PERPETUATING PERPETUITY

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I. INTRODUCTION

In 2005, The Environmental Trust, Inc. (TET) in southern California collapsed after spending the previous fifteen years amassing over 4,600 acres of sensitive habitat throughout San Diego County. TET held approximately 1,530 acres total of that in easements. However, no specific number of easements is known because the organization failed to properly record many of them. It also failed to deposit all of the funds it received for the easements’ perpetual monitoring, maintenance, and management opting instead to only deposit 80 percent of the funds into its Endowment Fund and to use the remaining 20 percent to fuel its operating expenses. TET’s mission was to protect sensitive properties by obtaining either fee title or conservation easements to certain parcels of land to “offset the impact of [developers’ construction projects].” After five years, TET was recently discharged from its bankruptcy proceedings in the fall of 2010.

According to its bankruptcy filings, TET could not easily transfer its lands to others and begin dissolution despite offering pro-rated shares of its depleted endowment fund. The main reason for this was the confusion surrounding the chain of title to many of the parcels and the disinterest by all parties in assuming TET’s obligations and liabilities without sufficient funds as well. After initiating discussion with the appropriate state and federal land managers, none of whom were interested in alleviating TET of its management obligations, the organization began to explore other ways to pass its lands and obligations onto others. It turned to both San Diego County and other non-profit organizations with similar missions, because for an organization to accept land from TET, the former must be

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2 TET Bankruptcy, supra note 1.

3 Id.

4 Lee, supra note 1.

5 TET Bankruptcy, supra note 1, at 136. 11 U.S.C. § 365(f) allows a trustee in a bankruptcy proceeding to assign a debtor’s executory contract or unexpired lease to a third party.

6 TET Bankruptcy, supra note 1.

7 Id.
involved in conservation work that satisfies 11 U.S.C. § 365(f). But, understandably, no one immediately jumped at the “opportunity.” As a result, TET initiated bankruptcy proceedings. If there are no entities qualified or willing to take possession and management of the lands previously owned by TET, all such assets would revert to the state of California. But what happens to the lands encumbered by conservation easements?

There has been some debate about whether TET was unsustainable from its beginning. Sherry Teresa, a former California-based land trust director, noted that the first time she met TET’s executive director, Don Hunsaker, it quickly became clear that his organization suffered from five fatal flaws, which eventually led to its demise. She convincingly points to TET’s failure to design and implement a business plan; lack of understanding of habitat stewardship; the failure by both state and federal agencies to adequately monitor TET’s financial and stewardship obligations; its board of directors’ lack of financial acumen; and the organization’s failure to adhere to any sort of corporate governance structure as factors that led to the organization’s bankruptcy. The culmination of these factors pushed approximately 4,600 acres of land protected by conservation easements, mitigation banks and other conservation areas into uncertainty.

TET is the only known example of a land trust that has become bankrupt in the United States. Its failure raises a series of critical questions about the management and mechanics of conservation easements. The organization’s failure brings the potential difficulty of protecting land in perpetuity by means of a conservation easement sharply into focus. The issue of maintaining perpetual conservation easements raises numerous unanswered questions. For example, the bankruptcy court’s suggested chain of succession for the easements and lands that TET held is logical, but one wonders if this is the most effective way to guarantee that those assets will be protected in perpetuity. Are there other tools or legal mechanisms available to land trusts to avoid a fate similar to TET’s? Is perpetuity a realistic legal timeline for any conservation easement? What can a land trust do to help ensure its own longevity and fulfill its duty to manage a conservation easement for perpetuity? Do local or state governments have a duty to play a more prominent role in the selection and administration of conservation easements? These are questions lawyers and government officials must begin to confront and examine if conservation easements are to continue as the most popular method of private land conservation for years to come. Put more succinctly by Mike Kelly of the San Diego Conservation Resources Network, “[w]e have two problems—what to do with these particular parcels of land and . . . how to prevent similar (failure)
in the future.”

This Note seeks to begin that conversation by exploring these questions.

Before analyzing how to better accommodate the perpetual nature of conservation easements, it is important to understand what they are, the laws governing their creation and administration, and the organizations that hold and maintain them. In this section, I review the creation and management of conservation easements, land trusts and how they acquire lands, and the laws governing conservation easements. In addition, I explore the current debate over the need to have public input in the creation and management of conservation easements. Finally, I suggest ways to effectively deal with a trust’s lands and easements if the trust becomes nonviable and is no longer capable of fulfilling its statutory functions, as well as what to do when a change in economic and other conditions makes the purposes of a conservation easement unattainable.

II. BRIEF OVERVIEW OF CONSERVATION EASEMENTS

A. Conservation Easements

Over the past twenty-five years, conservation easements have become increasingly popular throughout the United States as the primary vehicle for private land conservation. A conservation easement is a voluntary legal agreement between a landowner and a land trust or government agency that permanently restricts uses of the land for the purpose of protecting its conservation or historic values. These values are widely construed to include agricultural lands, frequently used trails and other recreational areas, building facades and other scenic or natural areas. As recently as 2005, local or state land trusts hold conservation easements that encumber over 6.2 million acres of private land. Additionally, the Nature Conservancy reported that it held over 3.2 million acres under conservation easements, which brings the national total to over 9 million acres. Many scholars and professionals believe the reason for this large and

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12 Lee, supra note 1.
13 Conservation easements will be referred to as either “conservation easements” or “easements” for the purposes of this paper.
16 Id. This figure does not include an estimate of acreage held as conservation easements by federal, state or local governments.
17 The 9 million acres “does not include conservation easements held by other types of nonprofit organizations or land trusts not included in the Land Trust Alliance[’s estimate].” Gerald Korngold, Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use
growing number of acres protected by conservation easements is a direct result of the voluntary nature of conservation easements and the generous tax benefits that state and federal governments provide to the donor.18

1. Conservation Easement Statutes

In response to conservation easements’ growing popularity, all states now have a codified conservation easement statute.19 The template for many of these statutes comes from the Uniform Conservation Easement Act (UCEA) and other sources.20 The UCEA was formally adopted by the National Conference of Commissioners on Uniform State Law in 1981 and has since been completely or largely adopted by twenty-four states and the District of Columbia.21 Many states also have laws in place that govern the voluntary dissolution of nonprofit organizations, and include requirements to alert either the attorney general or secretary of state and for the distribution of assets to be made to other charitable corporations.22 But how those laws intersect with bankruptcy laws is less clear. One hopes that if a charitable organization files for bankruptcy that a court will instruct the debtor to transfer those charitable assets to another charitable organization serving similar conservation goals.

