

2019

Conservation Easements & Their Critics: Is Perpetuity Truly Forever...And Should It Be?, 52 UIC J. MARSHALL L. REV 677 (2019)

Richard Roddewig

Follow this and additional works at: <https://repository.jmls.edu/lawreview>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Richard Roddewig, Conservation Easements & Their Critics: Is Perpetuity Truly Forever...And Should It Be?, 52 UIC J. MARSHALL L. REV 677 (2019)

<https://repository.jmls.edu/lawreview/vol52/iss3/4>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository. For more information, please contact repository@jmls.edu.

CONSERVATION EASEMENTS & THEIR CRITICS: IS PERPETUITY TRULY FOREVER . . . AND SHOULD IT BE?

RICHARD J. RODDEWIG, JD, MAI, CRE, FRICS MANAGING
DIRECTOR, JLL VALUATION & ADVISORY SERVICES, LLC*

I.	INTRODUCTION AND OVERVIEW	677
II.	THE FAILURE OF TRADITIONAL LAND USE PLANNING & THE ORIGINS OF THE CONSERVATION EASEMENT MOVEMENT	679
III.	THE TAX TREATMENT EXTENSION ACT OF 1980, THE LAND TRUST ALLIANCE, THE “IN PERPETUITY” REQUIREMENT, AND THE BEGINNING OF THE MODERN ERA IN THE CONSERVATION EASEMENT MOVEMENT	681
IV.	GROWTH OF THE CONSERVATION EASEMENT MOVEMENT IN THE 1990S.....	684
V.	TURN OF THE 21 ST CENTURY AND THE RISE OF THE CONSERVATION EASEMENT CRITICS	687
VI.	THE CONSERVATION EASEMENT MOVEMENT TODAY.....	692
VII.	GOVERNMENT REGULATION, SOUND LAND USE PLANNING, AND CONSERVATION EASEMENTS: THE INHERENT PUBLIC POLICY CONFLICTS.....	692
VIII.	PERPETUITY, CONSERVATION EASEMENTS, THE INTERNAL REVENUE SERVICE, AND THE CRITICS: THE PRINCIPAL ISSUES	695
IX.	THE PERPETUITY REQUIREMENT AND AMENDMENTS TO (OR EXTINGUISHMENT OF) CONSERVATION EASEMENTS: THE IRS POSITION	696
X.	PERPETUITY AND THE MORTGAGE SUBORDINATION REQUIREMENT: THE IRS POSITION.....	701
XI.	THE PERPETUITY REQUIREMENT, AMENDMENTS, EXTINGUISHMENT AND MORTGAGES: THE LAND TRUST MOVEMENT RESPONSE TO THE CRITICS AND TO IRS CHALLENGES TO EASEMENT DONATIONS.....	703
XII.	CONCLUSION: PERPETUITY PROVISIONS IN PROPER PERSPECTIVE.....	709

I. INTRODUCTION AND OVERVIEW

Land Trusts in the United States have become a powerful force

* Richard J. Roddewig is a Managing Director in JLL Valuation & Advisory Services, LLC, a division of JLL an international real estate company with offices in more than 80 countries. Mr. Roddewig is national director of the company’s litigation support group that provides real estate consulting and appraisal services to both private sector and public sector clients alike. Mr. Roddewig has authored, co-authored or contributed to 18 books, and has authored more than 70 articles on land use, zoning, environmental and real estate appraisal issues. He has an undergraduate degree in history and government from the University of Notre Dame and both a M.A. degree and a J.D. degree from the University of Chicago. He is a past Chair of the Land Use Law Committee of the American Bar Association and a past member of the Advisory Council of the Real Estate Center at The John Marshall Law School.

in efforts to protect and conserve regional open space and the nation's important environmental resources and natural areas through their activities acquiring lands directly (and then typically transferring them to units of federal, state or local governments with protective easements) or holding conservation easements acquired by donation or purchase. The conservation easements typically exclude some or all subdivision and development on the protected parcels, contain language requiring those protections to be enforced in perpetuity, and are frequently much more restrictive than the state or local land use and zoning codes that might otherwise apply to those lands.

While the alleged benefits of the land trust movement and the protections it provides went unchallenged for decades, the growth in the acreage protected has raised new questions and issues in the last two decades. Is it appropriate and fair in a democracy to turn over such strong land use controls to non-political private organizations? Should we continue to, in effect, subsidize their conservation activities through federal and state tax incentives that primarily benefit wealthy landowners? Is it right to tie up those lands in perpetuity? Are the legal rights granted to land trusts by conservation easement documents truly perpetual? Or can they be easily amended or terminated by disgruntled future owners of the land? And if they are truly perpetual, should they be? Can we realistically expect land trusts to have the resources to protect those lands in perpetuity? If a land trust fails to enforce the protections or goes out of business, what happens to the conservation easement and the protection it provided?

Those are some of the questions posed in this article and by the critics of the conservation easement movement. The answers to those questions are important since all activities of the more than 1,600 land trusts encompass 57.1 million acres – an area the size of the entire state of Idaho. As of 2017, the National Conservation Easement Database had compiled detailed information on more than 130,000 easements protecting 24.7 million acres of land, larger than the combined total area (land and water) of the states of New Hampshire, Vermont, Massachusetts and Connecticut. In some states, such as Virginia, almost five percent of the entire land area of the state is now protected by conservation easements.

This article traces the history of the conservation easement movement as a response to the perceived failure of federal, state and local land use laws to protect the nation's environmental and natural heritage. It then summarizes the criticisms that have emerged over the past two decades and the challenges posed by the Internal Revenue Service's watchdog role over the federal charitable donation deduction for donation of a qualified conservation restriction. Finally, this article questions whether the concerns raised by critics about perpetuity and the likelihood of future failures by land trusts are justified given actual experience

to date with conservation easements.

II. THE FAILURE OF TRADITIONAL LAND USE PLANNING & THE ORIGINS OF THE CONSERVATION EASEMENT MOVEMENT¹

The 1970s saw a burst of creative thinking in the United States regarding how best to reconcile the demand and need for land development with the need to conserve and protect scenic areas, critical natural resources, and cultural heritage. This creative thinking was an outgrowth of a larger citizens' movement related to protection of the environment that appeared following the publication in 1962 of Rachel Carson's book *Silent Spring*. The environmental movement not only led to the creation of federal and state environmental protection agencies, but also to awareness that many of the policies needed to protect the environment required growth management and improved stewardship of critical land and cultural resources.

In the early- to mid-1970s, land use planning professionals, land use and zoning attorneys, and real estate economists and appraisers began to exchange ideas and cooperate in devising creative techniques to manage growth and protect resources in ways other than by traditional zoning and planning regulations. Organizations such as the Urban Land Institute, The Conservation Foundation, the American Society of Planning Officials (now the American Planning Association), the President's Council on Environmental Quality, and the National Trust for Historic Preservation launched special projects and initiatives aimed at identifying, testing, and implementing a variety of new tools and techniques. The donation or acquisition of conservation and historic preservation easements, along with acquisition, donation, or transfer of development rights, began to appear on lists of recommended techniques. Seminal publications, such as *The Use of Land*, *The Quiet Revolution in Land Use Control*, *Windfalls for Wipeouts: Land Value Capture and Compensation*, and *Space Adrift: Landmark Preservation and the Marketplace*, touted acquisition or donation of conservation or historic preservation easements, sometimes as an element in programs for the acquisition, donation, or transfer of development rights, as a potential new tool. Special commissions such as the Blueprint Commission on the Future of New Jersey and the Connecticut Governor's Task Force for the Preservation of Agricultural Land also recommended the purchase of conservation easements and

1. See RICHARD J. RODDEWIG, *APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS* (2011) (providing that much of this history of the rise of the conservation easement movement is adapted from the aforementioned book as well as the upcoming second edition).

development rights as the means to save threatened prime farmland.

Although the use of conservation easements to protect scenic lands in America occurred on an occasional basis in the early 1900s, organized programs to acquire conservation easements were not developed until the 1930s. In that decade, the National Park Service pioneered and popularized scenic easements by using them to protect streams and parkways in Washington, D.C., and the Blue Ridge and Natchez Trace Parkways during their construction, according to William H. Whyte in *The Last Landscape*.² However, Whyte characterized efforts to emulate the National Park Service program elsewhere as “sporadic,” and by the late 1940s the easement device as a technique to protect scenic lands was almost forgotten.

In the 1950s and 1960s, another series of experiments in easement acquisitions blossomed around the country. The Wisconsin State Highway Department, modeling itself on the 1930s National Park Service, began acquiring protective easements along particularly scenic roads. The Wisconsin program resulted in the acquisition of scenic easements along fifty-three miles of the Great River Road between 1951 and 1961.³ In Minnesota and the Dakotas, the US Fish and Wildlife Service instituted a program to acquire conservation easements to protect waterfowl flyways, and by the mid-1960s about 500,000 acres had been protected, according to Whyte.

Also in the 1960s, Wisconsin based on its success in using scenic easements to protect the Great River Road, enacted legislation authorizing easement acquisitions to protect fisheries and wildlife habitat. Between 1961 and 1968, Wisconsin protected about 200 miles of stream and river frontage and 9,000 acres of hunting habitat through easement acquisitions.⁴

New York also began to experiment with easement acquisitions in the 1950s and 1960s. The state’s Department of Conservation began purchasing fishing easements along trout streams and by 1968 had acquired easements on more than 1,000 miles of streams.⁵

Funding shortages limited the success of the programs in the 1950s and early 1960s. However, as a result of the Land and Water Conservation Act of 1965, Congress began to appropriate more funds for direct federal acquisition of park and recreation lands and to provide matching grants to state and local governments for acquisition. The use of conservation easements rather than fee simple purchases was explored and used on a wider basis.

2. See WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 82-83 (Doubleday & Co ed., Univ. of Penn. Press 2002) (1968).

3. See BRIAN OHM, *THE PURCHASE OF SCENIC EASEMENTS AND WISCONSIN’S GREAT RIVER ROAD* 177-188 (2000); see also WHYTE, *supra* note 2, at 87.

4. WHYTE, *supra* note 2, at 87.

5. *Id.* at 94.

Between 1950 and 1975, a limited number of land trusts were accepting donations of conservation easements or acquiring easements by purchase or bargain sale. The Nature Conservancy, the largest land trust in the United States, accepted its first conservation easement in 1961. In many states, the legal underpinnings and enforceability of conservation easements remained uncertain, due to the tendency of the courts to uphold common law traditions prohibiting or severely limiting the enforcement of easements in gross.

Some in the real estate community began to develop concepts and programs to separate the development potential of property from its current use value as a way of protecting critical cultural and open space resources.⁶ In 1968, New York City added a voluntary transfer of development rights program to its zoning code and landmark protection program allowing unused development potential to be transferred from designated landmark buildings to “adjacent” lots on the same block, across the street, or diagonally across an intersection.⁷ In exchange for granting the right to sell or transfer the development potential, the city insisted on the recording of a deed restriction, in effect a historic preservation easement, forever limiting the development potential at the site of the designated landmark.

