforced such easements on the legal theory that they are charitable trusts or gifts upon a charitable use. Personal Communication with author (Mar. 29, 2006). Jeff Pidot, Chief of the Natural Resources Division of the Maine Attorney General's Office, notes that

[C]onservation easements have to be considered charitable trusts, with the AG having supervision over them as with any other charitable trust. A conservation easement has all of the indicia of a charitable trust (charitable intent, public purpose, comprising promises to be kept in the future, entrusted to a non-profit, tax and/or other public subsidy, etc) and should be treated as such.

E-mail attachment from Jeff Pidot, Chief of the Natural Resources Division of the Maine Attorney General's Office, to Nancy McLaughlin (Mar. 22, 2006) (on file with author). Andrew Goldberg, Assistant Attorney General in the Massachusetts Attorney General's Environmental Protection Division, notes that

while the Attorney General's authority to oversee public charitable trusts may provide an important weapon in enforcing conservation easements, we often rely on the Massachusetts easement enabling statute (which requires a public hearing and approval by a public official to release a conservation easement in whole or in part), coupled with the Attorney General's statutory authority to prevent damage to the environment, to ensure that restricted land remains protected.

E-mail from Andrew Goldberg, Assistant Attorney General in the Massachusetts Attorney General's Environmental Protection Division, to Nancy McLaughlin (Mar. 22, 2006) (on file with author).

the amendments outlined in the Concept Approval Letter is a separate issue. "Private benefit occurs if the assets or revenues of the exempt organization are used to benefit an individual or entity more than incidentally."¹⁵⁶ Private benefit can occur in many different forms, including, for example, when an exempt organization sells or exchanges the organization's property for less than its fair market value.¹⁵⁷ Thus, a charitable organization that agrees to amend a conservation easement in a manner that transfers valuable development or use rights to the owner of the encumbered land without receiving cash or other compensation of equivalent value in exchange presumably would violate the private benefit prohibition and thereby jeopardize its tax-exempt status.¹⁵⁸ To the author's knowledge, however, the Internal Revenue Service has not issued guidance regarding how private benefit should be determined in the conservation easement amendment context.¹⁵⁹

156. JOINT COMM. ON TAXATION, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 52 (JCX-29-05), Apr. 19, 2005, available at <http://www.house.gov/jct/x-29-05.pdf> [hereinafter JCT Report on Federal Tax Exemption]. States and municipalities (such as cities, counties, and towns) are subject to a similar requirement that public funds be used only in the public interest and not to benefit private individuals. See, e.g., Nicholas J. Wallwork & Alice S. Wallwork, *Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit from Public Funds*, 25 ARIZ. ST. L.J. 349, 350 n.8 (1993) (listing the state constitutions containing such "public funds provisions"); 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, § 21.07, at 21-16 ("Local government property cannot be conveyed to a private party without adequate consideration, for to do so would constitute an improper gift of public property or the granting of a subsidy contrary to state constitutional constraints.").

157. See JCT Report on Federal Tax Exemption, *supra* note 156, at 53.

158. *Id.* at 48.

159. For example, it is not clear if an assessment of "private benefit" in this context would involve an appraisal of the value of the encumbered land before and after the proposed amendments, with any increase in the value of the land as a result of the amendments constituting private benefit. It is not clear the extent to which any such private benefit could be eliminated by the landowner's payment of cash or in-kind compensation of equal value to the charitable organization without violating the requirement that conservation purposes of a tax-deductible easement be "protected in perpetuity." It also is not clear the extent to which any public benefit flowing from an amendment that is not measurable in economic terms should be taken into account in determining private benefit. But see *Rethinking*, *supra* note 3, at 491-99 (arguing that (i) the full value attributable to a conservation easement constitutes a charitable asset that belongs to the public, (ii) upon extinguishment of an easement in whole or in part the holder should be entitled, on behalf of the public, to the full value of the easement or any rights relinquished, and (iii) the value of the rights relinquished upon extinguishment of an easement in whole or in part should be determined in the same manner as such rights were valued upon the easement's acquisition—i.e., using the before and after method).

Given that the development rights to be relinquished by the National Trust to the Millers pursuant to the Concept Approval Letter had an estimated value of \$1,540,000,¹⁶⁰ it appears likely that the National Trust would have violated the private benefit prohibition by agreeing to the amendments outlined in that letter. However, the \$1,540,000 figure appears to have been an estimate of the stand alone value of the development rights to be relinquished, rather than of the *net* economic benefit that would have been derived by the Millers from the amendments,¹⁶¹ and it is not clear the extent to which other factors would have been taken into account in determining private benefit.¹⁶²

C. *Amending Perpetual Easements Within the Charitable Trust Framework*

Given that conservation easements conveyed to government agencies and charitable organizations for specified purposes in perpetuity are likely to be treated as held in trust or quasi-trust for the benefit of the public and, thus, as subject to charitable trust rules,¹⁶³ it is important to consider how such easements may be amended within the charitable trust framework.

1. Express Power to Amend

Flexibility can be built into perpetual conservation easements in the form of an amendment provision that expressly grants the holder the discretion to agree with the owner of the encumbered land to make certain amendments. Such amendment provisions are not uncommon¹⁶⁴ and generally grant the holder of an easement the discretion to agree to amendments that are either neutral with respect to or enhance the stated purposes of the easement.¹⁶⁵ The “neutral or enhancing” standard for amendments

160. See *supra* note 127 and accompanying text.

161. In estimating the *net* economic benefit of the amendments to the Millers, their transfer of cash and other compensation (in the form of additional easement restrictions) to the National Trust would have to be taken into account.

162. See *supra* note 159.

163. Such treatment seems clear with regard to donated easements. With regard to conservation easements that are acquired outside of the donation context, see *infra* Part V.

164. See *infra* note 169.

165. See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 377, 485 (setting

appears to have developed as a result of the fact that permitting amendments that would degrade or change the stated purpose of an easement would render the easement nonperpetual, and: (i) government agencies and land trusts traditionally have been interested in acquiring only perpetual easements, and (ii) to be eligible for the federal (and in many case state) tax incentives, the conservation purposes of an easement must be "protected in perpetuity."¹⁶⁶

Including an amendment provision in the deed of conveyance puts the easement grantor and the public on notice of the holder's intention to agree to amend the ostensibly "perpetual" easement if and when, in the holder's judgment, neutral or enhancing amendments become appropriate.¹⁶⁷ Including an amendment

forth sample amendment provisions); *id.* at 183–89 (discussing amendment policies and procedures and the various laws that must be complied with in making amendments, including the prohibition on private benefit and any conditions imposed under the relevant state easement enabling statute).