The TET case only begins to highlight some of the law’s shortcomings in the area of conservation easements. While a debate does exist,23 numerous sources indicate that the donation of a conservation easement should be treated as having created a restricted charitable gift or charitable trust since the easement is given in exchange for the promise that it will be managed for its stated conservation purposes in perpetuity.24


19 While every state may have a statute, there is great variety among them. North Dakota is the only state that does not have a perpetuity requirement and limits conservation easements to historic sites.


21 Nancy A. McLaughlin, Conservation Easements: Perpetuity and Beyond, 34 ECOLOGY L.Q. 673, 684 (2007) [hereinafter McLaughlin, Perpetuity and Beyond].

22 See MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 496–511, tbl.1 (2004), for a list of which states have such laws in place.


24 McLaughlin, In Defense of Conservation Easements, supra note 20, at 5 (the purpose for the conservation easement is usually specified in the deed); Tapick, supra note 18, at 288 n.110 (for a discussion about history of the debate and relevant cases). See also
All the state statutes share two basic elements: (1) that the easements be held by either an organization dedicated to conservation purposes or a local or state government; and (2) the conservation easement must be donated for one or more of the conservation or historic preservation purposes outlined in the statute. Interestingly, only five states have laws that require either strategic acquisition plans be in place or hearings be held prior to a government easement purchase or acquisition.25 The level of public involvement and review varies in each of those states tremendously even though conservation easements are treated as a public benefit.

While on their face, conservation easements may appear to be private transactions between landowners and land trusts, they are truly public charitable gifts for several reasons. The donative intent to give land to either the government or a land trust for a specified charitable purpose, for the benefit of the public, makes them public transactions. Further, governments and land trusts are entities that are established and operated to benefit the public. Finally, the federal and state tax subsidies available to landowners who donate or sell perpetual conservation easements create a public interest and make them charitable gifts held in trust for the public, even if not all donors choose to accept them.26

There are often three major parties involved in the donation of a conservation easement: the donor or landowner, a land trust, and the government (local, state, or federal collectively). The land owner conveys the easement with the expectation that the land trust will administer the easement consistent with its stated terms and conservation purpose in perpetuity. The land trust (generally a local, state, or regional 501(c)(3) non-profit organization with an express conservation mission) accepts the easement and undertakes the obligation to monitor and enforce it in perpetuity. Finally the public invests in the conservation easement in the form of foregone federal, state, or local tax revenues. Tax benefits have helped spur the rise in conservation easement donations. To qualify for federal tax benefits, donors must donate a qualified real property interest to a qualified organization exclusively for conservation purposes in perpetuity.27


26 See McLaughlin, Perpetuity and Beyond, supra note 21, at 678.

Unfortunately, the generous tax incentives to protect the environment were reportedly abused by the Nature Conservancy and other individuals and organizations, as detailed in several articles in the *Washington Post*. The reports of abuse created a skeptical view of easement law and land trust practices in some legislative circles and promoted greater scrutiny. This heightened scrutiny forced land trust organizations nationwide to begin reviewing their internal operations and spurred the Land Trust Alliance, a national umbrella organization, to create an accreditation program to prevent similar abuses from happening again. While the accreditation commission has, to date, accredited 130 land trusts, land trust operations remain largely unregulated by either the federal or state governments.

**B. Land Trusts**

Property ownership entails a bundle of rights generally controlled exclusively by an owner. Placing a conservation easement on a piece of land divides that bundle of rights between the owner of the land and the newly appointed holder of the easement (who holds the easement on behalf of the public). Typically, the easement holder is a local, state, or regional land trust dedicated to acquiring land for conservation purposes through easements and by providing conservation stewardship over other existing easements.

In 2009, there were over 1,700 land trusts nationwide, with at least one in every state. During the last ten years, many of these organizations have matured rapidly as evidenced by their sophisticated levels of funding and professional operations. The collective operating budget for land trusts has doubled since 2000 from $192 million to $423 million in 2005 and continues to increase, and these entities also control over $1 billion in various endowment funds.

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As holders of conservation easements, land trusts have several responsibilities. They have an obligation to monitor and enforce the easements they hold, and to abide by applicable federal as well as state laws, which can include, but are not limited to, charitable trust law, contract law, non-profit corporation law, public trust law, and federal and state tax laws.\(^{34}\)

Land trusts acknowledge that the “top threat to conservation durability [is] an inability to provide long term stewardship.”\(^{35}\) Good stewardship includes “strong financial planning, including the funds to monitor and enforce the easement.”\(^{36}\) One Land Trust Alliance (The Alliance) survey revealed that over 80 percent of land trust representatives “considered it likely that some of their holdings will not continue to be protected in 100 years, while only 8 percent considered this unlikely.”\(^{37}\) This telling statistic highlights the potentially uncertain future for perpetual conservation easements.

