

# Not a Charitable Trust

## The Donated Conservation Easement in Pennsylvania

Little evidence exists to support the proposition that a donated conservation easement, in the absence of a charitable trust agreement, is a charitable trust in Pennsylvania; indeed, there is compelling evidence to the contrary. (Holder covenants may be used to buttress easements and do not run into the legal obstacles or suffer from the policy failings of the trust proposition.)



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## Introduction

### An interest in real estate

By statute and by common law interpretation in Pennsylvania, a conservation easement is a real estate interest and is governed by real estate law, in particular, the law of servitudes. Its essential features are described in the WeConservePA guide [\*The Nature of the Conservation Easement and the Document Granting It\*](#).

### A false proposition

In the mid-2010s, a proposition that conservation easements are also governed by a second body of law—that of charitable trusts—drew attention in various forums. Advocates for the proposition asserted that all gifts (as distinct from sales) of conservation easements create charitable trusts. Many long-time practitioners in the conservation easement field strongly disagreed and continue to disagree with the proposition.

The laws, practices, and cultures of each state, as they relate to conservation easements, vary greatly. As such, this guide focuses on the charitable trust proposition as it applies to Pennsylvania, leaving it to conservation practitioners elsewhere to conduct their own state-level analyses. This guide, first published in 2015 and lightly edited for clarity and minor updates in 2022, finds in its analysis that the charitable trust proposition is demonstrably false in Pennsylvania.

## Failure of proposition does not discount goals

Fueling the charitable trust proposition has been the expectation that the concomitant involvement of the courts and states' attorneys general will greatly improve the durability of conservation easements over time. While the guide finds overwhelming evidence that gifts of conservation easements do not generally create charitable trusts, this is not to discount goals held by trust advocates to enhance the durability of easements and ensure that land trusts honor their commitments to easement donors.

The final section of the guide addresses the durability goal, identifying a means to strengthen easements, *donated and purchased alike*. Regarding the honoring of commitments, the findings contained here do not absolve a land trust of its responsibility to deal honestly and forthrightly with donors. Whether or not a charitable trust exists, the land trust is obligated to respect the commitments it makes to a donor.

## Contents of the guide

The next section reviews the experience of conservation and legal professionals in working with conservation easements and inferences to be drawn from that experience. It finds a lack of real-world evidence that conservation in the public interest requires new mechanisms for engaging the courts and attorneys general; it also finds an absence of intent to create charitable trusts by those establishing conservation easements.

The following section, "Not Grounded in Law," explains that a grant of conservation easement and a charitable trust agreement are different instruments, each governed by a separate legal framework under Pennsylvania law.

The final section, "Strengthening Long-Term Viability," addresses a key driver of the charitable trust proposition: the desire to buttress the objectives of conservation easements and the resources they protect from threats over the course of time. It explains that use of holder covenants can meet this desire without the legal obstacles to framing conservation easements as charitable trusts and without

having to address the policy failings of the charitable trust approach.

## Not Grounded in Fact or Experience

Advocates of the charitable trust proposition make assertions about the nature of conservation easement work without substantive real-world evidence to validate their key claims. Often, the facts argue against them. Contrary to their assumptions and the conclusions that spring from them:

- Easement amendments do not present a real and present danger to conservation in the public interest;
- The courts and attorneys general are not generally well equipped to analyze natural resource protection issues and make judgments regarding the management of conservation easements;
- Land trusts are not prone to substantially higher levels of incompetence, poor judgment, and bad intent than other charitable organizations;
- The conservation purposes of an easement are the heart of the easement, its *raison d'être*; they are not a restriction on the use of the easement.
- A conservation easement's purposes are generally holder-driven, not donor-driven; and
- Donors' advisors may be expected in general to be competent.

## Easement amendments do not endanger conservation in the public interest

Advocates of the trust proposition present statistics on the growing number of conservation easements as an indicator of a growing problem with easement amendments, one that is best fixed by application of charitable trust principles. What's striking, however, is that despite decades of ever-increasing numbers of conservation easements, the modification (or termination) of easements contrary to advancing conservation and the public interest appears virtually non-existent.

