Brooklyn Law Review

Volume 78
Issue 2
SYMPOSIUM
Post Zoning: Alternative Forms of Public Land Use Controls

Article 22

2013

Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility and Democracy

Gerald Korngold

Governmental Conservation Easements

A MEANS TO ADVANCE EFFICIENCY, FREEDOM FROM COERCION, FLEXIBILITY, AND DEMOCRACY*

Gerald Korngold†

INTRODUCTION

Over the past twenty-five years, conservation easements have become widely recognized and utilized as a major vehicle for preserving natural and ecologically sensitive land. Much of the discussion and acquisition efforts during this time have focused on conservation easements held by nonprofit organizations (NPOs).[1] Conservation easements held by NPOs have been lauded for being perpetual, private rather than governmental, efficient, consensual and representing the free choice of the parties, and serving the public interest in conservation.[2]

During this same period, courts have increasingly recognized and protected property rights in the face of a variety of governmental actions, prompting renewed calls for diminished governmental control over land.[3] These voices have condemned governmental coercion of owners and extolled the benefits of consensual, market-based arrangements. In light of these developments, the public's ability to control land use and

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† Professor of Law, New York Law School; Visiting Fellow, Lincoln Institute of Land Policy. Email: gkorngold@nyls.edu.

[1] Conservation easements held by NPOs are also referred to as "private" conservation easements. This paper sometimes uses the term "easements" for "conservation easements" for simplicity. For data on the growth of NPO easements, see LAND TRUST ALLIANCE, 2010 NATIONAL CENSUS REPORT: A LOOK AT VOLUNTARY LAND CONSERVATION IN AMERICA, *available at* https://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report.

[2] *See infra* note 8.

[3] *See* Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law* 1 (George Mason Law & Econ. Research, Working Paper No. 08-53, 2009), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/08-53%20Taking%20Property%20Rights.pdf ("[T]he Supreme Court has expanded protection for constitutional property rights. After decades of neglect, the Court has begun to take constitutional property rights seriously." (citation omitted)); *see also infra* Parts II.B, III.A.1, and III.A.2.

activities through uncompensated regulation has been curtailed and critiqued.

This paper argues that these two independent developments—the rise of private conservation easements and the critique of excessive public land use regulation—militate for the increased use of consensual conservation easements by governmental entities to achieve public land preservation goals. Governmental conservation easements can realize the benefits of efficiency, consent and free choice, and conservation, while also avoiding the coercion implicit in public land use regulation. Moreover, governmental conservation easements have advantages over private easements in some situations: they may be more easily modified or terminated to address future changes in conservation values and community needs; they are transparent and subject to democratic, participatory processes; and they may be better positioned to discern and represent the public interest when making acquisition, modification, and termination decisions about conservation easements.

I make two clarifications up front. First, I do not argue that NPO-held conservation easements should be eschewed. Indeed, private conservation easements provide tremendous benefits, and they should continue to be utilized and lauded as a land preservation vehicle. My main contribution lies in demonstrating that governmental conservation easements should also be increased, and that there may be some lessons from governmental conservation easements that can be beneficially applied to NPO-based easements. Second, I believe that public land use regulation is important and that the government should continue to use it. I simply suggest, however, that, in some circumstances, the increased use of consensual land use arrangements can advance land preservation goals while avoiding some of the negatives of public regulation.

Part I will examine the general background on conservation easements as well as the particular attributes and data related to governmental easements. Part II will develop the policy benefits and drawbacks of governmental conservation easements, and it will compare governmental easements to NPO-held easements and public land use controls. With respect to governmental easements, it will examine the issues of efficiency and cost, the dichotomy between freedom and coercion, the importance of flexibility, and the value of participatory democracy. Part III will examine some special concerns of governmental easements and suggest ways to address them, including nonconsensual acquisition through

eminent domain and exactions; procedural impediments to flexibility and democratic governance; and statutory controls on modification and termination.

I. THE CONSERVATION EASEMENT ARCHITECTURE

A. Features

A conservation easement is a negative restriction on a parcel of land that prevents the owner and successors from altering the property's ecological, natural, open, or scenic features.[4] Typical conservation easement documents require a general undertaking not to interfere with these natural

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[4] UNIF. CONSERVATION EASEMENTS ACT § 1(1), 12 U.L.A. 170 (1981). William H. Whyte, Jr. popularized if not coined the phrase, and was an early proponent. *See generally* William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, URB. LAND INST.: TECHNICAL BULL., No. 36, Dec. 1959. Russell Brenneman was an early, influential legal writer and supporter of conservation easements. *See generally* RUSSELL L. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND (1967). For prior work on the conservation easements, see generally Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984) [hereinafter Korngold, *Conservation Servitudes*]; Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1525-27 (2007); Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039 [hereinafter Korngold, *Contentious Issues*]; Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 28 WISC. INT'L L.J. 585 (2011) [hereinafter Korngold, *Globalizing Easements*].

Other articles on conservation easements include James Boyd, Kathryn Caballero & David R. Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209 (2000); Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119 (2010); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996); Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012); Jessica O. Lippman, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043 (2006); Julia D. Mahoney, *Land Preservation and Institutional Design*, 23 J. ENVTL. L. & LITIG. 433 (2008); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005) [hereinafter McLaughlin, *Rethinking*]; Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897 (2008); Peter M. Morisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373 (2001); James L. Olmstead, *Representing Nonconcurrent Generations: The Problem of Now*, 23 J. ENVTL. L. & LITIG. 451 (2008); Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. CHI. L. REV. 341 (2010); Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373 (2001).

features, as well as specific, related prohibitions that may, for example, ban or otherwise limit subdividing the property, erecting additional buildings and structures, harvesting timber, and paving roads.[5] With the exception of easements creating recreational rights, easements generally do not grant public access.[6] Accordingly, conservation easements protecting natural habitats or views do not grant public access to the property.[7]

Conservation easements are valued for safeguarding pleasing views, preserving biodiversity, remediating atmospheric conditions, protecting watersheds, and promoting psychic benefits.[8] Proponents claim various economic advantages as well, ranging from preserving ecological capital for future generations and conserving farmland for food sources to enhancing quality of life in order to attract skilled labor.[9] Individual property values may also benefit from nearby land restricted by conservation easements.[10] Yet despite these positive features, the conservation easement phenomenon is more than the sum of its beneficial components: it is part of a new American outlook toward our land. Indeed, in recent years, many have come to view the conservation of our natural and historic heritage as a vital value to be balanced against the traditional model favoring full development.[11]

In light of questions concerning the validity of conservation easements, various state legislatures have passed

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[5] Korngold, *Contentious Issues*, *supra* note 4, at 1045-46.

[6] *Id.* at 1046. The easement holder usually has a limited right of access to inspect and monitor the easement area. *See id.* at 1046 n.17.

[7] *Id.* at 1045.

[8] *See* VIRGINIA MCCONNELL & MARGARET WALLS, THE VALUE OF OPEN SPACE: EVIDENCE FROM STUDIES OF NONMARKET BENEFITS (2005), *available at* http://www.rff.org/rff/documents/rff-report-open%20spaces.pdf; *cf.* LILLY SHOUP & REID EWING, THE ECONOMIC BENEFITS OF OPEN SPACE, RECREATION FACILITIES AND WALKABLE COMMUNITY DESIGN (2010), *available at* http://www.activelivingresearch.org/files/Synthesis_Shoup-Ewing_March2010_0.pdf (Open spaces generate economic benefits to local governments, homeowners, and businesses because of higher property values and tax valuations.).

[9] *See* ECON. LEAGUE OF GREATER PHILA. ET AL., THE ECONOMIC VALUE OF PROTECTED OPEN SPACE IN SOUTHEASTERN PENNSYLVANIA (Jan. 2011), *available at* http://economyleague.org/files/Protected_Open_Space_SEPA_2-11.pdf; RAND WENTWORTH, LAND TRUST ALLIANCE FACT SHEET: ECONOMIC BENEFITS OF OPEN SPACE PROTECTION (Spring 2003), *available at* http://www.landtrustalliance.org/conservation/documents/economic-benefits.pdf; John L. Crompton, *The Impact of Parks on Property Values: A Review of the Empirical Evidence*, 33 J. OF LEISURE RES. 1, 5 (2001).

[10] *See* Jacqueline Geoghegan, *The Value of Open Spaces in Residential Land Use*, 19 LAND USE POL'Y 91 (2002).

[11] *See* Cary Coglianese, *Social Movements, Law and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 91-94 (2001); D.T. Kuzmiak, *The American Environmental Movement*, 157 GEOGRAPHICAL J. 265, 265-67 (1991).

statutes authorizing these interests.[12] While some jurisdictional variation exists, conservation easements generally share similar attributes: only a qualified nonprofit organization or government may hold them;[13] they are typically held in gross, meaning that the easement holder does not own adjacent land that the restriction benefits;[14] they are usually perpetual[15] and require unlimited duration for deductibility of easement donations;[16] they are enforceable in rem, as property interests;[17] and they are binding on successive owners of the burdened property.[18]

B. The Tax Subsidy

While the government's purchase of a conservation easement involves a direct payout of public funds, the donation of a conservation easement results in a tax expenditure and thus taps into the United States public purse as well. Under Section 170(h) of the Internal Revenue Code, a donation of a conservation easement to a nonprofit organization or to the United States, the states, or a political subdivision is deductible.[19] Moreover, for federal estate tax purposes, property values are reduced by the value of a conservation easement, which generates further potential revenue losses for the Treasury.[20]

Conservation easement donations also reduce state and local tax revenues. Some states allow income-tax deductions or credits for the donations.[21] Moreover, because easement restrictions reduce the assessed value of the land, the presence of conservation easements diminishes property tax revenues.[22]

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[12] *See* Korngold, *Globalizing Easements*, *supra* note 4, at 594-97.

[13] UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. 70 (1981).

[14] *Id.* § 4(1).

[15] *Id.* § 2(c) ("[A] conservation easement is unlimited in duration unless the instrument creating it otherwise provides.").

[16] I.R.C. § 170(h)(2)(C) (2006).

[17] UNIF. CONSERVATION EASEMENT ACT § 1(1).

[18] *Id.*, Comm'rs' Prefatory Note.

[19] 26 U.S.C. § 170(c) (2006).

[20] Property Subject to Restrictive Arrangements, 26 C.F.R. § 25.2703-1(a)(4) (1992).

[21] *See, e.g.*, N.Y. TAX LAW § 210(38) (McKinney 2012); N.C. GEN. STAT. ANN. § 105-151.12 (West 2012). This is usually reflected not by a specific state tax code provision but by the state tracking the federal income tax structure and its deductions. *See* Jeffrey O. Sundberg & Richard F. Dye, *Tax Property Value Effects of Conservation Easements* 7 & nn.15-16 (Lincoln Inst. of Land Policy, Working Paper No. WP06JS1), *available at* http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=1128.

[22] *See* Jet Black, LLC v. Routt Cnty. Bd. of Cnty. Comm'rs, 165 P.3d 744, 749-50 (Colo. App. 2006) (referring to special statutory treatment of conservation easement land under agricultural use); Firethorn Investment v. Lancaster Cnty. Bd. of Equalization, 622 N.W.2d 605, 610-11 (Neb. 2001) (when land's highest and best use was as a golf course, presence of conservation easements did not reduce its value); Ross

Lower property tax revenues leave the municipality with the prospect of decreasing services or increasing taxes on other citizens to close the gap. Accordingly, conservation easements both purchased by government and donated to nonprofits result in public expenditures, which may be direct or indirect costs borne by federal, state, or local governments.

C. Governmental Conservation Easements

A variety of governmental entities currently hold conservation easements of differing types. This subsection describes the history, forms, and emerging data on governmental conservation easements.

1. Background

Federal,[23] state,[24] and local[25] governments currently own conservation easements.[26] Governmental conservation easements

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v. Town of Santa Clara, 698 N.Y.S.2d 90, 91-93 (N.Y. App. Div. 1999) (since land was already restricted against development, conservation easement did not decrease value); Gibson v. Gleason, 798 N.Y.S.2d 541 (N.Y. App. Div. 2005) (upholding trial court's order to reduce property tax assessment because of conservation easement barring subdivision and limiting lot to agricultural uses); McKee v. Dep't of Rev., No. TC 4620, 2004 WL 2340265, at *3 (Or. T.C. Oct. 14, 2004) (finding significant effect of conservation easement on value when compared to other properties); Luca v. Lincoln Cnty. Assessor, No. TC-MD 010953F, 2003 WL 21252488, at *6 (Or. T.C. Mar. 19, 2003) (court acknowledges drop in development potential); Daniel S. Stockford, Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823 (1990) (addressing the reduced assessments resulting from the placement of a conservation easement). For an excellent discussion of the various jurisdictional treatments of conservation easements for state tax purposes, see Joan M. Youngman, *Taxing and Untaxing Land: Open Space and Conservation Easements*, 41 STATE TAX NOTES 747, 747-62 (2006).

[23] *See, e.g.*, Environmental Conservation Acreage Reserve Program, 16 U.S.C. § 3830 (2006); United States v. Albrecht, 496 F.2d 906, 908-10 (8th Cir. 1974) (enforcing easement barring draining of wetlands enforced against successor to grantor); Lost Tree Vill. Corp. v. United States, 92 Fed. Cl. 711, 716 (2010) (referring to conservation easements held by Corps of Army Engineers).

[24] *See, e.g.*, Long Green Valley Ass'n v. Bellevale Farms, Inc., 46 A.3d 473, 478, 486 (Md. 2012); Bennett v. Comm'r of Food & Agric., 576 N.E.2d 1365 (Mass. 1991) (agricultural preservation easement); *see also* Friends of Shawangunks, Inc. v. Knowlton, 476 N.E.2d 988, 989 (N.Y. 1985) (conservation easements purchased by the Palisades Interstate Park Commission, located in New York and New Jersey).