In 1974, Suffolk County, New York, became the first local government in the country to establish a program to purchase “development rights.” Programs to purchase development rights are also programs to purchase conservation easements since one condition of the sale of the development rights is the recording on the deed records of a conservation restriction (in essence an easement in gross) extinguishing the land’s development rights. To make the program work, appraisers for both Suffolk County and the property owners had to value the development rights before they could be acquired.

III. THE TAX TREATMENT EXTENSION ACT OF 1980, THE LAND TRUST ALLIANCE, THE “IN PERPETUITY” REQUIREMENT, AND THE BEGINNING OF THE MODERN ERA IN THE CONSERVATION EASEMENT MOVEMENT

The modern era in interest in conservation easement donations began when Congress passed the Tax Reform Act of 1976. In that legislation, Congress (partly in response to the nation’s bicentennial

6. See, e.g., Jared B. Shlaes, *The Economics of Development Rights Transfers*, 42 APPRAISAL J. 526 (1984).

7. A year later the program was amended to allow transfers through a daisy chain of adjacent parcels in common ownership so long as the first link in the chain was contiguous or across the street from the protected landmark. Richard J. Roddewig & Cheryl A. Inghram, *Transferable Development Rights Programs: Planning Advisory Service Report Number 401*, 6-8 (1987).

celebration) added specific incentives to the Internal Revenue Code to encourage the preservation of America's natural and historic heritage. One of the provisions modified the charitable donation rules to allow a charitable contribution deduction for a "lease, . . . option to purchase, or easement" to a qualifying organization "exclusively for conservation purposes."⁸ This language authorized an income tax deduction for the charitable donation of a less-than-fee interest in real estate. In 1977, the tax code was further amended to require that such leases, options, or easements be "in perpetuity" to qualify as a deductible donation. Both perpetual open space easements (for example, on scenic or public recreation land) and historic preservation easements (for example, on historic homes or income-producing historic structures such as historic office buildings, theaters, and apartment buildings) qualified. This legislation, combined with innovative attempts to implement easement acquisition and development rights transfer programs at the state and local levels, launched a new modern era for conservation and historic preservation easements.

In June 1977, Congress also significantly increased the funding authorized for the Land and Water Conservation Fund from \$300 million per year to \$900 million for fiscal year 1978 and later. Actual funds appropriated never reached the maximum authorization. Between 1977 and 1980, funds appropriated and spent on the acquisition of fee or less-than-fee interests averaged about \$88.2 million compared to \$69.5 million per year between 1972 and 1976. As a result, the US Forest Service, the Bureau of Land Management, and the National Park Service protected more properties each year, sometimes through cooperative efforts with units of state and local government and sometimes with conservation easements rather than fee simple acquisitions.

A few bold experiments in the acquisition of conservation easements and development rights were launched in King County, Washington,⁹ in Santa Monica, California,¹⁰ and in the Pinelands of New Jersey. Between 1979 and 1987, King County voluntarily

8. See I.R.C. § 170(f)(3)(B)(iii) (1980) (noting the other provision created two alternative types of rapid amortization of rehabilitation expenditures on qualifying historic buildings. This incentive was later expanded and modified by the Revenue Act of 1978 and the Economic Recovery Act of 1981 into the current system of investment tax credits to encourage rehabilitation of older and historic income-producing structures).

9. See MICHAEL A. MANTELL ET. AL., *CREATING SUCCESSFUL COMMUNITIES: A GUIDEBOOK TO GROWTH MANAGEMENT STRATEGIES* (1990) (noting that in 1979, voters in King County, Washington, in the metropolitan Seattle region, approved a \$50 million bond issue targeted at the acquisition of conservation easements on the county's diminishing supply of farmland, primarily fruit, vegetable, and dairy farms); see RODDEWIG, *supra* note 1, at 12-13.

10. In 1977, the State of California created the California Coastal Commission, and one of its first initiatives was the creation in 1979 of the Transfer of Development Credits (TDC) program in the Santa Monica Mountains.

acquired easements on more than 12,500 acres of farmland from 187 properties at a cost of about \$53.8 million. The Santa Monica program granted owners of antiquated, substandard platted but undeveloped subdivisions in sensitive areas of the mountains the right to sell the development potential to developers owning land parcels in less-sensitive areas. Once purchased, the selling site was encumbered with a permanent conservation easement.

On the East Coast, New Jersey enacted the Pinelands Protections Act in 1980 to protect an area known as the Pine Barrens, covering about one million acres between Philadelphia and Atlantic City. The act established the Pinelands Development Credit (PDC) program, one of the first transferable development rights programs created in the United States. Its purpose was to shift development from environmentally sensitive parts of the Pinelands to those areas that could better accommodate growth. The principal component of the program was a concept by which property owners in the area to be protected were allocated development credits that they could sell to property owners in the designated development districts who could then translate the purchased credits into density bonuses. Once the development restrictions were sold, a deed restriction—in essence, a conservation easement—was placed on the selling property.

The Santa Monica and Pinelands programs were widely publicized around the country and became models for a number of other state and local programs later in the 1980s.

However, it was tax legislation enacted in 1980 that truly ushered in a national conservation easement movement. The Tax Treatment Extension Act of 1980 added Section 170(h) to the Internal Revenue Code, providing detailed discussion of the donation of partial interests in real property “exclusively for conservation purposes” and dramatically expanding the impetus for donations of conservation easements to either units of federal, state or local governments or to qualifying land conservation organizations. Corresponding detailed regulations were later added in 1986 as Treasury Regulations §1.170A-14. One of the requirements for a conservation easement to qualify is that it is granted in perpetuity¹¹ and the conservation purpose for which the easement was created be “protected in perpetuity.”¹²

The now clear opportunity to take a charitable deduction for the donation of a conservation easement on scenic land, wildlife habitat, and open space spurred a surge in the creation of non-profit land trusts and charitable donations of easement. In 1982, the Land Trust Exchange (now the Land Trust Alliance) was established as a national coordinating organization for the conservation easement movement. Through education, publications, and an annual

11. I.R.C. § 170(h)(2)(C).

12. *Id.* at § 170(h)(5)(A).

national “Rally” (conference), the organization fostered the land trust movement and encouraged the donation of conservation easements. By 1988, at the end of this era, local, state, and national land trusts had protected more than two million acres of land through conservation easements, outright ownership, or other protection techniques.¹³

As rural American populations declined and the development value of many ranches and farms began to exceed their value for continued agricultural use, owners of large ranches and farms began to explore ways to preserve family lands for future generations. The inheritance tax began to be seen as a significant threat to the continuation of their ownership in the same family from one generation to the next. The value of the land was often so high and the original cost basis so low that families were forced to sell some or all of the land to pay the inheritance tax due to the land’s current market value. The Land Trust Alliance, The Nature Conservancy, and The Trust for Public Land began to devise easement programs and policies designed to save family farms and ranches for future generations.

IV. GROWTH OF THE CONSERVATION EASEMENT MOVEMENT IN THE 1990S

Interest in conservation easements continued to grow dramatically throughout the 1990s. The total acreage protected by local and regional land trusts through conservation easements increased from about 300,000 acres in 1988 to more than 2.5 million acres in 2000. By 2000, about 1,263 land trusts were operating in the United States, up from 889 in 1990, and between 1998 and 2000 alone, the number of their protected acres increased from about 1.25 million to 2.5 million. By the end of 2003, land trusts had protected more than five million acres with conservation easements.

The surge in interest in conservation easements resulted from three converging factors. First, a series of state initiatives boosted funding for the acquisition of fee simple or easement interests in scenic or environmentally sensitive lands, wildlife habitat, and farm and ranch lands. This response was due in part to declining federal appropriations to the Land and Water Conservation Fund.¹⁴ States

13. Land Trust Alliance, *National Land Trust Census – 2015 National Land Trust Census Results Released*, U.S. FOREST SERV. (last accessed Aug. 11 2019), www.landtrustalliance.org/about/national-land-trust-census (estimating from the graphic at page 6 of the 2015 National Land Trust Census Report, published by the Land Trust Alliance).

14. Land and Water Conservation Fund, *A Quick History of the Land and Water Conservation Fund Program*, NAT’L PARK SERV. (Sept. 19, 2008), www.nps.gov/nrcr/programs/lwcf/history.html/ (providing that between 1993 and 1997 acquisition funding dropped dramatically from \$10.32 million to only \$414,998).

created funding sources to replace some or all of the declining federal funds. Second, states also responded to increasing federal appropriations to the Farm and Ranch Lands Protection Program in place since 1996. States created purchase of agricultural conservation easement (PACE) programs in order to receive federal government matching funds to purchase conservation easements on farm and ranch lands. The third factor was a new market-driven demand for conservation and scenic lands especially among high-profile people such as Robert Redford, Ted Turner and other media personalities.

Many states initiated programs in the 1990s for the acquisition of conservation easements.¹⁵ Examples include the following:

- California -- in 1996 it created the Farmland Conservancy Program to acquire conservation easements on agricultural land.
- Arizona -- the Growing Smarter Act enacted in 1998 in combination with Proposition 303 passed the same year set aside \$20 million in matching grants annually for eleven years, starting in fiscal year 2001, for acquisition of fee or easement interests in critical lands.
- Colorado -- in 1992 the state created the Great Outdoors Colorado (GOCO) Trust Fund funded by proceeds of the Colorado Lottery to acquire fee or easement interests in important natural lands.
- Utah -- the 1996 Utah Quality Growth Act created a thirteen-member Quality Growth Commission to manage a Critical Land Conservation Fund used to purchase conservation easements for open space preservation.
- South Carolina -- a Conservation Bank was established in April 2002, funded in part by a portion of the state documentary tax revenue, to acquire fee or easement interests in significant pieces of undeveloped land.¹⁶ State agencies, municipalities, and not-for-profit charitable corporations or trusts in South Carolina participating in the program have used grants from the Conservation Bank totaling \$32.6 million to purchase 34 properties in fee covering more than 60,000 acres and an additional \$47.8 million to purchase 72 conservation easements covering 65,000 acres.
- Ohio -- the Ohio General Assembly in 1998 enacted legislation starting a conservation easement acquisition program. A total of 83 easements covering 15,410 acres were acquired between 1998 and mid-2008.¹⁷

15. RODDEWIG, *supra* note 1, at 18-19 (providing that the information about these programs is taken from The Trust for Public Lands website at www.tpl.org/ as well as websites of and contacts with various state agencies).

16. *Id.* (illustrating that in 2006, approximately 79.2% of program funding came from documentary tax revenue).