Many hundreds of easements have been donated in Pennsylvania in the past several decades. A couple dozen easement instruments at most may be amended each year.<sup>1</sup> These amendments have occurred and continue to occur without controversy. Nowhere does one find dissenting land trust directors, volunteers, or members; objecting local government officials; or the public condemning the judgment of land trust boards of directors. Nowhere does one find conservation or the public interest being subverted.<sup>2</sup>

Evidence to support the conjecture of a growing, continuing, or widespread problem with easement amendment does not appear to exist. This is not to say that a problematic amendment situation won't occasionally arise. However, one<sup>3</sup> or even several problems across the entire country over decades does not support a conclusion that protection of the public interest necessitates special oversight of board deliberations and decisions regarding conservation easement amendments.

## **Government is not well-suited to second-guess land trust board judgment**

If conservation easements were to be recast as charitable trusts, the boards of land trusts (and the conservation and legal professionals who advise them) would find their judgment second-guessed by the courts and attorneys general regarding easement management issues, not just in extraordinary cases, but in matters that land trusts have routinely and inexpensively resolved without government intervention for decades.

Government representatives, having no conservation expertise, are poorly equipped to address and make decisions

pertaining to natural resource protection and conservation easement management—decisions that are central to the corporate purposes of land trusts. It makes sense for the courts and attorney general to intervene in those rare circumstances where a land trust board appears to be running astray from the organization's corporate purposes or where a board initiates engagement due to challenging circumstances. However, absent such cause for intervention, the courts and attorney general do not have the capacity to add value to an amendment deliberation targeted to maximizing and fine-tuning conservation of natural resources in regard to a particular conservation easement.

Trust advocates have disparaged land trust concerns regarding the additional costs to land trusts that would result from having, in the normal course, to take board decisions to the courts and attorneys general for review and approval. Disparagement might be merited if expanded government oversight were to be determined to deliver substantial value, but in the absence of such evidence, one must be concerned that charitable assets will be wastefully diverted to addressing a new bureaucratic step without a commensurately greater value delivered to the public as a result.

## **Land trusts are as competent and dedicated as other charitable organizations**

Are land trust boards as dedicated and committed to their charitable mission as the boards of other charitable organizations? By all appearances, the evidence says *yes*. Are they as competent to manage their assets and make decisions as other boards? Again, *yes*.

Thus, barring the identification of substantial evidence to the contrary (or something particular to the conservation

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<sup>1</sup> WeConservePA reviewed the Schedule Ds of I.R.S. Form 990s filed by Pennsylvania land trusts in 2012 and 2013, and again in 2019 and 2020, to ascertain the volume of conservation easement amendments occurring each year.

<sup>2</sup> Observations of WeConservePA staff, directors, and policy council members during 2014 quarterly meetings.

<sup>3</sup> Maryland's Myrtle Grove case is the notable exception to responsible amendments. It provided the spark in interest for applying charitable trust principles to conservation easements. To read an account of the controversy and an analysis, albeit faulty, in support of application of charitable trust principles, see Nancy A. McLaughlin, "Conservation Easements: Perpetuity and Beyond," 34 *Ecology Law Quarterly*, 690-693 (2007).

easement as a charitable asset), there is no justification for special government oversight of board decision-making regarding conservation easements—no justification for discriminatory distinction between land trusts and other charities. (The following sections address the parenthetical caveat.)

## The conservation purposes are the heart of the easement; they are not a restriction on its use

The use of charitable trust property is restricted so as to serve the purpose of the trust. Conservation easements feature restrictions and purposes, but these restrictions and purposes define the easement; they are not restrictions on use of the easement. It does not follow that a conservation easement is a charitable trust simply because the concepts utilize some of the same words.

### Because A has feature X and B has feature X does not mean that A equals B

Central to the trust proposition is the following fallacious train of thought:

1. Gifts of property to be used *only* for the particular purposes stipulated by donors create charitable trusts.
2. All conservation easements have conservation purposes.
3. Therefore, all donated conservation easements create charitable trusts.

No argument on observation #1.

No argument on observation #2. All conservation easements have conservation purposes because, by definition, that is what a conservation easement is—an easement for conservation purposes.

The conclusion of #3, however, does not logically follow from the first two observations:

- The flawed reasoning may be demonstrated by substituting a teapot for the conservation easement.

Does a gift of a teapot create a charitable trust because it is a pot that, by definition, is for the purpose of pouring tea?