[25] *See, e.g.*, Sierra Club v. City of Hayward, 623 P.2d 180 (Cal. 1981) (agricultural use easement held by city); Ephrata Area Sch. Dist. v. Cnty. of Lancaster, 938 A.2d 264, 266, 268 (Pa. 2007) (county owned open space easement); Ashleigh G. Morris, Note, *Conservation Easements and Urban Parks: From Private to Public Use*, 51 NAT. RESOURCES J. 357 (2011) (suggesting use of municipal conservation easements to protect urban park lands); Amy Matzke-Fawcett, *Franklin County Gets Funding From State to Save Farmland*, ROANOKE TIMES (Jan. 20, 2012), http://www.roanoke.com/news/roanoke/wb/303743 (state providing $50,000 matching funds to county to acquire agricultural conservation easement).

date back to at least the 1930s. Early federal programs include the National Park Service's acquisition of scenic easements along the Blue Ridge and Natchez Trace Parkway in the 1930s and 1940s;[27] the legislation authorizing the acquisition of wetland easements and their designation as Waterfowl Production Areas in 1958;[28] and the Highway Beautification Act of 1965, which provided funding to the states for the acquisition of scenic easements along highways.[29] The state of Wisconsin launched "the first major state-supported program to purchase conservation easements in the United States" in the early 1950s, when it began to acquire scenic easements along highways adjacent to the Mississippi River.[30]

Governments may acquire easements by different methods and for different purposes. For example, governmental easements may be acquired in exchange for consideration[31] or

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[26] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.18, 8.5 (2000) (discussing acquisition and enforcement of conservation easements by governmental bodies). Government also might acquire a conservation easement and subsequently transfer it to a nonprofit, *see, e.g.*, Mesa Cnty. Land Conservancy v. Allen, No. 11CA1416, 2012 Colo. App. LEXIS 922 (June 7, 2012) (enforcing easement granted by United States through the Farmers Home Administration to a nonprofit), or provide funds to a nonprofit to acquire an easement, *see, e.g.*, Rusty Dennen, *Caroline Farmer Protects Land, Fort*, FREDERICKSBURG.COM (Dec. 3, 2011), http://fredericksburg.com/News/FLS/2011/122011/12032011/668261; Rusty Dennen, *Easement Problem Leads to Lawsuit*, FREDERICKSBURG.COM (May 22, 2012), http://fredericksburg.com/News/FLS/2012/052012/05222012/702032/; Christopher Dunagan, *Forest and Streams Protected in Union River Area*, KITSAP SUN (Bremerton, WA) (Jan. 4, 2012, 6:16 PM), http://www.forterra.org/news/forest_and_streams_protected_in_union_river_area (state provided $480,000 to NPO to acquire easement on forestland). The federal government has also contributed funds under the Army Compatible Use Buffer program for the acquisition of easements by state and local government and NPOs surrounding army bases that preserves the land and also provides buffer for training purposes. *See* 10 U.S.C. § 2684a (2006).

[27] Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (And Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. RPTR. 10,223, 10,223-24 (2004).

[28] United States v. Johansen, 93 F.3d 459, 461 (8th Cir. 1996).

[29] *See generally* Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 168 (1968) (describing federal Highway Beautification Act of 1965 allocating each state federal funds to acquire easements and fees along highways).

[30] Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin's Great River Road: A Progress Report on Perpetuity*, 66 J. AM. PLANNING ASS'N 177, 178 (2000).

[31] *See, e.g.*, *Johansen*, 93 F.3d at 461 (waterfowl easement purchased in 1960s in North Dakota on 320 acres for $600); Droste v. Bd. of Cnty. Comm'rs, 159 P.3d 601, 603 (Colo. 2007) (describing purchase by County in 1999 of conservation easement on 500 acres for $7.5 million and 1996 purchase of easement on 100 acres for $480,000); Long Green Valley Ass'n v. Bellevale Farms, Inc., 46 A.3d 473, 478 (Md. Ct. Spec. App. 2012) (agricultural easement on 199 acres purchased for $796,500 by Maryland Agricultural Land Preservation Foundation, an entity of the Maryland Department of Agriculture); Bill Reed, *Bucks County Preserves 150th Farm in Its Preservation Program*, PHILA. INQUIRER (Mar. 23, 2012), http://articles.philly.com/2012-03-23/news/

by gift.[32] Moreover, governments may obtain easements proactively pursuant to a statutory framework, such as specific legislation authorizing the acquisition of easements to preserve agricultural lands,[33] wetlands,[34] or other environmentally sensitive lands.[35] Alternatively, where the easement is not part of a larger pattern or program of easements, it may be acquired as part of the bargaining process in granting approval of a developer's building plan.[36]

Governmental easements vary in duration. While some governmental conservation easements are perpetual,[37] others may be for a designated time period, especially where the government acquires them pursuant to particular programs.[38] Moreover, some easements may be drafted as perpetual but permitted to terminate if certain events occur.[39]

31229859_1_agricultural-land-preservation-program-farms-4-h-program (payment of $608,260 by county for conservation easement on 135 acre farm).

[32] *See, e.g.*, Carol Kugler, *State Receives 1,500-acre Land Donation*, BLOOMINGTON, IND. HERALD-TIMES, May 13, 2012, at C7, *available at* http://www.heraldtimesonline.com/stories/2012/05/11/earth.703801.sto.

[33] *See, e.g.*, Environmental Conservation Acreage Reserve Program, 16 U.S.C. § 3830 (2006); MD. CODE ANN., AGRIC. § 2-501 (West 2012); Twomey v. Comm'r of Food & Agric., 759 N.E.2d 691, 694 n.5 (Mass. 2001).

[34] *See, e.g.*, United States v. Albrecht, 496 F.2d 906, 911 (8th Cir. 1974) (waterfowl habitat easement "effectuates an important national concern"); Wetlands Reserve Program, 7 C.F.R. § 1467.4 (2009).

[35] *See, e.g.*, 32 PA. STAT. ANN. §§ 5001, 5005 (West 2012) (listing a variety of purposes including open space, watershed protection, scenic protection, and forestry, among others); United States v. Hoyte, No. C10-2044BHS, 2012 U.S. Dist. LEXIS 30105 (W.D. Wash. Mar. 7, 2012) (easement pursuant to the Columbia River Gorge National Scenic Area Act, 16 U.S.C.A. § 544 (West 2012)); Lee Logan, *County Mulls Buying, Preserving Land Near Starkey Wilderness Park*, ST. PETERSBURG TIMES (Dec. 24, 2011), http://www.tampabay.com/news/localgovernment/county-mulls-buying-preserving-land-near-starkey-wilderness-park/1207621 (describing Pasco County, Florida's Environmental Land Acquisition and Management Program that acquires conservation easements).

[36] *See infra* Part III.A.2.

[37] *See, e.g.*, United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974); Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., 900 N.Y.S.2d 494 (N.Y. App. Div. 2010). With most private easements held by NPOs, the tax benefit provides the "consideration" for the transfer. Since donated easements must be perpetual in order to receive the tax benefit, *see supra* notes 19-20 and accompanying text, easements contributed to NPOs are usually of unlimited duration.

[38] *See, e.g.*, Roath v. United States, No. 10-C-0228, 2011 U.S. Dist. LEXIS 150120 (E.D. Wisc. Dec. 30, 2011) (thirty-year easement under the Wetlands Preserve Program); Sierra Club v. City of Hayward, 171 Cal. Rptr. 619 (Cal. Ct. App. 1981) (ten-year, renewable agricultural easement).

[39] *See, e.g.*, Long Green Valley Ass'n v. Bellevale Farms, Inc., 46 A.3d 473, 479 (Md. Ct. Spec. App. 2012) ("in perpetuity, or for so long as profitable farming is feasible").

2. Data

The dearth of data on the number of easements, their total acreage and location, and other key issues has hindered the policy assessment of conservation easements. In 2011, a consortium of several nonprofit organizations and federal agencies launched the National Conservation Easement Database in an attempt to collect these data and fill the existing gap.[40] While these data provide an incomplete picture of the current inventory of conservation easements (since reporting is voluntary), they still represent an important advance.[41] As of the most recent update in September 2012, the database reports that there are currently 64,640 governmental easements, which cover 11,410,653 acres.[42] To provide some perspective, the combined size of Rhode Island, Delaware, Connecticut, and Hawaii is some nine million acres.[43] Table 1 provides a breakdown of these findings:

Governmental Easement Holders	Count	Acres
Federal	23,876	4,700,130
State	30,399	5,589,793
Local	10,340	846,074
Regional	25	4,656
Total	64,640	11,410,653

Table 1. Number and acreage of governmental conservation easements held by federal, state, local, and regional governmental entities[44]

Evidence suggests that the public has been willing to support governmental acquisition of conservation easements.[45] For example, 77 percent of 1630 ballot measures to provide funds for land conservation between 1994 and 2005 were approved, providing $31.1 billion in funding.[46] According to some reports, however, the 2008 financial crisis has had a

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[40] *Nat'l Conservation Easement Database*, CONSERVATIONREGISTRY.ORG, http://conservationeasement.us/about (last visited Oct. 23, 2012).

[41] There is also only limited data on conservation easements held by NPOs. *See* Korngold, *Globalizing Easements*, *supra* note 4, at 597.

[42] *Nat'l Conservation Easement Database*, *supra* note 40.

[43] Youngman, *supra* note 22, at 747 n.1.

[44] Data from the National Conservation Easement Database, *supra* note 40.

[45] *See, e.g.*, Seong-Hoon Cho et al., *Measuring Rural Homeowners' Willingness to Pay for Land Conservation Easements*, 7 FOREST POL'Y & ECON. 757, 768 (2005).

[46] Andrew J. Plantinga, *The Economics of Conservation Easements*, *in* LAND POLICIES AND THEIR OUTCOMES 90, 91-92 (Gregory K. Ingram & Yu-Hung Hong eds., 2007).

negative impact on public funding of open space.[47] Nevertheless, governmental conservation easements are a growing phenomenon. Increased data collection of existing easements will assist policy makers in framing conservation easement decisions going forward.

II. OPPORTUNITIES PRESENTED BY GOVERNMENTAL CONSERVATION EASEMENTS

Governmental acquisition and administration of conservation easements offers various benefits. This section will assess the advantages and disadvantages of the government's use of conservation easements to preserve land, as compared with zoning and other forms of public regulation, as well as conservation easements held by NPOs. This section will focus on four policies: efficiency, freedom versus coercion, flexibility, and local democratic control. For the purposes of this section, we will assume that the sale or donation of a conservation easement by the owner to the government is consensual—that is, a freely negotiated market transaction. Part III will examine the issues inherent in governmental acquisition of conservation easements by exaction and eminent domain.

A. Efficiency and Cost

1. Benefits

Consensual conservation easement transactions—whether engaged in by government or NPOs—can increase the efficient allocation of our limited (and nonrenewable) land resources. In a market exchange, the purchaser of a conservation easement can acquire the precise interest in property that it desires (for example, scenic protection without physical access) and the seller can retain the degree of property rights that it wishes (for example, the right to maintain a single home on the property) while also monetizing the value of any property interest it is willing to sell (that is, the easement). If the parties were unable to negotiate conservation easements, the party seeking to conserve the scenic view would be required to overinvest in a fee interest, and the landowner would be forced to liquidate more property rights than it desired—

[47] *See* Joseph De Avila, *Crunch Hits Open-Space Funds*, WALL ST. J. (Aug. 6, 2010), http://online.wsj.com/article/SB10001424052748703748904575411690085797942.html.

namely, the possessory right.[48] In consensual sales of conservation easements, each party can get the partial interest in land that it seeks, which creates efficiency gains.[49]

Courts have implicitly recognized the importance of enforcing freely negotiated, efficiency-maximizing transactions. For example, one court enforced an agricultural easement against a successor to the burdened property: "Public funds were expended for the [easement] as a result of a bargain made by the commissioner and the Bennetts' predecessors in title, a bargain of which the Bennetts had notice. There is no reason why this reasonable restriction should not be enforced according to its terms."[50] Another court, in denying a request to install a swimming pool on land subject to a conservation easement, explained:

> [A] conservation restriction yields an economic benefit to the grantor of the restriction and successor owners of the property. . . . In return for that benefit to the owner, it is reasonable that the conservation restriction be protected against expedient exemptions which defeat the purpose of preserving land in its natural state.[51]

2. Comparison to Zoning

Governments incur a direct cost when they purchase a conservation easement. By contrast, when governments place the same substantive restrictions on the land through regulation, they are freed from making an initial cash outlay to the property owner. This would appear to provide an easy choice for governments, especially in an era of limited budgets: Why pay for a restriction when they could get one for free?

Although zoning comes without purchase costs, easement acquisition may still be cost effective. First, governments may avoid paying cash consideration when conservation easements are donated, and the donors will receive the benefit of charitable deductions.[52] By utilizing donated easements, state

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[48] Additionally, if government or an NPO were forced to acquire the property in fee, there could be a total loss of property tax collections on the property due to exemptions. *See generally* DAPHNE A. KENYON & ADAM H. LANGLEY, LINCOLN INST. OF LAND POLICY, PAYMENTS IN LIEU OF TAXES: BALANCING MUNICIPAL AND NONPROFIT INTERESTS (2010), *available at* http://www.lincolninst.edu/subcenters/significant-features-property-tax/upload/sources/ContentPages/documents/PILOTs%20PFR%20final.pdf.

[49] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 9-10 (6th ed. 2003).

[50] Bennett v. Comm'r of Food & Agric., 576 N.E.2d 1365, 1368 (Mass. 1991).

[51] Goldmuntz v. Town of Chilmark, 651 N.E.2d 864, 866 (Mass. App. Ct. 1995).

[52] *See supra* notes 19-20 and accompanying text.

and local governments can cover much of the acquisition cost through federal tax expenditures.

Second, purchasing an easement on a single property may involve significantly lower transaction costs than enacting new zoning restrictions. If a municipality goes through the regulatory process of "downzoning" a single property (that is, increasing the restrictions on it) rather than legislating over a broader area, the affected owner might be successful in challenging the restriction.[53] A broader rezoning would require studies as well as administrative and legislative processes, which can be expensive. Thus, the purchase of an easement on the single property ultimately may be more cost effective. As a related matter, speed and nimble movement may be essential to preserve a property that is facing development. Quick responses are imperative to a willing easement seller who is fielding other offers. An easement purchase can be executed more quickly and cost-effectively than a proper rezoning.

Third, as will be discussed in Part II.B.2 below, the courts have applied regulatory takings jurisprudence to limit the restrictions that can be imposed on development through open-space zoning. But even if the governmental action were vindicated by the court, litigation is expensive. If government were to lose, it may also be required to pay significant compensation to the owner. Thus, regulation's short-term cost savings ultimately may yield long-term losses.

3. NPO Holders

An NPO's acquisition of a conservation easement has certain advantages. Given the large demands on government and the reality of limited resources, land conservation is better served when private citizens step up to help improve their communities. In particular, NPO purchases of easements do not require direct public expenditures, which would otherwise draw from the limited governmental resources. Also, when an NPO purchases an easement, stewardship (that is, monitoring and enforcing the easement) becomes the responsibility of the private organization.[54] NPOs may be more nimble than

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[53] *See* DANIEL R. MANDELKER, LAND USE LAW § 6.37 (5th ed. 2003).

[54] Costs of enforcement have led to the creation of an insurance program for litigation expenses. Felicity Barringer, *Insurance Firm Is Set Up for Land Trusts, Which See Legal Costs Soaring*, N.Y. TIMES, May 20, 2012, at A14, *available at* http://www.nytimes.com/2012/05/20/science/earth/insurance-company-approved-for-land-trusts.html.

government actors, allowing them to react quickly and preserve threatened land. Nevertheless, NPO easements raise a number of potential concerns that governmental ownership can mitigate or avoid.

First, in the course of acquiring conservation easements, NPOs have virtually unlimited discretion, and they are not required to follow a plan or set of standards.[55] A nonprofit may simply accept any easement offered, even though the land and easement terms provide dubious environmental benefits. Many nonprofits abide by rigorous standards in acquiring easements and provide great value to the public.[56] Nevertheless, the best practices of industry leaders are not binding on other nonprofits, so the possibility that the public will subsidize the acquisition of low-value conservation easements through tax expenditures always remains a risk.[57]

Second, private organizations do not acquire easements pursuant to a *public* land use plan. This can lead to a patchwork of easements that fail to yield a community-wide open-space and preservation plan.[58] As a result, conservation easements might be sited based on the random decisions of private donors and unaccountable NPOs, who are properly pursuing their own interests and missions but not necessarily the broader and inclusive land use goals that the wider public would seek.[59] This is inconsistent with current notions of

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[55] The Uniform Conservation Easement Act § 1(1), 12 U.L.A. 70 (1981), only defines the values inherent in a conservation easement but does not provide a standard for how conservation easements must be created. I.R.C. § 170(h) (2006), sets a floor on deductibility but does not necessarily reflect an optimal easement.

