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Preserving Preservation: Long Green Valley Association, Conservation Easements, and Charitable Trust Doctrine

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COMMENT

PRESERVING PRESERVATION: *LONG GREEN VALLEY ASSOCIATION*, CONSERVATION EASEMENTS, AND CHARITABLE TRUST DOCTRINE

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Across the United States, landowners have preserved 19.8 million acres of farmland, forest, and wetlands through legal instruments known as conservation easements.[1] In a perpetual conservation easement, a landowner voluntarily restricts the uses of his land in perpetuity to serve a conservation purpose, binding future owners of the land to the restrictions set forth in the easement deed.[2] The land mass protected by these instruments is sizeable—roughly the size of South Carolina[3] and nearly one-quarter the size of the National Park System[4]—and those charged with its preservation face the threat of legal challenges in the years to come.[5] Conservation easements came into wide use in the 1980s as a means for landowners to preserve their land while maintaining private ownership.[6] Currently, land

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1. *See NCED at a Glance*, NAT'L CONSERVATION EASEMENT DATABASE, http://www.conservationeasement.us (last updated Sept. 2013). The total amount of preserved land in the country, including land preserved by conservation easements as well as fee simple ownership by conservation organizations, is estimated at 47 million acres. Land Trust Alliance, *Land Trust Alliance Census Survey*, SAVING LAND, Winter 2012, at 34.

2. *See, e.g.*, Vill. of Ridgewood v. Bolger Found., 517 A.2d 135, 136 (N.J. 1986) (explaining the mechanism of conservation easements and providing standard easement terms).

3. *State & County QuickFacts: South Carolina*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/45000.html (last visited Dec. 14, 2013).

4. NAT'L PARK SERVICE, THE NATIONAL PARKS: INDEX 2009–2011, 6 (2009), http://www.nps.gov/history/history/online_books/nps/index2009_11.pdf.

5. C. Timothy Lindstrom, Hicks v. Dowd*: The End of Perpetuity*?, 8 WYO. L. REV. 25, 26 (2008).

6. *See* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 676–77 (2007) ("Perpetual conservation easements encumbering land were

encumbered by the first wave of these easements is rapidly changing hands from the original conservation-minded easement donors to new owners.[7] Because the easement terms limit future residential and commercial development and, thus, landowners' ability to utilize their property, successor owners are much more likely to institute lawsuits to contest these terms.[8]

Some have argued that to protect these conservation easements in perpetuity, courts should apply charitable trust doctrine.[9] In a charitable trust, legal and beneficial title is split, and the landowner holds the legal title for the benefit of the general public.[10] If conservation easements were construed as creating charitable trusts, the easement could not be substantially modified without a court proceeding to ensure the new terms comport with the easement donor's purpose.[11] Many argue that this approach would secure the easements against legal challenges, as successor landowners could not simply modify the easement terms to permit the development they desire.[12] Additionally, construing the easement as a charitable trust confers standing on the state attorney general, and potentially on other interested parties,[13] to enter into the legal proceedings and defend the charitable trust, which commentators note could be an additional tool to protect the conservation purpose of these easements.[14]

The question of who has standing to enforce these conservation easements is likely to be a central inquiry in conservation law in the coming years. Application of charitable trust doctrine and standing affects the enforcement of the restrictions on the nearly twenty million acres already un-

not used on a widespread basis until the mid-1980s and courts are only now beginning to hear cases involving their substantial modification or termination." (footnotes omitted)).

7. Lindstrom, *supra* note 5, at 26.

8. *Id.* Since conservation easements travel with the title to the property, their restrictions bind not only the landowner who conveys the easement, but all subsequent owners as well. Vill. of Ridgewood v. Bolger Found., 517 A.2d 135, 136 (N.J. 1986).

9. *See* McLaughlin, *supra* note 6 (arguing that charitable trust doctrine "ensure[s] that the public interest and considerable investment in perpetual conservation easements is appropriately protected").

10. *See, e.g.*, State *ex rel.* Goddard v. Coerver, 412 P.2d 259, 266 (Ariz. 1966) ("Though the legal title had vested in the Board of Directors, the equitable title remained with those of the public to be benefitted.").

11. *In re* Lucas Charitable Gift, 261 P.3d 800, 809 (Haw. Ct. App. 2011).

12. Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 123–24 (2003).

13. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) ("A suit can be maintained for the enforcement of a charitable trust by the Attorney General . . . or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest.").

14. *See* Arpad, *supra* note 12, at 143–44 (noting that in a charitable trust case, the attorney general could enforce the easement even if the state easement statute and easement deed do not provide for third-party enforcement).

der easement[15] as well as future landowners' willingness to convey conservation easements.[16] While expanded standing may strengthen enforcement of existing easements, it may have a deterrent effect on the creation of future easements.[17] Landowners are less likely to convey an easement they think will result in costly litigation. The Maryland Court of Appeals, in *Long Green Valley Ass'n v. Bellevale Farms, Inc.*[18] ("*LGVA*"), recently addressed the issues of conservation easements, the application of charitable trust doctrine, and third-party standing, finding that there was no charitable trust, and the plaintiffs therefore lacked standing to enforce the easement.[19] This Comment examines *LGVA* in the context of case law pertaining to conservation easements and charitable trusts.[20] This Comment concludes that charitable trust doctrine is beneficial to securing the future of conservation easements[21] but suggests that third-party standing should be construed narrowly in order to comport with landowners' expectations.[22]