166. See *supra* note 2 and accompanying text. Whether such "neutral or enhancing" amendment provisions should be drafted or interpreted to grant the holder the discretion to agree to "trade-off" amendments (i.e., amendments that both negatively impact and enhance the stated purpose of an easement, but the *net* effect of which could be considered "neutral or enhancing" with regard to the protection of the encumbered land) is an open question. In a report on The Nature Conservancy issued in 2005, the Staff of the Senate Finance Committee noted that "modifications made to correct ministerial or administrative errors are permitted under present Federal tax law." STAFF OF S. COMM. ON FINANCE, 109th Cong., REPORT ON THE NATURE CONSERVANCY Executive Summary 9 n. 20 (2005), *mircoformed on* CIS No. 2005-5362-27 (Cong. Info. Serv.). The Staff expressed concern, however, with regard to trade-off amendments, such as, for example, an amendment to an easement that permits the owner of the encumbered land to construct a larger home on the land "in exchange for more limited use of the property for agricultural purposes." *Id.* at Pt. II 5. The Staff noted that trade-off amendments "may be difficult to measure from a conservation perspective," and that the "weighing of increases and decreases [in conservation benefits] is difficult to perform by TNC and to assess by the IRS." *Id.*

167. Representations currently made with regard to perpetual conservation easements often suggest that such easements cannot and will not be amended. See, e.g., Land Trust Alliance, Frequently Asked Questions, http://www.lta.org/conserves/faq.shtml#ce_head (last visited April 9, 2006) (answering the question "How long does a conservation easement last?" with "most easements 'run with the land,' *binding the original owner and all subsequent owners to the easement's restrictions.*") (emphasis added); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 21 ("A perpetual easement runs with the land—that is, *the original owner and all subsequent owners are bound by its restrictions.*"); Jackson Hole Land Trust, Frequently Asked Questions, http://www.jhlandtrust.org/our_work/faq.php#3 (last visited Apr. 9, 2006) (answering the question "What is a conservation easement?" with "A conservation easement is a voluntary contract between a landowner and a land trust, government agency, or another qualified organization in which the owner places *permanent restrictions* on the future uses of some or all of his or her property to protect scenic, wildlife, or agricultural resources. The easement is donated by the owner to the land trust, which then has the authority and *obligation to enforce the terms of the easement in perpetuity.* The landowner still owns the property and can use it, sell it, or leave it to heirs, but *the restrictions of the easement stay with the land forever.*").

provision in the deed of conveyance also removes doubt as to whether the holder has the discretion to simply agree to neutral or enhancing amendments. Moreover, if the holder of an easement is granted the power to agree to neutral or enhancing amendments in the easement deed, a court will not interfere with the holder's exercise of that power on charitable trust grounds unless there has been a clear abuse of discretion.¹⁶⁸

The benefit of including an amendment provision in easement deeds was recognized early on, and some (if not many) easement deeds contain such a provision.¹⁶⁹ Of course, easement grantors and the public (which is investing significant funds in perpetual easements through donations to land trusts, federal and state tax incentives, and easement purchase programs) may prefer to limit the amendment discretion granted to holders by, for example, providing that the holder's amendment discretion does not extend to amendments that increase the level of development permitted on the encumbered land.¹⁷⁰ In any event, directly addressing the level of amendment discretion granted to the holder in the easement deed will help to minimize confusion regarding the intent of the parties and the rights of the holder.

168. See, e.g., MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 145 (2004) (noting that trust instruments often confer broad discretionary powers on the trustee, and “[c]ourts do not interfere with exercises of discretion unless it can be clearly shown that the exercise was not within the bounds of reasonable judgment. The duty of the court is not to substitute its own judgment for that of the trustee but to consider whether [the trustee] has acted in good faith, from proper motivation, and within the bounds of [reasonable judgment]”).

169. See *THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS* 205–06 (Janet Diehl & Thomas S. Barrett eds., 1988) (noting—in 1988—that “[u]ntil quite recently, most conservation easements have been silent regarding amendment. It is unrealistic to think, however, that the need to amend will never arise. Because easements are perpetual, there are bound to be changed circumstances over time that require amendment—at least in a substantial number of cases—and many consider it prudent to set the ground rules ahead of time.”); *id.* at 164 (setting forth a sample amendment provision); see also *2005 CONSERVATION EASEMENT HANDBOOK*, *supra* note 1, at 377 (noting that amendment provisions are becoming more common); *id.* at 468 (noting that “[t]hough an easement is written to be perpetual, there may be cases of inadvertent omissions or unforeseen changes in the use of the land over time that require amendment. Many easement drafters therefore consider it prudent to set the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses.”).

170. See *2005 CONSERVATION EASEMENT HANDBOOK*, *supra* note 1, at 485 (providing examples of provisions limiting a holder's amendment discretion). There may be some question as to the circumstances under which an amendment increasing the level of development permitted on the encumbered land is “neutral or enhancing.”

2. Implied Power to Amend

Even in the absence of an express amendment provision, the holder of an easement should be deemed to have the implied power to agree to certain amendments. For example, if at the time of the conveyance of the easement, the grantee had formal amendment policies and procedures in place indicating its intention to, in its discretion, agree to neutral or enhancing amendments,¹⁷¹ and such policies and procedures were disclosed to the easement grantor, it should be assumed that the easement grantor intended the holder to have such a power to amend.¹⁷²

In addition, interpreting an easement deed as granting the holder the implied power to agree to amendments that clearly are neutral with respect to or enhance the stated charitable purpose of the easement would be appropriate where the deed grants the holder the overarching right to, for example, “preserve and protect the conservation values of the property,”¹⁷³ or because such amendments are consistent with the stated charitable purpose of the easement and requiring court approval of such amendments would be unduly burdensome and impractical.¹⁷⁴ The types of

171. See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 184–89 (discussing easement amendment policies and procedures).

172. See SCOTT & FRATCHER, *supra* note 16, § 186, at 6–9; *id.* § 380, at 320 (noting that charitable trustees have such powers as are specifically conferred by the terms of the trust and such powers as “are necessary or appropriate for the carrying out of the purposes of the trust and are not forbidden by the terms of the trust,” and in determining the powers a settlor intended to confer upon a charitable trustee, one must look not only to the express provisions of the trust instrument, but also to the intent of the settlor as evidenced by the circumstances that existed at the time of the execution of the trust instrument). If the easement deed expressly prohibits its amendment (or prohibits a certain type of amendment, such as an amendment that would increase the level of development permitted on the property), the holder should not be deemed to have the implied power to agree to any (or such) amendments because the amendments would be “forbidden by the terms of the trust.”

173. See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 367; see also *supra* note 18 and accompanying text (noting that courts are more ready today than they used to be to find that the settlor intended to confer broad powers on a trustee); BOGERT & BOGERT, *supra* note 18, § 551, at 41 (“Implied powers are those which are not clearly and directly given by the settlor . . . but which equity believes the creator of the trust . . . intended should exist. . . . If the settlor has directed the trustee to accomplish a certain objective, he must be deemed to have intended that the trustee use the ordinary and natural means for obtaining that result.”).

174. In *Wilstach Estate*, 1 Pa. D. & C.2d 197, 199–200, 202 (1954), the trustees of an art collection bequeathed to the City of Philadelphia to “be preserved . . . & taken care of & kept in good order, as the nucleus or foundation of an Art Gallery for the use and enjoyment of the people [and] . . . to be kept together, and known and designated by the name of the ‘W. P. Wilstach Collection’” petitioned the court to determine if they had the implied

amendments that should be considered to fall within such an implied power include, for example, those that clarify vague language, correct minor drafting errors, make minor boundary line adjustments, impose additional restrictions on the development and use of the encumbered land, and incorporate additional acreage into an easement.