[56] The Nature Conservancy, for example, is a recognized leader in high-quality easement practices. *See About Us: Vision and Mission*, NATURE CONSERVATORY, http://www.nature.org/about-us/vision-mission/index.htm (last visited Oct. 23, 2012).

[57] *See* ANTHONY ANELLA & JOHN B. WRIGHT, SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST 44-45 (2004) (emphasizing the importance of professional design standards). The Land Trust Association has been engaged in a project to accredit land trusts that follow best practices. *Accreditation*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/training/accreditation (last visited Oct. 23, 2012). While this may provide some help on easement acquisition, this is a non-mandatory program.

[58] *See* Heidi J. Albers & Amy W. Ando, *Could State-Level Variation in the Number of Land Trusts Make Economic Sense?*, 79 LAND ECON. 311, 312 (2003) ("[L]ocal land trusts specializing in providing open space often do not consider the impact of their decisions on regional conservation benefits. . . . [L]ack of coordination among [land trusts] has become . . . a serious problem . . . .").

[59] Again, industry leaders like The Nature Conservancy, however, typically coordinate their easement acquisitions with governmental plans and agencies. *Partners in Conservation*, NATURE CONSERVANCY, http://www.nature.org/about-us/our-partners/index.htm (last visited Oct. 23, 2012).

planning, which support broader regional and interstate land use planning.[60]

Finally, even proponents of NPO-held conservation easements have warned of the potential class issues with such easements. A pattern of easements can have the effect of large-lot zoning, by preserving landed estates and residential areas, and by preventing subdivision and construction of more affordable homes.[61] William H. Whyte, perhaps the earliest booster of NPO conservation easements, posed concerns of inherent "muted class and economic conflicts," with easement donors being the "gentry" who have an interest in the natural countryside, not in open space with access for parks and playgrounds.[62]

In contrast, governmental acquisition of conservation easements can and should be done pursuant to a coordinated, public land use plan or specific acquisition program. The democratic, administrative, and legal constraints on public action may help to ensure that the government's public expenditures yield high-quality easements that deliver a bigger bang for the conservation buck. Additionally, transparency is improved because citizens can require government to disclose easement data, while NPOs are under no such obligation.[63] The electoral process and public discussion can help to achieve an even distribution of government's conservation benefits and mitigate potential elitist actions.[64]

4. The Risk of Rent Seeking

Because the government's acquisition of a conservation easement utilizes public funds, easement purchases should serve the needs of the community. A particular easement may benefit neighboring owners more than other citizens, but the overall acquisition pattern should serve the overall citizenry. Unfortunately, there is a temptation for rent seeking, whereby powerful individuals lobby government officials to purchase

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[60] *See* ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 26-30, 132-34 (1994).

[61] There is at times a tension between proponents of conservation and affordable housing. *See, e.g.*, Miriam Jordan, *In Tony Monterey County, Slums and a Land War*, WALL ST. J. (Aug. 26, 2006), http://online.wsj.com/article/SB115655289960046223.html.

[62] Whyte, *supra* note 4, at 36-37.

[63] *See* Korngold, *Contentious Issues*, *supra* note 4, at 1046-47, 1070.

[64] *See* Gregg MacDonald, *Salona Task Force Will Meet*, WASH. POST, June 9, 2011, at 16 (describing public process to determine appropriate uses of land under conservation easements acquired by government, specifically whether ballfields should be permitted or land should be retained in more natural state).

conservation easements that will enhance the value of these individuals' properties.[65] Both rent seekers and officials may view the public purse as "other people's money," to be spent to enhance the value of rent seekers' property and help the politicians curry favor. Because land costs will be distorted by acquisitions where the buyer does not internalize the costs, such rent-seeking purchases will not yield efficient land allocations within the community. Moreover, there is the obvious unfairness when some citizens subsidize the wealth accumulation of others. NPOs are not susceptible to this maneuver, however, because they do not have ready access to a pool of funds and are required to both raise their funds and buy land in a competitive market.

Even if there were no rent seeking in the easement acquisition, neighbors whose property values are benefited by the governmental easement may view the easement as an entitlement.[66] This will cause them to seek its enforcement and resist any compromise. While this reaction is understandable, these neighbors ignore the fact that the easement was purchased to provide a public good, not a private benefit for their properties. This phenomenon may arise with NPO-held easements as well, where neighbors believe they hold an interest in the burdened land.

The risk of government manipulation, both by rent seekers and officials seeking reelection, is a concern inherent in many governmental activities, including the acquisition of property and services. For some, this means that the leviathan's activities should be limited. For others, the government's promotion of the public welfare through concerted action is important and valuable, and such activity should continue with appropriate risk-mitigation techniques—for example, procedural guidelines, sunshine regulation, anti-corruption measures, and other steps.

Governmental conservation easements are an efficient, cost-effective vehicle for preserving land. While they require up-front costs, they may prove cheaper over the long run than

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[65] There is a parallel problem when easements are not purchased as part of a governmental conservation program, but rather are exacted as part of the subdivision approval process. *See infra* Part III.A.2. There is a temptation that neighbors may lobby officials for the exaction to enhance their properties and officials might easily agree to placate voters.

[66] *See* discussion of *Zagrans v. Elek*, No. 08CA009472, 2009 WL 1743203 (Ohio Ct. App. June 22, 2009), *infra* Part III.B.1.b.

public land use regulation because they avoid potential litigation expenses and awards.

B. Coercion and Freedom

1. Policy Considerations

Governmental acquisition of a conservation easement through a consensual market transaction represents the property owner's free choice to relinquish rights in the land. Ownership entitles a land holder to exercise free choice in order to maximize personal utility and happiness with respect to the property, whatever others may think of that decision.[67] Thus, if an owner were to grant—or not grant—a conservation easement, the law should respect and enforce that preference.[68] Even supporters of preservation may balk at "legislated conservation easements" for impinging on their land values and freedom.[69]

Unlike consensual conservation easements, public land use regulation places restrictions on owners without their direct consent. In recent years, there have been renewed objections to the coercive nature of land use regulation and its effect on the rights of property owners.[70] For example, William

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[67] *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (2d ed. 1998) (arguing that property rights allow for democratic, participatory government as citizen-owners can criticize officials without fearing the loss of property privileges).

[68] *See* Loeb v. Watkins, 240 A.2d 513, 516 (Pa. 1968) ("Where a man's land is concerned, he may impose . . . any restrictions he pleases."); Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982). Courts have recognized that freely negotiated conservation easements acquired by government should be enforced against the owners. United States v. Albrecht, 496 F.2d 906, 910 (8th Cir. 1974) (enforcing easement barring draining of wetlands enforced against successor to grantor; "[The Government] acquired an interest which it termed an easement. It is clear that the parties intended it to be a permanent interest."); Md. Agric. Land Pres. Found. v. Claggett, 985 A.2d 565, 578 (Md. 2009) ("We do not see any ambiguity in the instrument, and construe it according to its plain language.").

[69] *See* Matt Smith, *An Unlikely Group Rebels Against Preservation Districts*, N.Y. TIMES, Dec. 31, 2011, at A25, *available at* http://www.nytimes.com/2012/01/01/us/an-unlikely-group-rebels-against-preservation-districts.html (one owner stating that "when regulations make it prohibitive economically to make improvements on your property, it's over the top for me").

[70] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN *x* (1985) ("I argue that the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, progressive taxation."); Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 TENN. L. REV. 891, 891 (2002) ("Between 1987 and 2000 the Supreme Court decided a large number of takings cases, and landowners won

A. Fischel has argued that the absence of a compensation requirement for the small number of community owners who bear the brunt of a zoning ordinance promotes inefficiency.[71] To demonstrate this phenomenon, he provides the illustration of a town that wants to impose open-space zoning (that is, require minimum lot sizes of ten acres), thus barring farmers from subdividing and cashing in, while preserving the agrarian amenity for the rest of the population. Because the majority is not required to compensate those who are burdened by the regulation, it is free to ignore the plan's effect on the town's total land values. In contrast, a compensation requirement would keep government from "overconsuming" land. Moreover, as the zoning beneficiaries, through increased property values, because the majority owners benefit from the zoning through increased property values, they should pay compensation in the form of higher property taxes. Therefore, the absence of a compensation requirement leads to rent seeking by the majority, which is especially problematic in this example because affected owners cannot easily exit the regulatory scheme by selling their properties. Nevertheless, Fischel perceives a judicial reluctance to require compensation, perhaps due to the political power of wealthy landowners in the zoning majority or a fear of a broader assault on all municipal regulation.

Government therefore may prefer using noncoercive land conservation methods, such as negotiated conservation easements. Indeed, in light of the high costs involved in defending regulation against legal action, conservation easements may provide a lower cost alternative. Additionally, a prolonged battle over land use regulation can be divisive among the citizenry and ultimately corrosive to the fabric of the community.[72]

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most of them. With this gradual drift toward the landowners' position and with no recent changes in Court membership, Court-watchers had little reason to expect the beginning of the 21st century to produce any striking change in the direction of the Court's takings decisions. The Court's first two rulings of the new century, however, have largely disappointed property-rights advocates while heartening those who favor the rights of government entities to regulate land.").

[71] *See* William A. Fischel, *Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 343-63 (Terry L. Anderson & Fred S. McChesney eds., 2003).

[72] *See* Gerald Korngold, *Cutting Municipal Services During Fiscal Crisis: Lessons from the Denial of Services to Condominium and Homeowners Association Owners*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 109, 131-34 (2012).

2. Legal Challenges

Legislation that imposes the substantive terms of a conservation easement, including a ban on the erection of buildings, might be challenged as a regulatory taking.[73] Depending on the particular facts, a burdened owner might show that the economic impact of the regulation is so great, and the retained rights of the owner so few, that the legislation crosses the line between a permissible police power regulation and a compensable taking.[74] The results in a given case would depend on the scope and extent of the conservation regulation and the rights the landowner retained. Rigorous legislation banning all structures, development, timbering, agricultural activity, and other uses[75] might be viewed as destructive to all economic use of the property and thus a per se taking under *Lucas v. South Carolina Coastal Council*,[76] while a height regulation preserving scenic views would likely be upheld.[77]

The Supreme Court has been satisfied whenever some economic value remains, even though there has been a significant diminution due to the land use regulation. Thus, "open-space zoning," which restricts the use of land to open space and single-family residences, did not amount to a taking in *Agins v. City of Tiburon* because the ordinance permitted owners to build one to five homes, even though they could not build the higher-density project they had hoped for.[78] Similarly, the coastal regulation in *Palazzolo v. Rhode Island*, which restricted the owner of eighteen acres to a $200,000 residence on the parcel, did not constitute a taking.[79] The specific prohibitions of "conservation-easement-type" public regulation will determine whether there has been a taking. Permitting the fee owner to

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[73] *See generally* Douglas R. Appler, *America's Converging Open Space Protection Policies: Evidence from New Hampshire, Virginia, and Oregon*, 36 URB. LAW. 341 (2004); Janice C. Griffith, *Green Infrastructure: The Imperative of Open Space Preservation*, 42/43 URB. LAW. 259 (2010/2011).

[74] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("the economic impact of the regulation"); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[75] Conservation easements often provide for extensive regulation of activities and uses, although (unlike in the posited regulation) they usually permit the owner to maintain a residence—which would likely be enough to counter a claim of a regulatory taking. *See* Korngold, *Contentious Issues*, *supra* note 4, at 1045-46.

[76] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). *See* Friedenburg v. N.Y. State Dep't of Envtl. Conservation, 767 N.Y.S.2d 451 (N.Y. App. Div. 2003) (wetlands regulation leaving owner only five percent of the value of the land was held a taking).

[77] *See* Echevarrieta v. City of Rancho Palos Verdes, 103 Cal. Rptr. 2d 165, 173-74 (Cal. Ct. App. 2001) (upholding tree-trimming regulation to protect views).

[78] Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980).

[79] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

maintain a home on the property might be viewed as allowing adequate economic use to defeat a regulatory taking claim.

Legislation that enacts the provisions of a conservation easement could also be analogized to a growth-management program that permanently bars development. Under *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[80] such a program would be vulnerable to a takings challenge. *Tahoe* refused to hold that a temporary moratorium was a per se taking, but the Court indicated that a moratorium of an excessive duration might be unconstitutional as applied to a particular landowner. Moratoria over a year could be treated with "special skepticism." Accordingly, it would appear that a "permanent moratorium" would not be upheld under the *Tahoe* analysis.[81] There are thus substantial policy, practical, and legal arguments against imposing the more stringent aspects of conservation easements through public regulation, rather than through agreement with consenting owners. Municipalities could be required not only to pay litigation expenses and damage awards but also to needlessly exhaust reputation and civic capital through overextensive regulation.

C. Flexibility

The perpetual duration of most conservation easements preserves land forever and supports environmental goals. Under a conservation easement, the easement holder has a permanent, enforceable property interest in the burdened land. By contrast, zoning and other public land use regulation can be amended. Moreover, government officials who make rezoning decisions are often heavily influenced by short-term needs and special-interest lobbying, such as the desire to raise additional revenue through development and the specter of looming elections.[82] Conservation easements therefore have the advantage of perpetual preservation, which frees them from the usual legislative vagaries implicit in legislative conservation efforts.

The permanent aspect of conservation easements, however, may present inflexible barriers to land use changes that are necessary to satisfy society's evolving needs. In rare cases, circumstances may change in such a way that it becomes

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[80] 535 U.S. 302 (2002).

[81] *See generally* Monks v. City of Rancho Palos Verdes, 84 Cal. Rptr. 3d 75 (Cal. Ct. App. 2008).

[82] *See* Korngold, *Contentious Issues*, *supra* note 4, at 1055.

necessary to modify or perhaps terminate a conservation easement in order to maximize social welfare for current and future generations.[83] Evolving climate and environmental conditions coupled with scientific advances may alter our view of what is valuable to preserve, making it sensible to shift development to land that is subject to an easement but is no longer ecologically important.[84] Moreover, in some cases, social, economic, technological, and human developments may require that a conserved parcel be used to serve other needs. Given a paucity of alternative viable sites, there may come a point, for example, when land burdened by an easement will be better suited for development in order to allow for some other pressing social need, such as to provide employment in an economically depressed area or to construct affordable housing in a previously exclusionary community. Competing visions of environmental necessity may clash as well. For example, land under an easement may be the optimal site for a solar-panel field or wind turbines, even though such structures and surface disturbances would violate the easement's terms.[85]

As a result, some situations may arise where it will be necessary to modify or even terminate a conservation easement.[86] When the parties cannot agree to a modification or termination, judicial action may be necessary under real-covenant doctrines such as changed conditions, relative

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[83] Specious attempts to invoke public policy should be rejected by the courts. *See* Gresczyk v. Landis, No. HHDCV044004887, 2006 WL 1644545, at *7 (Conn. Super. Ct. May 25, 2006) ("The plaintiff's complaint seeks to enforce a deed restriction on the defendant's property under the farmland preservation program. The defendant's claim that golf courses are environmentally friendly, if true, is legally and factually uncoupled from the issue of whether the development of [the property] as a golf course . . . is prohibited on this property as a matter of law by the terms of the deed to the state and the provisions of the [farmland preservation easement statute].").