17. *Id.* (noting that the program was suspended in mid-2008 due to a perceived conflict between Ohio's Marketable Title Act requiring that interests in land that are less than the entire fee must be re-recorded every 40 years or the severed interest ceases to exist but automatically reunites with the fee interest, and the requirement in the IRS regulations that an easement be perpetual to qualify for

- North Carolina -- established a number of trust fund programs in the 1990s to acquire conservation easements or fee simple interests. These included the Farmland Preservation Trust Fund, to acquire agricultural land conservation easements, and the Clean Water Management Trust Fund, to purchase land or conservation easements to protect land bordering streams, rivers, or lakes.
- New York -- in 1990, the state created an Open Space Conservation Plan that expended more than \$658 million between 1990 and 2006 to protect about 964,000 acres through outright purchases and easements. The largest transaction involved a single working forest conservation easement covering nearly 260,000 acres in the Adirondack Park and involved twenty-one separate tracts in thirty-four towns in nine counties.
- New Jersey -- in the late 1980s and early 1990s, New Jersey enacted a series of laws creating funding sources for the purchase of fee interests or conservation easements on significant lands.
- Georgia -- the Georgia Greenspace Trust Fund, created in 1999, uses various funding sources to purchase fee or easement interests in land to protect critical natural resources.

In the 1990s, celebrities rediscovered the West. Led by Ted Turner, who purchased eight ranches totaling almost 1.43 million acres in Nebraska, Montana, Colorado, and New Mexico, a number of high-profile individuals and celebrities became interested in owning “trophy” ranches.¹⁸ The identification of a separate trophy ranch marketplace among celebrities first appeared on a more limited scale in the late 1970s and early 1980s in sales activity around ski-oriented western destinations, such as Sundance in Utah, Jackson Hole in the Grand Tetons, and the Roaring Fork Valley near Aspen. The second wave of buyers in the 1990s did not necessarily look to the developed ski areas but sought larger pieces of property in more remote western locations. Many of these new buyers, as well as the earlier buyers in such places as Sundance and Jackson Hole, donated (or sold) conservation easements on some or all of their ranches as a way of ensuring the preservation of their scenic and natural character and, in some cases, became actively involved in promoting conservation easements on nearby or surrounding lands.

At the end of the 20th Century, there were more than 1,200 land trusts operating in the United States, a tripling in number since

the charitable donation deduction).

18. S. REP. NO. 106-267, at 30 (2000). In testimony before Congress, the Director of Lands for the US Forest Service defined a “trophy ranch” as follows: “A trophy ranch is a premium property available to only the wealthiest of buyers who can afford to enjoy the amenities of a property without necessarily deriving sufficient income from it to offset their investment or operating costs. These ranch properties appeal to an affluent segment of society who have (sic) exceptional buyer power and a desire for exclusivity and seclusion with a ranch having a high degree of ‘ambiance.’” *Id.*

1980.¹⁹

V. TURN OF THE 21ST CENTURY AND THE RISE OF THE CONSERVATION EASEMENT CRITICS

A series of articles in the *Philadelphia Inquirer* in February of 2001 alleging “troubling issues,” lack of benefits, and abuses in the charitable donation of conservation easements was the first salvo in a series of articles and inquiries that were to fundamentally change the easement landscape after 2003. A further series of articles in the *Washington Post* in May of 2003 focusing on conservation easements and a follow up series in December of 2004 focusing on historic preservation (facade) easements got even more attention, including attention from Congress. The articles alleged overvaluation in appraisals and easements accepted on properties such as golf courses with little or no conservation value.

For a while, however, the full implications of this new critical focus on the federal income tax incentives for easement donations and their public policy underpinnings were not clear. Between 2003 and 2005, the pace of donated conservation and historic preservation easements actually quickened as a result of wider promotion of conservation and historic preservation easements by private promoters, land trusts, and historic preservation organizations. A number of states also began to offer state tax incentives to complement the federal charitable donation deduction. As a result, the number of acres protected by local and regional land trusts with conservation easements increased from about five million in 2003 to almost 6.25 million by 2005.²⁰

In February of 2005, the Lincoln Institute of Land Policy in Boston convened a symposium of fourteen representatives of the legal and land trust communities “to discuss and debate perspectives on conservation easement issues and reforms.”²¹ One of the participants in that symposium was the Executive Director of the Georgetown Environmental Law and Policy Institute whose article published in 2005 entitled “Skeptic’s Perspective on Voluntary Conservation Easements” was a direct challenge to the idea that conservation easements are more appropriate than state and local land use laws as a way of protecting the nation’s conservation resources.²² The article claimed the widespread use of

19. Nancy A. McLaughlin, *Perpetual Conservation Easements In The 21st Century: What Have We Learned And Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 690 (2013).

20. *Id.* at 692.

21. JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM, (Lincoln Inst. of Land Pol’y ed., 2005).

22. John Echeverria, *Skeptic’s Perspective on Voluntary Conservation Easements*, GEO. ENVTL. L. AND POLY INST., (Aug. 31, 2005), www.gelpi.org/gelpi/current_research/documents/RT_Pubs_Short_EcoMarketplace.pdf.

conservation easements as a substitute for land use regulation was a “serious problem” and resulted in “dumb growth” rather than “smart growth” in the “right places.”²³ One of the principal contentions in the article is that idea that conservation easements provide permanent protection to important lands is a “myth” and conservation permanence is not an appropriate objective.²⁴ The article summarized the “chief asserted benefit” of allegedly permanent conservation easements as an elimination of the “possibility of political officials reversing the conservation decision in the future.” But, the article argued, “permanence itself can be problematic” because “[s]ocial, economic, and even ecological conditions and priorities will change over time, meaning that some of today’s conservation decisions will appear misguided in the future.”²⁵

The “Skeptic’s Perspective” also envisioned an inevitable failure by the land trust organizations to properly enforce the protections embodied in the easement language. Conservation easements, if indeed permanent, create “daunting enforcement challenges” that will inevitably get worse over time:

By Its very nature, a conservation easement creates a strained marriage between the non-profit easement holder and the owner of the underlying land. Moreover, this relationship will Inevitably become more contentious as the land Is bought and sold and/or passes by inheritance. Will land trusts continue to prosper when the bulk of their activity shifts from the appealing work of “saving” special places

23. *Id.* at 1-2.

24. Dana Joel Gattuso, *Conservation Easements: The Good, The Bad, and the Ugly*, NAT’L CTR. FOR PUBLIC POL’Y RESEARCH (May 1, 2008) nationalcenter.org/ncppr/2008/05/01/conservation-easements-the-good-the-bad-and-the-ugly-by-dana-joel-gattuso/; One of the other contentions in the article is that conservation easements are inherently unfair and undemocratic. The benefits accrue to some while the costs (in the form of tax deductions) are borne by all. Land use protection decisions should be made through public debate and “democratic procedures” and not by private landowners in conjunction with charitable organizations out of sight of the public. In addition, conservation easements are not a “free market” alternative to land use regulation because the easement movement is primarily driven by the opportunity to take an income tax deduction equal to the value of the donation. As a result, the conservation easement movement involves governments in the protection of land just as much as state and local government land use planning and regulation. Another research study published by the National Center for Public Policy Research made the same point, particularly in regard to conservation organizations and land trusts such as The Nature Conservancy that, in addition to holding easements themselves, transfer many easements to units of state or local government through pre-arranged deals. The study argued this subverted the purpose of the conservation goals in the tax laws by making conservation easements “not a means of protecting lands through a private sector partnership between landowner and land trust, but a non-transparent tool for government to obtain private property without public knowledge or approval.” *Id.*

25. *Id.* at 4.

to the grinding task of private law enforcement?²⁶

The entire group of fourteen participants in the Lincoln Institute Boston symposium took a more nuanced view of the prospects and problems created by the conservation easement movement. The report from the symposium entitled *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* identified the following key issues facing the conservation easement movement:

1. Variable quality in easement “design”
2. No public system for “tracking” conservation easements
3. Lack of transparency and clarity in the public benefits associated with creation of conservation easements
4. Failures in stewardship duties and responsibilities by “many” easement holding organizations
5. “Lack of clear standards for easement termination, amendment, and backup support”²⁷
6. Uncertainties and difficulties in the appraisal of the value of conservation easement donations as they relate to federal and state charitable donation rules
7. Potential conflicts between conservation easement programs and direct government regulation and/or acquisition of significant conservation lands
8. The need for “equity” and “environmental justice” issues to be addressed in public policy debates about the appropriate role of conservation easements as a land use planning and conservation tool

The first six of those issues have been addressed in whole or in part by the land trust movement, by the appraisal profession, and by the Internal Revenue Service (through tax court case challenges and revised regulation) in the past 15 years. Issue seven continues to be an open issue although, as discussed below, it is not as significant an issue as the symposium report would seem to indicate. Issue eight – the place of equity and environmental justice in conservation easement public policy debates – continues to be an unresolved issue although the recent “opportunity zones” legislation enacted by Congress in 2019 has potential to address some aspects of that issue at least insofar as historic preservation easements in urban areas or conservation easements in some rural communities.²⁸

26. *Id.*

27. Pidot, *supra* note 21, at 1.

28. Pidot, *supra* note 21, at 34 (noting the Lincoln Institute report summarized the “environmental justice” issue in the following words: “While many conservation easements and associated public subsidies benefit the affluent and their communities, some easements may have negative impacts on affordable housing, or may push development into environmentally or socially

The Internal Revenue Service, in response to the publicity generated by the articles in *The Washington Post* and the Senate Finance Committee hearings prompted by the same articles, issued a Notice in 2004²⁹ that it was aware of possible abuses involving inflated appraisals and inappropriate deductions and would launch an investigation of conservation easement charitable donation deductions and the land trusts receiving the donations. It created a new task force within the IRS “to attack all aspects of the problem of conservation easements.”³⁰ In 2006, in one of its early initiatives in this investigation, and out of concern that land trusts might not be properly monitoring and enforcing the provisions in the conservation easements they held, or improperly amending or terminating conservation easements, the IRS added a requirement to Schedule D of IRS Form 990 requiring easement holding organizations in 2008 and later years to provide information about the conservation easements they hold. The information required to be provided is extensive: the number of easements accepted since 2006; the total acreage protected by those easements; details about any past amendments or terminations of their easements; whether the organization has written policies for monitoring, inspecting and enforcing the easements and a summary of those policies; and the number of hours of staff time and the costs devoted to monitoring and enforcement of the easements held.³¹

inappropriate areas.” It characterized the “equity” issue as one that plagues many income tax policies because the benefits of the tax policy typically accrue to “relatively wealthy communities, although they are subsidized by all”); see Dept. of Treasury, *Opportunity Zones Frequently Asked Questions*, INTERNAL REVENUE SERV. (last updated July 29 2019), www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions (illustrating that the Opportunity Zone program is a new federal program initiated in 2018. The IRS defines an opportunity zone as follows: “An Opportunity Zone is an economically-distressed community where new investments, under certain conditions, may be eligible for preferential tax treatment.” The IRS then briefly defines the tax benefits associated with investing in an Opportunity Zone as follows: “Opportunity Zones are designed to spur economic development by providing tax benefits to investors. First, investors can defer tax on any prior gains invested in a Qualified Opportunity Fund (QOF) until the earlier of the date on which the investment in a QOF is sold or exchanged, or December 31, 2026. If the QOF investment is held for longer than 5 years, there is a 10% exclusion of the deferred gain. If held for more than 7 years, the 10% becomes 15%. Second, if the investor holds the investment in the Opportunity Fund for at least ten years, the investor is eligible for an increase in basis of the QOF investment equal to its fair market value on the date that the QOF investment is sold or exchanged”).