Although courts traditionally have been reluctant to find that a trustee has powers not expressly granted in the gift or trust instrument¹⁷⁵ (hence the desirability of including an express amendment provision in conservation easement deeds), interpreting conservation easements as granting the holders the implied power to make clearly neutral or enhancing amendments would be consistent with the goals of the charitable trust rules.¹⁷⁶ Such an interpretation would allow easement holders to quickly and efficiently agree to amendments that are clearly consistent with the stated purposes of easements, which is in the interest of both easement grantors and the public. Such an interpretation should not undermine the confidence of easement grantors or the public in perpetual easements because only those amendments that are clearly consistent with the stated purposes of an easement would fall within a holder's implied power to amend. Requiring easement holders to petition the court for approval of clearly neutral or enhancing amendments would be unduly burdensome and impractical, and therefore contrary to the interests (and, presuma-

authority to sell items out of the collection where such items were deemed to be making no contribution to the collection as a whole. After noting that the bequest of the collection created a "perpetual charitable trust," and examining the language of the will and the circumstances attending its execution, the court determined that the trustees had "the absolute right, in their discretion, without first obtaining permission from the court, to sell any painting, statuary, photograph or other work of art forming part of the estate . . . provided that the collection is 'kept together, and known and designated by the name of 'W. P. Wilstach Collection' and is made available to the public in accordance with the provisions of the will.'" *Id.* at 203-04, 206. The court found that the decedent's primary purpose was to furnish the people of Philadelphia with a much needed public art gallery and that she "certainly could not have intended that the [trustees] apply to the court for permission every time they intended to sell a painting or other art object. Such a requirement would make the successful management of the collection most cumbersome and impractical." *Id.* at 206. The court also noted, however, that the recommendations to dispose of items in the collection were not made lightly or casually, "and represent[ed] almost 15 years of careful study to determine which of the paintings were of sufficient merit to warrant exhibition," and that the Attorney General of Pennsylvania had submitted a letter to the court stating that the Commonwealth had no objection to the sale of the paintings by the trustees. *Id.* at 208-09.

175. See SCOTT & FRATCHER, *supra* note 16, § 186, at 10.

176. See *supra* notes 26-28 and accompanying text.

bly, intent) of both easement grantors and the public. Finally, interpreting conservation easements as granting the holders the implied power to make clearly neutral or enhancing amendments would be consistent with existing practice, as easement holders have been simply agreeing with the owners of the encumbered land to make what (in most cases) appear to be clearly neutral or enhancing amendments.¹⁷⁷

The discretion to agree to some neutral or enhancing amendments also may fall within the administrative powers granted to trustees in a state's "trustee powers act."¹⁷⁸ In addition, in some cases desired changes (such as imposing additional restrictions on the development and use of the encumbered land or incorporating additional acreage into an easement) can be accomplished through the conveyance of a second, separate conservation easement, rather than through amendment of the existing easement.

3. Public Oversight of Amendments

In situations where a proposed amendment to a perpetual conservation easement is *not* clearly neutral or enhancing, as in Myrtle Grove,¹⁷⁹ public oversight is appropriate.

In some cases, the holder of an easement might determine that review and approval by the state attorney general of such a proposed amendment provides the holder with sufficient comfort to proceed with the amendment, particularly given that a court

177. A 1999 study conducted by the Land Trust Alliance found that approximately four percent (or 302) of the 7400-plus easements held by local and regional land trusts had been amended, and that the amendments most frequently made were those that clarified ambiguous terms or corrected errors, relocated building envelopes, decreased the number of permitted residential buildings, made boundary line adjustments, and made a change in land management practices. See Rene Wiesner, *Conservation Easement Amendments: Results from a Study of Land Trusts*, EXCHANGE: NAT'L J. LAND CONSERVATION, Spring 2000, 9-12. The extent to which the 302 easements were amended in accordance with an amendment provision contained in the deed of conveyance or the land trust's amendment policies and procedures is not clear, although the article does discuss the amendment policies and procedures of a number of land trusts.

178. See *supra* note 21 and accompanying text (noting that the Uniform Trust Code authorizes a trustee to "exercise . . . any . . . powers appropriate to achieve the proper . . . management . . . of the trust property" and is intended to grant "the trustee the broadest discretion possible"). See also, e.g., MISS. CODE ANN. § 91-9-107(5)(a) (West 1972 & Supp. 2005) (providing that "[u]nless expressly provided to the contrary in the trust instrument, a trustee may consolidate two (2) or more trusts having substantially similar terms into a single trust").

179. In many cases "trade-off" amendments will not be clearly neutral or enhancing.

could approve the amendment if it is later challenged.¹⁸⁰ However, approval of a proposed amendment by the state attorney general, while probative of the fact that the amendment would be in the interest of the public, generally would not be binding upon a court.¹⁸¹ Accordingly, in some cases the holder of an easement may prefer the greater security of a court decree blessing the amendment.¹⁸²

From a public relations perspective, the opportunity of interested parties to comment on a controversial amendment in the context of a judicial proceeding, and a decision by a court that such amendment is either consistent with the stated purpose of the easement or nonetheless justified because the stated purpose of the easement has become impossible or impracticable due to changed conditions, may give the easement holder's decision to agree to the amendment substantial legitimacy in the eyes of the general public. As illustrated by the Myrtle Grove controversy, public oversight in the form of a judicial proceeding can ensure that the interests of the easement grantor and the public at large are appropriately represented.

4. Shaping the Development of the Law

The extent to which courts will determine that holders of conservation easements have the implied power to agree to amendments is not clear. Nor is it always clear when a proposed amendment should be considered "neutral or enhancing." However, easement holders can play an important role in shaping the

180. See *supra* note 168 and accompanying text (noting that if the holder of an easement is granted the power to agree to neutral or enhancing amendments in the easement deed, a court will not interfere with the holder's exercise of that power on charitable trust grounds unless there has been a clear abuse of discretion). see also BOGERT & BOGERT, *supra* note 18, § 551, at 42 (noting that "[w]ithout an express grant of [a] power [in the trust instrument], a trustee implies and exercises a power at his own risk, although his action subsequently may be approved by the court").

181. The law of the particular jurisdiction must be consulted. See FREMONT-SMITH, *supra* note 168, at 173-84 (discussing the doctrines of *cy pres* and administrative deviation and their application in various states); *id.* app. at 512-13, tb1. 2 (indicating that in Idaho and Illinois, a trustee need not obtain the approval of a court to apply the doctrine of *cy pres*, but does need the consent of the Attorney General).

