

# CONSERVATION EASEMENT REFORM: AS MAINE GOES SHOULD THE NATION FOLLOW?

JEFF PIDOT\*

[S]ome dark omens cloud the future of the [land trust] movement and, absent some changes in the legal structures that support it, time may erode the happy congruity between public and private at the cost of the environment and the public good. The legal community associated with the land trust movement should address these potential problems.<sup>1</sup>

Governing with a view to “conservation-easement-time” requires many elements including laws addressing transferring, amending, and extinguishing easements. More fundamentally, though, it requires systems to track conservation easements’ terms, holders, and locations.<sup>2</sup>

Not everything is the public’s business. This is a private transaction . . . . Not everything needs to be run by the government. That’s why land trusts exist. . . . There is great land conservation and stewardship going on. Leave it alone.<sup>3</sup>

## I

### INTRODUCTION

Six years ago, the Lincoln Institute of Land Policy published *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform (Reinventing Conservation Easements)*.<sup>4</sup> The work questioned the sufficiency of

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\* The author retired in 2007 from a career at the Maine Attorney General’s office, where he served as chief of the Natural Resources Division. His experience with conservation easements spans three decades of working with state government and local land trusts in Maine. During 2004–2005, he was a Visiting Fellow at the Lincoln Institute of Land Policy.

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1. Frederico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1078 (1996).

2. Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1242 (2009).

3. *Id.* at 1265 (quoting a land-trust representative).

4. JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (Lincoln Inst. of Land Policy 2005).

laws supporting conservation easements as today's land-conservation paradigm in America.

In 2007, Maine addressed many of the issues raised in *Reinventing Conservation Easements* by enacting the first, and to date the only, comprehensive conservation easement reform law in the nation (Reform Law).<sup>5</sup> This article explores how the Reform Law has worked and whether it makes sense as a model for other states in response to weaknesses in their enabling laws. After setting the contextual stage, this article tells the story of how the Reform Law came into being in Maine, which has more land under conservation easement than any other state. This article then examines significant provisions of the Reform Law and describes how, since its enactment, these provisions are perceived by a number of those most actively involved. The article concludes with suggestions for improvements in the law, including potential lessons for other states.

## II

### THE CONSERVATION EASEMENT PHENOMENON

Conservation easements eclipse all other land-conservation tools in America today. Founded upon enabling laws in virtually all of the states, underwritten by tax subsidies and public-financing programs, and promoted by the nation's thousands of land trusts and government holders, conservation easements have exploded onto the landscape. For better *and* for worse, conservation easements have displaced both public land acquisition and government regulation as the darling of the land-conservation movement.<sup>6</sup>

Currently there is no systematic method of accounting for all the conservation easements held by national, state, and local governments, and land trusts. In 2005, the most recent census as of this writing, the Land Trust Alliance (LTA) reported that in the previous five-year period the number of local and regional land trusts had increased nearly a third to over 1600,<sup>7</sup> while their reported conservation easement holdings had increased nearly 150% to over 6 million acres.<sup>8</sup> With the number of easements having inclined almost 2500% over two decades,<sup>9</sup> charts depicting this growth closely resemble exponential curves. Even these figures significantly understate reality, for they do not include several million acres of easements held by national groups such as The

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5. Act of June 25, 2007, ch. 412, 2007 Me. Laws 1114 (codified at ME. REV. STAT. ANN. tit. 33, §§ 476–479-C (Supp. 2010)).

6. See generally John Echeverria & Jeff Pidot, *Drawing the Line: Striking a Principled Balance Between Regulating and Paying to Protect the Land*, 39 ENVTL. L. REP. 10,868 (2009).

7. LAND TRUST ALLIANCE, 2005 LAND TRUST CENSUS REPORT 3 (2006). At this writing, LTA is preparing a new census to be published in 2011.

8. *Id.* at 5.

9. Ronald Zumbrun, *The Uses and Abuses of Conservation Easements*, DAILY RECORDER, June 11, 2007, at 3.

Nature Conservancy (TNC), or untold millions held by federal, state, and local governments.<sup>10</sup>

### III

#### THE LEGAL CONTEXT AROUND THE COUNTRY

Starting more than fifty years ago with California, New York, Massachusetts, and Maryland, virtually all states have now enacted conservation easement enabling laws.<sup>11</sup> Although state variations abound, many of these laws are based upon the Uniform Conservation Easement Act (UCEA), adopted in 1981 by the National Conference of Commissioners on Uniform State Laws.<sup>12</sup>

Despite this proliferation, very few state enabling laws explicitly deal with conservation easement content, structure, amendment, termination, or other issues discussed in this article.<sup>13</sup> Most of these laws were envisioned at a time when no one anticipated the explosive growth of this land-conservation tool and the wealth of issues it has spawned.

In addition to state enabling laws, federal tax law provides guidance for certain aspects of donated conservation easements that result in a tax deduction. Section 170(h) of the Internal Revenue Code and associated U.S. Department of the Treasury regulations provide that such easements must be “a qualified property interest” that is “granted in perpetuity” and given to a “qualified organization exclusively for conservation purposes”; each of these terms is the subject of nuanced requirements.<sup>14</sup> However, tax law is not currently designed to provide comprehensive standards for conservation easements or their holders, and has no applicability to wholly purchased or other nondeductible easements.

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10. LTA’s President has stated that there are 50,000 conservation easements held just by local governments in New Jersey, far eclipsing the number of easements held by land trusts nationwide. Rand Wentworth, President’s Column, *Conservation Easements at Risk*, EXCHANGE, Summer 2005, at 3.

11. ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES 7 (2010).

12. *Id.* at 6.

13. Outside of state enabling statutes, there are other sources of law, not specific to conservation easements, that may govern their use and administration, including laws involving the following: federal and state tax subsidies, other public funding programs, nonprofit and tax-exempt organizations, charitable gifts and trusts, real property, land-use regulation, eminent domain, and marketable-title requirements. *Id.*

14. Treas. Reg. § 1.170A-14 (as amended in 2009). See Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part I: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010).

## IV

## THE PUBLIC STAKE IN CONSERVATION EASEMENTS

Conservation easements often involve private transactions between landowners and land trusts, so it is reasonable to initially question the legitimacy of the public's interest in their utilization and durability. By one measure, the public stake derives from the fact that virtually all conservation easements constitute public investments.<sup>15</sup> Federal (and increasingly state) tax laws<sup>16</sup> and direct-financing programs provide substantially unaccounted for billions of dollars of public subsidies for easements.<sup>17</sup> The public is rightfully interested in knowing that its financial stake yields durable public benefits. Beyond the financial investment, there is a public stake manifested in the state enabling laws that authorize conservation easements in derogation of common law for public conservation purposes.

The public also has a vital interest in the long-term welfare of communities, landscapes, and wildlife habitats that conservation easements are intended to protect. Yet easements deliver little public benefit in the present; they represent promises to be kept in the indefinite future. Fulfilling these promises requires that easements permanently protect land with public conservation values and that land trusts and other easement holders have the capacity, resolve, and obligation to monitor and enforce conservation easements in perpetuity.

Conservation easements are not an asset of the holder so much as a permanent liability, due to their everlasting costs of monitoring and enforcement. TNC, the world's largest private easement holder, has said, "Conservation Easements are a permanent obligation not only for the landowners, but also for the easement holder, since it may not be easy to convey easements, and their responsibilities for monitoring and enforcement, to other organizations."<sup>18</sup> For these reasons, in recent years commentators have trended away from blind enthusiasm for conservation easements to a more thoughtfully critical attitude.<sup>19</sup> According to an LTA survey, even land-trust representatives harbor fears that their institutions will be unable to uphold the responsibilities entrusted to them by easement donors and the public.<sup>20</sup>

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15. Conservation easements fall into one or more of the following categories of public investment: (1) financed directly with public money; (2) offered as public mitigation to offset adverse impacts of regulated development; or (3) subsidized as charitable donations to a tax-exempt organization, either of the easement itself or of the money that pays for it.