1. **Similarities between Conservation Easements and Mitigation Banks**

In a recent article, Sherry Teresa addresses the stewardship risks that mitigation banks and compensatory mitigation lands are facing, many of which are eerily similar to the perpetuity challenges facing conservation easements. Mitigation banking “is an innovative and creative tool to assist in global conservation efforts to protect threatened and endangered species in their habitats in perpetuity.”\(^{38}\) There are three parties in a mitigation bank agreement: the banker, the permitting agency, and the long-term steward. The nature of their agreement focuses on a credit release schedule, development issues, long term management, financing, and funding for the bank.\(^{39}\)

Today, there is a dire need for long-term stewardship of sensitive lands placed under conservation easements or in mitigation banks. Traditionally, there was a focus on acquisition rather than stewardship. This creates serious problems for land managers who must deal with the rise in responsibility while watching their budgets dwindle.\(^{40}\) Since many land trusts manage both conservation easements and mitigation lands, Teresa’s suggestions for better and more active stewardship serve as a good model for the analysis in this paper.\(^{41}\) The goal of her stewardship plan is to ensure that the protected lands do not fall into worse condition than when

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\(^{35}\) Campopiano, *supra* note 29, at 910. Stewardship is defined as “the wise use, management, and protection of the human, physical, ecological, and financial resources needed to ensure the integrity of conservation lands for future generations.” Teresa, *supra* note 32, at 341.

\(^{36}\) Campopiano, *supra* note 29, at 909.


\(^{38}\) Teresa, *supra* note 32, at 340.

\(^{39}\) *Id.* at 341.

\(^{40}\) *Id.* at 339.

\(^{41}\) *Id.* at 340.
they were originally conveyed through neglect. According to her, a good stewardship plan includes the following elements:

(1) an appropriate planning process that incorporates multiple stakeholders’ interests; (2) the baseline conditions of the site; (3) clearly articulated, measurable and realistic goals, objectives, and strategies; (4) evidence of familiarity with the site; (5) a time-frame of at least five years that includes mechanisms for updates; and (6) evidence of reviews and approvals.42

It is hard not to see the simple wisdom in these suggestions or believe that if TET had adhered to something similar, the lands under its management might still remain there. Instead, TET’s failure to properly manage its finances led to negligent stewardship practices because it could not afford to do anything more.

2. Land Trust Accreditation

In response to both the growing number of land trusts and the heightened scrutiny they faced after a series of articles reporting abuses published by the *Washington Post*, The Alliance drafted and adopted an accreditation program. The new program seeks to enhance the ability of land trusts to police themselves and minimize the opportunities for trust executives and conservation easement donors to engage in opportunistic and questionable transactions.43 The purpose of the accreditation program is to:

“address the challenges facing land trusts” by (i) demonstrating to the public that land trusts are doing a credible, responsible job; (ii) assuring the public that conserved land will be protected far into the future; (iii) building strong land trusts; (iv) publicly recognizing that land trusts must meet accepted standards; and (v) deterring governmental efforts to intervene in land trust work or withdraw important tax incentives.44

Certification lasts five years, and is subject to an independent commission with the authority to conduct random inspections and reprimand participating land trusts that do not live up to the expectations of the program. A certified land trust must meet two requirements.45 First, the trust must have operated for a minimum of two years and completed two land conservation projects.46 Second, the applicant “must

42 *Id.* at 342–43.
43 *See generally* THE LAND TRUST ALLIANCE, http://www.landtrustalliance.org (last visited Apr. 4, 2011). The Land Trust Alliance is national umbrella organization for local and regional land trusts and provides resources, data, and expertise to both individual organizations and policymakers about private land conservation.
44 Campopiano, *supra* note 29, at 913.
45 *Id.* at 914.
46 *Id.* at 913.
adopt and demonstrate ‘substantial compliance’ with forty-two ‘indicator’ practices from the Land Trust Standards and Practices (Standards and Practices).”

The Standards and Practices cover twelve topics ranging from legal compliance to financial and asset management with the intention of acting as a “how-to” guide for responsible operation and management practices. They are dynamic by design in order to cover land trusts of all sizes and levels of sophistication.

The accreditation program has drawn criticism by some for lacking many “firm requirements,” and has been called “aspirational” in nature” by at least one critic. Another has observed that until accreditation becomes mandatory, “weak and abusive transactions” will continue to plague the conservation system. The Alliance opposes making accreditation mandatory and believes that if the system is “sufficiently rigorous, compliance could be imposed by either the IRS or state laws as a prerequisite.” An increased government role worries many conservation easement proponents, who fear that the voluntary nature and success of conservation easements would be lost.

The number of organizations seeking accreditation has been high, forcing The Alliance to conduct its organizational review through a lottery system. As of August 4, 2010, 105 land trusts had achieved accreditation under the Land Trust Accreditation Commission.

3. Finances

The Alliance’s “Standards and Practices” address the issue of financial and asset management and draw a firm connection between sound fiscal management and organizational longevity. Standard 6 highlights the importance of detailed financial accounting for both large and small organizations and acknowledges that “poor financial management may jeopardize the future of the land trust and its land conservation programs.” The standard explains the need for routine measures such as annual budgets and financial records, and offers suggestions for how funds for stewardship and enforcement should be established. Specifically, it advises land trusts to keep stewardship and defense monies separate from other operational

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47 Id.
48 Id.
50 Campopiano, supra note 29, at 913.
51 PIDOT, supra note 37, at 20.
52 Id.
53 Korngold, supra note 17, at 1071.
56 Id.
accounts and to establish policies for both raising adequate funds and defining the purposes for which the funds may be used. Each easement’s stewardship needs should be individually evaluated and the cost of providing long-range care for the land must be estimated. The resulting estimate becomes the baseline-funding goal for the organization’s stewardship fund.

(a) Land Trust Endowments

An endowment fund is an account that allows a donor or donors to invest capital with the understanding that the interest generated by the fund will provide revenue to be used for a specific charitable purpose. In the conservation easement context, the annual revenue generated by a stewardship endowment is used to pay for the annual stewardship costs associated with a specific easement and any excess revenue (if any) remains in the endowment fund, which increases the endowment’s value and annual rate of return. This reinvesting can also protect against inflation. Stewardship endowments are intended to ensure that each easement receives the appropriate level of annual stewardship funding over time.