182. Larry Barth, Senior Deputy Attorney General for the state of Pennsylvania, notes that if the state Attorney General and other interested parties agree that an amendment to a conservation easement is appropriate, obtaining court approval, at least in his jurisdiction, would be easy and involve the filing of a petition with the court and a hearing that might last ten minutes or so. Personal communication with author (Mar. 20, 2006).

development of the law in this area. For example, in the unusual circumstance where the holder of a conservation easement agreed to a clearly neutral or enhancing amendment and the amendment is challenged by a party who has standing,¹⁸³ the holder can defend its action on the ground that it has the express or implied power to agree to such amendments.¹⁸⁴ In addition, easement holders who are concerned about the extent of their express or implied power to agree to amendments can proactively petition the court for instructions regarding the extent of such powers.¹⁸⁵

Easement holders also have the opportunity to help shape the law with regard to the types of amendments that should (and should not) be considered “neutral or enhancing.” For example, in crafting easement amendment policies and procedures to be adopted by land trusts nationwide, the Land Trust Alliance could offer guidance with regard to the types of amendments that should (and should not) be considered clearly neutral or enhancing.¹⁸⁶ In addition, easement holders that have excellent land conservation records and reputations and that have established and follow rigorous written policies and procedures regarding amendments can expect state attorneys general, the courts, and

183. As a practical matter, the only persons generally granted standing to enforce charitable trusts are state attorneys general (*see infra* Part IV.C.5), and state attorneys general are unlikely to invoke charitable trust doctrine to object to clearly neutral or enhancing amendments. State attorneys general are likely to invoke charitable trust doctrine only when the holder of a conservation easement agrees to an amendment that is contrary to the purpose of the easement and the public interest (as in Myrtle Grove). *See, e.g.,* DUKEMINER, *supra* note 21, at 760 (“Unless newspaper publicity is given to some alleged irregularity, the attorneys general rarely investigate the internal workings of charitable foundations”).

184. *See infra* Part IV.C.1. and 2 (discussing express and implied powers to amend). In such a circumstance, conservation organizations could play an important role in educating the courts regarding express and implied powers to amend perpetual conservation easements. *See, e.g.,* United States v. Blackman, 613 S.E.2d 442, 448 n.49 (Va. 2005) (in which the Supreme Court of Virginia held that an easement in gross conveyed for conservation and historic preservation purposes fifteen years before the enactment of the Virginia Conservation Easement Act nonetheless was valid in part based on arguments in support of this position set forth in an amicus brief filed by conservation and historic preservation organizations).

185. *See* BOGERT & BOGERT, *supra* note 18, § 391, at 232–33 (noting that “[a]mong general powers possessed by charitable trustees are the powers to petition the court of chancery for construction of the trust instrument, or for advice concerning the performance of their duties”).

186. For example, the Myrtle Grove controversy provides a compelling illustration of the type of amendments that should *not* be considered clearly neutral or enhancing and, thus, should not be made (or agreed to) in the absence of state attorney general and court approval.

the general public to give considerable deference to their opinions regarding the types of amendments that should (and should not) be considered neutral or enhancing.

5. Standing

In most cases standing to enforce a charitable trust is limited to the state attorney general or a co-trustee or co-director.¹⁸⁷ The reason for this rule is "based not on a denial of the public's interest, but on the purely practical consideration that it would be impossible to manage charitable funds, or even to find individuals to take on the task, if fiduciaries were to be constantly subject to harassing litigation."¹⁸⁸

In some cases courts grant standing to private persons who are deemed to have a "special interest" in a charitable trust, but the overriding factor in almost every case in which a private person has been granted standing to enforce a charitable trust was the lack of effective enforcement by the attorney general or other government official.¹⁸⁹ Accordingly, the status of conservation easements as charitable trusts is not likely to expose easement holders to harassing litigation by private persons (such as neighboring landowners). On the other hand, to the extent that a land trust or government agency agrees to amend or terminate a conservation easement in contravention of its stated purposes (as in Myrtle Grove), and the state attorney general does not effectively enforce the easement (due to, for example, lack of understanding, interest, or resources), the charitable trust rules provide a ground on which parties with a "special interest" (such as

187. See *FREMONT-SMITH*, *supra* note 168, at 324 ("The common law not only conferred supervisory powers and duties on the Attorney General to enforce charitable funds, but it largely excluded other members of the general public from so doing."); *id.* at 334 ("One of several trustees may bring a suit to enforce a charitable trust or compel the redress of a breach. Similarly, a director may bring an action on behalf of a charitable corporation against a co-director.") (internal citations omitted). See generally *SCOTT & FRATCHER*, *supra* note 16, § 391.

188. See *FREMONT-SMITH*, *supra* note 168, at 324–25.

189. *Id.* at 333 ("The problem faced by the courts in deciding the grounds on which to permit an interested party to bring suit to enforce a charity is, of course, the need to strike the difficult balance between the desire to assure that abuses will be corrected and the desire to permit fiduciaries to function without unwarranted abuse and harassment. Theoretically, the Attorney General can serve the function assigned to him. In the great number of standing cases, it is only when he fails that the courts will feel compelled to broaden the class of parties who may take over his role.")

the easement grantor or the grantor's heirs, charitable conservation organizations, or members of the community) may be granted standing to enforce the easement.¹⁹⁰

D. *Assessing the Proposed Amendments in Myrtle Grove in the Charitable Trust Framework*

If the National Trust had the benefit of hindsight it would have approached the Millers' request to amend the Myrtle Grove easement as outlined in the Concept Approval Letter in a very different manner. The following sections discuss how the National Trust (with the benefit of hindsight) should have responded to the amendment request. Assessing how the National Trust should have responded to the amendment request hopefully will provide useful guidance to other holders of perpetual easements, as they inevitably will be presented with similar requests.

1. The National Trust's Amendment Discretion

The Myrtle Grove easement does not contain an amendment provision granting the National Trust the discretion to agree to amendments that are neutral with respect to or enhance the stated purpose of the easement (and the National Trust did not have amendment policies and procedures in place at the time of Donoho's donation).¹⁹¹ Nonetheless, as discussed in Part IV.C.2.,

190. For example, in *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435 (N.Y. App. Div. 2001), the Supreme Court of New York, Appellate Division, granting standing to the administratrix of the estate of the donor of a charitable gift to enforce the terms of the gift after the state attorney general entered into a compromise agreement with the donee that was contrary to the terms of the gift. The court noted that "the circumstances of this case demonstrate the need for co-existent standing for the Attorney General and the donor." In *Kapiolani Park Pres. Soc'y v. City of Honolulu*, 751 P.2d 1022, 1025 (Haw. 1988), the Supreme Court of Hawaii granted standing to members of the public who used a public park to object to a proposed lease of a portion of the park for use as the site of a restaurant. The city serving as trustee of the charitable trust creating the park was on notice that there was a genuine question as to its power to lease a portion of the park and attempted to proceed with the transaction instead of seeking the instructions of the court, and the state attorney general supported city's alleged breach of trust. In granting standing to members of the public, the court noted that "Were we to hold otherwise, the City, with the concurrence of the attorney general, would be free to dispose, by lease or deed, of all, or parts of the trust comprising [the park], as it chose, without the citizens of the City and State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court."

191. See *supra* Part III.I, noting that the National Trust did not adopt amendment policies and procedures until May of 1995.

the National Trust might have been deemed to have the implied power to agree with the owner of the encumbered land to make clearly neutral or enhancing amendments. However, the amendments to the Myrtle Grove easement outlined in the Concept Approval Letter were *not* clearly neutral or enhancing, and, thus, could not have been deemed to fall within the National Trust's implied power to agree to amendments.