29. IRS Notice 2004-41, 2004-28 C.B. 31 (2004).

30. *Tax Code and Land Conservation: Hearing Before the Senate Comm. on Fin.*, 110th Cong. (2005) (Statement of Steven T. Miller).

31. Dep’t of Treasury, *Instructions for Schedule D (Form 990)*, INTERNAL REVENUE SERV. (last accessed Aug. 12, 2019) (illustrating that the Instructions to Form 990 Schedule D define the modifications, releases and terminations that are to be reported by land trusts as follows: “an easement is modified when its terms are amended or altered in any manner. For example, if the deed of

In response to the concerns raised by the critics, and especially in response to the new initiatives by the IRS, the land trust movement, led by the Land Trust Alliance adopted a set of standards and practices and launched a land trust accreditation program that includes educational and training programs for land trusts participating in the program. The *Land Trust Standards and Practices* are a set of guidelines and standards for how to run a land trust “legally, ethically and in the public interest” that have been adopted by more than 1,000 land trusts across the country.³² In 2006, the Alliance created an independent Land Trust Accreditation Commission to assure that member land trusts comply with the *Land Trust Standards and Practices*. Among the standards are some on assuring that accredited land trusts have the financial resources to properly monitor and enforce their conservation easements.

In another initiative, the Trust for Public Lands and Ducks Unlimited, in conjunction with various governmental agencies and other conservation groups and private foundations, in 2009 created the National Conservation Easement Database (NCED), a map-based database of conservation easements across the United States. Its website describes it as “the first effort to *compile and standardize information about conservation easements* throughout the United States into a single online resource.”³³ It became operational in 2011 and has been continuously updated as state and federal agencies and land trusts provide additional information to it.

easement is amended to increase the amount of land subject to the easement or to add, alter, or remove restrictions regarding the use of the property subject to the easement, the easement is modified. An easement is transferred if, for example, the organization assigns, sells, releases, quitclaims, or otherwise disposes of the easement whether with or without consideration. An easement is released, extinguished, or terminated when it is condemned, extinguished by court order, transferred to the land owner, or in any way rendered void and unenforceable, in each case whether in whole or in part. An easement is also released, extinguished, or terminated when all or part of the property subject to the easement is removed from the protection of the easement in exchange for the protection of some other property or cash to be used to protect some other property. The categories described in the preceding paragraph are provided for convenience purposes only and aren't to be considered legally binding or mutually exclusive. For example, a modification may also involve a transfer and an extinguishment, depending on the circumstances. Use of a synonym for any of these terms doesn't avoid the application of the reporting requirement. For example, calling an action a “swap” or a boundary line adjustment” doesn't mean the action isn't also a modification, transfer, or extinguishment”).

32. *Land Trust Standards and Practices*, LAND TRUST ALLIANCE (last accessed July 10, 2019), www.landtrustalliance.org/taxonomy/term/17.

33. *Conservation Easements and the Nat'l Conservation Easement Database*, NAT'L CONSERVATION EASEMENT DATABASE (last accessed July 9, 2019), www.conservationaleasement.us/storymap/index.html.

VI. THE CONSERVATION EASEMENT MOVEMENT TODAY

In 2015 the Land Trust Alliance member census reported that more than 56.0 million acres of land in the United States were protected through various programs of land trusts including their easement programs. This included more than 16.7 million acres in conservation easements held by national, state, or local land trusts, and an additional 8.1 million acres owned outright by land trusts. Another 12.6 million acres had been acquired by land trusts and reconveyed, typically to federal, state or local governmental units.³⁴ This is a dramatic growth in acreage protected by easements between 1980 and 2015.

Almost 20 million acres of the easement protected acreage, or 77 percent, was protected by the 422 land trusts supervised voluntarily in their activities by the Land Trust Accreditation Commission.³⁵

By 2017, the National Conservation Easement Database had compiled detailed, searchable and inter-active map-based data on more than 130,000 easements protecting 24.7 million acres. The home page on its website now shows 158,00 conservation easements encompassing more than 27 million acres of land.³⁶ The database represents approximately forty-nine percent of all publicly held conservation easements and ninety percent of all easements held by land trusts in the United States.³⁷

VII. GOVERNMENT REGULATION, SOUND LAND USE PLANNING, AND CONSERVATION EASEMENTS: THE INHERENT PUBLIC POLICY CONFLICTS

There are a number of inherent public policy conflicts between the federal tax code's promotion of conservation easements and the essential land use regulatory authority of state and local government. The Lincoln Institute symposium report summarized the nature of those conflicts as follows:

The increasing focus on land protection through conservation easements may negatively affect the government's role in regulating private lands, acquiring public lands, and employing land taxation

34. *Land Trust Standards and Practices*, *supra* note 32, at 5 (noting the remaining 19.3 million acres consisted of approximately 1.16 million acres that could not be classified by type of program and an additional 17.76 million acres "protected by other means" described in the census report as "land protected as a result of the activities of the land trust, but which the land trust did not directly acquire in fee or under easement. Common examples include negotiating or preparing for acquisition by other organizations or agencies, or deed restrictions").

35. *Id.* at 13.

36. *Id.* at 32.

37. *Id.*

policies. Critics of conservation easements believe they are an expensive, haphazard, and untested approach to achieve land protection that could be more uniformly and inexpensively attained by regulation. Critics also believe conservation easements siphon off both public and charitable money that otherwise would go into acquiring outright ownership of selected lands with known conservation values.³⁸

However, as discussed above, and as easement proponents emphasize, the conservation easement concept evolved in response to the demonstrated failure of state and local governments in many parts of the country to enact appropriate land use regulations to control sprawl and otherwise protect sensitive environmental and conservation areas. It also evolved and grew in national support as a response to the failure of the federal government to fully fund authored but unbudgeted amounts for direct acquisition of land through the federal Land and Water Conservation Fund.³⁹

But there are two more fundamental differences between conservation easement policy and even the best local government land use planning and resource protection programs. First, land use laws and land use plans are enacted by state and local legislative bodies. The strength or weakness of the conservation policies and protections written into those plans and laws is a function of the will of the electorate and is in direct proportion to the strength of public support for conservation and willingness to fund conservation efforts through expenditure of public funds. Second, and as a result of the grounding of land use planning in political factors, even the best and strongest federal, state and local government programs to control sprawl or protect critical environmental resources and conservation areas by regulation or outright acquisition are temporary by their very nature and can change with changes in political support.⁴⁰ Those land use plans and laws can be modified and even the strongest conservation

38. Pidot, *supra* note 21, at 32.

39. Gattuso, *supra* note 24, at 4. "Rising costs of purchasing land for conservation - reflecting the opportunity costs of leaving land dormant rather than developed - have made easements a more affordable and practical approach." See RODDEWIG, *supra* note 1.

40. Consider, for example, the Trump Administration proposed and enacted changes to USEPA rules and regulations related to air pollution, groundwater contamination, and water resources via the Presidential Executive Order published in March 2017. See, e.g., Lisa Friedman & Carol Davenport, *New E.P.A. Rollback of Coal Pollution Regulations Takes a Major Step Forward*, N.Y. TIMES (Aug. 20, 2018), www.nytimes.com/2018/08/20/climate/epa-clean-power-rollback.html; Nathan Rott, *Trump EPA Proposes Major Rollback of Federal Water Protections*, NAT'L PUB. RADIO (Dec. 11, 2018), www.npr.org/2018/12/11/675477583/trump-epa-proposes-big-changes-to-federal-water-protections (highlighting that, for example, the Trump Administration has proposed or enacted changes to USEPA rules and regulations related to air pollution, groundwater contamination, and water resources via the Presidential Executive Order published in March 2017).

regulatory programs can be weakened or funding cut back or eliminated if public support wanes or conservation funding is diverted to other public policies and programs with more support or considered a higher priority.

Contrast those elements of land use planning and land use law with the conservation easement tool. First, the income tax code incentives for donation of a conservation easement were enacted by the federal not state or local government. That makes it a nationwide program. While some states have added state income tax incentives as an additional layer to the federal incentive, state and local governments have no ability to limit the opportunity of individuals and land trusts to create conservation easements in a particular state or locale. Second, local and state governments have only a limited role in the decision making process related to which parcels of land will be protected by conservation easements.⁴¹ That decision is typically made by the land owner at the time of the donation in conjunction with the land trust or government entity or unit that will be the recipient of the easement grant.

The third and final essential difference between a conservation easement and state and local land use plans and regulations is in the perpetual nature of conservation easements. Under the Internal Revenue Code, only conservation easements granted “in perpetuity”⁴² qualify for the charitable gift deduction. Proponents of conservation easements say that this perpetuity requirement is what makes conservation easements such an important and effective alternative to land use regulation – it removes the decision as to what lands to conserve from the political arena and allows land trust organizations in cooperation with motivated private land owners to conserve millions of acres that otherwise would never be protected.

To critics of the conservation easement movement, this perpetuity requirement is one of the serious issues and it has been the subject of discussion and debate within the conservation easement movement itself and been the basis for significant Internal Revenue Service challenges to many easement donations.

41. The tax code and Treasury Regulations do allow conservation easements to be granted pursuant to a “clearly delineated Federal, State, or local governmental conservation policy.” I.R.C. § 170(h)(4)(A)(iii)(II) and Treas. Reg. § 17.10A-14(d)(4)(vi)(A) (2018). There has been no definitive research done to determine how many conservation easements have been granted pursuant to a clearly delineated government conservation program or policy as contrasted to the other allowable purposes for the charitable donation of a conservation easement.

42. I.R.C. § 170(h)(2)(C).

VIII. PERPETUITY, CONSERVATION EASEMENTS, THE INTERNAL REVENUE SERVICE, AND THE CRITICS: THE PRINCIPAL ISSUES

In the follow up to the Lincoln Institute of Land Policy report, additional articles addressed some of these issues and the perpetuity requirement for federal charitable donation deductions in particular.⁴³ As part of its conservation easement investigation launched in 2005, the Internal Revenue Service has taken a strong position challenging dozens of conservation easements based on claims that they do not meet the perpetuity requirement. Among the issues related to the perpetuity requirement explored in the follow up studies and articles as well as in IRS challenges are the following:

- When and under what circumstances can “perpetual” conservation easements be amended?
- When and under what circumstances can a “perpetual” conservation easement be extinguished?
- What happens if the easement holder fails to enforce the easement or the purpose for which the conservation easement was granted (e.g., to protect an endangered species, to protect a scenic view, etc.) fails (e.g., by the die off of the endangered species from the protected land, nearby development that disrupts the scenic view, etc.)?
- What happens if the holder of the conservation easement does not have the necessary resources or commitment to enforce the conservation easement in perpetuity or simply fails to enforce the protections in a recorded perpetual easement document?
- How does the mortgage subordination requirement in the charitable donation rules for conservation easements interact with the perpetuity requirement?