C. Current Debate: The Public’s Role in Conservation Easement Acquisition

Five states require either a public process or governmental approval of conservation easements. Some scholars agree with this approach. They argue that federal tax incentives should be withheld until there is certification (approval) by the local, state, and federal governments that the easement does serve a public conservation purpose such as guaranteed public access for open space and natural habitat conservation easements. This group of scholars perceives a “risk to effective policy making and democratic principles when local public land use decisions are delegated to nonrepresentative, nonaccountable private organizations.” Some argue that as the public’s sense and understanding of what is “ecologically and scenically valuable and the best methods to preserve such areas evolve over time,” there is a danger in keeping the decision-making power in the hands of private land trusts. Instead, some believe requiring conformance with local, state, and federal land use plans ensures that a public benefit is conveyed in exchange for a loss of revenue from the land’s withdrawal from the local and state tax base. Additionally, “tax-based incentives cannot target specific

57 Id. at 10.
58 UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(2), (3) (1972).
60 Korngold, supra note 17, at 1068 (discussing the public process required for historic buildings to be added the National Register).
61 Id.
62 Id. at 1039.
63 Id. at 1063.
64 Id. at 1068–69.
properties for conservation, so the configuration of lands to be preserved is unpredictable. 65 The argument is that if the public is paying for a supposed benefit that is not even predictable, is that the best use of taxpayer funds and is conservation truly being served?

Others believe that the labeling of land trusts and other charitable organizations as “nonrepresentative, nonaccountable private organizations” is a misnomer because of these organizations’ reliance on public funding and the oversight that state attorneys general and the Internal Revenue Service have over them and the easements they hold. 66 But, as one author points out, the “missions, priorities, and acquisition decisions are not subject to the same kinds of public scrutiny and mechanisms of public accountability as those of government agencies.” 67 Land trusts may obtain easements as it suits them without being accountable for the broader public or conservation benefits. Conversely, in states such as Maryland and Virginia, the majority of the easements are held by the states themselves, while other local, state, and federal entities hold thousands more. 68 The proponents of greater public involvement through a government approval process articulate three benefits: “improving the planning process for conservation easement creation, ensuring that public funds are well spent, and avoiding market distortions.” 69 They acknowledge the increased transaction costs and bureaucratic burdens that could effectively slow down the approval process or even dissuade donors, but point to Massachusetts as an example of success. 70 There, 0.9 percent of state land is protected through easements held by either the state or local land trusts, a number that is higher than New York’s (0.4 percent), Arizona’s (0.04 percent), and Iowa’s (0.01 percent), each of which do not require any approval or hearing process. 71 These numbers may be misleading since each of the states is larger than Massachusetts and a sizeable portion of Arizona is comprised of federal public lands, including several sizeable wilderness areas, national parks, and other protected areas. Authors McLaughlin and Machlis do not necessarily disagree with

66 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, 1564–1565 [hereinafter McLaughlin & Machlis, Protecting the Public Interest].
69 Korngold, supra note 17, at 1069.
70 Id.
71 Id.
the concept of government approval of easement acquisition, but believe that before implementing such a change in policy there should be conclusive evidence that the current system is indeed broken and that “government certification programs are feasible, would produce higher quality easements, and would produce benefits that outweigh their costs.”

D. How to Pass Conservation Easements When a Land Trust Goes Bankrupt

For the purposes of this Note, the laws of charitable trusts will govern conservation easements. Lindstrom and others argue that since some conservation easements can be bought at fair market value as well as be given as charitable gifts, the rules of charitable trusts should not apply. While this is an interesting observation, it misses the obvious fact that those easements are still donated with the intent that the land will be conserved and that the funds used to maintain the easement were likely generated for that specific purpose. Thus, the intent to conserve is still present and should be honored in perpetuity. Otherwise, there is no guarantee that the seller would have sold or given the easement in the first place.

Since the economic downturn in 2007, courts are beginning to see a rise in nonprofits declaring bankruptcy. While this is symptomatic of the larger financial woes faced by many businesses, it does provide a framework to discuss how assets like conservation easements are treated when an organization is no longer able to meet its mission or financial obligations. The majority of states have laws dictating how nonprofits may transfer assets in a voluntary dissolution, but the question of how and where nonprofit laws and bankruptcy laws for involuntary dissolutions intersect is less clear.

I. Nonprofit Governing Laws

Under the Revised Model Nonprofit Corporation Act (RMNCA), an organization that provides a public benefit may transfer restricted gifts and assets to another organization that provides a similar benefit. If a charitable organization wishes to voluntarily dissolve, the majority of states direct them to transfer those restricted assets to other charitable groups so the donor’s intent may be perpetuated. These dissolution laws mirror the Treasury regulations, which require a “provision assuring that on dissolution, the assets of the corporation will be distributed to other organizations exempt from tax by virtue of being described

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72 McLaughlin & Machlis, Protecting the Public Interest, supra note 66, at 1563 n.3.
73 Lindstrom, supra note 23, at 82.
74 McLaughlin, In Defense of Conservation Easements, supra note 20, 84–85.
76 FREMONT-SMITH, supra note 22, at 496–511 (tbl.1, cols. 9 & 10).
77 Id. at 156; REVISED MODEL NONPROFIT CORP. ACT (RMNCA) §§ 10.20, 10.21 (2008).
78 FREMONT-SMITH, supra note 22, at 496–511 (tbl.1, cols. 9 & 10).
in § 501(c)(3). The RMNCA also requires corporations to provide notice to the state of incorporation’s attorney general while states vary in whether notice must be filed with the attorney general’s office or elsewhere. These laws do not instruct a court how to transfer charitable assets during an involuntary dissolution.