- An easement has conservation purposes as a matter of real estate law. A gift creating a charitable trust has limited charitable purposes as a matter of trust law. Does it follow that they are identical? Not at all. As an example, the purpose of a deed is to convey property; the purpose of a will is to convey property; does it follow that a deed is exactly the same as a will? Each has a purpose, but the purposes are different; the documentation of each is different; and the body of law governing each is different. All they have in common is the word *purpose*, which may have different meanings in different contexts.

### No evidence of donor stipulation of particular conservation purposes

Although the notion squares poorly with the law, one might argue that the purposes of the easement and the purpose of an intended restricted gift are coterminous and thus are stated only once. Why they are presented solely as the purposes of the easement and not as the purposes of the gift remains a troublesome question for the trust proposition. However, allowing for this possibility, what evidence would one want that donors in general intend to restrict the use of easements to each donor's particular interests and purposes?

To start, one might reasonably expect to find considerable variation in the wording of conservation purposes across a wide sampling of grant documents over time. However, discussions with conservation practitioners suggests that a study of grant documents in Pennsylvania, together with a survey of experience of practitioners, would show the reverse: that donor crafting of conservation purposes is rare. As a general rule, (i) easement holders, not donors, craft conservation purpose clauses; (ii) conservation purpose clauses in the holder's form of grant generally remain constant regardless of the identity of the donor; (iii) supplementary information in conservation purpose clauses explains the application of the generic conservation purpose to the particular resources within the eased

property; and (iv) as explained more fully below, the conservation purposes stated in the grant evidence the *holder's* purposes in accepting the easement.

## A conservation easement's purposes are generally holder-driven, not donor-driven

The conservation purposes set the scope of the holder's power<sup>4</sup> within the eased property. The grant is, as a general rule, drafted by the holder to include within that scope all of the natural and scenic resources that the holder has identified as being worthy objectives furthering holder's mission. For the grant to be finalized, the donor must agree with the holder that these are worthy objectives, but that is a far cry from concluding that the conservation purposes of the easement are the *donor's* purposes imposed on the freedom the *holder* would otherwise have to use the easement for any purpose whatsoever (subject to the constraints set forth in the grant's covenants). If the conservation purposes are not donor-imposed restrictions for donor's purposes, then there is no support for the conclusion that the land trust owes fiduciary obligations to the donor.

<sup>4</sup> See discussion in [The Nature of the Conservation Easement and the Document Granting It](#). The conservation easement is a real estate interest that empowers holder to block land uses within the scope of the easement. The scope of any easement is circumscribed by its purposes.

<sup>5</sup> See C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?* 8 Wyo. L. Rev., 25 (2008) for a discussion of the legal impediments faced by proponents of the charitable trust view, including the requirements of the Uniform Trust Code as adopted in a number of states including Pennsylvania (Pennsylvania Uniform Trust Act, 20 Pa. C.S.A. Ch. 77 Section 7701).

<sup>6</sup> See McLaughlin, Nancy, "In Defense of Conservation Easements: a Response to the End of Perpetuity," 9 Wyoming L.Rev. (2009) for a discussion of the rationale for disregarding, in the case of conservation easements, legal requirements otherwise applicable to the formation and documentation of charitable trusts. An excerpt:

## Failure to document charitable trust arrangements: are all advisors to donors incompetent?

### Implied trust cannot be applied generally

Experienced conservation professionals find it difficult to accept the assertion that, despite lack of mention of it in the documentation of the gifts, all donated grants of conservation easement create charitable trusts.<sup>5</sup> The explanation provided by trust advocates is that a trust may be created without the knowledge or consent of either the easement donor or the holder.<sup>6</sup> That assertion is true as applied to circumstances in which the court finds that inequity will result unless it imposes the common law remedy of an implied trust (also known as a resulting trust). But the courts do not apply this remedy unless the facts and circumstances surrounding a gift are egregious (for example, the donor had no counsel and unwittingly made the gift without proper trust documentation). They do not apply it as a universal rule to an entire class of charitable assets. Availability of a remedy depends upon the facts underlying the particular gift in question. Absent a finding of fact that donations of conservation easements are, as a class, fundamentally unfair to donors or contrary to the public interest, there is no basis in law or equity to furnish a remedy (classifying all easement gifts as charitable trusts).