16. Federal tax subsidies of donated conservation easements include deductions from income taxes as well as exclusions and credits from estate taxes. In a growing number of states, additional tax credits are provided. In some cases, the availability of both federal and state tax subsidies can result in financial benefits for donating easements that approach what would be realized if sold.

17. Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 145–46 (2010).

18. THE NATURE CONSERVANCY, FINAL REPORT: CONSERVATION EASEMENT WORKING GROUP 2 (Apr. 29, 2004).

19. Bray, *supra* note 17, at 137.

20. An LTA survey of land-trust representatives revealed that more than eighty percent considered it likely that some of their holdings will not be protected in one century. Respondents stated

Despite the public investment and interest in conservation easements, few states have enabling statutes that provide for easement registration, tracking, uniformity, holder credentialing, monitoring, planning, termination, amendment, backup enforcement, public transparency, or accountability. The secrecy that cloaks most conservation easement transactions may provide short-term allure to landowners and land trusts whose arrangements are free of public oversight or transparency. However, this opacity does not serve the durability of easements or the interests of the public over the long term.

In short, without sufficient legal mechanisms to govern conservation easements, future generations may not thank us for an unmanageable legacy of untold thousands of easements whose terms, holders, and locations may be difficult to determine, and whose public benefits ultimately could be lost. The need for legal reform is readily apparent to those willing to look.

## V

### THE MAINE CONTEXT

Maine has an unrivaled concentration of land trusts for its population and of conservation easement lands for any population. Despite its abundance of natural wonders, Maine's cultural and legal tradition is strongly aligned with private land ownership, with more than ninety percent of the State's land held privately.<sup>21</sup> Even Maine's two major parks, Acadia National Park and Baxter State Park, are substantially the product of private land acquisition and philanthropy.<sup>22</sup>

Compensating for its relative lack of public land, and perhaps contributing to it, conservation easements in Maine cover some 2 million acres, ten percent of the state's land area, with hundreds of thousands more likely on their way in the foreseeable future.<sup>23</sup> Maine has the largest conservation easement ever, covering more than three-quarters of a million acres. For a state of little more

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that the top threats to the durability of their conservation easements are that the land trust would be unable to steward or uphold them or would simply go out of existence. Responses to Land Trust Alliance survey conducted from December 2, 2004 to January 14, 2005 (on file with author). PIDOT, *supra* note 4, at 18.

21. MIKE LEVERT, ME. STATE PLANNING OFFICE FOR GOVERNOR'S COUNCIL ON ME.'S QUALITY OF PLACE, PUBLIC ACCESS TO MAINE'S PRIVATE LANDS: A CULTURAL AND ECONOMIC ASSET 3 (2008), available at <http://www.maine.gov/spo/specialprojects/qualityofplace/documents/publicaccesstomainesprivatelands.pdf>.

22. *Brief History of Our Park*, Baxter State Park, <http://www.baxterstateparkauthority.com/about/aboutHistory.html> (last visited May 7, 2011); *George B. Dorr*, Nat'l Park Serv., <http://www.nps.gov/acad/historyculture/george-b-dorr.htm> (last visited May 7, 2011) (discussing the history of Acadia National Park).

23. Interview with Tim Glidden, Me. State Planning Office (July 19, 2010); E-mail from Tim Glidden, Me. State Planning Office (July 19, 2010, July 20, 2010, and Oct. 12, 2010) (on file with author).

than a million people, Maine has an extraordinary 100 local land trusts,<sup>24</sup> roughly half of which have no paid staff.<sup>25</sup>

## VI

### A BRIEF HISTORY OF MAINE'S REFORM LAW

Maine's first conservation easement enabling law, enacted in 1969,<sup>26</sup> was replaced by a version of the Uniform Conservation Easement Enabling Act in 1985.<sup>27</sup> That statute went without substantial amendment until 2007, when the Reform Law was enacted.<sup>28</sup> It is instructive to briefly consider the Reform Law's evolution.

Prompted by some of the issues raised in *Reinventing Conservation Easements* and wanting land trusts to be involved in whatever reform legislation might ensue, in early 2006, Bruce Kidman of TNC assembled a working group<sup>29</sup> to address mutual concerns with the state's UCEA-based enabling act.<sup>30</sup> A bill title had been introduced by State Representative John Piotti that Kidman believed could be a vehicle for needed change. As Kidman later testified,

Representative Piotti expressed interest in taking a hard look at whether our statutes adequately protected the public benefits easements are expected to provide. What would happen, for example, should the organization holding the easement go out of business? What would happen if it failed to enforce the terms of the easement? What if, after seeking private and/or public funds to secure an easement for good purposes, the landowner and the easement holder choose to ignore key provisions?<sup>31</sup>

The working group met over the course of nearly a year. Although diverse ideologies were represented, views congealed around practical ideas for legal reform. The group recognized that the path of the state's burgeoning population of land trusts and their increasing numbers of conservation easements would encounter failures that would haunt the entire community. The group specifically agreed that something needed to be done about the lack of legal requirements for easement tracking, monitoring, amendment, termination, and backup enforcement.

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24. *Alphabetical List of Land Trusts in Maine*, ME. LAND TR. NETWORK, [http://www.mltn.org/view\\_trusts-alphabetical.php](http://www.mltn.org/view_trusts-alphabetical.php) (last visited Feb. 26, 2011).

25. *Id.* (linking to individual pages with staffing information).

26. Act effective May 9, 1970, ch. 566, 1971 Me. Laws 7, 33 ME. REV. STAT. tit. 33, § 667 (repealed 1985).

27. Act effective Sept. 19, 1985, ch. 395, 1985 Me. Laws 439 (codified as amended at ME. REV. STAT. ANN. tit. 33, §§ 476–479-C (Supp. 2010)).

28. Act of June 25, 2007, ch. 412, 2007 Me. Laws 1114 (codified at ME. REV. STAT. ANN. tit. 33, §§ 476–479-C (Supp. 2010)).

29. Much of the historical information included in this paper concerning the origins of the Reform Law comes from the author's personal knowledge, notes, and interviews.

30. The working group included representatives of The Nature Conservancy, Maine Coast Heritage Trust, Maine Departments of Conservation, Agriculture, and Inland Fisheries and Wildlife, Land for Maine's Future Program, Forest Society of Maine, New England Forestry Foundation, Trust for Public Land, Maine Land Trust Network, and Maine Attorney General's office.

31. Testimony of Bruce Kidman in support of L.D. 1737 before the Joint Standing Committee on Judiciary, Apr. 26, 2007 (on file with author).

Based upon the working group's points of consensus, Karin Marchetti Ponte of Maine Coast Heritage Trust (MCHT) drafted legislation, which was modified in response to comments. Meeting notes reflect the group's primary objective: "The overarching purpose . . . is to provide assurance that conservation easements continue to provide the public benefits they are written to secure. . . . The effort has come about not because there is an immediate problem here in Maine, but in order to tighten legislative language to prevent problems in the future" while placing "no additional burden on landowners."

The draft legislation underwent revisions as the circle expanded, and the resulting bill was introduced by Representative Piotti in the 2007 Maine legislature.<sup>32</sup> Although there was no formal opposition at the legislative committee hearing on the bill, Steven Schley, President of Pingree Associates, grantor of the largest conservation easement in history, expressed landowner concerns with some of the bill's provisions.

With the effort of MCHT's Jeff Romano working with Bill Ferdinand, representing the Maine Forest Products Council (a consortium of many of the state's largest landowners), and representatives of the Attorney General and Maine State Planning Office (SPO) among others, some of the bill's more controversial terms were modified. Terms acceptable to the Attorney General set the precise circumstances when that office would be empowered to act as backup enforcer of conservation easements. Because of major landowner concerns, provisions requiring baseline documentation and abolishing landowner equitable defenses had to be abandoned. Conservation easement registration requirements were refined.