[84] *See* Cornelia Dean, *The Preservation Predicament*, N.Y. TIMES, Jan. 29, 2008, at F1 (quoting Healy Hamilton, director of the Center for Biodiversity Research and Information at the California Academy of Sciences: "We have over a 100-year investment nationally in a large suite of protected areas that may no longer protect the target ecosystems for which they were formed . . . ." (internal quotation marks omitted)).

[85] *See* Todd Woody, *Desert Vistas vs. Solar Power*, N.Y. TIMES, Dec. 22, 2009, at B1 (A report concerning a solar panel field challenge by environmentalists was unclear as to whether the conservation interest was a fee or easement, but the conflict would be the same in either situation); Eileen M. Adams, *Residents to Decide on Town Ownership of Lots*, RIVER VALLEY SUN J. (Dec. 1, 2009), http://www.sunjournal.com/node/636647 (reporting on town meeting to discuss rescinding town's conservation easement so that six wind towers could be built).

[86] Some commentators are deeply troubled by modification and termination, and suggest strong procedural and substantive safeguards to perpetuity. *See* discussion in connection with cy pres, *infra* notes 166-69 and accompanying text. While I believe that modification and especially termination should be rather uncommon occurrences, they are inevitable as the law needs to accommodate changes and the needs of future generations.

hardship, and the prohibition of covenants violating public policy.[87] It would be better, however, if the parties to the easement could agree to alter the easement, since this would save time and litigation costs. Moreover, because the parties have "bought in" to the change, this would likely yield a more lasting and effective arrangement. It is therefore important that the legal rules and norms governing the easement holder allow necessary, consensual alterations of conservation easements. This is essential with both governmental and NPO easements. The next section will examine the relative capabilities of government and nonprofit holders to alter easements by consent.

D. Local, Democratic Governance

As described above,[88] nonprofit organizations are not bound by public land use plans in acquiring conservation easements, and some might accept easements that do not result in a meaningful conservation easement plan. As also described above, governmental conservation easements that are subject to a plan may be more effective vehicles.

Similarly, with respect to modification and termination, the presence of public input, process, and control in the governmental easement context might also bring superior results when compared to NPO easements. An NPO easement holder would decide this important matter of local land use solely by reference to its conservation mission, free from public scrutiny and accountability.[89] Moreover, because an easement

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[87] *See* Korngold, *Contentious Issues*, *supra* note 4, at 1076-81. In Northampton Twp. v. Parsons, 2010 Pa. Dist. & Cnty. Dec. LEXIS 607, *rev'd*, 2011 Pa. Commw. Unpub. LEXIS 549, the court applied the doctrine of relative hardship and refused to order the fee owner to remove a barn built in violation of a governmentally-held conservation easement. The fee owner had permitted the public to use the basketball courts housed in the barn. The court explained:

> Under this very unique set of facts, the harm that [the Parsons] and the community would suffer by having to remove this structure is far greater than the harm [the Township] will suffer if the pole barn remains on the property. If the pole barn is removed, [the Parsons] will suffer financially in the both the costs of constructing the barn as well as the cost of removing it, and the community will suffer the loss of this valuable resource. . . . [The Parsons] have been ordered to dedicate an equal amount of land in open space, and therefore [the Township] will not suffer the loss of dedicated land.

Id. at 16-17.

[88] *See supra* notes 58-60 and accompanying text.

[89] Stressing their desire to maintain state and local, rather than federal, control over Alaskan land issues, state legislators in Alaska introduced a resolution urging the federal government to assume control of New York City's Central Park. Andy Newman, *From Alaska, Great Concern for Central Park*, N.Y. TIMES (Jan. 26,

can be held in gross, the nonprofit may be located some distance away, enabling an absent entity to singlehandedly decide a key local concern, without understanding local issues and priorities. By contrast, a government easement holder faced with an alteration proposal would be bound to achieve the broader public interest and would not be restricted by a conservation mission.[90] Its decision would be made in public view, likely through open hearings, with due consideration of local issues and values by officials accountable to voters for their decisions.[91] Thus, this essential land use decision would remain in the hands of a participatory, democratic process. As in easement acquisition, there are always concerns of rent seeking in modification requests,[92] but one can hope that the democratic process will serve as a check.

Governmentally held conservation easements are therefore valuable vehicles for land preservation. As compared to NPO-held easements and public land use regulation, they have certain benefits and disadvantages in terms of achieving efficiency, avoiding coercion, providing flexibility, and enabling local democratic governance. The following section examines a number of problem areas that can arise with governmental conservation easements, and it suggests how they can be mitigated and even avoided.

III. MAXIMIZING BENEFITS OF GOVERNMENTAL CONSERVATION EASEMENTS

This section examines potential issues related to government-held conservation easements that must be skillfully addressed in order to maximize the efficiency, noncoercion, flexibility, and governance benefits of governmental easements. These issues include nonconsensual acquisition through eminent domain and exactions, procedural impediments to governmental administration of easements, and statutory controls on modification and termination of conservation easements.

2012, 6:58 AM), http://cityroom.blogs.nytimes.com/2012/01/26/from-afar-great-concern-for-central-park/. Presumably this was to make a point rather than a serious proposal, but it speaks of a concern about distant control of local lands.

[90] *See* Friends of Shawangunks, Inc. v. Clark, 754 F.2d 446, 452 (2d Cir. 1985) (describing the process in enforcing a particular conservation easement).

[91] There are gaps in the protection of the electoral process—those who live nearby and might want to move into the municipality have no vote. Neither do the unborn future generations who must clean up any mess left by today's citizens.

[92] *See supra* Part II.A.4.

A. Nonconsensual Acquisition

1. Eminent-Domain Takings of Easements

There is a divergence among state legislation on the question of whether governmental entities may use eminent domain to create conservation easements. Moreover, even where this practice is authorized by statute, it is unclear whether courts in the current climate would sustain the use of eminent domain to establish conservation easements.

There are competing policy considerations related to the government's use of eminent domain to take conservation easements. By definition, eminent-domain takings are not consensual, and as a result, they may not be able to achieve the efficiency benefits of a negotiated easement sale.[93] Eminent domain is necessary, however, to overcome holdouts that would otherwise frustrate rational government infrastructure and services—for example, government infrastructure in the form of roads, which generally must run in organized patterns and cannot endlessly jog around parcels. Similarly, eminent domain may be necessary and justifiable to acquire parcels with high conservation values, such as open land in otherwise developed areas, properties with unique ecological features, or tracts necessary to complete a conservation program, such as a scenic vista or watershed.

As a result of these competing policy views, states diverge as to whether conservation easements may be created by an eminent-domain taking.[94] Some state statutes are silent on the matter,[95] while others expressly grant governmental units the power to acquire conservation easements by eminent domain,[96] and still others expressly prohibit such takings.[97] The Third Restatement of Property contemplates the creation of conservation easements by eminent domain, which finds some

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[93] *See supra* Part II.A.

[94] For an overview, see Lara Womack Daniel & James D. Timmons, *Conservation Easements and Eminent Domain at the Intersection: How Modern Legal Creations Meet Constitutional Principles*, 36 REAL EST. L.J. 433 (2008).

[95] *See* UNIF. CONSERVATION EASEMENT ACT, Prefatory Note (1981) (leaving to states to determine this question).

[96] *See, e.g.*, 765 ILL. COMP. STAT. ANN. 120/1 (West 2010); 32 PA. STAT. ANN. §§ 5005(c)(1), 5008 (West 1996).

[97] *See, e.g.*, FLA. STAT. ANN. § 704.06(2) (West 2012); IOWA CODE § 457A.1 (West 2012). *See generally* ACCO Unlimited Corp. v. City of Johnston, 611 N.W.2d 506 (Iowa 2000) (rejecting owners' assertions that taking of land for flood control purposes was the taking of a conservation easement that was barred by statute).

support from case law.[98] In one recent case, for example, a court upheld the state's use of eminent domain to acquire a conservation easement on four acres of a church's property, which was part of a plan to mitigate the destruction of one hundred acres of upland forest and other terrestrial habitat as a result of the roadway's expansion to serve a regional airport.[99]

One possible question is whether eminent-domain takings to create conservation easements satisfy the "public use" requirement.[100] Governments have traditionally taken *affirmative* easements—where the government or public has the right to do something on the targeted land, which supports the proposition that the easement serves a public use.[101] Thus, governmental acquisitions of rights of way for utilities, roadways, and similar easements have been routinely permitted as meeting the public use test.[102] Airplane flights over property—which may constitute compensable takings[103]—also involve affirmative physical intrusions of public carriers on the property in a manner similar to public roadways on land. Indeed, courts have shown a willingness to stretch this physical-intrusion rationale, finding that the noise these flights generate can also rise to the level of a compensable taking and permitting airport neighbors to receive compensation even where they do not experience direct overflights.[104] By contrast, conservation easements typically do not give the government holder or the public a general right to physical access and therefore might fail to satisfy the public use requirement under this line of cases.[105]

Thus, governments must demonstrate a different, nonphysical "public use" in order to uphold the creation of a

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[98] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. h (2000).

[99] *See* State v. Korean Methodist Church of N.H., 949 A.2d 738 (N.H. 2008).

[100] The Fifth Amendment of the Constitution requires "public use" and "just compensation" to sustain an eminent-domain taking. U.S. CONST. amend. V.

[101] *See* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 2.02 (2d ed. 2004).

[102] *See, e.g.*, Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty., Md., 549 F. Supp. 584 (D. Md. 1982) (subway tunnel easement); City of Huntsville v. Rowe, 889 So. 2d 553 (Ala. 2004) (sewer easement); Liberty Dev. Corp. v. Metro. Utils. Dist. of Omaha, 751 N.W.2d 608 (Neb. 2008) (utilities easement).

[103] *See, e.g.*, Griggs v. Cnty. of Allegheny, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

[104] *See, e.g.*, Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962); Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964).

[105] Some might argue that a governmental holder with a right of occasional physical access under the easement document has physical access. *See* Korngold, *Contentious Issues*, *supra* note 4. That argument may be received sympathetically by a court or seen as boot strapping.

conservation easement as a valid exercise of eminent domain. In *Kelo v. City of New London*, the Supreme Court held that a taking pursuant to a comprehensive, legislatively approved economic-redevelopment plan served a public use.[106] Similarly, proponents would argue that an eminent-domain taking, pursuant to a plan and supporting environmental policies, benefits the public in a manner that also satisfies the public use test. Nevertheless, in light of the strong anti-*Kelo* reaction and state-law changes that narrow the permissible criteria for eminent domain, governments may face additional roadblocks to finding a public use in conservation easement takings.[107]

2. Exacted Conservation Easements

Developers may also grant conservation easements to governmental entities as a condition to favorable zoning or other governmental approvals, or to mitigate environmental damage caused by development.[108] These easements are not likely part of

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[106] *See* Kelo v. City of New London, 546 U.S. 469 (2005).

[107] After *Kelo*, over forty states enacted changes in their eminent domain rules in reaction to *Kelo*'s finding that economic development was a permissible "public use." *See* Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237 (2009); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2012 (2009). The *Kelo* decision has been highly criticized. *See, e.g.*, Richard A. Epstein, *Public Use in a Post-*Kelo *World*, 17 SUP. CT. ECON. REV. 151 (2009); Richard A. Epstein, Kelo*: An American Original*, 8 GREEN BAG 2d 355 (2005); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff?"* 33 PEPP. L. REV. 335 (2006); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006); Marc Mihaly & Turner Smith, Kelo*'s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 706-08 (2011). There are few scholarly articles supporting *Kelo*. One noteworthy exception supporting the decision is Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006). I too have written in support. Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1578-81 (2007).

[108] *See, generally, e.g.*, Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 481 F. Supp. 2d 1213 (D. Colo. 2007) (conditioning special use permit on the granting of a conservation easement); St. John's River Water Mgmt. v. Koontz, 861 So. 2d 1267 (Fla. Dist. Ct. App. 2003) (challenge to exaction); Conservation Law Found., Inc. v. Town of Lincolnville, 786 A.2d 616 (Me. 2001) (approving conditioning of subdivision approval on the granting of conservation easement under ordinance requirement that a subdivision "will not have undue adverse effect on the scenic or natural beauty of the area"); Smith v. Town of Mendon, 822 N.E.2d 1214 (N.Y. 2004) (constitutional challenge to exaction of conservation easement); *see also* Grosscup v. Pantano, 725 F. Supp. 2d 1370 (S.D. Fla. 2010) (describing negotiation between state Department of Environmental Protection and owner yielding agreement to create conservation easement as mitigation); Cal. Oak Found. v. Cnty. of Tehama, No. C066415, 2012 Cal. App. Unpub. LEXIS 3970 (Cal. Ct. App. May 25, 2012) (conservation easement required to mitigate loss of 774 acres of blue oak woodland

a broader pattern of easements, but they are theoretically acquired in response to a perceived threat that development poses to a governmental regulatory or planning scheme. As with other exactions, there is a risk that governments will use the land-approval process to extort property rights from developers who cannot afford the time, delay, and expense to challenge the request in court.

a. The Legacy of Nollan *and* Dolan

The limits of governmental exactions have been shaped by the Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.[109] In order to sustain an exaction against an owner's claim of an uncompensated governmental taking, *Nollan* requires that there be an "essential nexus" between the condition imposed on development—that is, the exaction—and a "legitimate government interest."[110] In the absence of such a requirement, government could use the exaction process to obtain a concession from the owner for "some valid governmental purpose, but without payment of compensation."[111] This would amount to "an out-and-out plan of extortion" by government.[112]

Adding to the "nexus" requirement, *Dolan* mandates a "rough proportionality" between the extent of the exaction and the projected negative impact of the proposed development. In *Dolan*, a landowner sought a permit to double the footprint of her store and also pave a parking lot on a parcel she owned. The

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resulting from 3000 acres of home development; easement on almost twice as many acres as lost); Citizens for Open Gov't v. City of Lodi, 140 Cal. Rptr. 3d 459 (Cal. Ct. App. 2012) (developer's creation of conservation easements on other property helped meet mitigation burden necessary for granting of conditional use permit to allow shopping center); Ballona Wetlands Land Trust v. City of Los Angeles, 134 Cal. Rptr. 3d 194 (Cal. Ct. App. 2011) (describing California regulatory procedure for protecting archaeological sites in exchange for approval of surrounding development by use of conservation easements); Chelsea Inv. Grp. v. Chelsea, 792 N.W.2d 781 (Mich. Ct. App. 2010) (under PUD agreement, owner conveyed conservation easement on approximately 30 acres); Town of Beloit v. Cnty. of Rock, 657 N.W.2d 344 (Wis. 2003) (town conditioned development on creation of conservation easement); John Laidler, *Senior Housing Planned at Former N. Andover Ski Area*, BOS. GLOBE, Mar. 22, 2012, at GN3 (conservation restriction on undeveloped portion required in exchange for special use permit to allow building of 133-unit senior living community on former ski area); Jessica Owley, *Exacted Conservation Easements: Emerging Concerns with Enforcement*, 26 PROB. & PROP., no. 1, Jan./Feb. 2012, at 51.