[T]he question of whether the conveyance of a conservation easement creates a charitable trust does not turn on the presence or absence of the word "trust" or "trustee" in the deed of conveyance (most conservation deeds do not contain those words). Also irrelevant is the fact that the easement donor may not have known that the intended relationship is called a trust. All that is required is what is present in any charitable donation of a perpetual conservation easement: the donation of property (the easement) to a government entity or charitable organization to be used, not for that entity's or organization's general purposes but for a specific charitable purpose – the protection of the particular land encumbered by the easement for the conservation purposes specified by the deed of conveyance in perpetuity.

### Implied trust not applicable to typical easement gift

The remedy of a resulting trust is not imposed when the donor has the opportunity to be engaged in the documentation of the gift and there is no language within the four corners of the gift documentation of an intent to create a trust.<sup>7</sup> Pennsylvania courts do not rewrite contracts entered into by competent parties without clear and convincing evidence of a mutual mistake or ambiguity justifying court intervention.

The factual background of typical easement donations does not support a claim that inequity will result if a trust is not imposed on the gift by implication:

- Many if not most easement donors are sophisticated.
- The standard land trust practice is to encourage donors to retain counsel and many donors do so.
- Donors and their advisors are, or have the opportunity to be, fully engaged in every element of the plan to donate an easement.
- Preliminary agreements, letters of intent, and other correspondence preceding the gift, as well as numerous exchanges of proposed granting documents, evidence a concentrated effort on the part of the landowners and land trusts to achieve documents fully capturing the intent of the parties in significant detail.

### No evidence to support proposition that all donors intended charitable trust rather than outright gift

An assertion that all conservation easements are charitable trusts presents an astounding and necessary corollary: that each and every easement donor intended to donate their easement in trust and not as an outright gift (or that where intent was lacking, the courts should apply resulting trusts to address supposed inequities). The evidence to support such a proposition appears to be absent.

Conversely, given the huge volume of large unrestricted cash gifts received by charities, many donors appear more concerned with maximizing the utility of their gifts by providing charities flexibility than with encumbering gifts with restrictions that bind the charity to the donor's parochial interests. It is reasonable to conclude that some, if not many, donors gave the holder the gift of the power to block inconsistent land uses within their property, expecting the holder to use the gift consistent with the holder's charitable purposes (as is the case with all gifts) but not placing restrictions on the holder's use of the gift.

### No evidence to support proposition that hundreds of advisors over several decades uniformly failed to appropriately document donor intent

If a charitable trust arrangement was intended by a donor, why did the donor's advisors fail to use the appropriate instrument (a charitable trust agreement) to document their clients' intent? Why has the failure occurred many hundreds of times in Pennsylvania? Is it reasonable to assume that all of these lawyers and financial advisors have failed to grasp their clients' intent? Certainly, if they had understood the intent, they would properly document that intent with a charitable trust agreement.

## Summation

The assumptions and assertions underpinning both the ostensible need for and the validity of the charitable trust proposition are not supported by evidence. Substantive facts generally contradict the proposition:

- Easement amendments do not present a real and present danger to conservation in the public interest. Evidence of a growing, continuing, or widespread problem with easement amendment does not exist. An occasional problematic amendment situation

<sup>7</sup> For example, in a case in which the donor and donee documented in a memorandum preceding the donation the details of how the gift was to be used, the court found that "there was no void in the parties' agreement that requires filling by the creation of a resulting trust."

*The Courtenay C. and Lucy Patten Davis Foundation and Amy Davis, Individually v. Colorado State University Research Foundation, University of Wyoming Foundation and C.C. Davis and Co. LLC and Gregory A. Phillips, Wyoming Attorney General*, 2014 WY 32 (2014).

somewhere in the country does not support an assertion that protection of the public interest necessitates special oversight of easement amendments.

- The courts and attorneys general are not generally well equipped to analyze natural resource protection issues and make judgments regarding the management of conservation easements.
- Land trusts are as competent and dedicated as other charitable organizations. No evidence exists that they are prone to substantially higher levels of incompetence, poor judgment, and bad intent than other charitable organizations. Government cannot equitably increase oversight of land trust decisions regarding its conservation easement assets *unless it extends such enhanced oversight to all charities and their management of their charitable assets.*
- A charitable trust by its nature involves restrictions on the use of a gift to serve a purpose, and the intent and consent of the parties regarding these restrictions and purpose. If the parties did not document a charitable trust at the time of the gift, a court will not subsequently impose a resulting trust unless it finds inequity. The rare circumstance of a court finding inequity and imposing a resulting trust cannot be squared with the assertion that all donated easements are charitable trusts.
- An alternative argument for the trust proposition—that the purpose and restrictions of the charitable trust are one and the same with the purpose and restrictions stated in the easement instrument—does not withstand scrutiny of the actual function served by the easement purposes and restrictions. The purpose and restrictions stated in the easement instrument describe the gift received by the land trust, not a restriction on the land trust's use of the