Even with these compromises, the bill retained significant requirements for all conservation easements regardless of the type of holder or whether the easement preexisted the law's enactment. Of particular significance were requirements regarding (1) public registration,<sup>33</sup> (2) easement monitoring,<sup>34</sup> (3) the Attorney General's role in backup enforcement,<sup>35</sup> (4) easement amendment and termination,<sup>36</sup> and (5) safeguarding easements from tax foreclosure of the landowner's interest or merger of the easement and fee.<sup>37</sup> As amended, the bill sailed to enactment as the Reform Law. Although isolated elements of the Reform Law exist elsewhere,<sup>38</sup> no other state has enacted comprehensive reform of its conservation easement laws.

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32. H.P. 1220, 123d Leg., 1st Reg. Sess. (Me. 2007).

33. ME. REV. STAT. ANN. tit. 33, § 479-C (Supp. 2010).

34. *Id.* § 477-A(3).

35. *Id.* § 478(1)(D).

36. *Id.* § 477-A(2).

37. *Id.* § 479(9), (10).

38. *See generally* LEVIN, *supra* note 11.

## VII

### GENERAL REACTION TO THE REFORM LAW

As part of the research undertaken for this article, the author interviewed and surveyed many of those most actively involved in implementation of the law, representatives of the state's largest land trusts, members of the steering committee of the Maine Land Trust Network (MLTN), and lawyers in the Maine Land Conservation Attorneys Network (MLCAN). Although issues were raised with some of the specific provisions of the law as reported in the point-by-point analysis later in this article, the overarching view of the respondents was positive.

Key participants in the legislation's working group believed that the process came out well, indeed better than expected. "It was an excellent collaboration of diverse views." "This is the way public policy should be done." In the views of many, the reform process was greatly facilitated by the leadership of both TNC and MCHT, the latter of which provides coordination for all of the state's land trusts through MLTN. Although with hindsight a few would have preferred involvement of major landowner groups earlier in the process, most believed starting the process with the working group and gradually expanding the circle worked for the best.

Prevalent among all those surveyed and interviewed was the general view that Maine's large population of land trusts and conservation easements is better protected by the reforms enacted. "Without this statute there would be no accountability." "There have been no negative unintended consequences." "The changes have forced small land trusts to rethink themselves." "This is the most considered and best protection of conservation easements existing in any state." "This ought to be cloned in other states."

## VIII

### THE REFORM LAW—POINT BY POINT

For each of the major issues covered by the Reform Law, there follows a description of the issue, how the Law deals with it, how well the Law has worked and been received, and ideas on how it might be improved.

#### A. Conservation Easement Registration

In the absence of a conservation easement registration system, over time easements may be lost or forgotten and their public benefits forfeited.<sup>39</sup> All conservation easements are recorded in the local registry of deeds in a manner typically commingled with other interests in real estate. This is designed to put future owners on notice when a title search is performed prior to purchase. However, standard recordation is wholly inadequate to keep track of easements and their holders for public purposes or to enable responsible parties to take

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39. PIDOT, *supra* note 4, at 12; *see generally* Morris & Rissman, *supra* note 2.

over if the holder goes out of business or fails in its duties, as will happen over the intended perpetual life of easements. The lack of a public registration system also prevents land-use planners from having an inventory of protected lands.<sup>40</sup> “[T]racking conservation easement data and providing substantial public access to those data are the most fundamental components of providing public accountability over ‘conservation-easement-time.’”<sup>41</sup> In sum, the long-term public benefits of conservation easements depend on ready access to information about easement holders, landowners, locations, restrictions, monitoring, assignments, amendments, and terminations.<sup>42</sup>

Praised nationally as a model,<sup>43</sup> Maine’s Reform Law requires registration of all conservation easements.<sup>44</sup> By contrast, the vast majority of states have no central registration system.<sup>45</sup> Even among the few states with any system, Maine’s is the most expansive,<sup>46</sup> embracing all types of conservation easement holders (land trusts as well as federal, state, and local governments) and extending to easements already in existence at the time of the law’s enactment.<sup>47</sup>

Holders of all conservation easements must annually register with the SPO. Registration includes recording information, municipality, number of acres encumbered, and “such other information as [the SPO] determines necessary to fulfill the purposes of this subchapter.”<sup>48</sup> In devising registration forms, the SPO must avoid duplicative filings and reduce administrative burdens. The state’s registration form requires disclosure of easement monitoring, assignment, amendment, termination, or landownership change. This information enables the SPO to monitor compliance with several substantive provisions of the Reform Law. There is an annual filing fee of thirty dollars per registration (not per easement), which helps underwrite the system’s cost. The SPO is required to report to the Attorney General any failure of the easement holder disclosed by the registration (or lack of it) or otherwise known to the SPO.

In consultation with land trusts, the SPO has designed a user-friendly interface for registrations. These are made online, with annual updates of prior years’ information. Registration data can be manipulated and managed by the SPO to maximize its usefulness in determining compliance and providing public compilations. The SPO follows up with easement holders to ensure they stay current with their registrations, and chases down known easement holders who fail to file.

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40. Gerald Korngold, *Private Conservation Easements: Balancing Private Initiative and the Public Interest*, in PROP. RTS. & LAND POLICIES 358, 367 (Gregory K. Ingram & Yu-Hung Hong eds., 2009).

41. Morris & Rissman, *supra* note 2, at 1282.

42. *Id.* at 1241–42.

43. *See, e.g., id.* at 1275, 1278.

44. ME. REV. STAT. ANN. tit. 33, § 479-C (Supp. 2010).

45. *Id.*; LEVIN, *supra* note 11, at 13.

46. *See* Morris & Rissman, *supra* note 2, at 1242.

47. *See supra* Part VI.

48. ME. REV. STAT. ANN. tit. 33, § 479-C.

As of this writing, 102 holders have registered over 1700 easements covering a total of 2 million acres of conservation easements, with hundreds of thousands of additional acres likely on their way.<sup>49</sup> Registered holders report that more than ninety percent of their easements have been monitored at least once during the last three years, as the Reform Law requires. Conservation easements range in size from one-tenth of an acre to 777,352 acres (the largest in world history).<sup>50</sup> Numbers of easements by date of origin show roughly a doubling every decade since 1980.<sup>51</sup> In order of numbers of easements held, registered holders include land trusts, federal agencies, state agencies, and municipalities. One hundred seventy-nine amendments have been reported, most of them occurring in the last ten years.<sup>52</sup>

Even though the registration system places modest administrative and financial burdens on easement holders, no other provision of the Reform Law enjoys such unqualified praise. Contrary to resistance elsewhere to public registries because of a desire to keep easement holdings secret,<sup>53</sup> no survey respondent or person interviewed expressed this concern about Maine's registry. Indeed, several expressed appreciation for its protection of easements for the benefit of the land-trust community and public at large.

Compliance with registration requirements is reasonably good. The SPO believes that ninety-five percent of easements and ninety-nine percent of easement lands are in compliance with registration requirements.<sup>54</sup> Except for two holders that have gone out of business, compliance from land trusts and state agencies has been "excellent," while federal agencies have a more mixed record, and the compliance of municipalities has been spotty.<sup>55</sup> Although the Attorney General can seek a court enforcement order against a noncomplying holder,<sup>56</sup> the lack of any financial penalty for violation is seen by some as a problem, particularly as it creates a sense of unfairness to holders who do make the effort to comply.

A possible next step is for the SPO to require easement locations to be reported, using a uniform and readily accessible mapping information system,<sup>57</sup> subject to appropriate map-labeling of whether easements provide public access. Another step might be to register scanned copies of the easements themselves. In order to enhance awareness and help assure compliance with

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49. E-mail from Tim Glidden, *supra* note 23.

50. *Id.*

51. *Id.*

52. *Id.*

53. Amy Wilson Morris, *The Changing Landscape of Conservation Easements: Public Accountability & Evolving Oversight* 108, 194 (June 2009) (unpublished Ph.D. dissertation, University of California at Santa Cruz) (on file with author).