[109] Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[110] *Nollan*, 483 U.S. at 837.

[111] *Id.*

[112] *Id.*

city was willing to grant the permit, provided that the owner would dedicate a part of the floodplain on the property as a greenway and also establish a fifteen-foot-wide pedestrian and bike path adjacent to the greenway. The total dedication was approximately 10 percent of the 1.67-acre parcel. The desired greenway was consistent with the city's recently adopted master drainage plan, which was designed to reduce flooding in areas along waterways, as well as the city's comprehensive land use plan, which called for bike and pedestrian paths to encourage alternatives to automobile transportation.

The *Dolan* court indicated that the city could have prohibited the owner from building in the floodplain under the police power, but that the city had gone further by requiring the property to be dedicated to the city as a greenway and permitting the public to cross the owner's land. With respect to the bicycle and pedestrian pathway, "the city [had] not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by [the] development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[113] Thus, *Dolan* places a limit on a municipality's ability to unfairly demand concessions from owners seeking to develop their land.

b. Application to Conservation Easements

The rule and reasoning of *Dolan* should apply to conservation easement exactions, as well. The exaction in *Dolan* through dedication by the owner is functionally equivalent to an owner's grant of a conservation easement to the city. Both involve the transfer of property rights to the city that result in development restrictions.[114] Indeed, courts have

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[113] *Dolan*, 512 U.S. at 395.

[114] States have limited the exaction power. *See, e.g.*, MASS. GEN. LAWS ch. 41, § 81R (1955) ("No rule or regulation shall require, and no planning board shall impose, as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use, or conveyed or released to the commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any other public purpose, without just compensation to the owner thereof."); Collings v. Planning Bd. of Stow, 947 N.E.2d 78 (Mass. App. Ct. 2011) (holding that the provision barred a town from requiring dedication of open space with public access as a condition of subdivision approval, even if the town waived certain subdivision requirements in exchange). It is unclear whether the exaction of a typical conservation easement that does not include public access would fall within the statute's purview.

applied *Nollan* and *Dolan* when determining the permissibility of exactions requiring conservation restrictions.[115]

In *Smith v. Town of Mendon*,[116] several portions of the property at issue were located in environmental protection overlay districts (EPODs) that the town code had created. The code required development permits in these areas, but permits were granted so long as the owners could show that their activities would not disturb the environmental conditions.[117] The Smiths, as landowners, submitted a site plan seeking approval to construct a home on the non-EPOD portions of their land. Upon review, the town planning board found that this development would not result in adverse environmental effects, as long as the Smiths did not develop in the EPOD areas. Accordingly, the board conditioned final site approval on the requirement that the Smiths file a conservation restriction—in the form of a covenant running with the land—that would prohibit development within the EPOD areas. Under these circumstances, however, the court held that no unconstitutional taking had occurred.[118]

In reaching its holding, the court refused to analyze the town's permit condition as an exaction under the *Nollan* and *Dolan* framework. Instead, the court examined whether the town's action was appropriate under the regulatory takings tests of *Palazzolo*, *Agins*, and *Penn Central Transportation Co. v. City of New York*.[119] Not surprisingly, the court concluded that the town's permit condition was proper under these cases' more forgiving standards. In support of its determination that *Nollan* and *Dolan* did not apply, the *Smith* court first recited the Supreme Court's definition of an exaction as "the conditioning of a land-use decision on the 'dedication of

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[115] *See* Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 481 F. Supp. 2d 1213 (D. Colo. 2007) (ordinance required special use permit for churches above certain size; county required conveyance of conservation easement over fourteen of the church's 54.4 acre parcel in exchange for approval of special use application related to building plan; held that RLUIPA claims were ripe, but statute of limitations had run on inverse condemnation claim based on the granting of the conservation easement); St. Johns River Water Mgmt. Dist. v. Koontz, 861 So. 2d 1267, 1268-69 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring) (court dismissed, on ripeness grounds, challenge to mitigation demands of government agency requiring conservation deed restrictions; concurring opinion stating that "I also hope that the District will stop the extortionate demands on property owners which this case demonstrates.").

[116] 822 N.E.2d 1214, 1215 (N.Y. 2004).

[117] *Id.*

[118] *Id.*

[119] Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

property to public use.'"[120] The court then concluded that "[t]here is no such dedication of 'property' here."[121] Indeed, the court explained that both *Nollan* and *Dolan* "involved the transfer of the most important 'stick' in the proverbial bundle of property rights, the right to exclude others."[122] On the other hand, the court argued that the Smiths' loss could be distinguished since it was far less severe, finding that "[i]f it is a property right, . . . it is trifling compared to the rights to exclude or alienate."[123]

The *Smith* court's analysis is unconvincing for a variety of reasons. First, "property" includes more than just the right to exclude. For example, "property" might also include the right to possession, which, for the Smiths, is now limited by the town's perpetual ownership interest in the Smith property. Indeed, the town now exerts control through a regime of in rem rights rather than through a regulatory process that is subject to public, constitutional, and legislative processes and controls.[124] Under the court's logic, municipalities could require restrictive covenants that paralleled the existing zoning regulations from every landowner seeking a permit without triggering *Nollan* and *Dolan*. The court's attitude runs counter to the legislature's clear mandate which declares conservation easements to be property interests.[125]

Second, if the restriction did not give the town an extra right in the Smith property, then why would the town have requested it? The court explained that the recorded restriction would provide notice to subsequent purchasers and "the most meaningful and responsible means of protecting the EPODs."[126] Providing notice to purchasers, however, is not an adequate justification. Indeed, black-letter law provides that purchasers acquire property subject to zoning and land use regulations.[127] Moreover, there is no reason why EPOD legislation requires

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[120] *Town of Mendon*, 822 N.E.2d at 1219 (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999)).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] Moreover, one case recently held that a restriction created in 1940 by an owner of a historic home in order to get special permit approval for subdivision was not subject to the state's marketable title act that generally limits the term of restrictions to thirty years. Killorin v. Zoning Bd. of Appeals of Andover, 935 N.E.2d 315, 316 (Mass. App. Ct. 2011).

[125] UNIF. CONSERVATION EASEMENT ACT, §§ 1(1), 3, prefatory note (1981).

[126] *Id.* § 3; 822 N.E.2d at 1216.

[127] *See, e.g.*, Rosique v. Windley Cove, Ltd., 542 So. 2d 1014, 1015-16 (Fla. Dist. Ct. App. 1989); Josefowicz v. Porter, 108 A.2d 865, 866-68 (N.J. Super. Ct. App. Div. 1954).

special treatment. Accordingly, although the town might have preferred a recorded restriction, it cannot obtain such an advantage by unilaterally compelling the landowner to deed away their rights.

The court underplayed the extent of the rights the town extracted from the Smiths, explaining that "[t]he terms of the proposed 'Grant of Conservation Restriction' mirrored the preexisting EPOD regulations, differing in only a few respects."[128] The court then acknowledged that the proposed grant would restrict the property in perpetuity, while the town could still amend the EPOD ordinance and thus create inconsistency between the grant and the ordinance. Although this may not have been important for the court, most owners would likely view the relinquishment of a perpetual land right as significant. Moreover, the court stated that the restriction could be enforced by injunction while ordinance violations could be enforced only by the issuance of citations. Again, most owners would likely deem these divergent legal ramifications significant. Accordingly, it seems clear that the grant of an in rem, perpetual, and enforceable property right is a significant loss.

Notwithstanding the *Smith* decision, the lessons of *Dolan* apply with particular force when analyzing the validity of exacted conservation easements. The concern over "extortion" of conservation easements in exchange for permits, for example, apparently underlies a California statute that provides, "no local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement."[129] As one court explained:

> One purpose of [the statute] is to insure that such conveyances to public entities are, in fact, voluntary . . . . [It] prevents a government entity from requiring an involuntary conveyance of a conservation easement and thus, protects the landowner from an unreasonable taking of property rights.[130]

Therefore, exactions of conservation easements pose a risk of violating property rights. Sound policy and the

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[128] *Town of Mendon*, 822 N.E.2d at 1216.

[129] CAL. CIV. CODE § 815.3 (West 2007). The California courts, however, have held in various contexts that the statute did not apply to bar easement exactions. *See, e.g.*, San Mateo Cnty. Coastal Landowners' Ass'n v. County of San Mateo, 45 Cal. Rptr. 2d 117, 124 (Cal. Ct. App. 1995) (holding that easements in question were not exacted under 815 but pursuant to other authority); Bldg. Indus. Ass'n of Cent. Cal. v. County of Stanislaus, 118 Cal. Rptr. 3d 467, 482 (Cal. Ct. App. 2010) (statute did not apply where owner arranged for third party to grant easements).

[130] *Bldg. Indus. Ass'n*, 118 Cal. Rptr. 3d at 480, 487.

Constitution demand that such exactions meet the requirements of *Nollan* and *Dolan* in order to avoid invalid takings of property.

c. Going Forward

Despite the issues highlighted above, exacted conservation easements offer a legitimate way to force developers to internalize their projects' environmental costs. Accordingly, these easements may embody sound policy, and they will typically pass constitutional muster—provided that the government ensures the nexus and proportionality requirements are met. If the exaction cannot satisfy these requirements, however, it will start to resemble simple extortion and power politics, permitting neighbors to extract rents through public officials who are anxious to placate them. Of course, this would run counter to the noncoercive benefits that consensual conservation easements can provide. Moreover, if neighbors and municipal officials are extracting gratuitous benefits that they should really be paying for, their conduct would create inefficiencies in land use.

B. Procedural Impediments to Benefits of Governmental Easements

In order to unlock the efficiency, flexibility, and governance advantages of governmental easements, rules of standing, mandamus, and cy pres must be delineated in a manner that strikes the right balance between the need for judicial review and the need to defer to legislative and executive judgments. Where government officials clearly neglect their duties or act without process, citizens need access to courts. But there are significant costs to allowing the decisions of accountable, duly elected public officials to be replaced by judicial decisions emerging from expensive litigation whose very nature is to second-guess matters that may be best left to the representative and political process. Furthermore, the substantive requirements of cy pres in particular pose a unique threat to the good administration of governmental conservation easements.

1. Standing

a. Policy Framework

By recognizing private citizens' standing to sue and permitting independent enforcement of governmentally held

conservation easements, courts threaten the dual goals of flexibility and democratic control over local land use decisions. Conservation easements create *public* rights. Citizens should not be able to convert conservation easements into private benefits by enforcing them individually and thereby increasing the value of their own properties. While it is true that government acquisition of a conservation easement may increase the value of neighboring land, the benefit is fortuitous. Neighbors should not have a right to enforce an easement when government has decided to alter its scope and application.

Government is the appropriate entity to balance competing public goals in easement modification decisions. Indeed, government actors are accountable for their decisions through the ballot box, and their decision-making processes are subject to procedural controls.[131] Both of these features help provide public oversight of governmental actions. State regulation addressing the disposal of public real property also helps to ensure public protection.[132] Courts should neither second-guess governmental decisions that were properly reached nor force government to defend private enforcement actions with the effect of depleting the public purse.

The policy reasons that support generally placing limits on standing apply to private enforcement of governmental conservation restrictions, as well. For example, the requirement that a plaintiff suffer specific injury helps preserve separation of powers by preventing the judiciary from conducting a generalized examination of legislative decisions.[133] Additionally, because the outcome may foreclose the rights of others through collateral estoppel or res judicata, standing doctrine also ensures that the plaintiff has adequate "skin in the game" to actively and effectively conduct the litigation.[134]

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[131] *See, e.g.*, Thomas v. Beaumont Heritage Soc'y, 339 S.W.3d 893, 896-97 (Tex. App. 2011) (granting historical association and individual standing under Texas Open Meetings Act to challenge school board decision to demolish a building); *see also* Soussa v. Denville Twp. Planning Bd., 568 A.2d 1225, 1226-27 (N.J. Super. Ct. App. Div. 1990) (indicating that a court could decide how the public interest should be represented in determination of enforceability of an open space covenant).

[132] *See infra* Part III.C.

[133] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); *see also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 450, 496 (2008).

[134] *See* Douglas v. Planning & Zoning Comm'n of Town of Watertown, 13 A.3d 669, 673 (Conn. App. Ct. 2011) ("[J]udicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented . . . .").

b. Case Decisions

Several recent cases show that there are divergent approaches to the issue of standing in the enforcement of conservation easements. In *Bjork v. Draper*,[135] the prior owners of the property, the Grays, granted a conservation easement to the Lake Forest Open Lands Association. The easement prohibited changes to the historical residence on the property, construction of additional buildings and improvements (except for a 1500-square-foot addition), and alterations of the lawn and landscaped grounds. The deed specifically provided, however, that enforcement of the easement was at the discretion of the association. The Drapers subsequently purchased the burdened property and took various actions that raised questions about whether they had violated the restrictions.

First, the Drapers sought to build a 1900-square-foot addition on the property, which exceeded the original easement deed's square footage allowance. Nevertheless, the association consented to the larger addition in return for the Drapers' agreement to replace the house's aluminum siding with wooden siding, which would restore the house to its original condition. Second, the Drapers altered some landscaping on the lot by adding new shrubs. When the association learned of these prohibited changes, it entered into an agreement with the Drapers regarding landscaping. Finally, the association agreed to eliminate a portion of the easement to allow the Drapers to build a driveway turnaround in exchange for the Drapers' designation of an equally sized easement on land that the original easement did not cover. The parties released 809 square feet from easement coverage, or 3.2% of the total size of the easement property.

The parties' actions made sense from a practical, conservation, and policy perspective. Indeed, best practices require an ongoing dialogue between burdened property owners and easement holders in order to monitor easement enforcement, discuss potential problems, and make changes necessary to ensure the viability of both the easement and the fee owner's use of the property.[136] As a result, the parties' first exchange led to a "win" for the association and the Drapers: the

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[135] Bjork v. Draper, 886 N.E.2d 563 (Ill. App. Ct.), *leave to appeal denied*, 897 N.E.2d 249 (2008), *and aff'd*, 936 N.E.2d 763 (2010), *and subsequent leave to appeal denied*, 943 N.E.2d 1099 (2011).

[136] *See* Korngold, *Contentious Issues*, *supra* note 4, at 1062.

association exercised its discretion to secure restoration of the exterior of the house, which it believed was well worth the additional 400 square feet, and the Drapers received permission to build an addition to the scale they desired. And while few details emerged on the nature of the exchanges surrounding the landscaping agreement and the easement amendment, there is no evidence that the association exercised its discretion contrary to its mission. The association, like a governmental holder, should be able to make these decisions about easement enforcement and modification in order to promote flexibility and pursue overarching conservation values.