2. Assessing the Likelihood of Court Approval of the Proposed Amendments

Having determined that it was unlikely to be viewed as having the implied power to agree to the amendments outlined in the Concept Approval Letter, the National Trust could have assessed the likelihood that such amendments would be approved by a court in an administrative deviation or *cy pres* proceeding. As discussed in Part II, the doctrines of administrative deviation and *cy pres* are distinct in that the former applies to a modification of the *administrative terms* of a charitable gift or trust, and the latter applies to a modification of *charitable purpose* of a charitable gift or trust. Accordingly, the National Trust would have had to determine whether the proposed amendments would constitute: (i) a change in the *administrative terms* of the easement (in which case court approval would be sought in an administrative deviation proceeding) or (ii) a change in the *charitable purpose* of the easement (in which case court approval would be sought in a *cy pres* proceeding).

Although the line between a change in the administrative terms and a change in the charitable purpose of a trust is sometimes difficult to draw, it would have been hard to argue that the amendments outlined in the Concept Approval Letter did not change the charitable purpose of the Myrtle Grove easement. The purpose of the easement as set forth in the deed is to preserve the historic, architectural, cultural, scenic, and natural values of the 160-acre property and improvements thereon, and prevent the use and development of such property in any manner that conflicts with the preservation of those values. Amending the easement to narrow its application to a forty-seven acre "Historic Core" and permit a six-lot subdivision on the remaining acreage, complete with a single-family residence and ancillary structures (such as a pool, pool house, and tennis courts) on each of the sev-

en lots, would have changed the charitable purpose of the easement because it would have permitted the property to be developed in a manner that conflicts with the preservation of its historic, architectural, cultural, scenic, and natural values.¹⁹²

Even though certain aspects of the amendments—i.e., the imposition of additional and more specific affirmative maintenance obligations on the owners of the encumbered land and the provision of funds to the National Trust to monitor and enforce the original and new easements—would have furthered the preservation of some of the property's historic, architectural, cultural, scenic, and natural values, it seems clear that, on balance, the amendments would have conflicted with the preservation of such values. Accordingly, a court likely would have viewed the proposed amendments as constituting a change in the charitable purpose of the easement, and the National Trust would have been forced to seek court approval of those amendments in *cy pres* proceeding, where: (i) as a prerequisite to the application of the doctrine, it would have to be shown that the charitable purpose of the easement had become "impossible or impracticable," (ii) the state attorney general, as representative of the public, would be a necessary party, and (iii) notice of the pendency of the proceeding would likely be given to the general public, and the suggestions of interested parties would be received and considered by the court.¹⁹³

It is highly unlikely that a court would have determined that the charitable purpose of the Myrtle Grove easement had become "impossible or impracticable" (and, thus, a court likely never would have even considered whether the amendments outlined in the Concept Approval Letter constituted an appropriate "substitute plan").¹⁹⁴ It clearly had not become "impossible" to continue

192. See, e.g., Attorney General's Memorandum in Support of Summary Judgment, *supra* note 37, at 26–27 (quoting Mr. Bierce, the historic architect who was principally responsible for the National Trust's easement program and visited with Donoho on several occasions, as stating "[o]pen space is the fundamental, defining character of a rural estate. . . . This context is the history that creates the sense of place known as a rural landscape. . . . The proposed subdivision frustrates the purposes of Mrs. Donoho's easement. . . . [It] completely alters the character of rural historic property: a dominant main dwelling with only subordinated dwellings scattered on the land."). Mr. Nagel concurs and notes that the proposed subdivision outlined in the Concept Approval Letter, in retrospect, and when viewed independently of the circumstances under which the National Trust was working at the time, seems excessive. Nagel Interview, *supra* note 67.

193. See BOGERT & BOGERT, *supra* note 18, § 438, at 157, § 441, at 201, 204.

194. Recall that under the doctrine of *cy pres*, if the purpose of a restricted charitable

to preserve the historical, architectural, cultural, scenic, and natural values of the property and prevent the use and development of the property in any manner that conflicted with the preservation of such values.¹⁹⁵ It also did not appear to have become “impracticable” to do so. The Millers’ argument that the historical, architectural, cultural, scenic, and natural values of the property could continue to be preserved only if the costs associated with such preservation were spread among numerous owners was not convincing given that: (i) Donoho had managed to maintain the 160 acres as a farm on a limited income¹⁹⁶ and (ii) the Millers could have offloaded some of the costs associated with maintaining the acreage outside the Historic Core by selling the Heir’s Lot to a third party.¹⁹⁷

Moreover, courts generally are reluctant to find that the charitable purpose specified by a donor has become “impracticable” if continuing to carry out that purpose will provide benefits to the public,¹⁹⁸ and it was clear at the time of the proposed amendments that continuing to carry out the charitable purpose of the Myrtle Grove easement would provide numerous significant benefits to the public, including the preservation of nationally recognized historic assets and the protection of an important component of the Chesapeake Bay watershed. Indeed, the vociferous objection to the proposed amendments by the Attorney General

gift or charitable trust is determined to have become “impossible or impracticable” due to changed conditions, and the donor is determined to have had a “general charitable intent,” a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is “as close as possible” to the original purpose specified by the donor. See *supra* note 24 and accompanying text. Even if a court were to determine that the charitable purpose of the Myrtle Grove easement had become “impossible or impracticable,” it is unlikely that the amendments outlined in the Concept Approval Letter would have been considered an appropriate substitute plan because the goal in formulating a substitute plan under the doctrine of *cy pres* is to apply the trust assets to a charitable purpose that is “as close as possible” to the purpose specified by the donor.

195. See *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867), discussed *supra* note 24, for an excellent example of when the purpose of a charitable gift or trust has become “impossible.” In that case the donor’s charitable purpose—to promote the abolition of slavery—clearly became “impossible” when the Thirteenth Amendment to the Constitution was adopted. *Id.* at 573–74.

196. See *Daughter’s Letter # 2*, *supra* note 41, at 4.

197. Paul Edmondson notes that this point was made by the Attorney General, the National Trust, and the parties who filed an amicus brief in the context of the litigation, and is what eventually made clear that the only viable settlement option would be financial. See Edmondson March 22, 2006 E-mail attachment, *supra* note 142, at 3.

198. See *Rethinking*, *supra* note 3, at 476 (noting that “[d]onors of charitable gifts are not required to devote their property to the most desirable or efficient charitable purpose, but simply one that is beneficial to the community”).

and other interested parties (including other conservation and preservation organizations operating in the area) provided compelling evidence that the easement continued to provide significant benefits to the public.

Given that the state attorney general generally is a necessary party to a *cy pres* proceeding, and that notice of the pendency of such a proceeding generally is given to the general public and the suggestions of interested parties are considered by the court, it would have been advisable for the National Trust to provide notice of the proposed amendments to the Attorney General and other interested parties *before* initiating the proceeding.¹⁹⁹ Testing the "public" waters and assessing the likelihood that a court would approve of the amendments outlined in the Concept Approval Letter in a *cy pres* proceeding would have caused the National Trust to consider: (i) Donoho's right, within certain prescribed limits, to control the use and disposition of her property (in this case, the easement); (ii) the danger that failing to honor the wishes of a conservation easement donor could chill future donations, (iii) the danger that amending an ostensibly perpetual conservation easement in a manner contrary to its stated purpose could cause the public to question the efficacy of such easements as long-term land protection tools and the credibility of the agencies and organizations acquiring such easements; and (iv) the interest of the public at large (rather than just the National Trust and its members) in the continued enforcement of the easement according to its terms. Had the National Trust engaged in such an assessment, it would have determined that the proposed amendments were highly unlikely to be approved by a court and that petitioning the court for such approval was likely to be a public relations disaster.