gift. If one or more of the easement's purposes and restrictions were eliminated, the result is not, as one would expect with a charitable trust's purpose and restrictions, an increase of the land trust's freedom in how it might use the gift; rather it is the diminishment or elimination of the gift itself.

- The trust proposition necessitates the identification of a *donor-imposed* purpose and restrictions. Even if one were to accept the fallacious argument that the purposes and restrictions contained within the easement instrument should be construed as charitable trust purposes and restrictions, a major obstacle remains: *A conservation easement's purposes are generally holder-driven, not donor-driven.*
- The trust proposition rests on the foundation of an extraordinary claim—that donors and their counsel uniformly fail to understand how to properly document a charitable trust arrangement or that everyone forgets the essential rules for creating a charitable trust when dealing with gifts of conservation easements. To be credible, this extraordinary assertion requires evidence—evidence that is lacking for a simple reason: *Donors' advisors may be expected in general to be competent; they are not generally incompetent.*

## Not Grounded in Law

A grant of conservation easement is an instrument of conveyance, not an agreement. Absent a separate trust agreement, there is little legal evidence to support the existence of a mutual understanding that a trust relationship has been created and accepted when a conservation easement is granted.<sup>8</sup>

<sup>8</sup> Pennsylvania law permits a charitable nonprofit corporation to accept property from a donor on the understanding that the property is committed to a charitable purpose. This authority, granted under §5547(a) of the Pennsylvania Estates and Fiduciary Code, exempts charities from meeting the qualifications and reporting obligations otherwise applicable to corporations acting as trustees. The fact that

charities *may* act as trustees does not mean that every time a charity accepts a donation of real and personal property, it *must* hold that property in trust for any particular purpose. Unless the limitation set forth in §5547(b) applies, charities may buy, sell, and exchange assets so long as they comply with applicable provisions of the Pennsylvania nonprofit corporations act.

## No reference to charitable trusts in the CPEA

Pennsylvania’s Conservation and Preservation Easements Act (the “CPEA”) contains no reference to charitable trusts or fiduciary relationships.

### No mention of “trust” in definition of conservation easement

The CPEA’s definition of conservation easement<sup>9</sup> covers several attributes describing the nature of the real estate interest (nonpossessory, either appurtenant or in gross, imposing limitations or affirmative obligations). The logical inference to be drawn from the absence of the words *trust*, *fiduciary* or the like is that the Pennsylvania General Assembly had no intention of imposing a trust or fiduciary regime on grants of conservation easement.

### No mention of “trust” in authority to create easement

The authority to create an easement<sup>10</sup> lists a number of activities and operations that may be performed relative to a conservation easement ending with the phrase “or otherwise altered or affected in the same manner as other easements.” If the General Assembly recognized the conservation easement as a kind of trust, it would have modified this broad scope with a caveat such as “subject to such approval as are required under applicable law governing charitable trusts.” Inasmuch as the legislature did not, the inference to be drawn is that that the statute does not contemplate governance of conservation easements under the framework of trust law.

<sup>9</sup> Section 3 CPEA.

<sup>10</sup> Section 4(a) CPEA.

<sup>11</sup> 20 Pa.C.S.A. §7732.

<sup>12</sup> A 2014 Pennsylvania appellate court decision held that the elements of a trust must be pleaded to support a donor’s claim that a charitable trust was created by his donation. *In re Foundation for Anglican Christian Tradition*, No. 2164 C.D. 2013, 2014 WL 5653304 (Pa.Cmwlth.2014). The court recites the elements of a trust based upon their codification in the Uniform Trust Act but also opines that the elements were the same under the common law preceding the adoption of the Act. The court upheld the lower court’s dismissal of the appellant donor’s claim because he failed to allege in his pleadings

## Response by advocates

Trust advocates offer two rationalizations for the failure of conservation easement enabling statutes to include any reference to trust relationships:

- The first is that state legislatures do not allow reference to one body of law in another. Pennsylvania practice contradicts this. The General Assembly often cross-references bodies of law in its legislative drafting.
- The second rationale is that enabling acts are intended to be narrow in scope, in this case only removing impediments to conservation easements under the common law. Pennsylvania practice does not support this contention. For example, the state enabling act authorizing municipalities to enact zoning, subdivision, and land development ordinances does not stop at mere authorization; it legislates public policy and mandates in great detail the procedures and rules to be followed.