So what was the problem? Unfortunately for the parties, Illinois legislation provided that owners within 500 feet of land subject to a conservation easement have standing to enforce it.[137] The legislature's impulse is understandable. In order to ensure that the benefits of conservation easements remain available to the public, it empowered a cadre of "private attorneys general" in the form of nearby property owners to enforce the easement. The effect of the legislation, however, can be perverse. It could allow neighbors to extract a private benefit (namely, the continuation of an easement arrangement that only serves the personal goals of neighbors), when the purpose of the easement, the overall conservation easement authorization, and the federal and state tax subsidies is to benefit the public. *Bjork* frames the harm arising from the Drapers' landscaping changes as interference with the public's ability to view the property and its open, scenic qualities from ground level on adjacent, publicly accessible land. But did the plaintiffs receive a special benefit from that view as nearby owners? Did their access to such a view enhance the value of their property? Although the case does not discuss this issue, one wonders if their attempt to enforce the restriction benefitted the views from plaintiffs' property and enhanced their value. Unfortunately, the Illinois statute allows private plaintiffs to extract a private benefit through enforcement of public conservation easements, particularly where the easement holder has decided to modify the easement or refuses to enforce it.

The initial appellate opinion held that the amendment permitting the land swap for the driveway turnaround was impermissible under the terms of the original easement. Moreover, on remand, the trial court held that the oversized

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[137] 765 ILL. COMP. STAT. ANN. 120/4 (LexisNexis 2010).

addition of 1900 square feet violated the easement.[138] These decisions ignored the practical give and take—a necessary component of effective easement stewardship and enforcement—as well as the expertise of the easement holder. Instead, at the request of unrelated, private individuals, the courts imposed their own views of a relatively minor issue onto the agreement between the easement holder and fee owner.[139] One can only imagine the amount of money this nonprofit organization was forced to spend on legal fees in several trials and appeals in this matter, rather than on land conservation activities. Accordingly, the Illinois standing statute is ill-advised. Moreover, while *Bjork* involved an NPO easement, its lessons about third-party standing apply with equal force to governmental easements, as well.

In contrast, the court in *McEvoy v. Palumbo* took a narrow view of third-party standing, leaving appropriate discretion to the town legislature.[140] There, defendant Palumbo and plaintiff McEvoy owned neighboring parcels of land, but their separate parcels once belonged to a common owner, who had granted a conservation easement over the larger tract to the town of Woodbury. The conservation easement barred the "cutting of trees or plants . . . or disturbance of change in the natural habitat in any manner . . . ."[141] Pursuant to a request by Palumbo, the town granted him the right to remove invasive species and mow a portion of his land subject to the easement. But when Palumbo later mowed the property, McEvoy brought suit against the town and Palumbo seeking to enjoin future cutting.

The court rejected McEvoy's request, finding that the selectmen had statutory authority to act for the town in such matters[142] and that McEvoy lacked standing pursuant to a specific statutory provision.[143] For support, the court cited the state's conservation easement statute, which expressly grants the attorney general standing to enforce conservation easements, and held that the legislation did not provide

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[138] *Bjork*, 936 N.E.2d at 769.

[139] Fortunately, the appellate court on the second appeal upheld the trial court's application of the relative-hardship doctrine. As a result, while the turnaround and new trees had to be removed and relocated, the oversize addition did not have to be removed or reduced. *Id.* at 772-73. In any event, as a matter of policy, one might wonder whether this amount of litigation is appropriate in order to secure what turned out to be a comparatively small remedy.

[140] McEvoy v. Palumbo, CV106002253S, 2011 Conn. Super. LEXIS 2939 (Conn. Super. Ct. Nov. 15, 2011).

[141] *Id.* at *3 (alteration in original).

[142] *Id.* at *4.

[143] *Id.* at *8.

standing to any other parties.[144] Additionally, because the town and Palumbo's actions did not cause specific injury to McEvoy's legal interest, the court also held that McEvoy lacked standing under general standing principles.[145]

The court apparently recognized the value of permitting a lawful easement holder to voluntarily modify agreements:

> [T]he plaintiff seeks to arrogate unto herself the right to determine when and how the town should exercise the discretion conferred upon it in the grant. The plaintiff has no legal right to compel the town to defer to her views as to when and how to exercise its discretion, and she has no standing to assert and litigate the claims in her complaint.[146]

Accordingly, the refusal to recognize third-party standing in *McEvoy* demonstrates how courts can simultaneously satisfy the goals of flexibility and democratic control of local land issues.[147]

Similarly, the court in *Zagrans v. Elek* correctly held that neighbors lacked standing to challenge an owner's modification agreement that was subject to conservation easements.[148] In that case, the owners of property adjacent to a park granted conservation easements to the county park district.[149] Subsequently, the park district entered into a modification agreement with one of the ensuing owners to

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[144] *Id.* at *7-8.

[145] *Id.* at *8-9.

[146] *Id.* at *14.

[147] Long Green Valley Ass'n v. Bellevale Farms, Inc., No. 0228, 2012 WL 468245 (Md. Ct. Spec. App. 2012), *depublished by* 46 A.3d 473 (Md. Ct. Spec. App. 2012), provides another example. Plaintiffs claimed standing to challenge decisions under governmentally-held conservation easements under three theories. First, plaintiffs alleged standing as third-party beneficiaries of the easement agreement. This was rejected by the court, which found that their status as neighbors and owners of properties also bound by conservation easements did not give them a right to bring an action. Rather, the court stated that the agreement made clear that the state had the right of enforcement. As discussed below, the court also (correctly) rejected standing based on charitable trust law. *See infra* Part III.B.3. While the court in *Long Green Valley* got most of the issues right, one aspect of its decision is troubling. The court felt compelled to apply to the case at hand a recent Maryland Supreme Court opinion that extended the rule that neighbors had standing in zoning cases to a challenge by a neighbor that a land disposition agreement by the city and a developer under an urban renewal plan was ultra vires or illegal. *See* 120 W. Fayette St., LLLP v. Mayor of Baltimore, 964 A.2d 662, 673 (Md. 2009). The *Long Green Valley* court thus held that the individual plaintiffs should be considered as "prima facie aggrieved" and thus entitled to standing, now placing the burden on defendants on remand to rebut that presumption by showing a lack of special damage. *Id.* at 506. This is an unfortunate extension of the standing rule, allowing public benefits to be converted to private rights and frustrating democratic governance principles.

[148] Zagrans v. Elek, No. 08CA009472, 2009 WL 1743203, at *5 (Ohio Ct. App. June 22, 2009).

[149] *Id.* at *1.

release a portion of the owner's property from the easement and place a previously unrestricted area under the easement.[150] The property owner entered this exchange in order to build a home on his parcel; the neighboring owners, however, sought to enforce the easement as originally written.[151] Nevertheless, the court held that the neighbors lacked standing, given that they neither qualified as an intended third-party beneficiary under the original easements nor possessed the requisite special interest for a taxpayer suit challenging a government contract.[152] As the court explained,

> Appellants received a benefit from the easement conservation agreement because, up until the Eleks sought to modify the agreement, they were able to enjoy the aesthetics of the property and to maintain continuity amongst the various surrounding properties, which were also subject to conservation easements. As previously noted, however, the mere receipt of a benefit from a contract does not transform the recipient of that benefit into an intended beneficiary. The Fauvers and MetroParks entered into their easement agreement for the stated purpose of maintaining the property "in its present state . . . for the preservation of woodlands, wetlands and wildlife." There is no evidence that the Fauvers and MetroParks intended to benefit Appellants by entering into their easement agreement. Consequently, Appellants' argument that they were intended beneficiaries lacks merit.[153]

It appeared that the court was sensitive to the neighbors' attempt to free ride on the public easement. The court appropriately rejected this effort to extract a private advantage and deferred to the judgment of the public body that held the easement.

c. Suggested Approach

The rejection of third-party standing permits government to exercise discretion, both enabling public officials to achieve flexibility and allowing burdened owners to enjoy reasonable uses. Absent procedural defects or corruption, neighbors should be limited to challenging these actions only through the democratic process—that is, through public advocacy and the ballot box. The law of standing is complex.[154]

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[150] *Id.*
[151] *Id.*
[152] *Id.* at *2-5.
[153] *Id.* at *4.
[154] *See* Bradford C. Mank, *Reading the Standing Tea Leaves in* American Electrical Power Co. v. Connecticut, 46 U. RICH. L. REV. 543, 547-48 (2012) (describing federal "constitutional" standing, based on Article III cases and controversies

It emerges from different legal standards and complex factual situations,[155] and as a result, courts balance competing policy and factual interests in reaching their decisions on standing.[156] In light of the policy concerns stressed above, courts should exercise their discretion within this framework to limit individual standing in the enforcement of governmental conservation easements.[157]

2. Mandamus

Mandamus is typically limited to compelling a government official or agency to perform a mandatory, ministerial, or statutorily imperative action.[158] On the other hand, where the act involves discretion or judgment by the government actor, a court should refuse mandamus.[159]

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requirement and the ban on advisory opinions, and "prudential" standing rules, designed to husband judicial resources or for other policy reasons).

[155] Federal courts have developed standing rules. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-03 (1998); Bennett v. Spear, 520 U.S. 154, 162-63 (1997) (describing the "zone of interests" test); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72 (1978). State rules may follow federal rules, *see, e.g.*, KS Tacoma Holdings, LLC v. Shorelines Hearing Bd., 272 P.3d 876, 881 (Wash. Ct. App. 2012) (specifically following federal "zone of interest" test), or may set their own standards, *see, e.g.*, Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005, 1012 n.3 (Cal. 2011) (specifically rejecting the federal "zone of interest" test); Bailey v. Preserve Rural Rds. of Madison Cnty., Inc., No. 2009-SC-000417-DG, 2011 WL 6542996, at *2-4 (Ky. 2011) (requiring a "judicially cognizable interest" that is not remote or speculative; permitting association standing); Templeton v. Town of Boone, 701 S.E.2d 709, 712 (N.C. Ct. App. 2010) (requiring particularized injury in fact, that will be redressed by a favorable decision). In addition to general standing rules, some substantive statutes may contain specific standing rules. *See, e.g.*, *In re* Broad Mountain Dev. Co., 17 A.3d 434, 439-40 (Pa. Commw. Ct. 2011) (applying standing rule of Pennsylvania Municipalities Planning Code); *KS Tacoma*, 272 P.3d at 881 (applying standing provisions under state Shorelines Management Act).

[156] *See* Heffernan v. Missoula City Council, 255 P.3d 80, 91-92 (Mont. 2011) (considering the "importance of the question to the public" along with traditional factors).

[157] Standing in zoning cases is often granted more easily than this article suggests advisable for claims involving governmental conservation easements. Owners of nearby land which has been zoned for more intensive use are usually granted standing to challenge the ordinance. Mandelker, *supra* note 53, § 8.04; *see, e.g.*, *In re Broad Mountain Dev. Co.*, 17 A.3d at 440; *Heffernan*, 255 P.3d at 93-94. The right of neighbors is sometimes defined by statute. *See, e.g.*, Douglas v. Planning & Zoning Comm'n, 13 A.3d 669, 671 n.1 (Conn. App. Ct. 2011) (owners within 100 feet, granted standing under CONN. GEN. STAT. § 8-8(a) (2007)).

[158] *See, e.g.*, Marathon Oil Co. v. Lujan, 937 F.2d 498, 500 (10th Cir. 1991); City of Tarpon Springs v. Planes, 30 So. 3d 693, 696 (Fla. Dist. Ct. App. 2010) ("[T]he Family requested the City to take an action under the agreement that the City had a right to refuse and did refuse. Such a case is not one for which this extraordinary writ is available . . . .").

[159] *See, e.g.*, Giffort Pinchot Alliance v. Butruille, 742 F. Supp. 1077, 1083 (D. Or. 1990) ("[M]andamus may not be used to direct acts within an agency's discretion."); *In re* Milek v. Town of Hempstead, 742 N.Y.S.2d 113, 113 (N.Y. App. Div. 2002).

Therefore, third parties are unlikely to succeed in obtaining mandamus orders to challenge governmental decisions regarding acquisitions, modifications, or terminations of conservation easements. Again, this outcome in the conservation easement context is appropriate in order to ensure that discretion remains in the hands of accountable, elected officials.

In *Moss v. Shinn*, for example, the court refused to order that state officials either post a sign or deploy personnel to ban bicycles, which would ensure compliance with a "hikers only" policy on public trails.[160] As the court explained, "A determination of the resources to be devoted to enforcement and the manner of enforcement clearly involves an exercise of the Department's discretion."[161] The court warned that judicial intrusion into executive decisions would violate separation-of-powers principles.[162]

On the other hand, if a statute requires procedural or substantive conditions as a predicate to governmental action, mandamus may be appropriate to compel compliance with these requirements.[163] Thus, in *Sierra Club v. City of Hayward*, mandamus by a third party, Sierra Club, was appropriate when the city canceled a conservation easement without following statutory procedure and standards.[164] Nevertheless, if statutory requirements are followed, no basis exists for a mandamus action challenging the government's ultimate decision.[165]

3. Charitable Trusts and Cy Pres

A donor may transfer property to a government or nonprofit organization in one of two ways: as an absolute gift, or as a gift subject to a charitable trust or condition. If a court construes the gift of a conservation easement as an absolute gift, the government or nonprofit organization has significant discretion in administering the easement. But if the charitable-trust doctrine applies, this opens the door to third parties to challenge the acquisition, modification, and termination of

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[160] Moss v. Shinn, 775 A.2d 243, 249 (N.J. Super. Ct. Law Div. 2000).

[161] *Id.* at 250.

[162] *Id.*

[163] *See, e.g.*, State *ex rel.* King v. Lyons, 248 P.3d 878, 886-87 (N.M. 2011).

[164] *See, e.g.*, Sierra Club v. City of Hayward, 623 P.2d 180, 182 (Cal. 1981) (city failing to apply statutory cancellation provisions correctly by not making certain required findings and in making other findings that were not supported by substantial evidence).

[165] *See* Glenn's Dairy, Inc. v. City of Pittsburgh, 675 A.2d 781, 783 (Pa. Commw. Ct. 1996).

governmental and NPO conservation easements. Unfortunately, this result may decrease the flexibility of conservation easements, subject the government to litigation expenses, and perhaps even replace the government holder's vision of the easement with the view of a third party.[166]

Proponents of the charitable trust classification support it because they believe it will better protect the public's interest, vindicate the charitable deduction, and better respect the perpetual nature of easements.[167] On the other hand, other commentators have rejected the charitable trust doctrine's application to conservation easements,[168] claiming that the requisite intent to create a trust is absent and that the law's limitations frustrate proper administration and alteration of conservation easements. Moreover, these commentators[169] believe that the Internal Revenue Code and accompanying regulations adequately ensure that any modifications or terminations will serve the public interest, since the nonprofit could otherwise lose its tax-exempt status and the original deduction could be invalidated.

Finally, in the context of governmental conservation easements, there is a risk that charitable trust doctrine might be used by some aggrieved members of the public to achieve a result that they could not win through the democratic process or usual legal channels. A right to invoke the charitable trust doctrine should not exist to enable judges to second-guess elected officials' decisions regarding the acquisition, modification, and termination of conservation easements. Indeed, objectors are not

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[166] The "conservation easements as charitable trusts" issue has been the subject of significant discussion. *See, e.g.*, Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757 (2005); C. Timothy Lindstrom, Hicks v. Dowd*: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008) [hereinafter Lindstrom, *End of Perpetuity*] (same); C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009) [hereinafter Lindstrom, *Conservation Easements*] (rejecting the use of cy pres); Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to* The End of Perpetuity, 9 WYO. L. REV. 1 (2009) (supporting use of charitable trust law); Matthew J. Richardson, Note, *Conservation Easements as Charitable Trusts in Kansas: Striking the Appropriate Balance Among the Grantor's Intent, the Public's Interest, and the Need for Flexibility*, 49 WASHBURN L.J. 175 (2009). For an excellent, thoughtful analysis of this issue, see Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012).