There are three points of view about these questions. First, there is the point of view of the Internal Revenue Service that the

43. See generally Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L. QUARTERLY* 673 (2007); Gerald Korngold, *Private Conservation Easements: A Record of Achievements and the Challenges Ahead*, 21 *LAND LINES* 8 (2009); Gattuso, *supra* note 24; Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 33 *UTAH ENV. L. REV.* 687 (2013); Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 *LA. J. ENERGY L. RESOURCES* 101 (2014); Adam Looney, *Charitable Contributions of Conservation Easements*, BROOKINGS INST. (June 1, 2017), www.brookings.edu/research/abuse-of-tax-deductions-for-charitable-donations-of-conservation-lands-are-on-the-rise/; see also Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 *HARV. ENV. L. R.* 423 (2005).

tax code requires conservation easements to be in perpetuity but many if not most conservation easements contain language that violates this perpetuity requirement. The IRS has launched scores of challenges in tax court proceedings to easement donations on these grounds. Second, the land trust movement argues that the wording of the easements and long-established practices of easement holding organizations assure that the “conservation purposes” of each easement will be guaranteed in perpetuity even if they are amended or terminated. And finally, there is the point of view of many critics of the conservation easement movement who posit that it does not matter whether the IRS or the land trusts point of view is correct – either position is not good public policy because there are inherent problems in using perpetual conservation easements as a substitute for state and local land use regulation.

Recent tax court case law on the relationship between the perpetuity requirements in the tax code and regulations and typical easement language allowing amendments or extinguishment sheds some light on these respective points of view. So too do recent cases analyzing the relationship between the perpetuity requirement and the requirement in the tax code and Treasury Regulations that mortgages be subordinated to the easement. The points of view contrary to the IRS position as expressed by the land trust movement and the critics of the conservation easements as a land use planning tool need to be reexamined in light of those decisions.

IX. THE PERPETUITY REQUIREMENT AND AMENDMENTS TO (OR EXTINGUISHMENT OF) CONSERVATION EASEMENTS: THE IRS POSITION

Virtually all conservation easements contain language allowing them to be amended.⁴⁴ Nothing in Section 170(h) of the Internal Revenue Code or its implementing regulations specifically prohibit the amendment of a previously recorded conservation easement. Nor is there wording specifically allowing amendments.⁴⁵

44. JANET DIEHL & THOMAS BARRETT, CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 164 (Land Trust Alliance ed., 1988) (noting that, for example, the following language from a model conservation easement from a 1988 handbook: “Amendment: If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code . . . and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of County, [state].”

45. See Jessica Jay, *When Perpetual Is Not Forever: The Challenge of*

The perpetuity requirements wording in the tax code only requires that the conservation restriction be granted in perpetuity and that the conservation purpose for which the easement was created be “protected in perpetuity.”⁴⁶ The only mention of amending easements in the tax code or the regulations is in the discussion of extinguishment as discussed below.

The Internal Revenue Service, however, has taken a strong counter position on the right to amend.⁴⁷ The IRS posits that the silence of both the tax code and the regulations on the right to amend is significant and means easements allowing the right to amend are fundamentally at odds with the perpetuity requirement in the tax code and the regulations. The 2016 IRS conservation easement audit guide says the following:

Amendment Clauses in Easement Deeds

The restriction on the use of the real property must be enforceable in perpetuity, meaning that it lasts forever and binds all future owners. An easement deed will fail the perpetuity requirements of § 170(h)(2)(C) and (h)(5)(A) if it allows any amendment or modification that could adversely affect the perpetual duration of the deed restriction.⁴⁸

In a 2016 release about alleged abuses in conservation easement donations, the IRS expressed its concern that some easement holding organizations have “allowed property owners to modify the easement or develop the land in a manner inconsistent with the easement’s restrictions.”⁴⁹ And in a series of court cases, the IRS has challenged specific amendments to easements as being in conflict with that perpetuity requirement. In at least one of the

Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, 36 HARV. ENV. L. REV. 1 (2012) (noting that the article cites to a letter from Stephen J. Small, Esq., dated January 17, 2011. Stephen J. Small, the principal author of the IRS regulations related to conservation easements has commented that amendment was neither contemplated nor outright prohibited at the time when the regulations were drafted).

46. See I.R.C. § 170(h)(2)(C) and § 170(h)(5)(A).

47. *Letter to Karin Gross – White Paper Re Proposed Rulemaking Pursuant to 1.170A-14 to Address Conservation Easement Deed Amendments*, LAND TRUST ALLIANCE (Jan. 17, 2017), www.alliancerally.org/wp-content/uploads/2017/05/Rally2017_B09_05-1.pdf. [hereinafter *Letter to Karin Gross*]. “In recent years, the IRS has seemed to be making the case (in court proceedings and ad hoc public statements at the Land Trust Alliance Rally) that a conservation easement cannot be altered over perpetuity, or at least as long as the conditions do not make the conservation purposes impossible or impractical to protect.” *Id.*

48. Dep’t of Treasury, *Conservation Easement Audit Techniques Guide*, INTERNAL REVENUE SERVICE 13 (last modified Jan. 24, 2018), www.irs.gov/pub/irs-utl/conservation_easement.pdf.

49. Dep’t of Treasury, *Background – Abusive Transactions Involving Charitable Contributions of Easements*, INTERNAL REVENUE SERVICE (last updated Mar. 26, 2019), www.irs.gov/charities-non-profits/conservation-easements.

cases, *Pine Mountain Preserve, LLLP v. Commissioner*,⁵⁰ the tax court more broadly addressed the issue of amendments in general. Three easements granted in successive years on portions of a larger property were in issue. The Tax Court described the amendment provision as follows:

Article 6.7 of the easement provides that Pine Mountain, its successors in interest, and NALT “shall mutually have the right, in their sole discretion, to agree to amendments to this Conservation Easement which are not inconsistent with the Conservation Purposes.” This provision reflects the recognition by Pine Mountain and NALT “that circumstances could arise which could Justify the modification of certain of the restrictions contained in this Conservation Easement.” However, NALT “shall have no right or power to agree to any amendments * * * that would result in this Conservation Easement failing to qualify * * * as a qualified conservation contribution under section 170(h) of the Internal Revenue Code and applicable regulations.”⁵¹

The IRS challenged that “general provision of the [2007] easement deed that permits amendments”⁵² which the court noted in a footnote is language “widely used” in the estimated 40,000 conservation easements in the United States held by land trusts.⁵³ But in a decision that the Land Trust Alliance called a “big win for lasting conservation,”⁵⁴ the tax court said the following:

It appears that many conservation deeds of easement include amendment provisions of this sort. Respondent contends that article 6.7 could enable the parties to amend the 2007 easement in ways that would clearly violate the statutory “perpetuity” requirements, e.g., by reducing the size of the 2007 Conservation Area or by permitting residential construction within it. But it is hard to imagine how NALT could conscientiously find such amendments to be “consistent with the conservation purposes” set forth in the easement. Respondent thus appears to contend that the easement’s restrictions should be deemed “nonperpetual” at the outset because of the risk that the qualified organization might be unfaithful to the charitable purposes on which its exemption rests.

Both we and the Courts of Appeals have rejected similar arguments previously. For example, in *Simmons v. Commissioner*, 646 F.3d 6 (D.C. Cir. 2011), aff’g T.C. Memo. 2009-208, 98 T.C.M. (CCH) 211, the historic preservation deed of easement reserved to the trust the right to consent to changes in the conserved facade and to abandon certain rights under the easement. We held that this power did not disqualify

50. *Pine Mountain Pres., LLLP v. Comm’r of Internal Revenue*, 151 T.C. No. 14 (2018).

51. *Id.* at 18.

52. *Id.* at 52.

53. *Id.* at 54.

54. Leslie Ratley-Beach, *Big Win for Lasting Conservation*, LAND TRUST ALLIANCE (Jan. 8, 2019), www.landtrustalliance.org/blog/big-win-lasting-conservation.

the easement under section 170(h). The D.C. Circuit affirmed, holding that “[t]he clauses permitting consent and abandonment, upon which the Commissioner so heavily relies, have no discrete effect upon the perpetuity of the easements.” As the D.C. Circuit noted, “[a]ny donee might fail to enforce a conservation easement, with or without a clause stating that it may consent or abandon its rights, and a tax-exempt organization would do so at its peril.”

The 2007 easement involves a conveyance, which is a form of contract. Generally speaking, the parties to a contract are free to amend it, whether or not they explicitly reserve the right to do so. Viewed from this perspective, this portion of article 6.7 is reasonably regarded as a limiting provision, confining the permissible subset of amendments to those that would not be “inconsistent with the Conservation Purposes.” This text tracks the Secretary’s regulation governing the “enforceable in perpetuity” requirement, which provides that any retained interest “must be subject to legally enforceable restrictions * * * that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.”

Respondent’s argument would apparently prevent the donor of any easement from qualifying for a charitable contribution deduction under section 170(h) if the easement permitted amendments. We find no support for that argument in the statute, the regulations, the decided cases, or the legislative policy underlying the statute.⁵⁵

While the 2018 *Pine Mountain* decision generally rejected the IRS argument that any language in an easement allowing amendment violates the perpetuity provision and, the implication, therefore, that all such easements are “nonperpetual,” that same case, as well as a number of other tax court decisions, have held that some *specific* types of amendments violate the perpetuity requirement. Provisions involved in those cases typically included language allowing changes to the actual boundaries of the property protected by the conservation easement or provisions allowing liberal substitution of development sites (so called movable building areas) within the entirety of the property protected by the conservation easement.⁵⁶

55. *Pine Mountain Pres., LLLP*, 151 T.C. at 54-7 (footnotes and citations omitted).