I. BACKGROUND

Conservation easements undoubtedly provide an environmental, scenic, or cultural benefit to the public, and may thus be characterized as "charitable."[23] It is a separate inquiry, however, whether the landowner who conveyed the easement intended to impose equitable duties on himself to manage the property for the benefit of the public, thereby creating a charitable trust.[24] Maryland courts have twice addressed the question of whether a conservation easement creates a charitable trust, most recently in *LGVA*.[25] The related question of who has standing to enforce a charitable trust carries the potential to greatly influence future conservation easement case law.[26]

This Part first provides a basic background on conservation easements and charitable trusts.[27] Second, it highlights examples of the application of

15. *See NCED at a Glance*, *supra* note 1.
16. *See infra* Part II.C.
17. *See* Lindstrom, *supra* note 5, at 66 (arguing that charitable trust doctrine complicates conservation easement enforcement by increasing the number of parties involved in litigation).
18. 432 Md. 292, 68 A.3d 843 (2013).
19. *Id.* at 313–24, 68 A.3d at 855–62.
20. *See infra* Part I.D.
21. *See infra* Part II.A.
22. *See infra* Part II.C.
23. *See infra* Part I.A.
24. *See infra* Part I.C.
25. *See infra* Part I.D.
26. *See infra* Part I.E.
27. *See infra* Parts I.A–B.

charitable trust law to conservation easements[28] before detailing the two Maryland cases that address this issue.[29] Lastly, it examines standing to enforce charitable trusts, with a particular focus on third-party special interest standing.[30]

A. Conservation Easements

A conservation easement is a legal agreement between a landowner and a grantee organization, usually a nonprofit land trust or a government agency, that restricts potential uses of the land.[31] Conservation easements generally limit residential and commercial development but may permit agricultural uses.[32] In exchange for devaluing the property by limiting the allowable uses, a landowner may be paid directly[33] or receive income, property, or estate tax benefits.[34] With some exceptions, conservation easements are generally perpetual,[35] and the deed of easement passes along with the land to subsequent landowners, binding them to the easement's restrictions.[36] Although conservation easements provide a number of benefits to the public—open space, air and water quality, and scenic views, for example[37]—most conservation easements make no provisions for public access.[38] Easement deeds generally provide for their enforcement, allowing the grantee land trust to seek judicial enforcement to ensure the landowner complies with the easement terms.[39]

28. *See infra* Part I.C.

29. *See infra* Part I.D.

30. *See infra* Part I.E.

31. Md. Envtl. Trust v. Gaynor, 370 Md. 89, 91, 803 A.2d 512, 513 n.1 (2002). A "land trust" is a commonly used term for an entity, usually a nonprofit organization or government agency, that accepts, monitors, and enforces conservation easements. *See id.* at 92–93, 803 A.2d at 513–14 (considering a conveyance to a government-affiliated land trust).

32. *See, e.g.*, Md. Agric. Land Pres. Found. v. Claggett, 412 Md. 45, 52–53, 985 A.2d 565, 569–70 (2009) (detailing the uses permitted by an agricultural easement).

33. *See, e.g.*, *id.*, 985 A.2d at 569 (noting that the landowner received $262,190.50 for the conveyance of the easement).

34. *Gaynor*, 370 Md. at 91, 803 A.2d at 513 n.1.

35. *See, e.g.*, Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 302, 68 A.3d 843, 848 (2013) (stating that the easement was to be "in perpetuity, or for so long as profitable farming is feasible").

36. *See, e.g.*, Vill. of Ridgewood v. Bolger Found., 517 A.2d 135, 136 (N.J. 1986) (noting the easement was binding on the current landowners as well as their "successors and assigns").

37. *See, e.g.*, Hicks v. Dowd,157 P.3d 914, 916 (stating the purpose of a land trust was to preserve the area's "scenic resources," defined as "all attributes of the landscape from which visually defined values arise including but not limited to topography, rock outcrops, vegetation, lakes and streams, panoramic view, and wildlife.").

38. *See, e.g.*, *Long Green Valley Ass'n*, 432 Md. at 299, 68 A.3d at 847 (noting that the easement "does not grant the public a right of access or a right of use" to the preserved property).

39. *Id.*

B. Charitable Trusts

A charitable trust is defined as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose."[40] In a charitable trust, legal and beneficial title is split, and the owner of the trust property (the trustee) maintains the property for the benefit of the public (the beneficiary) for charitable purposes.[41]

A valid charitable trust has five elements: (1) a fiduciary relationship, (2) duties of trustees, (3) trust property, (4) the settlor's manifestation of intention to create a trust, and (5) a charitable purpose.[42] In the conservation easement context, the fourth and fifth elements are the most likely to be contested.[43] To determine charitable purpose, the settlor must manifest the intent to impose equitable duties to deal with the property for another's benefit.[44] The writing that establishes the trust need not say explicitly that it is a trust, or that its purpose is charitable, so long as the settlor demonstrates charitable intent.[45] Conversely, grantor intent is the hallmark of trust interpretation, and a charitable trust will not be found if the grantor did not intend to benefit others in a charitable manner.[46] The charitable purpose prong is very broad, encompassing the relief of poverty, advancement of education, advancement of religion, promotion of health, governmental or municipal purposes, or other purposes beneficial to the community.[47]