[167] *See* McLaughlin & Weeks, *supra* note 166, at 5 (addressing perpetual easements); *id.* at 27-28, 55-56, 80-82 (discussing charitable deductions); *id.* at 70-71 (discussing the public's interest).

[168] *See* Lindstrom, *End of Perpetuity*, *supra* note 166, at 83.

[169] *See, e.g.*, *id.* at 45-56.

without protection. They can remove officials through the democratic, electoral process. And they can invoke procedural protections, as well. For example, general constitutional and procedural requirements constrain officials' actions and require transparency. Moreover, specific statutes may set additional procedural and public-participation requirements for these decisions—for example, statutes governing the sale of government-held land. If the objectors cannot prevail by these means, they should not be allowed to hijack the process. Democratic governments need freedom to perform the business of the people.

a. Policy Considerations

Interpreting a conservation easement to create a charitable trust generates several potential negative outcomes. First, a charitable trust finding would mean that the restrictive doctrine of cy pres applies to conservation easements. Under that doctrine, a trust can be modified only if unforeseen circumstances make the performance of the trust's terms impossible or impracticable.[170] Unfortunately, the requirements of unforeseen circumstances, impossibility, and impracticability severely limit the circumstances where a conservation easement could be modified to serve the public interest. Moreover, under the cy pres doctrine, only courts are empowered to approve a modification and make the final determination of what constitutes an appropriate alteration to the trust. As a result, the parties cannot agree to changes by themselves without ultimate court approval.[171] Therefore, this doctrine's application would severely limit the scope and circumstances of conservation easement modifications and terminations. As I have argued above, this is not a good result.

Second, because attorneys general have standing to enforce the terms of charitable trusts, they have authority to contest a proposed modification in a cy pres action.[172] This might prove problematic at times because it may expose a governmental entity to intragovernmental turf battles with the attorney general. Indeed, the units could have different conceptions of the public interest, as well as potentially competing political agendas. Finally, other third parties, such

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[170] RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).
[171] *Id.* § 399 cmts. d, e.
[172] *Id.* § 391 cmt. a.

as members of a small class of persons for whom the trust is created to benefit, may also have standing to participate in cy pres proceedings—at least pursuant to the law of some states[173]—and could stand in the way of beneficial modifications and terminations for many of the reasons set forth above.[174]

b. Theoretical Gaps

Doctrinal problems may also arise in attempting to apply charitable trust law to conservation easements. As an initial matter, conservation easements are creatures of property law, not charitable trust law. The fundamental goal of their enabling acts, such as the Uniform Conservation Easement Act (UCEA), is to ensure that conservation easements are treated like other easements. For example, section 2(a) of the UCEA states that "a conservation easement may be created . . . released, modified, terminated, or otherwise altered or affected *in the same manner as other easements*."[175] This means that the doctrines of real property law—doctrines that allow termination of conservation easements upon consent of the parties[176] or by judicial action under rules of easement and covenant law[177]—should apply.

Not only should the rules of property law control, but the underlying policies and history of American land law should also inform conservation easement decisions. Property law has developed a series of principles to simultaneously guide the allocation of our limited land resources, balance competing private and public land rights, and accommodate the social, personal, economic, historical, and political importance of land ownership in the United States experience. Land law also takes account of the needs of both the present owners and of future generations.[178] As creatures of property law, conservation easements invoke these policy considerations, and real property law supplies the architecture to find appropriate solutions. For example, the law of easements and covenants provides doctrines that allow for modifications and

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[173] *Id.* § 391 & cmt. c.

[174] *See supra* Part III.B.1.

[175] UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 170 (1981) (emphasis added). Others rely on *comments*, rather than the *text* of the statute, for support to view conservation easements as charitable trusts. *See infra* note 190.

[176] KORNGOLD, *supra* note 101, §§ 6.08 (easements), 11.03 (covenants).

[177] *See id.* at chs. 6, 11.

[178] *See generally* Korngold, *supra* note 107.

terminations to address changed conditions, violations of public policy, and hardship.[179] These doctrines help to prevent the frustration of current generations' autonomy and aspirations, as well as the inefficiency of seemingly perpetual land ties.

Moreover, conservation easement donations are not like typical charitable gifts since the donor retains an ownership right—namely, the fee in the land that is subject to the easement. This, in effect, creates two "owners" of the property—the fee owner, and the easement holder—and the rights of both must be recognized and protected. Fortunately, various property-law doctrines have been designed to confront these challenges: to manage various "owners" and their interests, resolve conflicts, and allow for necessary flexibility.[180]

Cy pres proponents appear to overlook another important distinction: an owner can donate land or property without placing any restrictions on the gift.[181] Although the NPO or governmental donee must use the donated property to serve its overall mission, there is no restriction that would require the donee to continue to hold the property or use it in a certain way. Indeed, the donee could sell the property and use the cash for mission purposes.[182] Alternatively, an owner could donate a fee interest in land subject to a restriction. In that instance, the donee must follow the terms of the restriction precisely, in a manner analogous to a charitable trust.[183] If those terms cannot be effectuated as new conditions emerge, then a cy pres proceeding would be necessary to find an alternate use. For example, if a donor gave a fee interest in land provided that the property is used for a boarding school for orphans, the restriction must be followed. If it becomes impractical to follow the restriction because, for example, there

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[179] *See* KORNGOLD, *supra* note 101, §§ 10.02 (covenants violating public policy), 11.07 (changed conditions), 11.08 (relative hardship).

[180] The law of waste, for example, manages conflicts between current and future interest holders. *See* A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 358-60 (5th ed. 2004).

[181] A.L.I., PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 400(b) (Tentative Draft No. 2, 2009) [hereinafter ALI, NONPROFIT ORGANIZATIONS DRAFT NO. 2].

[182] GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 324 ("In the case of the *absolute gift* full ownership of the property given vests in the corporation, subject to the duties imposed upon it by its charter or articles of incorporation and by the terms of any agreements it makes by contract or in its acceptance of a qualified gift. The Attorney General has the power, as a representative of the state and by *quo warranto* or other proceedings, to compel the corporation to perform these duties, but he acts in a different capacity than as enforcer of charitable trusts.").

[183] *See* Blumenthal v. White, 683 A.2d 410, 413-14 (Conn. App. Ct. 1996) (finding gift of land to city on condition for use as a park creates charitable trust); ALI, NONPROFIT ORGANIZATIONS DRAFT NO. 2, *supra* note 181, § 400(b).

is an insufficient number of orphaned children, then a court could apply cy pres and order that the property be used for a similar purpose—for example, a school for children with only one living parent.

Note, however, that the gifts in these examples convey a *fee interest* in the land, which the donor gives either unconditionally or subject to a restriction. On the other hand, with gifts of conservation easements, the gift is the conservation easement *itself*. In other words, the property right the donee acquires is the power to limit the use of land held by another. But there are no restrictions on the gift of the easement. For example, the easement does not state that the donor grants a conservation easement to the NPO subject to a restriction that the NPO offer free landscape painting classes. A gift of an easement therefore resembles a general gift to the organization, much like an unrestricted fee donation, which may be retained or sold as long as it serves the mission.[184] Indeed, courts invoke cy pres only where a gift is subject to a restriction, regardless of whether it is a fee or an easement. Cy pres is not appropriate, however, where a gift of a fee or an easement is unconditional.

Finally, some conservation easements may be acquired by purchase rather than by gift.[185] Even if one were to argue that gifts of conservation easements should be construed as creating charitable trusts (a view that this article rejects), much less support exists for applying the law of charitable trusts—which by its own terms only covers gifts—to easements that were acquired for consideration.[186]

Others disagree with this assessment, however, and argue for the application of charitable trust law to conservation easements.[187] Their positions are often based on articulated policy concerns, including the importance of preserving land,

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[184] Selling a fee or an easement for a suboptimal amount—for example, for less than the benefit the organization would have by simply retaining the property—would *not* serve the mission. NPO directors would be held accountable for breach of fiduciary duty if they foolishly made a sale for too little money. *See* A.L.I., PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 315 (Tentative Draft No. 1, 2007) (defining duty of nonprofit directors).

[185] *See supra* note 31 (discussing governmental easements acquired for consideration).

[186] *See* Loomis v. City of Boston, 117 N.E.2d 539, 540-41 (Mass. 1954) (consideration plus lack of restrictive language mean no charitable trust was created); *but see* Cohen v. Lynn, 598 N.E.2d 682, 685 (Mass App. Ct. 1992) (allowing charitable trust despite payment of consideration).

[187] *See* McLaughlin, *Rethinking*, *supra* note 4, at 434-35.

respect for the donor's intent, and loss of the public's tax expenditure.[188] Moreover, modification outside of a cy pres proceeding may well place the 170(h) charitable deduction in dispute under current regulations and interpretations.[189]

While I recognize that cy pres proponents raise some important policy concerns that cannot be ignored in crafting an appropriate legal solution, I respectfully disagree with their ultimate resolution of the issues. I have argued that the charitable trust model is not appropriate for analysis of *all* conservation easements and related modification issues. In order to address important land use policies and the needs of future generations, more flexible property-law modification and termination doctrines should apply unless there is clear and specific evidence of an intent by the donor, beyond the act of creating a conservation easement, to create a charitable trust and invoke that body of doctrine. At the same time, I hope that the various voices on the charitable trust question might join in a policy-based discussion of the issues and ultimately a greater understanding and accommodation of other perspectives.[190] If

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[188] *See supra* note 166 & accompanying text; *see also* Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561.

[189] *See* 26 C.F.R. § 1.170A-14(g)(6) (an easement is not denied deduction if subsequent unexpected changes in conditions make continued use of the property "impossible or impractical" for conservation, as long as funds from extinguishment of easement are invested in another conservation easement; the regulation does not permit swaps that are merely advantageous to conservation goals, but has the high threshold of "impossible or impractical" for conservation purposes); Belk v. Comm'r, No. 5437-10, 2013 U.S. Tax Ct. LEXIS, at *23-28 (U.S. T.C. Jan. 28, 2013) (clause in easement agreement allowing donor to unilaterally substitute new property for land being placed under easement prevented deduction; arguably, the facts are distinguishable from a situation where there is no such clause and the easement holder and donor subsequently mutually agree to a swap that increases the conservation goals of the nonprofit or governmental holder).

[190] Textual support for treatment of conservation easements as charitable trusts is ambiguous. Language inserted into the Prefatory Note of the Uniform Conservation Easement Act in 2007 states that "the Act does not directly address the application of charitable trust principles to conservation easements." UNIF. CONSERV. EASEMENT ACT, Prefatory Note, at 3 (2007). Somewhat surprisingly in light of that comment, the Comment to section 3 of the Act was amended at the same time to read that "the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements." *Id.* § 3 cmt. This does not clearly state, though, that conservation easements are considered to be charitable trusts. Indeed, the charitable trust law of a state might be applied to find a lack of intent to create a charitable trust with respect to any particular easement. This same Comment to section 3 quotes the comment to Uniform Trust Act § 414 in support, yet that only states that conservation easements "will *frequently* create a charitable trust"—but, by its own terms, not always. *Id.* (emphasis added) (quoting UNIF. TRUST ACT § 414 cmt. (2000)). Finally, these are statements in the comments of uniform acts, and courts typically hold that such comments are not controlling authority but may provide some guidance on legislative intent. *See, e.g.*, Wakefield v. Crawley, 6 S.W.3d

so, a consensus may begin to develop on a viable, workable, and realistic modification and termination model that will serve present and future conservation goals and generations.

c. Illustrative Cases

Long Green Valley Ass'n v. Bellevale Farms, Inc. correctly refused to apply charitable trust law to a conservation easement, thus denying standing to an open-space-preservation association and two of its members and dismissing their challenge to a governmental easement holder's decision.[191] The Maryland Agricultural Land Preservation Foundation (MALPF), an entity of the Maryland Department of Agriculture, purchased an agricultural preservation easement over Bellevale's 199-acre farm for $796,500.[192] The easement limited the land's use to agricultural purposes and lasted "in perpetuity, or for so long as profitable farming is feasible" on the land.[193] A Maryland statute, however, permitted owners of land subject to such easements to terminate the arrangement after twenty-five years, thus in effect limiting the perpetual feature.[194] Subsequently, MALPF approved Bellevale's request for permission to build a 7000- to 10,000-square-foot building to house a creamery operation, processing facility, and farm store. In support of its decision, MALPF reasoned that under the terms of the easement agreement, this was a "farm related use."[195]

The Long Green Valley Association (LGVA), a community organization dedicated to open-space preservation in the Green Valley, and the Yoders, neighbors of Bellevale and members of LGVA, challenged the MALPF decision.[196] After MALPF and the state secretary of agriculture refused to reverse the approval, plaintiffs brought suit.[197] Plaintiffs sought a declaration that the creamery operation would violate the

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442, 446-47 (Tenn. 1999) (comments to U.C.C. helped to clarify legislative intent to include stock in closely-held corporation within definition of "security"). The strongest statement supporting cy pres comes in *Restatement (Third) of Property: Servitudes* § 7.11, cmt. a, an influential but nonbinding source. Moreover, the hunt for textual clues and fragments suggesting the charitable trust view obscures the essential policy inquiry that should be taking place.

[191] Long Green Valley Ass'n v. Bellevale Farms, Inc., No. 0228, 2012 WL 468245 (Md. Ct. Spec. App. Feb. 14, 2012), *vacated*, 46 A.3d 473 (Md. Ct. Spec. App. 2012).

[192] 46 A.3d at 478.

[193] *Id.* at 479.

[194] *Id.* at 497-98.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 479-80.

conservation easement and requested a writ of mandamus to order enforcement of the easement agreement.[198] Plaintiffs argued that the conservation easement created a charitable trust that "any interested person," including LGVA and the Yoders, could enforce.[199]

The court extensively examined the conservation-easement–charitable-trust issue. It discussed secondary sources and the limited case law before concluding that there was insufficient intent to create a charitable trust in the conservation easement before it. The court, however, limited its holding to the facts, stating that "we are not persuaded that the charitable trust doctrine *must* be applied to purchased, nonperpetual agricultural preservation easements, nor even that it *should* be."[200] Given the limited duration and consideration, the court found that the "donor" (that is, Bellevale) did not intend to create one.[201] The court noted that while there are no specific words required for creation of a trust in the conservation-easement context, it "is not something to be lightly inferred."[202] Thus, parties are free to create a charitable trust relationship with respect to a conservation easement, but they must do so clearly. This view implicitly recognizes that if easements are treated as charitable trusts, they generate concerns of increased standing, loss of flexibility, and diminished control by democratically elected representatives.[203]

C. Statutory Controls on Conservation Easement Flexibility

A diverse range of state legislation governs the termination and modification of governmentally held conservation easements.[204] In particular, however, there are three varieties of statutes that might contain restrictions on easement alteration: legislation authorizing conservation

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[198] *Id.* at 480.

[199] *Id.* at 487.