54. Interview with Tim Glidden, *supra* note 23.

55. *Id.*

56. ME. REV. STAT. ANN. tit. 33, § 478(1)(D) (Supp. 2010).

57. For a discussion of the need for mapping as integral to easement registration, see Morris & Rissman, *supra* note 2, at 1276.

amendment requirements, the SPO should also consider integrating into the registration form the law's basic substantive requirements.

#### B. Conservation Easement Monitoring and Stewardship

Conservation easements are only as good as the holder's commitment and capacity over the long term to monitor, steward, and enforce them.<sup>58</sup> As stated by TNC, "Once an easement is acquired, sufficient funding and resources must be available to ensure perpetual active monitoring, management and if necessary enforcement. The effectiveness of even the toughest easement will be severely compromised by weak or non-existent monitoring."<sup>59</sup> Because monitoring, documentation, landowner relations, and other stewardship responsibilities require continuing effort and expense, conservation easements should always be considered by their holders to be liabilities rather than assets.

The LTA has devised comprehensive standards and practices for its members, which set a reasonably high bar for stewardship of conservation easements, including for holder capacity, baseline documentation, and annual monitoring.<sup>60</sup> Similarly, the LTA's accreditation program sets demanding stewardship benchmarks for member land trusts wishing to apply for that designation.<sup>61</sup> However, these programs are purely voluntary and no standards are legally imposed.

In the absence of legal requirements, monitoring and stewardship may be considered discretionary and lack the fundraising glamour of acquisitions. Although easement holders may be taking these responsibilities more seriously today, a landmark 1999 study in the San Francisco area found that only half the easements surveyed were being actively monitored, forty percent had no baseline documentation, nearly two-thirds of easement holders had no endowment, and nearly one-third could not even readily locate their easement documents.<sup>62</sup>

For donated easements resulting in tax deductions, holders are required by federal law to have the commitment, resources, and baseline documentation necessary to do the job,<sup>63</sup> but these are loose requirements that often have been honored in the breach, particularly since land trusts are not directly bound by them. No state imposes broad-based requirements that holders be accredited or demonstrate the financial and institutional capacity to carry on their

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58. PIDOT, *supra* note 4, at 18.

59. THE NATURE CONSERVANCY, *supra* note 18, at 14.

60. LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES (2004), *available at* <http://www.landtrustalliance.org/training/sp/land-trust-standards-and-practices>.

61. 2010 Accreditation Indicator Practices, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/training/accreditation/2010-accreditation-indicator-practices> (last visited Feb. 26, 2011).

62. BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS: REPORT ON THE USE AND MANAGEMENT OF CONSERVATION EASEMENTS BY SAN FRANCISCO BAY AREA ORGANIZATIONS (May 14, 1999).

63. Treas. Reg. § 1.170A-14(g) (as amended in 2009).

responsibilities.<sup>64</sup> The result is that holders vary considerably in terms of their capacity and commitment to undertake monitoring, recordkeeping, and other stewardship duties necessary to maintain the integrity of conservation easements.<sup>65</sup>

Maine's Reform Law is unique in imposing monitoring duties on all conservation easement holders.<sup>66</sup> Under the law, each holder "shall monitor the condition of the real property . . . at least every three years and shall prepare and retain a written monitoring report in its permanent records."<sup>67</sup> There is no legal standard concerning the rigor of monitoring or recordkeeping. There is also no sanction for failure. By statute, failure to comport with these requirements does not invalidate an otherwise compliant conservation easement.<sup>68</sup>

Maine's annual conservation easement registration form requires holders to indicate when they last monitored each property.<sup>69</sup> According to the SPO, self-reported compliance with the law's three-year monitoring requirement is well over ninety percent.<sup>70</sup> The state follows up with holders when monitoring is not reported on the required schedule.<sup>71</sup> However, without a periodic audit one may question the degree to which such self-reporting is completely accurate.

Survey respondents unanimously expressed support for a minimum legal standard for monitoring at least as rigorous as that imposed by the Reform Law. However, numerous respondents believed that monitoring should be required more frequently than every three years, with several wanting to require monitoring annually. Some survey comments also suggested imposing requirements for baseline documentation, as was provided in the original bill. However, that provision was abandoned because of opposition by major landowners who expressed concerns about maintaining confidentiality of proprietary information. Despite the fact that baseline documentation is essential to easement enforcement, holders often overlook or skimp on this responsibility.

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64. A few states have programs that partially deal with holder-stewardship-capacity issues. Colorado requires state certification of easement holders when the donor intends to take advantage of that state's generous tax-credit program. Virginia requires easement holders to have been in business for five years. Morris, *supra* note 53. Many conservation easements in Maryland are held or co-held by quasi-state agencies like the Maryland Environmental Trust or Maryland Agricultural Land Preservation Foundation, but these organizations lack the resources to monitor more often than every four to ten years. *Id.* at 94–95. Vermont Land Trust, a private organization working in concert with the Vermont Housing and Conservation Board, holds or co-holds most of the easements in that state and annually monitors each one. *Id.* at 100, 113–14.

65. Adena R. Rissman & Van Butsic, *Land Trust Defense and Enforcement of Conserved Areas*, CONSERVATION LETTERS, Feb. 2011, at 1, 6.

66. LEVIN, *supra* note 11, at 42.

67. ME. REV. STAT. ANN. tit. 33, § 477-A(3) (Supp. 2010).

68. *Id.*

69. *Id.* § 479-C (authorizing the SPO to require such other information as it determines necessary to fulfill the purposes of the law).

70. Interview with Tim Glidden, *supra* note 23.

71. *Id.*

### C. Backup Enforcement

All conservation easements require an enforcement presence. In the absence of a backup holder or secondary enforcer, conservation easements may fail over time as inevitably some land trusts falter or entirely fail.<sup>72</sup> Even when land trusts remain in business, according to a recent national survey, they are frequently deterred by enforcement costs, capacity limitations, or the desire to maintain positive landowner relations.<sup>73</sup> Said one land-trust staffer, “often non-enforcement is the answer you come up with.”<sup>74</sup>

In a limited number of states, the law gives the attorney general express authority to directly enforce conservation easements.<sup>75</sup> While such power may be considered implicit in some jurisdictions, the lack of explicit authority in most states creates considerable uncertainty for attorneys general to assert direct enforcement power. In Virginia, there are statutory provisions for automatic transfer of conservation easements to a public agency (represented by the Attorney General) when the holder has gone out of business without assigning its easements.<sup>76</sup>

In most states the attorney general, as guardian of charitable trusts, may assert at least the indirect role of taking action against the easement holder for failure to enforce easements entrusted to them. A compelling case has been made for the application of charitable-trust principles to conservation easements.<sup>77</sup> The federal Tax Court too has suggested that charitable trust principles are applicable to deductible conservation easement donations.<sup>78</sup> However, under most state enabling statutes (including those based upon the UCEA), the role of the attorney general is not clearly described, is left to the application of other laws and legal doctrines, and is often misunderstood or undervalued.<sup>79</sup>

72. PIDOT, *supra* note 4, at 22–23.

73. RISSMAN & BUTSIC, *supra* note 65.

74. *Id.* at 4.

75. LEVIN, *supra* note 11, at 31–32.

76. VA. CODE ANN. § 10.1-1015 (2010).

77. UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (2007); UNIFORM TRUST CODE § 414 cmt. (2000); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000); LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 108–10 (2007); Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, PROB. & PROP., July–Aug. 2009, at 52; Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005); LEVIN, *supra* note 11, at 29–33.

78. The federal Tax Court has recently referred to Treasury requirements applicable to amendment of deductible conservation easement donations as “a regulatory version of cy pres.” *Kaufman v. Comm’r*, No. 15997-09, 2011 WL 1235307, at \*9 (T.C. Apr. 4, 2011).