56. See e.g., *Belk v. Commissioner*, 774 F.3d 221 (4th Cir. 2014) (*Belk III*), affm’g 140 T.C. No. 1 (U.S.T.C. 2013) (*Belk I*) and T.C. Memo. 2013-154 (U.S.T.C. 2013) (*Belk II*); *Balsam Mountain Investments, LLC v. Commissioner*, T.C. Memo 2015-43 (U.S.T.C. 2015); and *Bosque Canyon Ranch, L.P. v. Commissioner*, 867 F.3d 547 (5th Cir. 2017) (*Bosque Canyon II*), vacating and remanding T.C. Memo 2015-130 (U.S.T.C. 2015) (*Bosque Canyon I*) (noting that the Fifth Circuit in *Bosque Canyon II* stated that “common sense” supports the appropriateness of “de minimis” amendments. In an earlier 2000 decision, *Strasburg v. Commissioner*, 79 T.C.M. (CCH), 1697, 2000 Tax Ct. Memo LEXIS 107 (2000), the tax court considered valuation issues related to an original easement grant and a later amendment for which the grantor took an additional charitable gift donation based on the additional restrictions imposed by the amendment. The court presumptively accepted the fact that a conservation

Virtually all conservation easements include language allowing them to be extinguished and the tax code and IRS regulations specifically address the extinguishment question. That contrasts with the absence of wording related to amendments. The IRS has taken the position that both the tax code and Treasury Regulations dictate a judicial proceeding as the only means by which an extinguishment can occur.⁵⁷

IRS regulations recognize that an “unexpected change” in “conditions” may make it “impossible or impractical” to continue to “use” the property for conservation purposes.⁵⁸ In such a situation, those regulations allow the conservation easement to be terminated by judicial extinguishment. The regulations specify that the perpetuity requirement in the tax code and the regulations is not abrogated by this extinguishment clause because the regulations mandate that all of the proceeds from any subsequent sale or exchange of the previously protected property *must* be used by the easement holding organization “in a manner consistent with the conservation purposes of the original contribution.”⁵⁹ And there will be at least some proceeds in the hands of the organization that formerly held the conservation easement because the IRS regulations also state that the former easement holding organization is entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.⁶⁰

The case law is inconsistent in its interpretation of the tax code and regulation language as it relates to the necessity of a judicial process in every easement extinguishment situation. In *Kaufman v. Commissioner*, the tax court stated that “the drafters of [Regulations] section 170A-14 . . . understood that forever is a long time and provided what appears to be a regulatory version of *cy pres* to deal with unexpected changes that make the continued use of the

easement can be amended and that it can impose additional restrictions and potentially create an additional charitable donation deduction. In that case, the IRS apparently did not raise the argument that any amendment violates the perpetuity requirement. The complexity of the interplay between the most recent cases such as *Belk*, *Balsam Mountain*, *Bosque Canyon*, as well as the *Pine Mountain* case, and the potential inconsistencies between the Fifth and Fourth Circuits in reviewing the *Belk* and *Bosque Canyon* tax court decisions is discussed in detail via Nancy McLaughlin); *see also* Nancy McLaughlin & Stephen Small, *Trying Times: Important Lessons to be Learned from Federal Tax Cases Involving Conservation Easement Donations*, ESTATE PLANNING & COMMUNITY PROPERTY LAW J. (March 3, 2017) ssrn.com/abstract=2808234.

57. McLaughlin, *supra* note 56, at 7 (referencing in note 26 an “information letter” from Karin Goldsmith Gross, Senior Technician Reviewer, IRS).

58. Treas. Reg. §1.170A-14(c)(2) (2018).

59. Treas. Reg. §1.170A-14(g)(6)(i) (2018).

60. Treas. Reg. §1.170A-14(g)(6)(ii) (2018).

property for conservation purposes impossible or impractical.”⁶¹ In a footnote, the 2011 *Kaufman* decision states that it is “suggested” by the extinguishment language in the Treasury Regulations that only a judicial proceeding can extinguish a conservation easement but the court was careful to note that it was not imposing a hard and fast rule that a *cy pres* judicial proceeding was the only way to extinguish an easement. In a later case the tax court disallowed a conservation easement donation deduction “because petitioners’ easements may be extinguished by mutual consent of the parties, the easements fail as a matter of law to comply with the enforceability in perpetuity requirements under section 1.170A-14(g), Income Tax Regs.”⁶²

X. PERPETUITY AND THE MORTGAGE SUBORDINATION REQUIREMENT: THE IRS POSITION

The Internal Revenue Code and IRS regulations require that all existing and future mortgages be subordinated to the terms of the conservation easement for the easement donation to qualify as charitable donation.⁶³ As a result, all conservation easements created to take advantage of federal and state tax incentives require mortgages to be subordinated. But the question as to what constitutes a proper “subordination” of a mortgage is not set out in any detail in the tax code or the implementing regulations. Even the 2016 conservation easement audit guide issued by the IRS simply says the following about the subordination requirement:

If the property has a mortgage or lien in effect at the time the easement is recorded, the easement contribution is not deductible unless the mortgagee or lien holder subordinates its rights in the property to the rights of the donee organization to enforce the conservation purposes of the easement in perpetuity.

The subordination agreement must be recorded at the same time that the Deed of Easement is recorded.⁶⁴

The requirement that mortgages be subordinated has been a significant impediment to the donation of many conservation easements. Existing mortgage lenders – especially in many proposed conservation easement donations involving historic preservation easements – have resisted subordinating their

61. *Kaufman v. Comm’r of Internal Revenue*, 136 T.C. 294, 306-307 (2011).

62. *Carpenter v. Comm’r of Internal Revenue*, T.C. Memo 2012-1, 19 (2012); *see also Carpenter v. Comm’r of Internal Revenue*, T.C. Memo 2013-172, 21 (2013) (noting in a subsequent decision in the same case denying reconsideration and supplementing its earlier decision, the tax court was even more direct: “extinguishment by judicial proceeding is mandatory”).

63. Treas. Reg. § 1.170A-14(g)(2) (2018).

64. Dep’t of Treasury, *supra* note 48, at 13 (citations omitted).

mortgage loans to the conservation easements.⁶⁵

In a series of tax court cases, the IRS has challenged the traditional mortgage subordination language in the various model conservation easement documents utilized by land trusts across the United States. The typical mortgage subordination language in thousands of conservation easements is worded similarly to the following language from the model conservation easement in the 1988 first edition of *The Conservation Easement Handbook* published by the Land Trust Alliance:

At the time of conveyance of this Easement, the Property is subject to the mortgage identified in Exhibit [C or D] attached hereto and incorporated by this reference, the holder of which has agreed by separate instrument, which will be recorded immediately after this Easement, to subordinate its rights in the Property to this Easement to the extent necessary to permit the Grantee to enforce the purpose of the Easement in perpetuity and to prevent any modification or extinguishment of this Easement by the exercise of any rights of the mortgage holder. The priority of the existing mortgage with respect to any valid claim on the part of the existing mortgage holder to the proceeds of any sale, condemnation proceedings, or insurance or to the leases, rents, and profits of the Property shall not be affected thereby, and any lien that may be created by Grantee's exercise of any of its rights under this Easement shall be junior to the existing mortgage. Upon request, Grantee agrees to subordinate its rights under this Easement to the rights of any future mortgage holders or beneficiaries of deeds of trust to the proceeds, leases, rents, and profits described above and likewise to subordinate its rights under any lien and to execute any documents required with respect to such subordination, except that the priority of any lien created by Grantee's exercise of any of its rights under this Easement prior to the creation of a mortgage or deed of trust shall not be affected thereby, nor shall this Easement be subordinated in any other respect.⁶⁶

The IRS challenges have been generally based on one or more of the following arguments:

- Language in an easement providing that the right of the mortgage lender to foreclose on a delinquent loan is subordinate to the rights of the easement holder and the lender cannot extinguish the conservation easement in a foreclosure action does not satisfy the subordination requirement. All rights of the mortgage lender must be subordinated to the rights of the easement holder.
- Language in an easement providing, in the event of an extinguishment of an easement by casualty or condemnation, that a mortgage lender has “priority” to the proceeds from the extinguishment equal to the amount of the

65. *Mortgage Subordination*, PENN. LAND TRUST (last accessed July 10, 2019), conservationtools.org/guides/55-mortgage-subordination.

66. Dhiel & Barrett, *supra* note 44.

outstanding mortgage balance over any rights of the easement holder to the proceeds does not meet the requirement that the easement be granted in perpetuity. In effect, the IRS argues, such language merely gives the holder of the easement a “contractual claim” against the property owner rather than an actual legal “right” to the proceeds as required by the tax code.

- It is not enough for the conservation easement community or the holder of a conservation easement to demonstrate that the likelihood of a foreclosure – either in general or as to a particular property -- is so remote as to be negligible.⁶⁷

Although the tax court in a series of decisions has generally accepted the IRS position, at least one federal court of appeals has rejected the IRS argument. In two *Kaufman v. Commissioner* decisions⁶⁸ as well as in the first of two *Palmolive Building Investors v. Commissioner* decisions,⁶⁹ the tax court held that easement language giving priority to the mortgage holder in any extinguishment proceeding did not satisfy the perpetuity requirement. The First Circuit Court of Appeals reversed the portion of the *Kaufman* tax court decision related to extinguishment language and the perpetuity requirement. The appellate court held that it was sufficient under the perpetuity requirement for the easement holder to have a contractual claim rather than a legal right to the proceeds.⁷⁰

XI. THE PERPETUITY REQUIREMENT, AMENDMENTS, EXTINGUISHMENT AND MORTGAGES: THE LAND TRUST MOVEMENT RESPONSE TO THE CRITICS AND TO IRS CHALLENGES TO EASEMENT DONATIONS

Proponents of conservation easements argue that the silence in the tax code and regulations related to amendments presumably means the charitable donation provisions allow amendments to conservation easements that are consistent with the original conservation purpose. The Land Trust Alliance in its 2017 booklet entitled *Amending Conservation Easements: Evolving Practices and Legal Principles* says the following about the necessity of inferring an amendatory power:

67. Treas. Reg. at § 1.170A-14(g)(3) (2018) (stating that events that are “so remote as to be negligible” as of the date of the charitable donation do not have to be taken into account at the time of the donation when considering whether the donation meets the perpetuity requirement).

68. *Kaufman v. Comm’r of Internal Revenue*, 134 T.C. 182 (2010); *Kaufman v. Comm’r of Internal Revenue*, 136 T.C. 294 (2011).

69. *Palmolive Bldg. Inv’rs v. Comm’r of Internal Revenue*, 149 T.C. No. 380 (2017).

70. *Kaufman v. Comm’r of Internal Revenue*, 687 F.3d. 21, 26-7 (1st Cir. 2012).

[A] land trust has legal and ethical responsibilities to ensure perpetual protection of its easements. How, then, is it possible to contemplate amending “perpetual” conservation easements?

The occasional need to amend an easement is rooted in our inability to predict all of the circumstances that may arise in the future. Any decision to amend (or not to amend) a conservation easement must serve public interests by ensuring that conservation easements not only endure but are also robust, enforceable and fair, both to the public and to the landowners. The concept of amendment recognizes that neither original grantors nor land trusts are infallible, that natural forces can transform a landscape in a moment or over a century and that amendments can strengthen protections as well as weaken them. Exceptional circumstances sometimes warrant amendments, and a land trust should be prepared for that possibility while also remaining vigilant in protecting an easement’s purposes and restrictions forever.⁷¹

Some notable conservation law commentators have also challenged the narrow interpretation by the IRS and some courts that amendments can only be accomplished through a judicial *cy pres* proceeding. For example, a 2007 article in the *Ecology Law Quarterly* concedes that substantial amendments that “deviate from the stated purpose of the easement” may require “court approval in a *cy pres* proceeding.”⁷² However, the article also argues that “amendments that are consistent with the purposes of a perpetual conservation easement would not require court approval in a *cy pres* proceeding” and “the holder of a perpetual conservation easement should be deemed to have the implied power to simply agree to amendments that are necessary or appropriate to carrying out the purpose of the easement and are not forbidden by its terms, such as amendments that clarify vague language, correct a drafting error, increase the level of protection of the encumbered property, or add additional acreage to the easement.”⁷³

Another commentator notes that at best “the [legal] ability of land trusts to alter or release conservation easements is unsettled because few courts have considered the issue.”⁷⁴

But what if the “extinguishment” is only “partial” and not a total termination of the easement? What if only some elements of the conservation easement are “extinguished”? The land trust movement would characterize that as an amendment rather than an “extinguishment” contrary to the Internal Revenue Service characterization of any amendment as a partial “extinguishment.”