[200] *Id.* at 494.

[201] *Id.* at 501.

[202] *Id.* at 494-96 (quoting Lindstrom, *Conservation Easements*, *supra* note 166, at 403).

[203] *See generally* Hicks *ex rel.* Bd. of Trs. of the Scenic Preserve Trust v. Dowd, 157 P.3d 914 (Wyo. 2007). This decision is of ambiguous precedential value in finding that conservation easements create charitable trusts because of its specific facts and because neither side challenged the trial court's determination that a charitable trust was created.

[204] For a comprehensive and helpful compilation, see Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 REAL PROP. TR. & EST. J. 1, app. A (2011).

easements in general, statutes creating specific governmental easement programs, and legislation governing the sale of governmental assets and land in general. In order to achieve policy goals, these statutes should be crafted and interpreted to capture the flexibility and governance benefits of governmental conservation easements.

1. General Conservation Easement Statutes

The Uniform Conservation Easement Act and a number of state statutes provide that conservation easements may be released, terminated, or modified in the same manner as other easements.[205] These statutes apply both to governmental and NPO easements, but they usually fail to provide specific substantive or procedural guidelines for the alteration of easements. Nevertheless, some statutes that generally authorize conservation easements do mandate special procedures to terminate governmental or NPO easements, such as approval by a governmental executive or legislative body.[206] For example, New York requires that termination be permitted under the terms of the instrument or secured through the exercise of eminent domain, and it also prescribes a judicial proceeding to terminate easements held by NPOs or public bodies.[207]

2. Specific Governmental Easement Programs

In addition to statutes generally authorizing conservation easements, many states have enabling legislation creating particular programs for governmental conservation easements.[208] Some of this legislation delineates specific requirements with respect to the release, termination, and modification of easements under these programs.[209] Most of the statutes only address requirements for termination or release,[210]

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[205] *See id.* at 71 (citing Florida, Illinois, and Idaho, as well as the Uniform Act jurisdictions).

[206] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 184, §§ 31-34 (West 2012); NEB. REV. STAT. ANN. § 76-111 (West 2012); N.J. STAT. ANN. § 13:8B-5 (West 2012) (also requiring prior public hearing).

[207] *See* N.Y. ENVTL. CONSERV. LAW § 49-0301 (McKinney 2012).

[208] McLaughlin, *supra* note 204, app. B at 90-92 (providing an excellent description of such statutes). This section relies on Professor McLaughlin's compilation.

[209] *Id.* at 90-124 (describing legislation relating to such programs).

[210] *See, e.g.*, CAL. PUB. RES. CODE §§ 10270-10277 (West 2003) (agricultural easements); CONN. GEN. STAT. ANN. § 22-26cc(c) (West 2011) (agricultural easement); DEL. CODE ANN. tit. 3, § 917 (agricultural easements); N.H. REV. STAT. ANN. § 432:24 (2012) (water supply protection).

while a limited number cover modifications and alterations, as well.[211] Many of the statutes with termination requirements involve agricultural easements.[212]

These legislative acts may dictate procedural requirements, including a public hearing prior to termination;[213] approval by the executive or legislative branch,[214] perhaps with a required onsite inspection of the property[215] or judicial authorization;[216] a judicial proceeding to review the executive or legislative termination decision;[217] and voter approval.[218] Substantive requirements may include a finding of a public interest or necessity for termination;[219] a finding of an absence of plausible alternatives;[220] a determination that the required agricultural use is no longer profitable;[221] a payment to the government holder equal to the value of the released rights;[222] a

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[211] *See, e.g.*, ARK. CODE ANN. § 15-20-314 (2005) (easements held by Natural Heritage Commission); MINN. STAT. ANN. §§ 103F.515, .535 (2012) (agricultural easements).

[212] *See, e.g.*, CAL. PUB. RES. CODE §§ 10260-10277 (agricultural easements); CONN. GEN. STAT. ANN. § 22-26cc(c) (agricultural easement); DEL. CODE ANN. tit. 3, §§ 901-941 (1998) (agricultural easements); 3 PA. CONS. STAT. § 903 (2012) (agricultural easements).

[213] *See, e.g.*, CONN. GEN. STAT. ANN. § 22-26cc(c) (agricultural easement); N.H. REV. STAT. ANN. § 486-A:13 (water supply protection easement); N.J. STAT. ANN. §§ 13:8-49, -56 (West 1977) (scenic river easements).

[214] *See, e.g.*, CAL. PUB. RES. CODE §§ 10200-10277 (agricultural easements); MICH. COMP. LAWS ANN. §§ 324.36101 to .36117 (2008) (farmland and open space); MINN. STAT. ANN. § 103F.515 (agricultural easements); N.H. REV. STAT. ANN. § 432:31-a (water supply protection); R.I. GEN. LAWS §§ 32-4-4, -6 (2012) (easements pursuant to Green Acres Land Acquisition Act); S.C. CODE ANN. §§ 48-59-10 to -140 (2002) (easements owned by South Carolina Land Bank).

[215] *See, e.g.*, DEL. CODE ANN. tit. 3, § 917 (agricultural easements).

[216] *See, e.g.*, KY. REV. STAT. ANN. § 262.908(2)(c) (West 1994) (agricultural easements).

[217] *See, e.g.*, ARK. CODE ANN. § 15-20-314 (easements held by Natural Heritage Commission).

[218] *See, e.g.*, CONN. GEN. STAT. ANN. § 22-26cc(c) (agricultural easement); 32 PA. CONS. STAT. ANN. § 5010 (West 2012) (open space easements).

[219] *See, e.g.*, CAL. PUB. RES. CODE § 10273 (agricultural easements); CONN. GEN. STAT. ANN. § 22-26cc(c) (agricultural easement); MINN. STAT. ANN. § 103F.535 (agricultural easements); N.H. REV. STAT. ANN. § 432:26 (agricultural easements); TENN. CODE ANN. § 11-15-108 (West 1976) (open space easements).

[220] *See, e.g.*, ARK. CODE ANN. § 15-20-314 (easements held by Natural Heritage Commission).

[221] *See, e.g.*, DEL. CODE ANN. tit. 3, § 917 (2012) (agricultural easements); *see* N.C. GEN. STAT. §§ 106-735 to -745 (2011) (agricultural easements); 3 PA. CONS. STAT. ANN § 903 (West 2012) (agricultural easements).

[222] *See, e.g.*, CONN. GEN. STAT. ANN. § 22-26cc(i) (agricultural easement); MICH. COMP. LAWS ANN. § 324.36106 (West 2002) (farmland and open space); N.H. REV. STAT. ANN. § 486-A:13(II)(e), (III)(b) (water supply protection easement and scenic river easements); S.C. CODE ANN. §§ 48-59-10 to -140 (2002) (easements owned by South Carolina Land Bank).

return to the state of any grant funds used to acquire the easement;[223] and a replacement easement.[224]

A number of states set a low bar for termination or modification. For example, Illinois permits the release of some governmental easements simply upon mutual consent of the parties.[225] Additionally, West Virginia permits the fee owner to essentially cancel an agricultural easement at will by repaying the amount initially received for the easement.[226]

3. Disposition of Governmental Lands Generally

Government termination or modification of a conservation easement could be viewed as a reconveyance of the easement rights in whole (termination) or in part (modification) to the fee owner. This raises the question of whether such "reconveyance" is consistent with the general rules regulating government transfers of real property. Those rules vary, however, depending on whether the land is held for public use or "private" use—that is, a ministerial or governmental capacity rather than for the public's use more broadly.[227]

Property held by the government for "private" purposes can be sold,[228] subject to various procedural rules.[229] These rules may require, for example, public notice of sales and a bidding process,[230] as well as approval by specified government officers

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[223] *See, e.g.*, HAW. REV. STAT. ANN. § 173A-10 (LexisNexis 2012); N.H. REV. STAT. ANN. § 486-A:15 (2012) (water supply protection easement); R.I. GEN. LAWS § 32-4-12 (2012) (easements pursuant to Green Acres Land Acquisition Act).

[224] *See, e.g.*, S.C. CODE ANN. § 48-59-80 (2012) (easements owned by South Carolina Land Bank).

[225] *See, e.g.*, 505 ILL. COMP. STAT. ANN. 35/1-1 to 4-1 (West 2012) (conservation easements generally); *id.* 35/2-1 to 2-5 (easements pursuant to the topsoil protection program); OHIO REV. CODE ANN. §§ 901.21 to .22 (West 2012) (agricultural easements extinguished according to terms of the creating instrument).

[226] W.VA. CODE §§ 8A-12-1 to -21 (2004) (agricultural easements).

[227] 10 MCQUILLIN MUNICIPAL CORPORATIONS § 28:35 (3d ed. 2012). The public/private distinction is sometimes difficult to make. *Id.* § 28:41.

[228] *Id.* § 28:35.

[229] *See, e.g.*, IND. CODE § 36-1-11-4 (2011) (describing sales procedures); State *ex rel.* King v. Lyons, 248 P.3d 878, 881 (N.M. 2011) (New Mexico Constitution requires that the state land cannot be sold or leased except to the highest and best bidder at a public auction.); Killam Ranch Props., Ltd. v. Webb Cnty., No. 04-10-00324-CV, 2012 WL 1193722 at *2-4 (Tex. Ct. App. Apr. 11, 2012) (discussing TEX. LOC. GOV'T CODE ANN. §§ 263.007, 272.002 (West 2007) (requirements for sale of land by counties, including public notice and sealed bids)). Political subdivisions are subject to state control as they are agents of the state. *See* 10 MCQUILLIN MUNICIPAL CORPORATIONS, *supra* note 227, §§ 28:35, :40.

[230] *See supra* note 229.

and bodies.[231] Other guidelines may examine the terms of the sale, requiring, for example, "adequate consideration."[232] A central purpose motivating these restrictions is to ensure that governments receive the highest price possible whenever they sell a public asset, thus providing maximum assistance to the public purse.[233] Furthermore, these rules may help to prevent corruption in sales and protect government officials from pressure and coercion.[234]

Property held by the government for public use cannot be sold except pursuant to specific statutory authority.[235] These statutes typically impose requirements beyond mere procedural fairness, however. Parks, for example, are often singled out for special attention.[236] Thus, in California, land that has been dedicated to park use cannot be conveyed by a park district unless approved at a special meeting by a majority of the district's voters.[237] In New York, park land cannot be sold without approval of the state legislature,[238] given that "dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State."[239] A prerequisite to such treatment, however, is that the land must be *dedicated* to public use, which may require certain formalities.[240] Together, these protections demonstrate the public's special

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[231] *See, e.g.*, IND. CODE § 36-1-11-3 (approval by executive and also by fiscal body for property appraised at over $50,000).

[232] N.Y. CONST. art. VIII, § 1; *see* W.N.Y. Land Conservancy v. Town of Amherst, 773 N.Y.S.2d 768, 770 (N.Y. App. Div. 2004).

[233] *See, e.g.*, *King*, 248 P.3d at 882-83; *In re* LaBarbera v. Town of Woodstock, 814 N.Y.S.2d 376, 379 (N.Y. App. Div. 2006) (N.Y. CONST., art. VIII, § 1 bars conveyance of public property to private entities without adequate consideration.).

[234] *See, e.g.*, *King*, 248 P.3d at 883, 889; *see also* Murphy v. State, 181 P.2d 336, 338 (Ariz. 1974) (describing land sale abuses when states admitted to Union disposed of large amount of public land).

[235] 10 MCQUILLIN MUNICIPAL CORPORATIONS, *supra* note 227, §§ 28:35, :36.

[236] *But see* Fulton Cnty. Bd. of Educ. v. Citizens for Educ. & Env't, Inc., 552 S.E.2d 483, 483 (Ga. Ct. App. 2001) (upholding city charter provision giving municipality the right to sell or otherwise dispose of park properties).

[237] CAL PUB. RES. CODE § 5540 (West 1985) (including conservation easements dedicated to open space). Land held by park districts but not dedicated as such, however, are not subject to this provision. Ste. Marie v. Riverside Cnty. Reg'l Park & Open-Space Dist., 206 P.3d 739 (Cal. 2009); *see also* Citizens Planning Ass'n v. City of Santa Barbara, 120 Cal. Rptr. 3d 495 (Cal. Ct. App. 2011) (city ordinance restricting sale of parkland unless majority of voters approve).

[238] Levine v. Vill. of Island Park Bd. of Zoning Appeals, 944 N.Y.S.2d 270, 272 (N.Y. App. Div. 2012).

[239] Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1055 (N.Y. 2001).

[240] Courts thus must determine if the land was actually dedicated or acquired otherwise by the city. *See, e.g.*, Vestavia Hills Bd. of Educ. v. Utz, 530 So. 2d 1378, 1380-81 (Ala. 1988); *Ste. Marie*, 206 P.3d at 741.

interest in parks, the assumption that parks should remain as such, and perhaps the legislature's concern that government officials may be willing to compromise those values for expediency or more sinister reasons.

The courts have protected parklands with equal vigor. For example, one court rejected a simple utilitarian test, explaining that "no objects, however worthy, . . . which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred."[241] Other jurisdictions, however, may not be quite so deferential to parkland—at least under some circumstances. For example, courts have drawn a distinction between land donated to a city in fee simple absolute, on one hand, and land donated conditionally or formally dedicated to park purposes, on the other, permitting cities to sell the former but not the latter.[242] Presumably, these jurisdictions are willing to let elected officials settle the issue of park permanence, allowing the political process and procedural rules to protect citizens. Courts thus must distinguish absolute gifts containing only precatory words from gifts manifesting a grantor's intent to impress a binding park restriction.[243]

As a preliminary matter, a court must determine whether governmental conservation easements are held for "public use." When the easement does not grant public access, one could argue that there is no actual *use* of the land by the public and that the land is therefore different from parkland. On the other hand, the public does derive a benefit from the scenic values, habitat protection, and open-space benefits the easement secures. Indeed, the law recognizes nonpossessory interests, such as restrictive covenants, as valued property rights. Accordingly, a court would likely find that governmental conservation easements are for public use.

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[241] Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920).

[242] *See, e.g.*, O'Rorke v. City of Homewood, 237 So. 2d 487, 489 (Ala. 1970); Carlson v. City of Fremont, 142 N.W.2d 157, 159 (Neb. 1966); *see* Fulton Cnty. Bd. of Educ. v. Citizens for Educ. & Env't, Inc., 552 S.E.2d 483 (Ga. Ct. App. 2001) (upholding city charter provision giving municipality the right to sell or otherwise dispose of park properties).

[243] *Compare* Loomis v. City of Boston, 117 N.E.2d 539, 541 (Mass. 1954) (park land could be sold), *with* Cohen v. City of Lynn, 598 N.E.2d 682, 684-85 (Mass. Ct. App. 1992) (binding words of condition).

CONCLUSION

Governmental conservation easements are a valuable tool, along with easements held by nonprofit organizations and public land use regulation, to help protect our limited land resources. In certain situations, governmental conservation easements offer unique benefits by increasing efficiency, avoiding coercive governmental action, promoting flexibility of conservation arrangements, and valuing democratic participation in vital land use decisions. Accordingly, legislatures and courts should ensure that the law regulating governmental easements is designed and applied in ways that maximize their benefits for today's citizens and future generations.