79. Section 2(a) of the UCEA provides that a conservation easement may be modified or terminated “in the same manner as other easements,” suggesting that the consent of the landowner and easement holder may be sufficient. However, section 3(b) states that “[the] Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.” The Uniform Commissioners’ commentary to the UCEA clarifies their intent to leave

Even with these shortcomings, attorneys general in a growing number of states have asserted power over conservation easements as charitable trusts.<sup>80</sup> The celebrated Myrtle Grove case in Maryland involved a lawsuit brought by the State Attorney General under the charitable-trust doctrine; the case was settled with the abandonment of the offending easement amendment.<sup>81</sup> Guidance recently issued by a group including New Hampshire's Attorney General is based upon that office's recognition of conservation easements as charitable trusts.<sup>82</sup> After the Wyoming Supreme Court invited participation by the State Attorney General in a lawsuit where a neighbor lacked standing to challenge wrongful easement termination,<sup>83</sup> the Attorney General initiated action as enforcer of charitable trusts. The matter was ultimately settled by reinstatement of the easement.<sup>84</sup> In Maine too, the Attorney General has adopted an activist stand supporting enforcement of conservation easements, essentially taking over a case when a land trust lacked the resources to do so.<sup>85</sup>

A corollary to the Maine Attorney General's assertion of broad authority over conservation easements as charitable trusts,<sup>86</sup> the Reform Law provides detailed direction concerning the office's role in easement enforcement. Under the statute, in addition to the unfettered power to intervene in any action affecting a conservation easement, the Attorney General is specifically authorized to initiate enforcement when the holder (1) is no longer in existence, (2) is bankrupt or insolvent, (3) cannot be contacted after reasonable diligence to do so, or (4) has failed to take reasonable action to bring about compliance after ninety days' notice by the office.<sup>87</sup> Although the original bill would have given the Attorney General unlimited power to directly enforce conservation easements, negotiated improvements in the final version established specific circumstances when the office would have reason to take action because the holder is failing, without becoming primarily responsible for enforcement when the holder remains viable.<sup>88</sup> To make the application of this power practicable, the annual registration system calls for the Attorney General to be informed of holders that may be in noncompliance.

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in place the application of the charitable-trust doctrine. See LEVIN, *supra* note 11, at 17–19, 28–34; PIDOT, *supra* note 4, at 22–23; McLaughlin & Machlis, *supra* note 77, at 53.

80. McLaughlin & Machlis, *supra* note 77, at 54.

81. Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1062 (2006).

82. SOC'Y FOR THE PRES. OF N.H. FORESTS, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS 2 (2010).

83. Hicks v. Dowd, 157 P.3d 914, 918 (Wyo. 2007).

84. Nancy A. McLaughlin & W. William Weeks, *Salzburg v. Dowd: Another Look*, 33 WYO. LAW. 50, 50 (June 2010).

85. Windham Land Trust v. Jeffords, 967 A.2d 690, 695–96 (Me. 2009).

86. Interview with Linda Conti, Div. of Consumer Prot. Chief, Office of the Me. Att'y Gen. (Aug. 18, 2010) (discussing Ms. Conti's responsibility to oversee charitable trusts in Maine).

87. ME. REV. STAT. ANN. tit. 33, § 478(1) (Supp. 2010).

88. In her interview, *supra* note 86, Linda Conti referred to the Reform Law's restrictions on the Attorney General's enforcement role as "appropriate, reasonable, and practical. . . . This falls in line with our natural priorities anyway."

Despite some theoretical fears by land trusts of attorney general involvement described in the national literature,<sup>89</sup> the land-trust community in Maine is supportive of the backup enforcement role of the Attorney General under the Reform Law. One person interviewed expressed it this way, “Possible overzealousness by the Attorney General is a risk I’m willing to take given the larger risk of land trusts that are unable or unwilling to do their work.” Several survey respondents viewed this involvement of the Attorney General as “useful,” even “essential,” in supporting land-trust enforcement work, assuaging donor concerns, and generally fortifying the durability of conservation easements. Some stated a preference for the statute’s explicit and precise handling of this issue rather than relying upon the general principles of charitable-trust law.

One shortcoming of the Reform Law is that it does not designate a default holder of easements when the original easement holder goes out of business. Even if the Attorney General acts to enforce such an easement, the absence of a backup holder means that there will be no monitoring or other institutional presence on the ground. To fill this gap, the law could specify as an automatic backup holder a government agency, municipality, or other land trust.

In written comments submitted to the author, Professor Nancy McLaughlin, the foremost authority on the charitable-trust doctrine as applied to conservation easements, expressed concern that the Reform Law’s ninety-day notice requirement to the holder before the Attorney General can take enforcement action fails to allow immediate action to address impending, irreparable harm.<sup>90</sup>

Subject to possible improvements to address these concerns, the Reform Law’s provisions concerning backup enforcement by the Attorney General are widely supported.

#### D. Amendment and Termination

No aspect of conservation easement law has spawned as much controversy as the procedural and substantive standards that attend amendment and termination. The upshot has been litigation<sup>91</sup> and arguments in academic journals.<sup>92</sup> The controversy motivated the LTA to bring together a team of

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89. DARLA GUENZLER, BAY AREA OPEN SPACE COUNCIL, CREATING COLLECTIVE EASEMENT DEFENSE RESOURCES: OPTIONS AND RECOMMENDATIONS 40 (May 6, 1999).

90. E-mail from Nancy McLaughlin (Sept. 19, 2010) (on file with author).

91. See, e.g., Bjork v. Draper, 886 N.E.2d 563 (Ill. App. Ct. 2008); Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007); Salzberg v. Dowd, Civ. No. CV-2008-0079 (Aug. 12, 2009); McLaughlin & Machlis, *supra* note 77, at 54.

92. See, e.g., C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009); C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008); Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010); Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009).

experts to assemble the best thinking on the subject, but the resulting report is largely a smorgasbord of viewpoints.<sup>93</sup>

That said, in the absence of clear statutory direction, the best considered and most prudent course is to adhere to the well-settled principles of charitable-trust law,<sup>94</sup> which generally require court approval in a *cy pres* or similar proceeding to authorize termination of a conservation easement or an amendment that would be detrimental to the conservation purposes of the easement. Parallel requirements apply for tax-deductible, donated easements.<sup>95</sup> Best practices for easement drafting include meticulous terms setting out the process of easement amendment and termination.<sup>96</sup> Even so, under the laws of many states these procedures are not well established or understood, so there remains the prospect of easements being wrongfully amended or terminated simply by agreement of the holder and landowner and without proper regard for the interests of the donor, public, Internal Revenue Service (IRS), or charitable-trust principles.<sup>97</sup>

In an effort to create a clearer path, Maine's Reform Law stands out in dealing explicitly with both the process and substance of easement amendment and termination.<sup>98</sup> Although the statute does not specifically refer to the common law of charitable trusts, it is intended to provide procedures and standards for amendment and termination that are a practical means to the same end.<sup>99</sup>

First, under the Reform Law, court approval is required for any termination and any amendment that "materially detracts" from the conservation values protected by the easement.<sup>100</sup> This threshold enables amendments that have an immaterial impact on conservation values to proceed without court approval. On the other hand, amendments that materially impair protections afforded under the easement require court approval, even though they may be traded for protections afforded other land. While the materially detract standard requires the exercise of reasonable discretion by the holder, prudence requires a

93. See LAND TRUST ALLIANCE, *AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES* (2007); LEVIN, *supra* note 11, at 14–17.

94. See generally LAND TRUST ALLIANCE, *supra* note 77, at 10; LEVIN, *supra* note 11, at 16; SOC'Y FOR THE PRES. OF N.H. FORESTS, *supra* note 82; McLaughlin & Machlis, *supra* note 77; McLaughlin, *supra* note 77.

95. Treas. Reg. § 1.170A-14 (as amended in 2009); McLaughlin, *supra* note 14; see Kaufman v. Comm'r, No. 15997-09, 2011 WL 1235307, at \*9 (T.C. Apr. 4, 2011).