199. In fact, petitioning a court for the application of *cy pres* without the tacit approval of the state attorney general can be risky for a trustee. See *In re Estate of Buck*, No. 23259 (Cal. Super. Ct. Aug. 15, 1986) (where a trustee petitioned the court for the application of *cy pres* to authorize it to use some of the considerable assets devoted to charitable purposes in an affluent county in neighboring counties, and the Attorney General of California intervened arguing against the application of the doctrine and asking whether the trustee was in violation of its fiduciary duties for bringing the suit and ought to be removed as trustee).

3. Negotiating for Neutral or Enhancing Amendments

Having determined that the amendments outlined in the Concept Approval Letter effectively would have changed the charitable purpose of the Myrtle Grove easement, and that such amendments were highly unlikely to be approved by a court in a *cy pres* proceeding (as well as exceedingly unpopular), the National Trust could have attempted to negotiate with the Millers for amendments that, on balance, were either neutral with respect to or enhanced the charitable purpose of the easement. Neutral or enhancing amendments would not change the charitable purpose of the Myrtle Grove easement and, thus, potentially could be approved by a court under the doctrine of administrative deviation (which is generally more generous than the doctrine of *cy pres*).²⁰⁰

For example, the National Trust could have suggested to the Miller Trust that the easement be amended to, on the one hand, permit very limited additional subdivision and development of the property (such as one or two more residential lots that would be appropriately sited and screened to have minimal impact on the historic, architectural, cultural, scenic, and natural values of the property) and, on the other hand, impose additional and more specific affirmative obligations on the owners of the encumbered land to maintain the property to a standard appropriate for property listed on the National Register of Historic Places; prohibit the development of the adjacent twenty-acre Willis Parcel; and provide the National Trust with funds to monitor and enforce the easement (a "stewardship endowment"). Such amendments might have been considered, on balance, to be neutral with respect to or actually enhance (rather than change) the charitable purpose of the Myrtle Grove easement because they might have been found to substantially further the preservation of the historic, architectural, cultural, scenic, and natural values of the property while permitting development that only minimally conflicted with the preservation of those values. Had the Millers been agreeable to

200. See *supra* note 23 and accompanying text (noting the modern tendency of courts to be more lenient in permitting trustees to deviate from the administrative terms as opposed to charitable purpose of a gift or trust). Given the Millers' initial amendment request, it seems unlikely that any amendment alternative the parties settled upon would have involved clearly neutral or enhancing amendments that might be deemed to fall within the National Trust's implied power to amend.

such amendments,²⁰¹ the National Trust could have considered petitioning the court for approval of such amendments under the doctrine of administrative deviation.²⁰²

Given that *any* additional subdivision of the Myrtle Grove property was likely to be controversial, it would have been advisable for the National Trust to seek approval of the proposed alternative amendments from the Attorney General and other interested parties *before* petitioning the court. If the Attorney General and other interested parties indicated that they would not object to (and, therefore, tacitly approved of) such amendments, a court may have been more inclined to authorize such amendments as permissible administrative deviations.²⁰³ Alternatively, if the Attorney General and other interested parties objected to such amendments, the National Trust could have renegotiated with the Miller Trust for amendments that would permit even less or no subdivision of the property or, perhaps, abandoned the idea of amending the easement altogether.

It is possible that the Attorney General and other interested parties, as well as the court, would have objected to *any* additional subdivision of the property as contrary to Donoho's intent and the charitable purpose of the easement.²⁰⁴ According to Mr. Edmondson, the overwhelming reaction from the conservation community and Donoho's heirs was that amendments allowing

201. Mr. Nagel indicated that, prior to the rancor engendered by the litigation described in *supra* Part III, it appeared the Millers would have been willing to consider alternative amendments *and* petitioning the court for approval of such alternative amendments. Nagel Interview, *supra* note 67; see also Miller's Memorandum in Support of Motion to Dismiss or Mediate, *supra* note 34, at 24 (stating that, in the context of court-supervised mediation, "the Miller Trust would entertain proposals, for example, to subject the 20-acre Willis tract to a preservation easement prohibiting development of the tract, to reduce the number of houses to be built or parcels to be created, [or] to strengthen the terms of the Easement . . .").

202. The amendments would have to be crafted to avoid private benefit. See *supra* Part IV.B (discussing the private benefit prohibition).

203. See, e.g., Jonathan Scott Goldman, *Just What the Doctor Ordered? The Doctrine of Deviation, The Case of Doctor Barnes's Trust and the Future Location of the Barnes Foundation*, 39 REAL PROP. PROB. & TR. J. 711, 723-24 (2005) (noting that there is a structural bias in favor of administrative deviation as most requests under that doctrine are effectively made unopposed).

204. See, e.g., Bierce Affidavit, *supra* note 51, para. 16 (noting that, in his professional judgment, the subdivision prohibition was an "extremely important element for the protection of the historic integrity of the property . . . further subdivision would ultimately change the character of the property . . . [and] any subdivision that would permit additional structures would irrevocably change the ratio of structures to open space, which is an essential characteristic of a large rural estate such as Myrtle Grove").

any additional subdivision of the property would be such a blatant violation of the donor's intent that it would undermine the prospect of future easement donations in Maryland.²⁰⁵ In any event, assessing the reaction of the Attorney General and other interested parties to the proposed alternative amendments would have enabled the National Trust to both assess its chances of having the amendments approved by a court and avoid (or at least minimize) damaging negative publicity.

Although petitioning the court for approval of alternative amendments that it believed to be neutral or enhancing would not have been costless for the National Trust, it likely would have been less costly than the litigation that followed the National Trust's withdrawal of its Concept Approval Letter (particularly when the \$225,000 settlement payment that was made to the Miller Trust is taken into account). Moreover, even if some interested parties had objected to the alternative amendments (such as neighboring landowners), but the National Trust determined that such amendments were nonetheless appropriate, approval of the amendments by a court would have given them substantial legitimacy in the eyes of the public, and would have shielded the National Trust from liability for a breach of its fiduciary duties under charitable trust principles.²⁰⁶

V. EASEMENTS OUTSIDE OF THE DONATION CONTEXT

This article has thus far focused on the application of charitable trust rules to conservation easements that are donated to charitable organizations or government agencies for specified purposes in perpetuity. Charitable trust rules also should apply when charitable organizations (and, in many cases, government agencies) purchase perpetual conservation easements with funds received or raised expressly for that purpose.²⁰⁷ But what of expressly perpetual conservation easements that are purchased

205. See Edmondson March 22, 2006 E-mail attachment, *supra* note 142, at 3.

206. The remedies for a breach of a trustee's fiduciary duties include: "(1) the specific enforcement of the duties . . . ; (2) an injunction against a threatened breach of trust; (3) redress for a breach of trust; (4) the appointment of a receiver; [and] (5) the removal of the trustee." SCOTT & FRATCHER, *supra* note 16, § 199, at 204.