2. Bankruptcy

Land trusts are governed by the same bankruptcy laws as other nonprofits and businesses. The obvious difference between land trusts and other organizations in bankruptcy is that a land trust’s most valuable assets are not for sale. Bankruptcy law is very specific about the transfer of assets, but as a restricted gift, an easement does not become a commodity that can be used to satisfy a creditor’s claim. While Chapters 7 and 11 provide organizations the opportunity to either liquidate their assets or protect themselves from creditors until they reemerge as financially solvent, there is no similar provision that is directly applicable to restricted land based assets. The protections of Chapter 11 allow organizations to reorganize while getting relief from creditors and receiving emergency funding in an effort to return to a place of financial viability. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 seeks to harmonize nonprofit and bankruptcy law by compelling the sale or transfer of any nonprofit assets under either § 363 or a bankruptcy plan satisfying the governing nonbankruptcy law that addresses property transfers. Those laws support the transfer of charitable assets to other organizations that provide a similar public benefit. This is a simple solution that honors the donative intent and insures that the conservation easements will continue to be managed by those with the appropriate skills and resources.

III. ANALYSIS

Today, there are many unresolved issues concerning conservation easements on the horizon, the most important being how to perpetuate the perpetuity requirement. To tackle this question, one must begin by examining several key areas: money for the management of the land, organizational longevity, and how to pass easements from one holder to another. Currently, these issues are largely unresolved as shown by the TET case.

79 Id. at 157 (citing Treas. Reg. § 1.501(c)(3)-1(b)(4)).
80 RMNCA § 14.02; FREMONT-SMITH, supra note 22, at 496–511.
81 Under RMNCA’s administrative dissolution provision, § 14.21, property is to be transferred much like a voluntary dissolution.
A. Funding Land Management

As stewardship costs continue to rise and management budgets dwindle, the importance of savvy and sound financial management of land trust endowments is critical. The current economic recession may lead to an increase in donations of conservation easements because of the tax benefits, but that does not necessarily equate to an increase in monetary charitable giving. Therefore, it is likely that the land trust community will continue to wrestle with how to stretch limited funding to cover a growing number of conservation easements to be monitored and enforced—an acute hardship in a time when many endowments are experiencing significant losses. Additionally, while land trusts are becoming more professional, they are not financial planning experts and still need the guidance and knowledge of trained professionals. Although these services are invaluable, they are also quite expensive. Land trusts may be able to find volunteers or board members to donate their time and services, but they will also need to continue to increase their own institutional capacity.

The importance and need to protect against endowment depletion is paramount if the land trust community and its supporters want to ensure perpetuity and continue to enjoy a relatively low amount of government oversight. Failure to do so will likely result in an increased role of state attorneys general seeking to protect discarded lands and conservation easements through the powers provided to them as supervisors of charities and charitable assets in the states. Teresa’s financial recommendations are particularly strong and serve as viable solutions to situations like TET’s, where privately acquired lands get dumped into public land manager’s laps with no funding and therefore the public subsidizes private development because no one is held accountable. She proposes to prevent similar scenarios from reoccurring by requiring stewardship funds to be strictly “managed, invested, and accounted for using standard rules and accounting principles with independent audits and transparent reporting formats,” a need echoed in The Alliance’s 6th and 11th Standards and Practices. Unfortunately, many of her other recommendations are mitigation bank specific and do not carry over easily to easements.

One suggested method for minimizing endowment risk is investing in municipal or state bonds. A municipal bond is a “debt security issued by a state, municipality, or county to finance its capital expenditures.” These bonds are desirable to many investors because they are exempt from federal taxes, as well as

83 See Teresa, supra note 32, at 342.
84 Id. at 348.
most state and local taxes, and are seen as relatively safe investments. This perception is largely true, but bonds do present some risks. Bonds pay out a fixed rate of interest over a set period of time. This can be very comforting to investors when the interest rates in the market decline significantly, but can also frustrate those who are locked in at a lower rate during times when interest rates are rising. Municipal bonds can also be repaid before their date of maturity for a premium, which curtails an anticipated stream of revenue sooner than expected. Bonds may be traded before their maturity date or retained. They are rated based on an issuer’s ability to meet its debt obligations.

Municipal bonds must be used for a public purpose, which can be an ambiguous and often difficult term to define. The public purpose requirement is similar to the IRS standard. Courts tend to look to at least four factors when evaluating a bond’s purpose: “(1) historical expansion of the scope of public purpose; (2) effect of legislative finding of public purpose and the scope of judicial review; (3) availability of capital for project from private sector; and (4) relationship between proposed activity and traditional government functions.”

From 2003 through 2007, the USDA spent over $1.8 billion on conservation easements, which resulted in $1.4 billion in federal income tax deductions. This equates to a $600 million loss of tax revenue for the federal government. Local and state tax revenues also suffer from conservation easements since many offer income tax credit, rather than a simple deduction. This impacts local residents who likely have to choose between losing services and paying higher taxes. For example, Colorado provided approximately $275 million in state tax credits for conservation easements between 2001 and 2007.

These figures show two things. First, they point to the financial interest in conservation easements that the public holds and are indicative of the high level of support conservation easement programs have. Professor Korngold points to data that found between 1994 and 2005 “[s]eventy-seven of 1630 ballot measures providing funds for land conservation . . . were approved, providing $ 31.1 billion in funding.” Such broad public support and willingness to pay for land acquisition and protection should not be underestimated. One way to build upon this momentum is through the investment of local and state bonds as a way to further conservation easements’ perpetuity requirement.

Second, the data also shows an opportunity for easements to be used as both tools for land preservation and a way to improve government finances for

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89 Id.
90 Korngold, supra note 17, at 1049–50.
91 Id.
92 Morris & Rissman, supra note 88.
93 Korngold, supra note 17, at 1061.
conservation and recreation beyond easements alone. If special municipal bonds were available for easement endowment funds to invest in, local government losses in property tax revenue could be offset by the investment in bonds used for either additional government acquisitions or long-term stewardship management.