96. See, e.g., LAND TRUST ALLIANCE, *supra* note 60, at 11I, 11K; LEVIN, *supra* note 11, at 16.

97. Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements. Part 2: Comparison To State Law* (forthcoming); PIDOT, *supra* note 4, at 22.

98. ME. REV. STAT. ANN. tit. 33, § 477-A(2) (Supp. 2010); LEVIN, *supra* note 11, at 17–26 (providing a comprehensive review of state statutes concerning amendment and termination).

99. By incorporating charitable-trust-like procedures and standards, including the requirement of independent court review of terminations or material amendments, the Reform Law avoids multiple issues that may be spawned by proposals to delegate such decisions to politically appointed review boards that have no history or mandate to consider charitable-trust principles.

100. ME. REV. STAT. ANN. tit. 33, § 477-A(2)(B).

cautious approach, because an amendment that is later found to violate this standard could well be voided, perhaps in an action brought by the Attorney General. To minimize this risk in a close case, informal advice from the Attorney General's office may be sought concerning whether the amendment requires court approval under the materially detract standard.

Second, in a court action seeking approval for amendment or termination, the Attorney General must be made a party.<sup>101</sup> That presence will help ensure that the interests of the public and, in the case of a donated easement, the donor will be appropriately represented.

Third, the court's approval of an amendment or termination must be based upon consideration of the conservation purposes expressed in the easement as well as the public interest, among other relevant factors.<sup>102</sup>

Fourth, if the value of the landowner's fee interest is increased as a result of the amendment or termination, that increase must be paid over to the holder or to such nonprofit or government agency as the court designates, to be used for the protection of lands consistent, as nearly as possible, with the easement's stated conservation purposes.<sup>103</sup> This provision ensures that landowners will not be unjustly enriched by an easement amendment or termination, since the holder and not the landowner owns the development and use rights set aside in the easement. This provision eliminates pressure from landowners to amend or terminate easements in order to increase the value or economic usefulness of their fee interest. It also goes significantly further to protect the public interest in the easement than IRS regulations applicable to tax-deductible easement donations.<sup>104</sup>

Feedback concerning the amendment and termination provisions of the Reform Law displays general approval, subject to some specific concerns. The provisions are applauded as providing a framework, both procedural and substantive, for conservation easement amendments and terminations. "I think this is one of the central strengths of the Reform Law." "This has certainly changed my approach and caused a more thorough examination of the easement as a whole." "These provisions were widely praised by speakers at the Land Trust Rally [in 2010]." The law "has been well received and has had a useful role in guiding land trusts when faced with amendment requests."<sup>105</sup> "First, it [gives] easement holders significant negotiating leverage when

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101. *Id.*

102. *Id.*

103. *Id.*

104. IRS requirements for extinguishment of tax-deductible, donated easements deal only with terminations and not amendments, and provide a floor for the holder's sharing of proceeds based upon a ratio of the value of the easement relative to the value of the unencumbered fee, fixed at the time of donation rather than determined at the time of extinguishment, with payment triggered only when the property is later sold or exchanged. Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009). As to each of these elements, the more extensive and rigorous requirements of Maine's Reform Law are more protective of the holder, the public, and the easement's conservation purposes.

105. LEVIN, *supra* note 11, at 26.

handling amendment and termination requests by landowners. Second, it [discourages] landowners from pressing ahead with court actions to amend or terminate easements without the holder's consent."<sup>106</sup> At the same time, the law removes financial incentives for the landowner to want to amend or terminate, which is "an important provision to limit possibilities for private inurement."

Specific criticisms have also been noted. Drafting challenges have been encountered in melding the Reform Law's provisions on disgorgement of the increased value of the landowner's fee interest with the different and generally narrower Treasury requirements regarding easement termination. In the event of termination of a tax-deductible easement, Treasury regulations require that the holder be entitled to a minimum share of proceeds upon a subsequent sale or exchange based upon the value of the easement relative to the value of the land at the time of the easement's creation.<sup>107</sup> Thus, the Treasury regulations fail to account for the appreciated value of the easement as of the time of termination. In addition, under the Treasury regulations, payment to the holder of this minimum share is deferred until the land is sold or exchanged.<sup>108</sup> In contrast, the Reform Law requires prompt disgorgement to the holder of the entire increase in value of the land as a result of the easement's termination.<sup>109</sup> In addition, unlike the Treasury regulations, the Reform Law similarly requires disgorgement to the holder of the increase in value of the land arising from amendment.<sup>110</sup> Accordingly, the Reform Law better protects the value of the easement and the interests of the public, because (1) disgorgement is due upon termination *or* amendment without awaiting sale of the property and regardless of whether the easement was donated, and (2) disgorgement is based upon the appreciated value of the easement between the time of its creation and the time of its amendment or termination. While melding these provisions requires careful draftsmanship, in these ways the Reform Law fills in the considerable gaps left by the Treasury regulations.

Professor McLaughlin has noted<sup>111</sup> that Maine's law technically refers to "partial releases" as allowed in the same manner as other easements,<sup>112</sup> conceivably suggesting that approval of the holder and landowner might be sufficient for such alterations. However, "partial releases" should always be recognized as a type of termination or amendment that materially detracts from the conservation values of the easement, and therefore that must meet the rigorous requirements of the law dealing with such changes, including court approval.

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106. *Id.*

107. Treas. Reg. § 1.170A-14(g)(6).

108. *Id.*

109. ME. REV. STAT. ANN. tit. 33, § 477-A(2)(B) (Supp. 2010).

110. *Id.*

111. E-mail from Nancy McLaughlin, *supra* note 90.

112. ME. REV. STAT. ANN. tit. 33, § 477(1).

Professor McLaughlin has further noted that the Reform Law might be interpreted to provide more flexibility for court decision making concerning amendment or termination than the *cy pres* standard under the charitable-trust doctrine or the extinguishment standard under the Treasury regulations applicable to tax-deductible easements.<sup>113</sup> Under the Reform Law, the court's decision to authorize termination or amendment must be based upon the "public interest" as well as consideration of the parties' expressed conservation purposes in the easement, among "other relevant factors."<sup>114</sup> Under the Treasury regulations and the doctrine of *cy pres*, a conservation easement may be terminated by a court if continued use of the property for conservation purposes has become "impossible or impractical"<sup>115</sup>—a standard that requires inquiry into the intent of the grantor as expressed in the easement (in other words, the stated conservation purposes of the easement) and the public interest. Accordingly, although there may be nuanced differences, the Reform Law is framed and should be interpreted to readily embrace charitable-trust principles as well as the extinguishment standard in the Treasury regulations.

Survey respondents expressed a miscellany of other specific issues. A few believed that the landowner disgorgement provision might induce some land trusts to cash out of an easement. However, the standards for permitted amendment and termination forbid consideration of any economic rationale for easement amendment or termination. Moreover, the landowner, by having to disgorge the added value to its estate due to easement termination or amendment, has no financial incentive to go through the process merely in order to pay the enhanced value over to the holder.

One respondent objected to the burden of having to obtain court approval to abandon an easement with little conservation value. Likewise, a few respondents were confused about whether court approval could be avoided for an easement covering one land area traded for another. In all such cases, it is precisely the purpose of the Reform Law to require a judge to independently pass upon such a material alteration or termination. For easement trading, the materially detract threshold requiring court approval applies to the conservation values of the property protected by the original easement, meaning that a loss to these values requires court approval even if there is a conservation gain on non-easement land or other benefits to the holder or public.

Finally, some commenters wanted to know where they might obtain advice on whether the material detract threshold had been reached so as to require court approval of an amendment. The Attorney General's office can be approached to provide this advice on an informal basis.<sup>116</sup> While such advice is not legally dispositive, informal views of the Attorney General's office provide

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113. *Id.*

114. *Id.* § 477-A(2)(B).

115. Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009).