40. Rosser v. Prem, 52 Md. App. 367, 374, 449 A.2d 461, 465 (1982) (citing RESTATEMENT (SECOND) OF TRUSTS § 348 (1959)).

41. Burrier v. Jones, 92 S.W.2d 885, 888 (Mo. 1936) (en banc). Charitable trusts have a strong history of enforcement in the United States, with the Supreme Court in 1819 rooting the trustee's duties to comply with the trust instrument in the Constitution's contract clause. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 649–50 (1819) (interpreting U.S. CONST. art. I, § 10, cl. 1). In that case, the Court reasoned that because the contract clause prohibits the states from interfering with contracts, the New Hampshire state legislature could not alter Dartmouth College's charter of incorporation in contravention of the trust settlor's intention. *Id.*

42. *Rosser*, 52 Md. App. at 377–78, 449 A.2d at 467 (citing RESTATEMENT (SECOND) OF TRUSTS § 348 (1959)).

43. *See, e.g.*, *Long Green Valley Ass'n*, 432 Md. at 318–24, 68 A.3d at 858–62 (examining whether the easement grantor had intent to create a trust and whether the easement's purpose was charitable).

44. S.C. Dep't of Mental Health v. McMaster, 642 S.E.2d 552, 555 (S.C. 2007) (citing RESTATEMENT (SECOND) OF TRUSTS § 24 (1959)).

45. *Id.*

46. From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 182, 803 A.2d 548, 566–67 (2002).

47. *Rosser*, 52 Md. App. at 374, 449 A.2d at 465 (citing RESTATEMENT (SECOND) OF TRUSTS § 368 (1959)). The breadth of uses qualifying as charitable was demonstrated in *Rosser*, where a testator had written a quasi-religious manuscript about her experience mourning her daughter and provided for the book's publishing and distribution in her will. *Id.* at 368–70, 449 A.2d at 462–63. Although the book was described as "ungodly bad" and having "no ready-made

A key aspect of charitable trusts is that the charitable purpose cannot be modified without court approval.[48] In this court proceeding, known as *cy pres*, a court may impose a substitute purpose as near as the original charitable purpose as possible.[49] *Cy pres* is only appropriate if the original purpose for the gift has become impossible or impracticable—for example, a bequest to fund scholarships to a specific university that later goes bankrupt.[50] As conservation easements can be modified without court approval outside of the charitable trust context,[51] a court finding that a trust purpose cannot be modified without a court proceeding is often tantamount to finding a charitable trust.[52]

C. Case Law on Conservation Easements and Charitable Trusts

Case law applying charitable trust doctrine to conservation easements is generally sparse, giving even more import to a fully adjudicated case such as *LGVA*.[53] Analogous cases involving conveyances of land for public use, however, have helped develop the charitable trust doctrine.[54] In *Balti-*

audience," the court held that the testator's subjective charitable intent was manifested in the text of the deed, the manuscript had the possibility of helping people in similar situations to the author, and thus a charitable trust had been created. *Id.* at 370–71, 385–86, 449 A.2d at 463, 471.

48. *See, e.g.*, Kolb v. City of Storm Lake, 736 N.W.2d 546, 548 (Iowa 2007) (using *cy pres* to modify a charitable trust for a memorial garden after the garden area was slated for development).

49. *Id.* at 553. *Cy pres* has three requirements: the existence of a charitable trust, the trust's impracticability, and a general charitable purpose by the donor. *Id.* at 555. In *Kolb*, for example, the Supreme Court of Iowa found that although the original location of the garden was important to the settlors, the primary purpose of the trust was to memorialize their family member and benefit the city. *Id.* at 559–60. *Cy pres* thus permitted the court to choose an alternate location for the garden. *Id.*

50. *See* Simmons v. Parsons Coll., 256 N.W.2d 225, 226–28 (Iowa 1977) (finding that although the original purpose of the trust had become impossible to fulfill, *cy pres* did not apply because the testator had provided for alternative disposition of the funds). The theory underlying *cy pres* is that a charitable institution is merely the "agent for effectuating" the charitable gift. *In re* Coleman's Estate, 584 P.2d 1255, 1261 (Kan. Ct. App. 1978). Thus, if the gift becomes impracticable, the court must seek another agent to accept the gift and effectuate the settlor's charitable intent. *Id.*

51. *See, e.g.*, MD. CODE ANN., REAL PROP. § 2-118(d) (West 2013) (providing that conservation easements, like other easements, can be extinguished by mutual agreement of the grantor and grantee).

52. *See Kolb*, 736 N.W.2d at 560 (holding the gift created a charitable trust and approving a proposed use under *cy pres*).

53. *See* Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 296, 68 A.3d 843, 845 (2013) (stating that the question of whether a conservation easement creates a charitable trust is a "question of first impression" for the Maryland Court of Appeals).