207. See, e.g., *St. Joseph's Hospital v. Bennett*, 22 N.E. 2d 305, 308 (N.Y. 1939) (holding that a charitable corporation "may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands").

with unrestricted funds or acquired in other nondonative transactions, such as where subdivision approvals are conditioned on the conveyance of a perpetual easement to a government agency?

There are a number of compelling reasons to require that expressly perpetual conservation easements—regardless of how they were acquired—be modified or terminated in contravention of their stated purposes only in the context of a *cy pres* or similar proceeding. First, to permit holders of expressly perpetual conservation easements obtained in nondonative transactions to agree to modify or terminate such easements at their pleasure, subject only to the general federal and state laws governing their conduct (including the requirement that they use their assets in accordance with their public or charitable mission and avoid private benefit) would be contrary in many cases to both the intent of the easement grantor and the public. Given the representations made to easement grantors and the public regarding the “perpetual” nature of conservation easements,²⁰⁸ the general understanding of the meaning of the term “perpetual,”²⁰⁹ and the fact that conservation easements outside of the donation context often expressly provide that they can be extinguished only upon “impossibility or impracticality” and only then in a judicial proceeding,²¹⁰ it is reasonable to assume that the public, which is investing substantial sums in the acquisition of expressly perpetual easements,²¹¹ as well as landowners selling such easements, do not intend that the holders will have the discretion to later simply sell or exchange such easements for cash or other compensation that could be used by the holders to accomplish their public or charitable mission in some other manner or location.

It also is not difficult to imagine that the two parties with a significant financial interest (i.e., the holder of a conservation

208. See *supra* note 167.

209. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004) (defining “perpetual” to mean “[l]asting for eternity”) (emphasis added); THE AMERICAN HERITAGE DICTIONARY OF IDIOMS (1997) (defining “in perpetuity” to mean “[f]or all time, forever”) (emphasis added).

210. The language essentially reiterating the doctrine of *cy pres* that is included in tax-deductible conservation easements to comply with the requirement that the conservation purposes of such easements be “protected in perpetuity,” see *supra* notes 153 and 154 and accompanying text, is also often included in easement deeds outside of the donation context. See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 1, at 462.

211. Such investment takes many forms, including donations to land trusts, tax revenues used to fund easement purchase programs, and the provision of benefits to developers in exchange for perpetual easements.

easement and the owner of the encumbered land) might fail to take appropriate account of the public's interest when considering the modification or termination of the easement. The resulting modification and termination of expressly perpetual conservation easements in manners contrary to the public interest could seriously undermine public confidence (and willingness to continue to invest) in conservation easements, and discourage landowners from participating in easement purchase programs.²¹² When confronted with the modification or termination of an expressly perpetual conservation easement in contravention of the public's interest, the public is unlikely to think that the method of acquisition should be relevant to the question of whether the easement should continue to be enforced.²¹³ Maintaining public confidence in perpetual conservation easements as a land protection tool requires that such easements continue to be enforced for as long as they provide the benefits for which they were acquired, and be modified or terminated in contravention of their stated purposes only in the context of a *cy pres* or similar proceeding where the interests of the public—and, where relevant, the grantor—are appropriately considered.

Moreover, outside the donation context the parties generally are free to negotiate for the sale or conveyance of *nonperpetual* conservation easements (i.e., conservation easements that expressly grant the holder the discretion to agree with the owner of the encumbered land to modify or terminate the easement as the holder sees fit, subject to only the baseline constraints on its behavior noted above).²¹⁴ Accordingly, when parties outside the do-

212. A landowner who sells a perpetual conservation easement to a government agency or land trust might well have refused to do so if informed that "perpetual" has a special meaning in the easement context—i.e., enforceable only until the holder and a subsequent owner of the land decide to modify or terminate the easement.

213. See, e.g., Tad Ames, *Perpetuity is not Forever*, BOSTON GLOBE, Feb. 13, 2006, at A15 (describing the potential termination of a perpetual conservation easement purchased by the Commonwealth of Massachusetts to protect an historic residence and the surrounding grounds and provide limited public access because the new owner of the property wishes to use the property as a "luxury boutique resort," and noting that while the easement "was to bind all future owners of the property in perpetuity . . . it turns out that 'perpetuity' may be defined as 'until a better offer comes along.'").

214. The Internal Revenue Code requirement that the conservation purposes of a conservation easement be "protected in perpetuity" is not relevant outside the donation context, and in most states conservation easements are not required to be perpetual. See Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 40, 42 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (noting that, while "there is a philosophical

nation context instead agree to the conveyance of an expressly *perpetual* conservation easement, it should be assumed that the perpetual nature of the restrictions was a material component of the transaction to at least to one of the parties (whether it be the grantor, the grantee, or the public, which in one way or another invested in the easement).

Finally, although the law in analogous areas is unclear and inconsistent,²¹⁵ there is some support for applying charitable trust rules or similar principles to the modification and termination of expressly perpetual conservation easements in the nondonative context.²¹⁶

proclivity toward perpetual easements," only four states—California, Colorado, Florida, and Hawaii—require that easements be perpetual); *see also* UCEA, *supra* note 147, § 2(c) (providing that "a conservation easement is unlimited in duration unless the instrument creating it otherwise provides"). The relative merits of perpetual versus nonperpetual (as well as term) easements is the subject of a future article. This article concerns itself only with those easements that are expressly perpetual.

215. *See, e.g.*, V. Woerner, Annotation, *Nature of Estate Conveyed by Deed for Park or Playground Purposes*, 15 A.L.R.2d 975, §§ 2–6 (1951); Ferdinand S. Tinio, Annotation, *Construction of Highway Through Park as Violation of Use to Which Park Property May be Devoted*, 60 A.L.R.3d 581, §§ 3–5 (1974); Kevin A. Bowman, Comment: *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. CIN. L. REV. 595, 595 (1997).

216. *See, e.g.*, *Cohen v. City of Lynn*, 598 N.E.2d 682, 685 (Mass. App. Ct. 1992) (in preventing the sale by a city of land purchased pursuant to deeds stating that the land was to be used "forever for park purposes," the Massachusetts Court of Appeals held that the conveyance created a public charitable trust and acceptance of the deeds by the city "constituted a contract between the donor and the donee which must be observed and enforced," and stated "We have found no authority, nor is any cited to us, to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust"); *In re Village of Mount Prospect*, 522 N.E.2d 122 (Ill. App. Ct. 1988) (holding that where a lot had been dedicated "for public purposes" pursuant to a subdivision ordinance, the village acquired "legal title to the land upon an express charitable trust to use the property for public purposes" and, despite the fact that the Assistant Attorney General agreed with the village that the most beneficial use of the lot for the entire village would be to sell it and apply the proceeds to a public purpose, the court refused to apply the doctrine of *cy pres* and permit the sale "because it was practical and feasible to keep the lot in its present condition" and abutting landowners and fifty-two residents of the village by petition objected to the sale). *See also* Press Release, Connecticut Attorney General's Office, Nov. 5, 2004, available at <http://www.ct.gov/ag/cwp/view.asp?A=1779&Q=289620> (reporting that the Connecticut Attorney General sought an emergency injunction to stop the illegal construction of a golf course on a farm where the state had purchased the development rights to prohibit the development of the farm in perpetuity, and quoting the Attorney General as stating: "The survival of our farmland preservation program is at stake, not just a single piece of land or farm," and "The taxpayers own these farmland development rights—and my office will fight tooth and nail to uphold those rights").