116. Interview with Linda Conti, *supra* note 86.

a strong signal as to what kind of amendments would pass muster. Nonetheless, since parties to an amendment might be second guessed by others in the future, a formal ruling on the issue might be helpful in certain cases.

Despite these specific issues, the vast majority of respondents were generally pleased with the Reform Law's treatment of easement amendment and termination. One noted that the statute "has given me backbone" to deal with pressure from landowners, which was "much greater" before the Reform Law was enacted. A lawyer familiar with other state enabling acts characterized Maine's law on amendment and termination as "imperfect but the most satisfying formula I've seen."

#### E. Merger and Tax Foreclosure

Certain laws can place conservation easements in jeopardy. Under the doctrine of merger, some believe that a conservation easement might be wiped out if the easement holder later also becomes owner of the landowner's fee interest.<sup>117</sup> Similarly, if the landowner's fee interest is subject to tax foreclosure, the government's lien on the property will ordinarily be superior to the easement, which will be extinguished.<sup>118</sup>

The Reform Law dispenses with these risks by ensuring the easement's survival.<sup>119</sup> In interviews and surveys, most respondents praised these provisions: "It is important to be able to provide assurance to easement donors that their wishes will be fulfilled." However, some consternation was registered about the awkward way that the merger provision is written. A few also raised concern with how monitoring and amendment would work if the landowner and easement holder were the same. The Reform Law invites holders in such instances to replace the easement with a declaration of trust or new easement held by another party.<sup>120</sup> The holder of the easement could also, if permitted by the grant of the encumbered land, convey that land subject to the existing easement. Although the Attorney General remains the ultimate backup enforcer, the lack of an independent holder in the event the easement holder becomes the landowner may result in awkward processes for easement monitoring, enforcement, and amendment.

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117. LEVIN, *supra* note 11, at 34–36; PIDOT, *supra* note 4, at 24. Although the risk of merger arises where there is no clear state law on the subject, some experts believe that merger generally should not occur, since there may be no "unity of ownership" of the two estates as required for the doctrine to apply. Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 LAW & CONTEMP. PROBS. 279 (Fall 2011).

118. LEVIN, *supra* note 11, at 34–36. In states (unlike Maine) having "marketable title" laws requiring periodic recording of title encumbrances, similar provisions could protect conservation easements from extinguishment due to the holder's failure to timely re-record the easement, since the public value of the easement will otherwise be lost due to an administrative failure.

119. ME. REV. STAT. ANN. tit. 33, § 479(9), (10) (Supp. 2010).

120. *Id.* § 479(10).

## IX

### ISSUES NOT COVERED BY THE REFORM LAW

While Maine's Reform Law is the most comprehensive in the nation, there are many issues it does not address, either by intention of the drafters, compromise necessary to gain passage, or inadvertence.

#### A. Baseline Documentation

Baseline-documentation requirements were included in the original bill but eliminated in compromises struck with major landowners to gain enactment.<sup>121</sup> This excision was noted with regret by several survey respondents. All conservation easements should be accompanied by baseline documentation at least at a level mandated by the IRS for donated easements, although as a matter of practice the considerable work involved is sometimes delayed, shortchanged, or even avoided.<sup>122</sup> While no holder should acquire a conservation easement without baseline documentation sufficient for future monitoring and enforcement, many have done so.

#### B. Sanctions

Although the Attorney General can seek a court compliance order to respond to holder violations of the law's legal requirements, the Reform Law imposes no penalties for violation. Indeed, the law protects easements even when the holder fails to comply with monitoring and registration requirements. Violations of other provisions, such as for amendment or termination, may void the purported noncompliant legal action. Some respondents regretted the lack of a monetary penalty for violation, particularly failure to register or monitor.

The omission of monetary penalties was intentional because the Reform Law's purpose was to establish clear standards that holders would find it in their interests to follow, especially to maintain good standing with donors and supporters. As these legal expectations have now become well understood and respected, appropriate monetary sanctions might be considered in the future for targeted types of violations. This might be accomplished in a simple fashion, for instance by adopting a graduated schedule of fees for late-filed or otherwise noncompliant registrations. Alternatively, the state could simply publish the names of holders considered to be in noncompliance, so as to alert prospective donors.

#### C. Uniformity

Conservation easements are both blessed and cursed by their adaptive variability, with no two easements identical. The subtle variations and sheer density of highly negotiated and nuanced easements will make interpretation

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121. *Supra* note 29.

122. BAY AREA OPEN SPACE COUNCIL, *supra* note 62, at 21–22.

and enforcement far more difficult, diserving holders, donors, landowners, and the public in the future.<sup>123</sup> Massachusetts addresses this problem by generally mandating use of its boilerplate in the approval process required for every conservation easement, a system appreciated by land trusts in that state.<sup>124</sup> Another solution would be statutory forms for easement boilerplate paralleling those for fee-simple deeds in many states.

Until the problem is addressed, the legal community in each state can devise “best practice” forms, a job that has been tackled by the MLCAN in Maine and the LTA nationally.<sup>125</sup> Nevertheless, absent legal requirements, lawyers eager to promote the interests of their clients often feel driven to negotiate adjustments to even the most fundamental boilerplate. As an illustration, conservation easements submitted to Maine’s environmental regulatory agencies have sometimes been seriously flawed by departures from agency guidelines and standard practices.<sup>126</sup>

#### D. Tax Credits

Maine has chosen not to follow the lead of some states offering significant (and in some cases transferable) tax credits for conservation easement donations. States that have enacted generous tax-credit programs, which when combined with federal tax incentives can make conservation easement donation a profit-making business, have experienced abuses as well as substantial budgetary impacts.<sup>127</sup> Without these costly tax incentives, Maine has experienced no lack of easement donations by generous, conservation-minded landowners.

#### E. Condemnation

There are insufficient standards in many states governing condemnation of lands encumbered by conservation easements.<sup>128</sup> Under the Reform Law, although condemnation of a conservation easement should require court approval as a termination, the statute does not include standards geared specifically to condemnation and does not offer special protection to

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123. See PIDOT, *supra* note 4, at 8–11. See also BAY AREA OPEN SPACE COUNCIL, *supra* note 62, at 7–8; THE NATURE CONSERVANCY, *supra* note 18.

124. PIDOT, *supra* note 4, at 11.

125. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE LAND TRUST ALLIANCE & TRUST FOR PUBLIC LAND, THE CONSERVATION EASEMENT HANDBOOK (2005).

126. For example, major conservation easements proposed by Plum Creek Real Estate Investment Trust as part of its expansive development project in northern Maine, although negotiated by major land trusts including TNC, were criticized for their wholesale departures from agency guidelines and standard practices. These included compromised enforcement and liability provisions. See Written testimony of R. Howard Lake, Esq., submitted to Maine Land Use Regulation Commission, Sept. 14, 2007.

127. Echeverria & Pidot, *supra* note 6, at 10,870.

128. See generally Nancy A. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (or Not)*, 26 VA. ENVTL. L.J. 399 (2008); LEVIN, *supra* note 11, at 37–39.

conservation easements in such matters.<sup>129</sup> In the absence of clear direction on these issues, one may worry that “conservation easements and the land they encumber become the path of least resistance for condemning authorities.”<sup>130</sup>

#### F. Landowner Defenses and Rules of Construction

The original bill leading to the Reform Law also contained provisions abolishing laches as an equitable defense to easement enforcement.<sup>131</sup> These provisions were eliminated in compromises with major landowners necessary to reach enactment. Regardless, all decent easement forms include landowner waiver of these defenses, and some state laws so provide.<sup>132</sup> Otherwise, failure by the holder to bring an enforcement action in the event of a violation may imperil future enforcement and jeopardize the donor’s and the public’s interest and investment in the easement.

Also worthy of consideration would be adding a general rule of construction, such as found in Pennsylvania law,<sup>133</sup> that favors liberal construction of conservation easements for their conservation purposes so as to overcome common-law rules that generally favor free use of land over restraints imposed by conveyances.