Bonds are criticized and labeled as labor intensive because of the need to actively track payments and expiration dates. They are also viewed as being risky investments because of the credit rating and security of bonding companies. But government bonds are much more stable and provide a fixed rate of return. They also create an invested relationship between the local government and the land trust.

Another solution is to create a government conservation bond, which allows the government to raise funding for stewardship of conservation easements and ensure better planning. The local government could agree to set aside a percentage of the investment into a “rainy day” fund for the purpose of managing those easements identified through its public process in the event that the current holder becomes defunct. Alternatively, it could join those same funds to easements held by a defunct land trust and then transfer them together to other land trusts willing to accept the combination. These methods avoid the problem that the TET court faced when offering lands that required management without adequate funding. It is reasonable to assume that many of the creditors, agencies and conservation organizations were not excited about the prospect of taking on management responsibilities and implicit fundraising challenges associated with the conservation easements formerly held by TET.

B. Organizational Longevity

The trouble with perpetual conservation easements is that there is no guarantee as to who or what will be around to enforce them in the future. A land trust may operate for many years as a result of good planning, sound management, and wise financial investment, but this is not guaranteed and can be easily shaken by unforeseen and outside factors like an economic crash or other events. This uncertainty requires land trust directors and local governments to think creatively about how to manage their assets and uphold the public trust in a manner that can outlast catastrophe. Land trusts are relatively young organizations that often seem to rise from very humble beginnings. The last twenty-five years have seen a meteoric surge in their numbers and level of sophistication, but many remain small and localized and may not have the resources or capacity to appropriately manage perpetual conservation easements over the long term. It is telling that in the five years since The Alliance adopted its accreditation program, only 105 organizations

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94 Teresa, supra note 33, at 353–54.
95 Id. at 352–53.
have been accredited out of the existing 1,700.\textsuperscript{96} Accreditation is a rigorous and expensive process that requires a large staff and organizational commitment that many budget-strapped and understaffed organizations cannot afford. Other organizations may fear being reprimanded or scorned by their own community or by those they are working with and receiving funding from a land trust. This does not make accreditation a bad idea or unworthy goal, but it does point to the fact that other tools and ideas are needed to accommodate the larger constituency.

1. The Value of Planning

The sharp rise in the number of land trust organizations raises concerns beyond the potential for repeated neglect of land and abuse of laws as chronicled by the \textit{Washington Post} in 2003. The increasing number of new players flooding the market may lead to the acquisition of conservation easements on an ad hoc and opportunistic basis, and the competition among land trusts could lead to overbidding, strained fundraising pools and networks, and even the removal of tax benefits. As a result, the very purposes for creating conservation easements may become distorted, and land may not be properly managed or protected as intended. This potential for distortion reinforces the need for better planning processes that five states already employ because it serves as a check against poor acquisitions.

McLaughlin and Machlis acknowledge the need for better planning, but point out two interesting facts in responding to an argument against voluntary easement acquisitions. First, in many jurisdictions there is not an existing or effective land-use planning process already in place that could easily accommodate such additional requirements, while in other areas those processes lack credibility and are seen as shills for development interests.\textsuperscript{97} As a result, poor planning decisions are more likely to be made. Second, there is no data that shows in the last twenty-five years since conservation easements have become popular that land-use planning processes have become any more effective.\textsuperscript{98} As a result, the authors do not see much merit in trying to improve conservation easement acquisition through a process that is still largely theoretical in practice.\textsuperscript{99} Instead, they recognize the potential for improving easements through a public land-use process, but until there is a better way to implement such ideas, easements should only be seen as an “imperfect but nonetheless effective response to the well-recognized inadequacies of the traditional land-use planning process.”\textsuperscript{100} This is an opportunity for states to begin experimenting with new planning requirements.

Those public processes and planning requirements are extremely important because of the public interest created by the tax credits available to easement


\textsuperscript{97} McLaughlin & Machlis, Protecting the Public Interest, supra note 66, at 1567.

\textsuperscript{98} Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id.
donors as well as for conservation purposes. Improved planning by state and local government leads to better acquisition. “Acquisition [alone] does not equal better protection,” meaning that if lands are going to be legitimately managed for perpetuity they must be part of a broader, publicly supported vision or strategy.  

Ideally, the conservation plan would incorporate local or regional economic growth and development plans, and other resource management related projects to minimize conflicts. Such a holistic approach to the creation and management of conservation easements should enhance the ability of conservationists and private land developers to engage in mutually beneficial arrangement, an ideal the Montana statute openly acknowledges. The marriage of visions also allows donors, planners, land trusts, businesses and elected officials to identify potential resource conflicts and to plan accordingly.

There are limitless possibilities on how to stitch a patchwork of properties together depending on a particular conservation vision, which may be driven by a variety of factors. For example, habitat preservation for large predators will produce a different vision than one for smaller animals or birds because of their different needs. Adhering to such a vision is a more cost effective way to ensure that limited funds and resources are spent on the most worthy lands, ultimately achieving a greater public benefit and broader conservation goals. Additionally, stewardship costs will be lower if lands are managed together and for a singular purpose rather than on ad hoc basis. Otherwise, the public benefit may be reduced because lands encumbered by easements may be left to languish or may not be used to their maximum potential. Federal land managers make similar complaints about managing disjointed lands across large geographical areas or managing small parcels surrounded by urban or commercial lands.

All will likely agree that Korngold’s worst case scenario is best avoided, “a patchwork of conservation easements that [have] been purchased with mostly public dollars, but that provide[d] dubious public value, [and] are not part of an overall conservation plan . . . and frustrates the legitimate land use, conservation, and development goals of citizens for the land in their area.”