54. *See, e.g.*, Kapiolani Park Pres. Soc. v. City and County of Honolulu, 751 P.2d 1022, 1025–26 (Haw. 1988) (concluding that a conveyance of land for use as a public park created a charitable trust).

more v. Peabody Institute,[55] for example, a man left property to the City of Baltimore in his will with the designation that the property be sold and the proceeds applied to create "The Leakin Park."[56] The city proposed to build several smaller neighborhood playgrounds instead, and the testator's sister sued, alleging the plan was contrary to her brother's intent.[57] The city argued that it was able to accept any charitable gift for any use within its corporate powers.[58] The Maryland Court of Appeals disagreed, noting that when a municipality holds a property in trust, the court will prevent misapplication of the trust funds.[59] Concluding that the will had created a charitable trust and that the establishment of several playgrounds was contrary to the donor's intent to create one park, the court compelled the city either to create the park according to the donor's intention or relinquish its claim to the funds.[60]

Similarly, in *In re Village of Mount Prospect*,[61] a subdivision developer was required by a local ordinance to dedicate a lot "for public purposes" with no other restrictions.[62] The village then passed an ordinance stating the property no longer served a public use and requested the trial court apply *cy pres* to sell the property and use the proceeds for another public purpose.[63] The Illinois Appellate Court disagreed, finding the grantor's charitable purpose in the designation on the subdivision plat reading "for public purposes"[64] and declaring that "[w]hen land is dedicated for public usage, the municipality becomes the trustee for the benefit of the public."[65] Thus, the court concluded that the developer's designation of the land for public use (although required by law) created a charitable trust, but that *cy pres* should not be applied because maintaining the lot as it was remained practicable.[66]

Although there are many similarities between the transactions, conservation easements differ from the fee simple conveyances in *Peabody* and *Mount Prospect* in several ways. With conservation easements, the public is likely not permitted to access the property, so the public benefit may be

55. Mayor of Balt. v. Peabody Inst. of Balt., 175 Md. 186, 200 A. 375 (1938).

56. *Id.* at 188–89, 200 A. at 376.

57. *Id.*

58. *Id.* at 190, 200 A. at 377.

59. *Id.* at 192, 200 A. at 378.

60. *Id.* at 193, 200 A. at 378.

61. 522 N.E.2d 122 (Ill. App. Ct. 1988).

62. *Id.* at 124. The village used the property for access to a drainage ditch and left it vacant except for shrubs. *Id.* at 124–25.

63. *Id.* at 124.

64. *Id.* at 126.

65. *Id.* at 125.

66. *Id.* at 126.

less clear than when the property is transferred in fee.[67] Additionally, the property encumbered by the easement likely remains in private ownership, and, as a result, the grantee organization does not retain an economic asset.[68] In the conservation easement context, therefore, the connection between the conveyance and the creation of a charitable trust is weaker than in fee simple conveyances for public use.[69]

Courts across the country have taken different approaches to considering whether a conservation easement creates a charitable trust. In *Tennessee Environmental Council v. Bright Par 3 Associates*,[70] a Chattanooga developer conveyed a perpetual easement to a nonprofit land trust on approximately eight acres of woodlands.[71] The easement declared that the property possessed "scenic, open space, and recreational values of great importance to the people of the city and the state of Tennessee."[72] The easement granted rights to the developer to access an adjacent property he owned, but prohibited construction and contained a catch-all provision prohibiting any activity that would "significantly impair or interfere with its conservation values."[73] When the adjacent property was developed as a Wal-Mart, the developer built a four-lane access road across the property, kicking off a firestorm of controversy.[74] The parties eventually settled the dispute, with the developers transferring both an equivalent amount of land and $500,000 to the plaintiffs for conservation purposes.[75] In the settlement order, the Chancery Court for Hamilton County, Tennessee, noted that the conservation easement was a "charitable gift" within the charitable beneficiaries statute and described a *cy pres* process to change the easement

67. *See, e.g.*, Windham Land Trust v. Jeffords, 967 A.2d 690, 698 (Me. 2009) (noting that the encumbered land was only to be used for "residential recreational purposes, and maintenance or access related to such purposes").

68. While the grantee organization "holds" the easements, they are not generally counted as economic assets because the land trust is not in a position to exercise the development rights extinguished by the easement. *See* Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 653, 46 A.3d 473, 483 n.7 (2012) (noting that conservation easements involve payment for the "termination or extinguishment" of property rights), *aff'd*, 432 Md. 292, 68 A.3d 843 (2013).

69. *See, e.g.*, Carpenter v. Comm'r, T.C.M. (RIA) 2012-001, 5 (2012) (finding the conservation easement in question did not create a charitable trust).

70. No. E2003-01982-COA-R3-CV, 2004 WL 419720, at *1 (Tenn. Ct. App. March 8, 2004). This unpublished opinion is from the initial lawsuit concerning the plaintiff's standing. *Id.* The subsequent lawsuit on the merits of the case settled and thus did not result in a published court opinion. McLaughlin, *supra* note 6, at 698.

71. McLaughlin, *supra* note 6, at 695.

72. *Id.*

73. *Id.*

74. *Id.* at 697.

75. *Id.* at 698.

terms, underscoring the view that conservation easements are charitable trusts that cannot be modified without court approval.[76]

Not all courts, however, agree that conservation easements create charitable trusts. In *Carpenter v. Commissioner*,[77] the United States Tax Court looked to the easement deed to determine whether the grantor manifested an intention to create a charitable trust.[78] The court considered the easement's stated purposes, which included "assur[ing] that the [p]roperty will be returned to and retained forever predominantly in a natural, scenic, and open space condition."[79] The court concluded that the grantors did not intend to donate the easement "with a general charitable purpose."[80] Because the deed manifested no such intention, the court concluded that a charitable trust was not created, and the parties were free to mutually agree to extinguish the easement.[81] Although the idea that conservation easements create charitable trusts has gained some traction in courts in recent years, it is far from a settled matter.[82]

D. Conservation Easements and Charitable Trusts in Maryland

In an area of law with very little court precedent, Maryland has a unique juxtaposition of two cases, *Attorney General of Maryland v. Miller* (known as the "Myrtle Grove" case)[83] and *LGVA*, both of which considered