However, the Land Trust Alliance has recognized that “in

71. LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 3 (2d. ed. 2017).

72. McLaughlin, *supra* note 43, at 681.

73. *Id.* at 27.

74. Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 12, 160 (2011).

certain contexts, it can be difficult to distinguish between an amendment and a partial termination.”⁷⁵ It has offered the following differentiation between full or partial terminations and amendments.

[A] full termination occurs when a conservation easement has been completely terminated or extinguished. A partial termination occurs when a geographic portion of the easement’s protected property has been removed from the easement. Often a partial termination is accompanied by other changes to the easement, such as the addition of new property or strengthening of the easement’s restrictions. These instances are treated as both partial terminations and amendments.⁷⁶

The IRS position and that of some courts that both the tax code and Treasury Regulations dictate a judicial proceeding as the only means by which an extinguishment can occur⁷⁷ is directly contrary to the position of many conservation law commentators and land trusts. Those IRS critics emphasize that the language in the regulations states only that conservation easements “can” be extinguished by a judicial proceeding but does not say they can “only be” or “must be” extinguished exclusively by means of a judicial proceeding. For example, a 2012 article in the *Harvard Environmental Law Review* says the language in the Treasury Regulations on extinguishment can be “read to imply a broader range of possibilities, with the judicial process interpreted as a ‘safe harbor’ or one option that ‘can’ be used in termination to ensure compliance with the Code and Regulations.”⁷⁸

Some critics of conservation easements argue that language in the typical conservation easement makes amendments for even non-conservation purposes too easy and many land trusts have abused the opportunity to amend and used it as an excuse for failing to properly monitor and enforce their easements. A 2011 *Stanford Environmental Law Journal* article notes the “tricky line to walk” between amendments that respond to “legitimate changes in societal and ecological needs” and amendments “outside of the

75. LAND TRUST ALLIANCE, *supra* note 71, at 171.

76. *Id.*

77. McLaughlin, *supra* note 56, at 7 (referencing and citing in note 26 an “information letter” from Karin Goldsmith Gross, Senior Technician Reviewer, IRS).

78. Jay, *supra* note 45 (highlighting that the article also cites to a 2011 commentary to the Model Montana Conservation Easement Amendment Policy stating that the “plain language of the Regulation does not mandate termination or reformation by the courts if the conservation purposes have become impossible or impractical to accomplish”); *see generally* Andrew C. Dana, *Commentary to the Model Montana Conservation Easement Amendment Policy* 19 (2011); *see also* Ann Taylor Sewhing, *Perpetuity is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENT’L. L. REV. 217 (2013) (providing a counter argument).

public eye” that “confer solely private benefits.”⁷⁹ The article claims that “examples of land trusts modifying conservation easements are plentiful” but cites only three examples.⁸⁰ The article also contends that land trusts also amend easements when they discover violations of the provisions in the easement after the fact:

Land trusts periodically discover landowner (or neighbor) violations of conservation easement terms. Often these violations occur because a landowner did not fully understand or know about the conservation easement terms. Where the landowner has violated the building envelope requirements or improperly removed trees, for example, land trusts face a quandary of how to proceed. Land trusts may not deem such violations worthy of legal action or may consider restoration of the property too onerous. Or they may obtain some other conservation benefit (or funds for conservation) from the landowner as compensation for the violation. Therefore, the conservation easement holder may agree to modify the conservation easement to align with the current state of the property or negotiate a settlement regarding payment of damages.⁸¹

The article cites only one example, however, in Sonoma County, California, to support its claim that amendments in response to violations are a significant occurrence among conservation easement holders.

Critics of conservation easements, principally the IRS, also argue that the vagueness in the mortgage subordination requirements in the Treasury Regulations combined with creative draftsmanship by conservation easement grantors and grantees has, in effect, increased the likelihood of extinguishment of easements by foreclosure and means those easements are not, in fact, granted in perpetuity. However, there appear to have been no studies done to date to determine whether, and to what extent, mortgage lenders may have, in fact, foreclosed on properties with conservation easements and subsequently eliminated the easement protections.

Critics of the land trust movement who favor land use regulation rather than conservation easements are concerned that many easement holding organizations will last into “perpetuity” or even have sufficient financial resources or strength of commitment to their existing easements to incur the burdens of future enforcement. Even the land trust movement itself acknowledges the legitimacy of these concerns. A 2005 survey of its member organizations by the Land Trust Alliance discovered the following: “Respondents indicated that the top threats to conservation durability are that their land trust would be unable to steward or uphold their easements or would simply cease to exist.”⁸²

79. Owley, *supra* note 74, at 155.

80. *Id.*

81. *Id.* at 157.

82. Pidot, *supra* note 21.

Does the actual history of the conservation easement movement in the United States since the 1980s support the critics' contentions? That question has been addressed by the Land Trust Alliance. Between 2012 and 2015, it commissioned various studies to determine the number of amendments and terminations. As of those dates there were more than 20,300 land trusts in the United States. One independent researcher retained by the Land Trust Alliance studied IRS Form 990 filings during the years 2010 and 2011.⁸³ It found that less than one percent (0.6%) of all easements were amended per year.⁸⁴ In 2014, the Land Trust Alliance published the results of its own member survey to determine the number and frequency of easement amendments and terminations. The 616 Land Trust Alliance members who responded to the survey held a total of 33,667 easements.⁸⁵ In 2015, only 217 amendments were reported, a figure that is again less than one percent of the easements held by the reporting land trusts. Based on the two sets of data, the Land Trust Alliance has concluded that "roughly one in every 155 conservation easement deeds is amended in a typical year."⁸⁶

Questions in the Land Trust Alliance survey also addressed the reasons for the amendments. As reported by the Alliance, about seventy-five percent of all deed amendments were for the following five reasons: correcting errors (twenty-four percent); adding acreage to the protected area (twenty percent); adding language to strengthen the easement protections (twelve percent); eliminating reserved rights (eleven percent); and adding clarification to "ambiguous terms" or "updating old provisions" (ten percent).⁸⁷ The Alliance also reported that "only a tiny fraction of the amendments, about two percent, were attributed to categories that suggested even the potential for a less than neutral impact to protected conservation values ('reducing restrictions' and 'expanding a

83. RODDEWIG, *supra* note 1 (as discussed earlier in this article, since 2008, tax exempt 501(c)(3) organizations have been required to include information about easement amendments on that form).

84. *Results of Land Trust Alliance Research and Survey on Easement Modification and Termination*, LAND TRUST ALLIANCE (Dec. 2014), www.s3.amazonaws.com/landtrustalliance.org/publication/files/ResearchResults.pdf.

85. *Letter to Karin Gross*, *supra* note 47 (noting that this represented more than 72% of the 847 land trusts that are members of the Land Trust Alliance); *Results of Land Trust Alliance Research and Survey on Easement Modification and Termination*, *supra* note 84, at 9 (stating "[s]urvey respondents reported holding 27,538 easements totaling 9,266,084 acres. If we apply the 2010 Land Trust Census data to these numbers, these figures would represent 65 percent of the total easements held by land trusts and 83 percent of all acres conserved under easement").

86. *Results of Land Trust Alliance Research and Survey on Easement Modification and Termination*, *supra* note 84, at 14.

87. *Id.*

reserved right’).”⁸⁸ That later number of possible non-conservation oriented amendments represented less than 0.0013 percent of all easements.

The survey also inquired about denial of amendment requests and found that since 2006, land trusts reported declining 164 requests for amendment. That indicates that twenty-seven percent of amendment requests have been denied and the eighty-eight percent of the denials were because the amendment would either “diminish the conservation purpose” or create a private (not public) benefit.⁸⁹

The frequency and number of terminations was also covered in the survey. The trusts participating in the survey reported a total of only “35 easements released in whole and 155 easements released in part” representing a total acreage affected of 4,602 acres, or less than one half of one percent of the more than 9.2 million acres in easement protected property held by the responders to the survey.⁹⁰

A 2015 follow-up survey inquired into the reasons for the amendments and terminations. Half of the termination events investigated in the follow-up survey involved “swap amendments” in which the conservation easement on some portion of the protected land is terminated in exchange for adding additional land to the protected acreage.⁹¹ The attorney undertaking the follow-up survey could identify only two terminations that appeared to be “controversial” and only one of those two involved a situation in which the land trust appeared to have terminated the easement rather than face expensive litigation.⁹²

In a January 2017 letter to the Internal Revenue Service, the Land Trust Alliance outlined the results of its research and reported that it “demonstrates that, generally, conservation easement deed amendments rarely occur, and when a deed amendment is executed, it is necessary to address the particular facts and circumstances and almost entirely to strengthen or to be neutral to the easement’s conservation values.”⁹³ According to the Alliance, more than three-quarters of the amendments had “no detrimental effect and often had a beneficial impact on conservation values – they corrected drafting errors, added land, added new restrictions or clarified language in easement deeds.” The remaining twenty-five percent of the amendments “involved court-ordered resolutions of disputes, neutral exchanges often of exacted easements or trail easements or

88. *Id.* at 15.

89. *Results of Land Trust Alliance Research and Survey on Easement Modification and Termination*, *supra* note 84, at 15-6.

90. *Id.* at 27.

91. *Kumar v. Comm’r of Internal Revenue*, T.C. Memo 2013-184; *see also* Robert H. Levin, *Follow-Up Research Report on Terminations and Amendments*, LAND TRUST ALLIANCE (Aug. 2015), www.tlc.lta.org/topclass/topclass.do?expand-CatalogBrowse&catId=0.

92. *Id.* at 8.

93. Letter to Karin Gross, *supra* note 47, at 12.

exchanges for fee simple property, all of which were necessary and resulted in the best possible result for conservation.”⁹⁴

XII. CONCLUSION: PERPETUITY PROVISIONS IN PROPER PERSPECTIVE

The three players (the Internal Revenue Service, the land trust movement, and an informal group composed of legal commentator critics) in the perpetuity issue debate present fundamentally different points of view about the implications and consequences of the growth in the amount of land protected by conservation easements held by land trusts over the past forty years.