## No evidence of donor’s intention to create trust

Pennsylvania requires the settlor (the granting landowner) to sign a writing that indicates an intention to create the trust and contains provisions of the trust.<sup>11</sup> In the absence of a specific charitable trust agreement, this requirement fails to be satisfied.<sup>12</sup> WeConservePA’s widely used [Model Grant of Conservation Easement and Declaration of Covenants](#) and other grant forms do not mention an intention

“clear and unambiguous language or conduct that he intended to create a trust.” *Ibid.* The language of gifts (words such as *personally donated*, *contribution*, *donor*, and *charitable gifts*) was consistent with a donor-donee relationship but insufficient to establish a trust relationship absent words such as *trust*, *trustee*, *beneficiary*, and *trust property*. Evidence of conduct and contemporaneous statements offered to show donor’s purposes in making the gift were also found to be consistent with relationships other than a trust relationship. *Ibid.* Applying the rationale of *In Re: Foundation* to conservation easement donations, claims of charitable trust based upon typical easement grant documents (in which there is no mention of a trust) are likely to be dismissed for failure to state a claim under Pennsylvania law.

to create a trust, nor do they mention that the conservation easement is conveyed in trust.<sup>13</sup>

## No evidence of holder's intention to accept trust

Pennsylvania law requires a knowing and voluntary written acceptance on the part of holder to act as trustee for certain beneficiaries.<sup>14</sup> The charity is not bound to act as trustee of any real property committed to it unless the charity has signed a written document evidencing its acceptance of the property in trust for specific trust purposes. In the absence of a specific charitable trust agreement, this requirement fails to be satisfied:

- The [\*Model Grant of Conservation Easement and Declaration of Covenants\*](#) and other forms call for the signature of holder to evidence acceptance of the gift and its willingness to be bound to the holder covenants, but there is no indication that the holder signs for the purpose of binding itself to act as trustee for specific trust purposes.
- Pennsylvania land trust executives and legal counsel attending meetings of the WeConservePA Policy Council (in 2014) reacted with surprise and consternation upon learning that trust advocates claim they serve as trustee for all of their donated easements. It is unlikely that, given this response, Pennsylvania holders have been knowingly and voluntarily agreeing to serve as trustees.
- Information is available to non-profit charities from a number of sources (including their accounting and legal advisors) on the red flags that signal whether a gift may be classified as restricted and, if so, what special handling is required for it in the future. Customary formula to evidence the conveyance of a restricted real property interest (whether gifted or

not) is to add to the initial granting clause “for use as X and no other purpose).” For example, a parcel could be granted by a landowner to a land trust “to expand the ABC Nature Preserve and no other purpose.” Such language is not found in Pennsylvania’s easement instruments.

## Trust beneficiaries not co-terminous with easement beneficiaries

A beneficiary is someone who is intended to benefit from a legal relationship. Trusts have beneficiaries. Servitudes have beneficiaries. That similarity does not support any implication that a conservation easement is a kind of trust. The legal relationship may be a land-based relationship, a trust relationship, or a contract relationship.

Easement beneficiaries are limited by the CPEA to land trusts and governmental entities. Trust beneficiaries may be individuals or entities with no qualifications to manage conservation assets. If the trust proposition were to prevail, what would that mean for the legal treatment of the universe of beneficiaries associated with an easement/trust? Would it nullify the CPEA’s limit? Would it expand the universe of easement beneficiaries to include persons (for example, easement donors and their families or the public at large) with no qualifications to manage conservation resources?