76. *Id.* at 698, 700. A similar case was presented in *In re Preservation Alliance of Philadelphia*, where the owner of a historic house in Philadelphia donated an easement to preserve the façade of the house. *Id.* at 693. After the easement conveyance, the house became dilapidated; and the Preservation Alliance petitioned the court to use *cy pres* to extinguish the façade easement, replace it with covenants preserving the site as a park, and require any future building to comply with the historic character of the area. *Id.* at 694. The court determined that the easement was a "charitable interest," but the house had become so dilapidated that the charitable purpose had been frustrated. *Id.* The court thus extinguished the easement and instituted the covenants sought by the Preservation Alliance. *Id. Preservation Alliance* presents the first time a court has authorized the extinguishment of a perpetual easement, but demonstrates the charitable trust principle that the parties are not free to simply extinguish an easement by private agreement. *Id.*

77. T.C.M. (RIA) 2012-001 (2012). Here, the United States Tax Court applied Colorado law, where the highest appellate court in Colorado had not decided whether easements constitute charitable trusts. *Id.* at 5.

78. *Id.* at 5–6.

79. *Id.* at 7.

80. *Id.*

81. *Id.*

82. *See* McLaughlin, *supra* note 6, at 712 ("It is hoped that the application of charitable trust principles to perpetual conservation easements will soon be confirmed.").

83. Complaint for Declaratory Relief, Attorney Gen. of Md. v. Miller, No. 20-C-98-003486 (Md. Cir. Ct. Jul. 9, 1998). In the absence of a published court opinion, the facts and proceedings of the Myrtle Grove case are best summarized in Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006).

the question of whether a conservation easement creates a charitable trust.[84] The Maryland Attorney General was involved in both cases[85] and argued seemingly opposing positions: in Myrtle Grove that a charitable trust had been created[86] and in *LGVA* that no trust had been created.[87]

1. The Myrtle Grove Case

In the Myrtle Grove case, Margaret Donoho donated a perpetual conservation easement on a 160-acre historic tobacco plantation on Maryland's Eastern Shore to the National Trust for Historic Preservation ("the National Trust"), a nonprofit land trust.[88] Mrs. Donoho's donation aimed to preserve the "historic, architectural, cultural and scenic values of said land and the improvements thereon for the continuing benefit of the people of the State of Maryland and the United States of America" and to prohibit activities such as subdivision and further construction.[89] After Mrs. Donoho died, the property was sold to a private trust established by a Washington, D.C. developer ("the Miller Trust").[90] Representatives of the Miller Trust, contending that they were under significant financial burden to maintain the historic buildings, petitioned to limit the easement to a 47-acre "historic core" of the property and allow the subdivision of the property into six additional residential lots.[91] The National Trust voted to permit the amendment, arguing that it was an "opportunity to strengthen the easement by imposing affirmative obligations" to maintain the historic buildings and grounds.[92]

The National Trust's decision was highly contentious.[93] After public outcry, the National Trust reconsidered its position and withdrew its ap-

84. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 297, 68 A.3d 843, 845 (2013); Complaint for Declaratory Relief, *supra* note 83, at 1–2.

85. The Maryland Attorney General intervened in Myrtle Grove as the overseer of charitable trusts, and represented the Maryland Agricultural Land Preservation Foundation, a state agency, in *LGVA*. Motion to Dismiss and Brief of Respondent Maryland Agricultural Land Preservation Foundation at 1, Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 68 A.3d 843 (2013) (No. 65); Complaint for Declaratory Relief, *supra* note 83, at 7.

86. Complaint for Declaratory Relief, *supra* note 83, at 1, 6–7.

87. Motion to Dismiss and Brief of Respondents, *supra* note 85, at 22.

88. McLaughlin, *supra* note 83, at 1041. The property contained several historic buildings, including the oldest law office in the United States. *Id.* at 1042.

89. *Id.* at 1043. The conservation easement made no provisions for later amendment. *Id.* at 1044.

90. *Id.*

91. *Id.* at 1046–47.

92. *Id.* at 1049.

93. *Id.* at 1050. Mrs. Donoho's daughter wrote in a letter to the National Trust that the distinction between the "historic core" and the rest of the property "would have made no sense" to Mrs. Donoho and pointed out that if Mrs. Donoho had wanted to preserve only the buildings, she could have sold off the surrounding farmland and "thus insured herself a much easier old age than she had." *Id.* at 1050–51.

proval of the amendment, noting that the conservation easement clearly prohibited further subdivision of the property.[94] The Miller Trust then sued the National Trust for breach of contract, seeking specific performance of the amendment.[95] The National Trust contended that the easement created a charitable trust and could not be amended so substantially outside of a *cy pres* proceeding.[96]

The Maryland Attorney General then filed a collateral suit against the Miller Trust,[97] arguing that the easement was "not a mere conservation agreement but a gift in perpetuity to a charitable corporation for the benefit of the people of Maryland" and as such was "subject to a charitable trust."[98] Although the Maryland conservation easement enabling statute permitted conservation easements to be amended by mutual agreement of the parties,[99] the Attorney General argued that the statute did not intend to "abrogate application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation."[100] Arguing that the conservation easement and extrinsic evidence manifested the requisite charitable intent to create a charitable trust, the Attorney General concluded that because the easement's purpose had not become impracticable, the easement could not be amended in a *cy pres* proceeding.[101]

The Myrtle Grove case settled in 1998; the National Trust agreed to pay the Miller Trust $225,000, and both parties agreed that subdivision of the property was prohibited. Moreover, the consent decree stipulated that the easement could not be amended "without the express written consent of the Attorney General of Maryland."[102] Although the case did not result in a court opinion, the trial court's agreement to the settlement terms was interpreted by some as support of the application of charitable trust principles to conservation easements.[103]

2. Long Green Valley Association v. Bellevale Farms, Inc.

A decade after the Myrtle Grove case, a similar case made its way to the highest court in Maryland. In *LGVA*, the Maryland Court of Appeals

94. *Id.* at 1055.