#### G. Public Participation

As typified by the survey responses, no major proposal concerning conservation easements evokes more vigorous negative reaction from many land trusts and landowners than public involvement in easement creation. Many fear that any public participation or transparency will seriously impair easement creation. However, not all forms of public involvement are the same: they can range from a modest opportunity for public comment before easement terms are finalized to a full-blown government approval process.

The benefits of public transparency include creating general awareness of easements that will affect the public’s community and landscape, better assuring that the public investment in easements yields sufficient public benefits, coordinating easements with public planning processes, and simply making for better quality easements.<sup>134</sup> In regulatory and public-funding contexts, the

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129. Debate exists on whether conservation easements should be given some degree of protection from the exercise of eminent domain. See Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1082 (2007); Echeverria & Pidot, *supra* note 6, at 10,879–80. But see Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold’s Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1582 (2008).

130. McLaughlin, *supra* note 128, at 427.

131. H.P. 1220, 123d Leg., 1st Reg. Sess. (Me. 2007).

132. New York law abolished laches, estoppel, and adverse possession as landowner defenses in easement enforcement. LEVIN, *supra* note 11, at 41.

133. *Id.* app. B, at XVIII.

134. See, e.g., Leigh Raymond & Sally K. Fairfax, *The “Shift to Privatization” in Land Conservation: A Cautionary Essay*, 42 NAT. RESOURCES J. 599, 636–39 (2002); Jesse J. Richardson, Jr., *Conservation*

quality of easements exposed to public comment is often significantly improved. One private lawyer exposed to such a public process offered that the input was “extremely valuable in providing stronger conservation terms in the easement.”

A few states have processes for a public dimension to conservation easement creation.<sup>135</sup> Although not a public-participation process, Virginia requires that easements conform to local comprehensive plans.<sup>136</sup> Only Massachusetts has a comprehensive system involving state and local government review and approval of conservation easements, including a local public hearing.<sup>137</sup> Despite some consternation about delays and inconsistencies at the local level, many land trusts in Massachusetts believe their easements benefit from the transparency of the process and the more uniform quality that it affords.<sup>138</sup> In light of the substantial number of easements that have successfully navigated the Massachusetts system over four decades, it is hard to argue that it has significantly deterred easement creation.

Even so, Maine’s Reform Law intentionally avoided inclusion of any process for public participation or transparency, in part for fear that it would jeopardize the entire legislation.<sup>139</sup> That calculation is fortified by many of the survey and interview respondents, who almost universally opposed the idea. “Whatever the merits, this is not practical in Maine at this time.” “I feel strongly that state and local government and the public should not be involved.” “Many landowners would be unwilling to participate.” “I am unalterably opposed to public participation.” However, one brave land-trust official reported, “I think public review should be a requirement. It would help keep us honest.”

Given the pervasive and permanent implications that conservation easements pose for the public, there are indisputable benefits to at least a minimally intrusive system of public participation. This could be as elementary as requiring that easements be compatible with adopted comprehensive plans and inviting online comments and suggestions prior to easement terms being cast in stone.

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### SUMMARY AND CONCLUSIONS

The conservation easement laws of most states remain fixed in a time long past when easements were a new experiment. By contrast, conservation easements today have become the paradigm, if not the paragon, of the land-conservation movement. Legal systems need updating to deal with the

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*Easements: Smart Growth or Sprawl Promotion?*, AGRIC. L. UPDATE, Sept. 2006, at 4–5; Bray, *supra* note 17, at 174; Echeverria & Pidot, *supra* note 6, at 10,878–79; Korngold, *supra* note 40, at 366–69; Morris, *supra* note 53, at 29–30; PIDOT, *supra* note 4, at 13–17.

135. LEVIN, *supra* note 11, at 12–13, 23.

136. VA. CODE ANN. § 10.1-1010(E) (2006).

137. MASS. ANN. LAWS ch. 184, § 32 (LexisNexis Supp. 2011).

138. PIDOT, *supra* note 4, at 11, 17; Morris, *supra* note 53, at 72, 105, 110.

139. *Supra* note 29.

shortcomings experienced or known to be on the way. Relying upon case-by-case court interpretations of skeletal statutes and common-law principles is too slow and chaotic. Statutory reform is more predictable, amenable to fine tuning, and designed to provide coherent public policy.

Recapping the detailed analysis in the last section, the following summarizes highlights of Maine's Reform Law together with principal areas where improvements might be considered:

#### 1. Registration

The Reform Law requires holder registration with a state agency of all conservation easements, both new and existing and regardless of type of holder. Registration is made annually online and includes updated information on monitoring, amendment, termination, assignment, and change in land ownership. Ideas for improvement might include providing geographic information using a widely available mapping database; providing a summary or scanned copy of the easement or amendment; correlating amendment information with the law's substantive requirements; and providing a modest penalty for those who fail to register on time, perhaps by a progressive fee schedule for late or incomplete filing.

#### 2. Monitoring and Stewardship

The Reform Law requires easement monitoring by holders at least once every three years, as well as preparing and maintaining monitoring reports. Ideas for improvement might include requiring monitoring more frequently (the LTA recommends annually), requiring baseline documentation that creates a permanent record of the property's condition at the outset for comparison during later monitoring and enforcement, and perhaps requiring basic credentialing standards for easement holders.

#### 3. Backup Enforcement

The Reform Law specifies in a practical way the circumstances in which the State Attorney General may independently seek enforcement of an easement when the holder has failed. The annual registration system is used to discern when holders are no longer in operation, so that the Attorney General can initiate this process when needed. Ideas for improvement might include legally designating a government agency or other backup holder when the named holder has disappeared to assure a continuing monitoring and enforcement presence, and allowing the Attorney General to initiate enforcement action in emergencies when the statute's ninety-day notice period would prove imprudently long.

#### 4. Amendment and Termination

The Reform Law short circuits the national debate on these issues by establishing procedural and substantive requirements for easement amendment and termination, including setting threshold and decisionmaking standards for

court approval and requiring disgorgement of the unjust enrichment to the landowner's estate due to easement amendment or termination. These standards, while not precisely duplicating the common-law charitable-trust doctrine and Treasury regulations, are broad enough to embrace them. Ideas for improvement might include creating greater clarity and consistency in the language of these requirements and providing a formal process by which the Attorney General may sign off on amendments that do not materially detract from the conservation purposes of the easement and therefore do not require court approval.

#### 5. Merger and Tax Foreclosure

The Reform Law abolishes these two means by which conservation easements may otherwise be subject to forfeiture. The language of the merger provision, while adequate, could be made clearer.

#### 6. Issues Not Covered

In addition to the above-mentioned ideas for improvement, the Reform Law might benefit by specifically addressing condemnation standards and processes, landowner equitable defenses such as laches and estoppel, the liberal construction of easements to favor their conservation purposes, a process for achieving uniformity of easement boilerplate, and a modest method allowing a degree of public transparency. Because this last issue is particularly sensitive among land trusts and landowners, a starting point could be to provide an opportunity for the public to be informed about and comment on easements online, before their terms are cast in stone. Experience in both Massachusetts and Maine with public comment on conservation easements reveals that it may not have the negative effect on easement formation that is often feared and can result in much improved easement terms and greater understanding and support of the public benefits of easements.

This article's title poses the question: 'Conservation easement reform: As Maine goes should the nation follow?' The answer is a qualified yes. Maine enjoys the only comprehensive easement reform law in the nation in large part because its land-trust community, with more land under easement than anywhere else, has come to understand the dangers associated with failing to resolve known shortcomings. As surveys and interviews for this article manifest, since its enactment in 2007, the Reform Law has garnered broad and strong support among Maine's conservation easement leaders. In short, the Reform Law has proven a successful experiment.

Other states should take advantage of the learning experience that Maine's law provides, both as a model and as an opportunity to make improvements. Those who say that reform is too risky and burdensome must consider the inevitable risk and burden of continuing to amass conservation easements without the legal structures necessary to assure that their promise is fulfilled.