2. Public Planning Requirements

Most state conservation easement statutes replicate various aspects of either the UCEA or the Restatement (Third) of Property and thus appear to be very similar to one another. However, five states deviate from the majority by including public planning requirements as part of the conservation easement acquisition process. While no state’s public process is identical, each process allows the state

101 Teresa, supra note 32, at 340.
102 See MONT. CODE ANN. § 76-6-110 (2009).
103 Boyd, Caballero & Simpson, supra note 65, at 248–49.
105 Korngold, supra note 17, at 1068.
to ensure that each easement provides some level of public value and furthers the goals of the legislation’s conservation policy.

(a) Massachusetts

Massachusetts has two parallel approval processes for easements depending on whether the holder is a governmental entity or a charitable corporation or trust. The first is for easements held by government entities. It requires that easements held by a municipality or other local government entity be approved by the secretary of environmental affairs “if a conservation [easement], the commissioner of the metropolitan district commission [if a] watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction.”106 If the easement is held by a charitable corporation or trust, Massachusetts law requires approval by either a local mayor or city manager and city council, selectmen, or town meeting in which the land is situated in addition to the appropriate state official.107

(b) Montana

Montana’s statute dictates that it is the responsibility of the proposed easement’s holder to present an application for the easement to the local land planning authority of the county in which the land lies before it can be properly recorded.108 The local planning authority has at least ninety days to review the application, during which time it compares the proposed conveyance with the area’s larger comprehensive plans.109 The planning authority may make comments on the proposed easement and its suitability with the larger plan, but these comments are only intended to be advisory and are not binding.110

(c) Nebraska

The Nebraska statute mirrors Montana’s in its intent to “minimize conflicts with land-use planning” by requiring each easement to “be approved by the appropriate governing body.”111 Unlike Montana, this law does distinguish between the approving government body and the local planning commission where

106 MASS. ANN. LAWS ch. 184 § 32(a) (LexisNexis 2009).
107 Id. at § 32(b) (Interestingly, the same statute requires a public hearing before either the government or charitable holder of an easement can release the easement for consideration).
109 Id.
110 Id.
111 NEB. REV. STAT. ANN. § 76-2,112(3) (2009).
the proposed easement is located.\textsuperscript{112} Here, the approval board submits the proposal to the local planning commission, which has sixty days to review it and submit comments supporting or opposing the conveyance based on its relationship with the broader comprehensive planning for the area where the land is located.\textsuperscript{113} The approval of a conservation easement that is given to a government entity may be denied if it is inconsistent with the formal and previously adopted comprehensive plan; runs counter to the objectives of local, regional, state, or national conservation programs; or if there is an existing proposal for the land by any governmental body.\textsuperscript{114} Presumably, if denied, the donor could donate the easement to a charitable organization instead. Further, the state or any state agency or political subdivision other than a city, town, or county may apply directly to the local planning commission where the easement is located.\textsuperscript{115}

\textit{(d) Oregon}

Oregon’s statute calls for at least one public hearing on the proposed easement and the reasons for placing an easement on the land, but only on conveyances proposed by government entities in Washington or Clackamas counties.\textsuperscript{116} Furthermore, it does not address easements acquired by charitable organizations.

Oregon’s statute does allude to a bond raising measure: “This section does not apply to conservation easements or highway scenic preservation easements acquired pursuant to ORS 390.121, 390.310 to 390.338 and 390.805 to 390.925 or acquired pursuant to a metropolitan service district bond measure authorizing the acquisition of open spaces within specific areas.”\textsuperscript{117}

\textit{(e) Virginia}

Virginia is unique because it has two enabling statutes, one for conservation easements held by government entities and another for those held by charitable organizations.\textsuperscript{118} The first statute applies to public bodies\textsuperscript{119} and, unlike Montana and Nebraska, does not require charitable holders to present their proposed conveyances to a local authority for approval or consideration under a larger

\begin{footnotes}
\item[112] Id.
\item[113] Id.
\item[114] Id.
\item[115] Id. at § 76-2,112(4).
\item[116] OR. REV. STAT. § 271.735(1) and (4) (2007).
\item[119] Under VA. CODE ANN. §§ 10.1-1700, a “public body” includes “any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority formed pursuant to Article 6 (§ 15.2-5152 et seq.) of Chapter 51 of Title 15.2, or the Virginia Recreational Facilities Authority.”
\end{footnotes}
comprehensive land use plan, although the statute does require that “the use of real property for open-space land shall conform to the official comprehensive plan for the area in which the property is located.”

(f) The Uniform Conservation Easement Act

The UCEA drafters considered the benefits of a public evaluation process and ultimately excluded any provision requiring them. Their main concerns were that subjecting easement transactions to public processes would invite complexity that might deter potential donors from donating or selling easements. The threat of an easement donation becoming hindered by unnecessary bureaucratic and political processes, which they equated with a public approval process, was enough to discourage inserting a public ordering system requirement. Ultimately, they concluded that there were sufficient safeguards in other state and federal legislation that guaranteed that the conservation easements would serve a public interest without placing additional and unnecessary administrative and fiscal burdens on the state.

There are several dangers associated with the public planning requirement, which is different than a public approval requirement, although may result in the same final outcome. First, identifying desirable easement properties could have a detrimental impact on the voluntary nature of conservation easement creation. Landowners could seek to hold out from donating or selling in hopes of generating a higher price for an easement and thus create a bidding war, particularly for lands that are identified by competing plans. It is unlikely that local or regional land trusts will be able to generate the resources to competitively bid on lands against other business interests. Secondly, it is possible that easement plans could be rejected or tabled in local democratic meetings by a public that is not interested in conservation, believes that the tax credits are just excess spending, or for other political and bureaucratic reasons. This would take away the voluntary nature of easements and force potential donors to wrestle with being public about their own private property decisions, two of the strongest advantages of conservation easements.