95. *Id.*

96. *Id.* at 1056.

97. *Id.* The collateral suit technically named the National Trust as a defendant, but the court immediately realigned it to a plaintiff. *Id.* at 1056–57.

98. *Id.* at 1057.

99. *See* MD. CODE ANN., REAL PROP. § 2-118(d) (West 2013) ("[A conservation easement] may be extinguished or released, in whole or in part, in the same manner as other easements.").

100. McLaughlin, *supra* note 83, at 1057.

101. *Id.* at 1059.

102. *Id.* at 1062.

103. McLaughlin, *supra* note 6, at 693.

reached the opposite conclusion of the parties in Myrtle Grove,[104] determining that the conservation easement in question did not create a charitable trust.[105] Robert and Carol Prigel own and operate Bellevale Farms, an organic dairy farm, on 199 acres in Baltimore County, Maryland.[106] In 1997, the Prigels sold an agricultural easement on Bellevale Farms to the Maryland Agricultural Land Preservation Foundation ("MALPF") for $796,500.[107] The MALPF is a state agency within the Maryland Department of Agriculture with the purpose of "promot[ing] the continued availability of agricultural supplies and markets for agricultural goods."[108] The easement stated that Bellevale Farms "shall be preserved solely for agricultural use," a restriction that would be in effect in perpetuity, "or for so long as profitable farming is feasible on [the property]."[109] The easement reserved the Prigels' right "to use the . . . land for any farm use, and to carry on all normal farming practices," including the right to process, store, and sell agricultural products produced on the property.[110] The easement further granted the Prigels the right to submit future building requests to MALPF for approval as well as MALPF's right to enter the property to monitor it for compliance, but stated that the easement did not grant the public the right to access or use the farm.[111]

In 2007, the Prigels submitted a request to MALPF to construct a 10,000 square foot creamery, with associated retail space and parking lot, in order to process raw milk into dairy products.[112] The MALPF approved the proposal, noting that the operation was a "farm related use" under the terms of the easement.[113] Both John and Susan Yoder, who own property adjacent to Bellevale Farms, and Long Green Valley Association ("LGVA"), a community association, opposed the creamery.[114] The Yoders and LGVA filed a complaint in the Circuit Court for Baltimore County against the Prigels, Bellevale Farms, and MALPF.[115] The Circuit Court concluded that LGVA and the Yoders lacked standing and suggested that they had a reme-

104. *Id.*

105. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 324, 68 A.3d 843, 862 (2013).

106. *Id.* at 296, 68 A.3d at 845.

107. *Id.* at 300, 68 A.3d at 846–47.

108. *Id.* at 297–98, 68 A.3d at 845–46.

109. *Id.* at 300–02, 68 A.3d at 847–48.

110. *Id.* at 301, 68 A.3d at 848.

111. *Id.* at 302, 68 A.3d at 848.

112. *Id.* at 302–303, 68 A.3d at 849.

113. *Id.* at 303, 68 A.3d at 849.

114. *Id.* at 303–08, 68 A.3d at 849–52. The LGVA and the Yoders first contested the decision to the Deputy Zoning Commissioner, who determined that the creamery plan was consistent with farm use. *Id.* at 303–04, 68 A.3d at 849–50.

115. *Id.* at 305, 68 A.3d at 850.

dy only through the zoning, planning, and permit process.[116] The Yoders and LGVA appealed the case to the Maryland Court of Special Appeals, arguing that they had standing on three possible grounds: as intended third-party beneficiaries of the easement, as aggrieved parties suffering a special harm, or as "interested person[s]" under the Maryland charitable trust statute[117]—thereby asserting that the easement created a charitable trust.[118]

The Maryland Court of Special Appeals held that LGVA and the Yoders did not have standing as intended beneficiaries of the easement.[119] The court held, however, that as adjacent landowners, the Yoders had standing under a theory of special harm.[120] The court then considered whether the easement created a charitable trust such that "any interested person" would have standing to enforce its restrictions.[121] Reasoning that although a contract may create a trust without using the word "trust" specifically, the court found that the easement stated only that the land was preserved solely for agricultural use, thereby failing to manifest a charitable purpose.[122] Furthermore, the court held that charitable trust doctrine should not apply in this case because the easement was potentially non-perpetual, permitting termination in the event that farming ceased to be profitable.[123] Lastly, the court reasoned that because the Prigels were paid consideration, the transaction was primarily for their benefit, with only incidental benefits to the public.[124] In sum, the Court of Special Appeals held that the Yoders and LGVA lacked standing under a charitable trust theory because the easement failed to manifest charitable purpose or intent.[125] Furthermore, the court

116. Yoder v. Bellevale Farms, Inc., No. 8-5467, 2009 WL 6560543, at *1 (Md. Cir. Ct. March 19, 2009).

117. MD. CODE ANN., EST. & TRUSTS § 14-302 (West 2013) ("[A] court of equity, on application of any trustee, or *any interested person*, or the Attorney General of the State, may order an administration of the trust, devise or bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator." (emphasis added)).

118. Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 652–53, 46 A.3d 473, 483 (2012), *aff'd*, 432 Md. 292, 68 A.3d 843 (2013).

119. *Long Green Valley Ass'n*, 205 Md. App. at 656–57, 46 A.3d at 485–86.

120. *Id.* at 688–89, 46 A.3d at 504–05. Special harm is a cause of action by which a landowner may petition for judicial review of a government decision affecting land use of a nearby property. *See, e.g.*, Ray v. Mayor of Balt., 430 Md. 74, 99, 59 A.3d 545, 560 (2013) (denying special harm standing to plaintiffs who lived more than one thousand feet from the development in question).

121. *Long Green Valley Ass'n*, 205 Md. App. at 659, 46 A.3d at 487.

122. *Id.* at 673, 683, 46 A.3d at 495, 501.

123. *Id.* at 676–77, 46 A.3d at 497–98. The court noted that due to the "flexibility built into the document," it was unnecessary to apply charitable trust doctrine "to react to a change of circumstances." *Id.* at 677, 46 A.3d at 498.

124. *Id.* at 683, 46 A.3d at 501.

125. *Id.*

found the easement was non-perpetual and thus did not require charitable trust doctrine to account for changed circumstances.[126]

On LGVA and the Yoders' appeal, the Maryland Court of Appeals affirmed the judgment of the Court of Special Appeals, concluding that the purchased agricultural easement did not create a charitable trust, and therefore LGVA and the Yoders did not have standing to seek judicial enforcement of the easement.[127] The Court of Appeals reasoned that the easement did not evidence the Prigels' intent to benefit others, a key requirement of charitable trust creation.[128] The court found that the easement's language limited the individuals entitled to preserve the land for agricultural use, and thus benefit from that use, to the Prigels and MALPF.[129]

After determining that the easement lacked intent to create a charitable trust, the Court of Appeals considered whether the easement's purpose was charitable.[130] As LGVA and the Yoders argued, if the easement's intent was to further MALPF's objectives, and these objectives were charitable, then the easement could create a charitable trust.[131] While LGVA and the Yoders contended that MALPF's purpose was charitable because of the public benefit of rural land preservation,[132] the court found that MALPF did not qualify as a charity because its primary purpose is to maintain agriculture as a profitable enterprise.[133] Although the court acknowledged that "public benefits potentially and incidentally flow" from MALPF's agricultural easement program, the court noted that the easement makes no mention of conserving rural land and, instead, focuses only on "profitable farming and sale of farm products," which the court found insufficiently charitable.[134] The court therefore concluded that because neither the language of the easement nor the statutory scheme of MALPF indicated charitable intent and purpose, the easement did not create a charitable trust.[135]

126. *Id.*, 46 A.3d at 502.

127. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 324, 68 A.3d 843, 862 (2013). Charitable trust was the only theory of standing brought to the Court of Appeals. *Id.* at 307, 68 A.3d at 851 n.22.

128. *Id.* at 318–19, 68 A.3d at 858–59.

129. *Id.* at 319–20, 68 A.3d at 859. In coming to this conclusion, the court relied on the fact that the easement: precludes parties other from MALPF from enforcing the easement; does not grant public access; and allows only MALPF to consider a proposed use of the property. *Id.* at 320, 68 A.3d at 859.

130. *Id.* at 320–21, 68 A.3d at 859–60.

131. *Id.*

132. *Id.*

133. *Id.* at 321, 68 A.3d at 860.

134. *Id.* at 322–24, 68 A.3d at 861–62.

135. *Id.* at 324, 68 A.3d at 862.

Without a charitable trust, LGVA and the Yoders had no standing to seek judicial enforcement of the easement as interested persons.[136]

The Maryland Attorney General was thus in a difficult position of distinguishing Myrtle Grove, where, as the overseer of charitable trusts, it argued for the existence of a charitable trust,[137] from *LGVA*, where it argued against the existence of a charitable trust in its defense of a state agency.[138] The Attorney General distinguished the cases on several grounds.[139] First, it argued that the Myrtle Grove easement was donated as a gift instead of being sold for hundreds of thousands of dollars as was the Prigels' easement.[140] The Attorney General also contended that the Myrtle Grove easement deed "expressly and clearly recited the donor's intent" that the easement benefit the general public.[141] The issue of perpetuity, and the Prigels' easement's potential termination in the event that profitable farming was no longer feasible, was also cited as a potential distinguishing factor between the two cases.[142] The Court of Appeals found this analysis persuasive,[143] and held that the conservation easement failed to evidence the requisite charitable intent to create a trust, barring the plaintiffs from pursuing their claim.[144].

E. Charitable Trusts and Standing

As the Maryland Court of Appeals in *LGVA* held that the conservation easement had not created a charitable trust, the question of whether LGVA and the Yoders had standing to enforce the trust as "interested persons" was never addressed.[145] The enforcement of charitable trusts has generally been granted to the state attorney general as the representative of the public interest, but a modern exception to this rule confers standing on a party who can demonstrate a "special interest" in the trust.[146]

136. *Id.*

137. Complaint for Declaratory Relief, *supra* note 83, at 2.

138. *Long Green Valley Ass'n*, 432 Md. at 319–20, 68 A.3d at 859.