The IRS view since 2005 is that there has been a pattern of abuse of the charitable donation rules in the conservation easement realm. It has applied a strict interpretation of the “in perpetuity” requirement and the “conservation purposes” test in the tax code and regulations. Part of its strategy is to challenge traditional easement language allowing future changes or amendments as well as the typical mortgage subordination language. There is a specific process for amendment or termination which should almost always only be done through a judicial proceeding and for only a very limited set of reasons. The IRS fears, or so it says, that opening the door to easy easement amendment will thwart the goal of Congress in adding the conservation easement deduction to the tax code, that is, to assure that the conservation values of the protected lands will be protected forever and benefit future generations.

However, it is also concerned about the Treasury revenue lost through inappropriate conservation easement donations and overvaluation of their value. In 2017 the IRS issued a notice announcing an investigation of promoters syndicating conservation easement donations.⁹⁵ In 2018, as part of that investigation, it filed a complaint against five persons and one investment entity alleging that just those six parties alone were involved in ninety-six conservation easement “syndication schemes” that “resulted in over \$2 billion of federal tax deductions (in the form of noncash charitable contribution deductions).”⁹⁶ In March of 2019, the Senate Finance Committee launched its own investigation into syndicated conservation easements. The press release announcing the Senate investigation stated the cost of abusive syndications to the federal government has been “billions of dollars in revenues” and that a

94. *Id.*

95. Dep’t of Treasury, Listing Notice – Syndicated Conservation Easement Transactions, Internal Revenue Service (last accessed Aug. 18, 2019), www.irs.gov/pub/irs-drop/n-17-10.pdf (highlighting that “Notice 2017-10” made the public aware that syndications of conservation easements would now be considered listed transactions for purposes of § 1.6011-4(b)(2) of the Treasury Regulations and §§ 6111 and 6112 of the Internal Revenue Code).

96. *U.S. v. Nancy Zak, et al.*, 1:2018-cv-05774, ¶ 5 (N.D. Ga. 2019).

Brookings Institution study found \$3 billion in lost revenue in 2014 alone.⁹⁷

The land trust movement point of view is that the typical conservation easement language (including the language related to amendments and mortgage subordination) is in compliance with that rule. It says the IRS should be more flexible in its interpretation of the perpetuity requirement. It also believes there are only a few bad actors among the more than 1,000 land trusts established across the country. Although the land trust community itself is capable of self-enforcement to assure that the conservation purposes behind the charitable donation provisions for conservation easements are assured into the future, it has asked for IRS assistance in ferreting out abusive conservation easement syndications and the rogue land trusts created to support the syndicators.⁹⁸

The critics of the conservation easement movement that have emerged since the turn of the twenty-first century have a point of view fundamentally different from either the IRS position or the land trust position. Requiring perpetuity and drafting conservation easements to assure conservation purposes in perpetuity is misguided governmental policy. The “in perpetuity” requirement (at least for qualified conservation restrictions under the Internal Revenue Code) creates inherent conflicts with state and local land use planning and development codes. It transfers to private landowners and land trusts the governmental authority to regulate the land development process. The critics argue that is counter to the democratic process and creates fundamental issues of fairness and equity.

The perpetuity requirement in current tax law, the critics contend, creates inevitable future problems. Conservation easement holding land trusts will either lack the funds or the commitment to enforce the protections in their conservation easements as the decades go on. The perpetuity requirement locks in forever our current thoughts about what should be conserved and how it should be conserved. Those critics fear that amending conservation easements to incorporate future advances in

97. U.S. Senate, *Grassley, Wyden Launch Probe of Conservation Tax Benefit Abuse*, SEN. FIN. COMM. (Mar. 27, 2019), www.finance.senate.gov/www.irs.gov/pub/irs-drop/n-17-10.pdf chairmans-news/grassley-wyden-launch-probe-of-conservation-tax-benefit-abuse; see also Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INST. (Dec. 20, 2017), www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/.

98. Peter Elkind, *The Billion-Dollar Loophole*, PROPUBLICA (Dec. 20, 2017), propublica.org/article/conservation-easements-the-billion-dollar-loophole (referring to the inability to stop syndicators through “moral suasion, the [Land Trust] Alliance has increasingly prodded the IRS to take action”).

environmental science or to respond to climate change and its effects on local ecological systems will be difficult or impossible. The conservation purposes locked into perpetual conservation easements granted decades earlier will block appropriate governmental response to future environmental crises. As a result, the critics argue, something should be done to eliminate or modify the federal tax code requirement that conservation easements be granted in perpetuity or, at a minimum, create some incentive for conservation easements of shorter duration than perpetuity.

The critics raise an even more fundamental policy issue. The goal of protecting critical environmental habitats and natural resource or conservation areas is better left to governmental regulation or to legislative funding of direct acquisition of conservation easements (or fee interests) in lands that are clearly identified as meeting publicly identified land conservation goals.

There is an element of truth in each of the divergent points of view. The IRS is right that the tax code provisions related to conservation easement require the grant to be in perpetuity and those provisions are silent about how to amend an easement. However, in its challenges to the typical easement amendment and mortgage subordination language it has let its mission to ferret out alleged abuses in conservation easement programs overshadow other goals of the conservation provisions in the tax code. However, as has been made clear by the recent complaint the IRS filed against promoters of syndicated conservation easements and by the launching of the Senate Finance Committee investigation into easement syndications, there have been abuses in the use of conservation easements.

However, the survey research conducted by the Land Trust Alliance clearly shows that any abuses related to amendments and extinguishments of conservation easements have been extremely limited. And the amendments or terminations that have occurred, have, with few exceptions, been done for legitimate conservation purposes.

The land trust survey research also demonstrates that the critics have been wrong, at least so far, in their belief that there will be an inevitable failure in the financial ability and institutional will of land trusts to monitor and enforce their conservation easements. The land trust movement has more than forty years of experience in monitoring and enforcing easements and land trusts now enforce more than 33,000 conservation easements across the United States. The Land Trust Alliance survey could only find thirty-five easements released in total and another 155 easements released in part affecting a total acreage of only 4,602 acres, or less than one half of one percent of the more than 9.2 million acres protected by easements held by survey respondents. With the establishment of the Land Trust Alliance Accreditation Commission, the movement has a mechanism to ensure that land trusts continue in the future

to have the resources and will to properly monitor and enforce their easements.

And there is little or no evidence to date to support the critics' fear that permanence itself is the problem. The evidence to date from the last forty years indicates that permanent conservation easements do not negate our ability to respond to future changes in the nation's conservation goals in response to changes in ecological conditions. Despite IRS challenges to the right to amend, the land trust movement has shown an ability to respond to changing needs due in part to the manner in which conservation easements are written. Language in the typical conservation easement allows the land trust holding the easement to respond to changing ecological concerns with appropriate actions.

Perhaps the results of the Land Trust Alliance survey will convince the IRS that its focus on strict interpretation of the perpetuity requirement is misplaced and is not the right place to be focusing its efforts to monitor the use of the conservation easement provisions in the tax code. While focused on amendments and terminations, the IRS, in a time of more limited staff resources, could not quickly turn its attention to the sudden surge in promotion of syndicated conservation easement investments.⁹⁹ The land trust movement has shown its willingness to work with the IRS on more important issues such as abusive syndications which jeopardize Congressional support for continuing the charitable donation deduction for conservation easements. In a 2015 statement, the Land Trust Alliance agreed that "syndications involving the allocation of tax deductions deserve close scrutiny" and that such abusive syndications based on "inflated easement appraisals can undermine the viability of the tax benefits for conservation easements and the credibility of the voluntary land conservation effort."¹⁰⁰ The IRS appears to recognize that the land trust movement may be its best ally in combating the more pressing problem of syndication and over-valuation of charitable donations of conservation easements.¹⁰¹ The land trust community has rallied to support H.R. 4459, the Charitable Conservation Easement Program Integrity Act of 2017, a bill backed by the Treasury Department that "would eliminate the ability of partnership investors to profit from the donation of a conservation easement on

99. *Id.* "The speed at which the syndications have increased has left the resource-starved agency looking like a befuddled mall cop lurching off his chair and trying to figure out which of the dozen teenagers simultaneously grabbing candy bars to chase down." *Id.*

100. Timothy Lindstrom, *The Syndication of Conservation Easement Tax Deductions*, LAND TRUST ALLIANCE (Summer 2015), www.landtrustalliance.org/news/syndication-conservation-easement-tax-deductions.

101. *Id.* "The IRS has asked that land trusts use common sense in questioning appraisals that seem inflated and that land trusts help landowners avoid substantially overstating the value of their donations." *Id.*

land held for a short period of time.”¹⁰²

Finally, there is the critics’ contention that conservation easements are a “haphazard piecemeal”¹⁰³ tool that interfere, or are actually contrary, to “smart growth” programs and policies of state and local governments, and are fundamentally undemocratic. The critics make this contention about interference without citing any specific evidence to support it. In fact, many land trusts, especially some of the largest national and statewide land trusts, work quite closely with units of state and local government to promote adopted conservation programs and policies. A review of the websites of any of these larger land trusts indicates how frequently they work with units of state or local government to implement comprehensive conservation strategies.¹⁰⁴

The contention that conservation easements are inherently “undemocratic” is simply not true. The opportunity for landowners to take a charitable donation for the deduction of a conservation easement is the result of changes to the income tax code enacted by Congress in the period between 1976 and 1980. Charitable donation deductions for conservation easements are no more undemocratic than any other tax incentive enshrined in the Internal Revenue Code that provides a tax deduction or a tax advantage to promote a legitimate governmental purpose. Congress over the years has monitored the conservation easement incentive and periodically held hearings to consider its effectiveness and its potential for abuse. The programs of local land trusts have widespread public support. If the public begins to change its support and believe that the current charitable deduction for the donation of conservation easements is bad public policy, its representatives in Congress can modify or eliminate that provision of the tax code.

102. *Conservation Community Joins Land Trust Alliance in Endorsing Legislation to Curb Syndication Abuse*, LAND TRUST ALLIANCE (Dec. 13, 2017), landtrustalliance.org/conservation-community-joins-land-trust-alliance-endorsing-legislation-curb-syndication-abuse.

103. Owley, *supra* note 74, at 170. “One particular concern associated with conservation easements is their haphazard, piecemeal nature. Preserving land through scattered private agreements leaves key ecological areas underprotected. Such a strategy fails to ensure the availability of important ecological features, such as corridors, while increasing edge habitat.” *Id.*

104. *See, e.g.*, the various stories on The Nature Conservancy website about its cooperative programs in Virginia working with units of federal, state and local government. Among the initiatives discussed are the Southern Tip Partnership in Accomack and Northampton counties, and a partnership with the U.S. Fish and Wildlife Service to add property to the Eastern Shore of Virginia National Wildlife Refuge and help develop the Cape Charles Bike and Hike Trail. *See* Virginia Coast Reserve: Land Protection, NATURE CONSERVATORY (last accessed Aug. 18, 2019), www.nature.org/en-us/about-us/where-we-work/united-states/virginia/stories-in-virginia/vcr-land-protection-overview/ (noting that there are dozens of similar stories on The Nature Conservancy website as well as the websites of dozens of other land trusts).