The easiest way to prevent this from occurring while keeping the public process requirement alive is to encourage land trusts to create their own vision plans outside of the public process. This allows land trusts to distinguish themselves from each other, focus on specific, narrower goals, achieve broader results, and maintain a donor’s rights to creating a voluntary easement and option of privacy. Land trusts may also be able to act as intermediaries in negotiations with other stakeholders and planners. Seeking approval of the plan rather than each

120 Id. at § 10.1-1701.
122 Id.
123 Id.
individual area provides some privacy, but still allows the public to be informed and participate.

3. *Easement Selection Processes*

The process of identifying and acquiring the best parcels of land to complete a conservation vision can be very difficult, expensive, and time consuming, but ultimately more cost-effective than the other alternatives previously mentioned.\(^{124}\) Conservation modeling through Geographic Information Systems (GIS) presents numerous advantages because it allows for easy sharing and transferring of data, proposals and visions, but there are also problematic assumptions.\(^{125}\) GIS assumes land is of equal value or that there is a proxy value that can be assigned to an entire region. The selection of key parcels is made more difficult by considering not only what lands to preserve, but also the intensity of the conservation to take place on those and other lands.\(^{126}\) Computer modeling also leaves many biological questions unanswered such as: size of units versus goals of the project or organization; what is the goal of preservation; whether one spatial configuration of lands is better suited to a vision’s goals than another. “The assumption that each of many different species would be similarly preserved by a particular size and configuration of parcels is heroic in aspiration, but misguided in science.”\(^{127}\) Additionally, “tax based incentives cannot target specific properties for conservation, so the configuration of lands to be preserved” becomes even more complicated.\(^{128}\) Thus the challenge becomes the balancing of conservation opportunities versus the cost of acquisition. Teresa suggests using a Property Analysis Record (PAR) “to estimate tasks and costs associated with long-term stewardship of . . . conservation lands.”\(^{129}\) This tool monetizes the biological and protection requirements of a property or series of properties by evaluating stewardship tasks, plan management tasks, and costs for specific projects.\(^{130}\)

C. *How to Pass Easements*

After twenty-five years of rising popularity and growth, land trust organizations are just beginning to face novel legal questions. As the TET case symbolizes, not all the law and legal theories regarding what to do with easements held by defunct land trusts are established or agreed upon. The Restatements suggest adhering to cy pres procedures, while the majority of states allow for cy pres, deviation, modification, or termination to be used. Specifically, both cy pres and deviation allow for a court to rewrite the trust in a way that best satisfies the

\(^{124}\) Boyd, Caballero & Simpson, *supra* note 65, at 248.

\(^{125}\) *Id.*

\(^{126}\) *Id.*

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 216.

\(^{129}\) Teresa, *supra* note 32, at 344.

\(^{130}\) *Id.* at 344–45.
donor’s original intentions. But deviation is somewhat limited to the restrictions of a trust’s administrative terms, unless a judge is willing to broadly interpret what those terms are. Some judges have done so and others have not. The uncertainty creates a preference for cy pres, which is more flexible and developed as a “legal response to the problems inherent in permitting institutions to have perpetual existence.”131

Others have begun to include lines of succession in the easement drafting documents as a way to avoid these problems altogether.132 Moving forward, this may be the most obvious, practical and economic solution, but does not resolve the uncertainty surrounding the thousands of previously drafted easements.

IV. RECOMMENDATION

I present three solutions to the problems described above: (1) encourage legislatures to create a statutory planning or public hearing requirement in each state’s conservation easement statute that includes the creation of a dual regional (government and land trust) inventory and planning system; (2) establish an optional investment program for accredited land trusts using municipal, county and state bonds; and (3) formalize transfers as the primary method for passing easements from one organization to another by forming a line of succession in each creating document.

The first recommendation ensures better and more strategic planning. Creating dual inventory systems achieves two goals: (1) it identifies which species, habitats, or historic places are the most threatened or desirable for protection; and (2) it identifies and prioritizes which private lands fulfill the areas identified by the state and local inventories. The inventory further sets the stage for multiple and divergent interests to have conversations about the direction in which their community will grow and develop by working from one map rather than competing visions. This produces a result that puts conservation first rather than a last minute concern to any planning processes.

An investment program for accredited land trust organizations to invest their management funding in municipal, county, and/or state bonds ensures a more stable and long-term source of stewardship monies. Requiring that a portion of the money invested be directed to an account that will be held in trust in the event a land trust becomes bankrupt or dissolves helps guarantee that the donor’s expectation of perpetuity is realized. In the event that the land trust becomes insolvent, the funds held in trust can then be made available to either the appropriate land managing agency or replacement land trust to manage and perpetuate the existing easements. The money also increases the role and capacity of the state’s attorney general’s office to monitor both the easements and their funding as charitable assets.

131 FREEMONT-SMITH, supra note 22, at 173.
132 Glass v. Comm’r of Internal Revenue, 471 F.3d 698, 704–05 (6th Cir. 2006).
Including lines of successions in creating documents is not a new concept and is already practiced by some organizations. Requiring this to become standard practice will limit ambiguity and allow for smoother transfers between parties. It is economical and pragmatic because it will further reduce any court’s role unless there is an objection by one of the parties as to who is receiving the lands. This line of successive holders would provide prospective donors assurance that their gift will be perpetual and it will further solidify the question of intent for courts. Another option is to create a statutory addition to a state’s enabling act that specifies where easements should go in the event of a dissolution or transfer.

V. CONCLUSION

TET’s fate was unfortunate and the result of a combination of many different factors, but it was also avoidable. Land trusts must become better financial managers and strategic planners if similar future bankruptcies are to be avoided. But the law and government must adequately prepare for these situations and refine the mechanisms that govern how easements are managed for perpetuity and how they are transferred in the event of a land trust becoming defunct if the public’s interest and donor’s intentions are to be truly honored.