If the advocates and drafters of the CPEA had thought that easements might be construed as charitable trusts, it is nearly incomprehensible that, over the course of the decade spent moving the CPEA into law, they would have failed to acknowledge or address this issue in the statute or the deliberations leading to the act. There exists a simple explanation: Neither lawmakers, nor land trusts and their advisors, nor easement donors who championed the act, nor any other party involved with establishing the CPEA

<sup>13</sup> Trust advocates have not pursued a campaign to bring conservation easement documentation into line with trust documentation. This is curious. The use of fully thought-out charitable trust agreements would clarify the intentions of the parties with respect the fiduciary

relationship being created; identify with precision the entrusted property and the trust beneficiaries; and remove ambiguities and deficiencies in the proper documentation of a trust.

<sup>14</sup> The Pennsylvania statute of frauds (33 Pa.Stat.§2) applies to conveyances of real property to a trustee to be held in trust.

ever intended conservation easements to be generally construed as charitable trusts.

## Strengthening Long-Term Viability

Trust advocates want to protect the long-term viability of conservation easements. So do those who do not see the imposition of a charitable trust regime on conservation easements as an optimal way to achieve that common goal. Fortunately, land trusts already possess tools to protect easement viability—tools that provide uniform protection to conservation easements, not just donated ones, and that focus charitable work on achieving conservation in the public interest (without unnecessary emphasis on parochial personal agendas).

## Protect all conservation easements

Even if the problems identified in the previous sections could be resolved satisfactorily, the charitable trust approach only addresses a fraction of easements—those donated, not those purchased<sup>15</sup>—even though the public benefit provided by an easement is not related to the manner of its establishment. (Easements documented by grants that include a clause permitting amendment may also be excluded from the charitable trust umbrella.)

In sharp contrast, holder covenants included in the grant to assure perpetual enforceability<sup>16</sup> may be written into any grant of conservation easement to provide land trust or government beneficiaries named in the grant oversight over changes to the conservation easement and remedies in the case of failure to enforce the easement. The holder covenants may authorize beneficiaries (and the attorney general) to petition a court of competent jurisdiction to remove a non-performing holder and replace that holder

with another who is ready, willing, and able to enforce the easement in furtherance of its conservation purposes.

## Focus on conservation in the public interest

The establishment and management of conservation easements have been firmly grounded in the public interest under the guiding hands of charitable holders whose missions are to protect natural resources. The trust proposition shifts the ground, placing greater emphasis on the donor's parochial personal objectives at the expense of the holder's broader public interest.

A charitable trust agreement and the *cy pres* proceeding it offers may provide an excellent inducement to potential donors, who might not contribute to the public interest but for the achievement of their own private interest as part of the transaction. However, to the extent that conservation in the public interest may be achieved without inserting the control of a donor to advance the donor's narrower personal interest, this is the responsible path for a charitable organization dedicated to the public interest.

If a potential donor needs the inducement of a charitable trust agreement to donate a conservation easement, it is sensible for a land trust to weigh the pros and cons of subjecting itself to this burden and evaluate any loss of focus on achieving conservation in the public interest that may result as part of its overall analysis of whether to accept such a gift. The land trust may determine that the burden of the charitable trust is an acceptable price for the conservation to be achieved, but this is a far cry from imposing on land trusts a charitable trust regime for *all* easements, past, present, and future, thus compromising land trusts' ability to focus on conservation strictly in the public interest and universally and needlessly elevating the role of private preferences.

<sup>15</sup> Some trust advocates argue that since land trusts, as 501(c)(3) organizations, receive preferential tax treatment from the public, purchased conservation easements also should be treated as charitable trusts in that they should only be modified or terminated via a *cy pres* type of proceeding. In a 2007 article, McLaughlin grounds this argument in the use of the word *perpetual*. (See McLaughlin, Nancy A., "Conservation Easements: Perpetuity and Beyond," Ecological Law

Quarterly, Vol. 34:673, pp. 701-704). While *cy pres* may be appropriate due to specific covenants within the grant, these lines of charitable trust thought face even larger legal barriers to adoption as public policy in Pennsylvania than those applying to just donated easements.

<sup>16</sup> See [The Nature of the Conservation Easement and the Document Granting It](#) for a description of holder covenants and their operation in assuring perpetual enforcement of conservation easements.

Once again, holder covenants provide a legally feasible and practical tool for ensuring the continued enforcement of conservation objectives in the public interest without the negative baggage associated with reconstructing easements as charitable trusts. Covenants may be drafted to provide, implicitly or explicitly, a role for attorneys general and courts in providing another layer of assurance that holders of conservation easements will act responsibly over time.



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