VI. CONCLUSION

The primary lesson to be learned from the Myrtle Grove controversy is that the modification or termination of a perpetual conservation easement is not a private contractual matter between the owner of the land and the holder of the easement, and the holder of a perpetual conservation easement that simply agrees with the owner of the encumbered land to modify or terminate the easement in contravention of its stated purposes does so at its peril. Conservation easements conveyed as charitable gifts to government agencies and charitable organizations for specified purposes in perpetuity—as with any other type of property interest conveyed in such a fashion—are likely to be treated as held by such agencies or organizations in trust or quasi-trust for the benefit of the public and, thus, as subject to oversight by state attorneys general and the courts under charitable trust principles.

It is difficult to predict the extent to which state attorneys general and other interested parties will invoke charitable trust doctrine to ensure that perpetual conservation easements are enforced in accordance with their stated purposes, although some state attorneys general have indicated that they take their role as enforcers of conservation easements on behalf of the public very seriously. In many cases other factors—such as the prohibition on private benefit, the ethical standards adopted by land trusts,²¹⁷ and specific provisions concerning modification and termination in an easement enabling statute²¹⁸—will be sufficient to discourage inappropriate modifications or terminations. However, charitable trust rules serve as the ultimate backstop, permitting state attorneys general (and, when state attorneys general decline to become involved or are ineffective, parties with a “special interest”) to object when the holder of a perpetual conservation easement nonetheless agrees to modify or terminate the easement in

217. The Land Trust Alliance has promulgated ethical guidelines for the responsible operation of land trusts and requires all of its land trust members to adopt such guidelines. See Land Trust Alliance, Standards and Practices, http://www.lta.org/sp/land_trust_standards_and_practices.pdf (last visited Apr. 9, 2006).

218. See, e.g., MASS. GEN. LAW. ANN. ch. 184 § 32 (2006) (stating that release of a conservation easement in whole or in part requires a public hearing and approval by a public official); see also *supra* note 155 (noting that the Massachusetts Attorney General generally relies on the Massachusetts easement enabling statute to ensure that restricted land remains protected).

contravention of its stated purposes and the public interest.²¹⁹ Indeed, the mere threat of enforcement by state attorneys general and other interested parties pursuant to charitable trust principles will help to ensure that: (i) land trusts adhere to the ethical standards promulgated by the Land Trust Alliance,²²⁰ and (ii) the myriad of state and local government agencies that have acquired perpetual conservation easements continue to enforce those easements and otherwise comply with their fiduciary obligations.

A second lesson to be learned from the Myrtle Grove controversy is that land trusts and government agencies would be wise to proactively address the issue of amending ostensibly "perpetual" conservation easements in manners consistent with their stated purposes. Formal amendment policies and procedures and amendment provisions included in easement deeds should set the ground rules regarding amendments and clearly specify the limits on the holder's discretion to simply agree to amendments. Addressing the level of amendment discretion granted to the holder in the easement deed will minimize uncertainty regarding the intent of the parties and the rights of the holder, and hopefully encourage more thoughtful drafting of these perpetual instruments.

219. See, e.g., *Rethinking*, *supra* note 3, at 457 n.119, describing a case being litigated in Wyoming where parties with a "special interest" in the enforcement of a perpetual conservation easement have filed suit objecting to a resolution passed by the Board of Commissioners of Johnson County to terminate the easement. The parties have asserted, inter alia, that the Board of Commissioners holds the easement in a charitable trust for the benefit of the public and may not extinguish the easement without receiving court approval therefor in the context of a *cy pres* proceeding, where it would have to be shown that the charitable purpose of the easement has become "impossible or impracticable." *Id.*

220. Ethical standards, such as the Land Trust Alliance Standards and Practices, do not have the force of law. In discussing museum governance, Marie C. Malaro explains the difference between ethical standards and legal standards:

[A]n ethical standard for a profession must be distinguished from a legal standard. An ethical code sets forth conduct that a profession considers essential in order to uphold the integrity of the profession. Codes of ethics are based on commitments to public service and personal accountability. Quite frequently codes of ethics have no enforcement mechanism. They depend on self-education, self-motivation, and peer pressure for their promulgation. And even in those situations where a profession undertakes to police its own code, enforcement cannot be effective without consistent and voluntary commitment from a sizable portion of the profession . . . The law, as a rule, sets a lower standard than that required by ethical codes, but the legal standard has clout. If one falls below the legal standard, the subsequent exposure to civil or criminal liability usually commands attention.

MARIE C. MALARO, MUSEUM GOVERNANCE 17 (1994).

A final lesson to be learned from the Myrtle Grove controversy is the importance of consulting with all potentially interested parties with regard to amendments that are likely to be controversial or are not clearly “neutral or enhancing.” One of the fundamental errors made by the National Trust in the Myrtle Grove controversy was its failure to consult with potentially interested parties—including the family of the easement grantor, other conservation and preservation groups operating in the area, and the state Attorney General as representative of the general public—before “conceptually approving” the amendments requested by the Millers. Had the National Trust consulted with such interested parties, it would have discovered that the requested amendments were extremely controversial and, after reconsideration (and before triggering a series of unfortunate events), likely would have realized that agreeing to such amendments would constitute a breach of its fiduciary duties to the easement grantor and the public.

VII. EPILOGUE

The National Trust continues to hold the easement encumbering Myrtle Grove, and the property is still owned by the Miller Trust.²²¹ In the years since the litigation, the National Trust’s relationship with the Millers has been essentially the same as with any other owner of easement-encumbered property.²²²

The easement requires that the owner of the encumbered land obtain the National Trust’s written approval before engaging in certain activities, such as making structural changes to the manor house and law office.²²³ The Millers have approached the National Trust with two such requests for approval, and the National Trust granted approval in one case and denied approval in the other.²²⁴ In each case, the review of the request for approval was conducted with input from interested preservation organizations in Maryland (including the Maryland Historical Trust and Preservation Maryland) and the Attorney General.²²⁵ The Na-

221. See Edmondson March 22, 2006 E-mail attachment, *supra* note 142, at 3.

222. See *id.*

223. See Myrtle Grove Easement, *supra* note 29.

224. See Edmondson March 22, 2006 E-mail attachment, *supra* note 142, at 3.

225. See *id.* at 3–4 (noting that the Attorney General’s office reviewed the requests for approval to determine whether they fell within the National Trust’s discretionary author-

tional Trust also has worked with the Millers on a cooperative basis on other issues such as routine maintenance.²²⁶

The Heir's Lot has remained on the market, subject to the easement, and as of early 2006 was still owned by the Miller Trust. It remains in agricultural use.²²⁷

The National Trust last inspected the Myrtle Grove property in September of 2005, and the property was in excellent condition and in full compliance with the easement.²²⁸

ity under the easement deed and, in each case, the Attorney General's office had no objection to the National Trust's position).

226. *Id.* at 3.

227. *Id.* at 4.

228. *Id.*

Appendix A Myrtle Grove Area Map