139. Motion to Dismiss and Brief of Respondent Maryland Agricultural Land Preservation Foundation, *supra* note 85, at 37–40.

140. *Id.* at 39.

141. *Id.*

142. *Id.*

143. *Long Green Valley Ass'n*, 432 Md. at 319 n.37, 68 A.3d at 858 n.37.

144. *Id.* at 324, 68 A.3d at 862.

145. *Id.*

146. *See infra* Part I.E.2.

1. Standing to Enforce Charitable Trusts

Generally, standing is the litigant's right to seek judicial enforcement of an issue, based on the litigant's interest separate from that of the general public.[147] Beneficiaries of a trust generally have standing to enforce trusts, but standing is a more difficult issue in the charitable sector, as the beneficiary is the general public.[148] Historically, the state attorney general has the primary responsibility for representing the public's interest in enforcing charitable trusts.[149] The modern trend, however, confers standing on the state attorney general as well as any "person with a special interest in the trust."[150] Additionally, "the fact that a party may benefit from [the trust] is insufficient to confer standing to bring an enforcement action."[151] The policy of limiting standing to enforce charitable trusts is rooted in the undesirability of "vexatious litigation that would result from recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally from the trust."[152]

2. Application of "Special Interest" Standing

The question of whether a litigant has a "special interest" is often at the crux of third-party enforcement of charitable trusts.[153] Although a plaintiff's interest need not be unique to the plaintiff in order to confer standing,[154] the "special interest" exception has generally been construed narrowly.[155] For example, in *Forest Guardians v. Powell*,[156] conservation groups and schoolchildren objected to the school district's management of

147. *See* Allen v. Wright, 468 U.S. 737, 750–51 (1984) (explaining the elements of standing under Article III of the Constitution).

148. *See* Forest Guardians v. Powell, 24 P.3d 803, 809 (N.M. Ct. App. 2001) ("The fact that an individual may benefit from a charitable trust is insufficient to confer standing to bring an enforcement action.").

149. *See* Gene Kauffman Scholarship Found., Inc. v. Payne, 183 S.W.3d 620, 626–27 (Mo. Ct. App. 2006) (examining the role of the Attorney General in charitable trust enforcement); *see also* CAL. GOV'T CODE § 12598 (West 2013) ("The primary responsibility for supervising charitable trusts in California . . . resides in the Attorney General.").

150. *In re* Clement Trust, 679 N.W.2d 31, 36 (Iowa 2004) (internal quotation marks omitted).

151. *Forest Guardians*, 24 P.3d at 809 (citing RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959)).

152. Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990) (citing RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 411 (2d ed. 1977)).

153. *See, e.g.*, *id.* (examining the relationship between the trust document and the potential beneficiaries' interest).

154. *See* Hiland v. Ives, 257 A.2d 822, 824–25 (Conn. Super. Ct. 1966) (finding that plaintiffs were not barred from standing merely because others shared their injury).

155. *See Hooker*, 579 A.2d at 612 (characterizing special interest standing as "[a]n exception to the general rule").

156. 24 P.3d 803 (N.M. Ct. App. 2001).

land held in trust.[157] The Court of Appeals of New Mexico held, however, that because the public school did not benefit directly under the act creating the trust, the schoolchildren failed to prove they had a "special and definite interest in the trust or [were] entitled to receive a benefit."[158] Similarly, in *Warren v. Board of Regents*,[159] a charitable trust had been created to fund a prestigious faculty position at the University of Georgia.[160] Faculty members, arguing that they had standing as either contributors to the trust or as faculty members who might be eligible for the position, alleged the university breached its fiduciary duty by selecting an unqualified candidate to receive the position.[161] The Court of Appeals of Georgia found that the trust agreement did not "identify either plaintiff, by name, position, or association, as a member of a class of potential beneficiaries entitled to a preference," and dismissed the case for a lack of standing.[162]

Some courts, however, have recognized a plaintiff's standing under a "special interest" theory, generally based on a specific designation in the trust instrument.[163] In *Hooker v. Edes Home*,[164] for example, a woman established in her will a free home for elderly, impoverished widows in the Georgetown area of Washington, D.C.[165] Eighty years later, four elderly unmarried women challenged the home's proposed closing, sale, and relocation.[166] Noting that the beneficiaries of the trust were designated by category, the Washington, D.C. Court of Appeals granted standing, holding that the plaintiffs met the requirements set forth in the will and had a special interest distinct from the interest of the general public.[167] The principle of special interest standing was also affirmed in *Alco Gravure, Inc. v. Knapp Foundation*,[168] where a corporate donor established a trust to benefit employees of his company and successor companies.[169] When the foundation proposed to dissolve and transfer its funds to another foundation, an alleged

157. *Id.* at 803–04.

158. *Id.* at 809.

159. 544 S.E.2d 190 (Ga. Ct. App. 2001).

160. *Id.* at 191.

161. *Id.* at 191–93.

162. *Id.* at 193–94.

163. *See, e.g.*, YMCA of Washington v. Covington, 484 A.2d 589, 591 (D.C. 1984) ("Persons who have a special interest in the enforcement of a charitable trust may maintain a suit for the trust's enforcement.").

164. 579 A.2d 608 (D.C. 1990).

165. *Id.* at 608.

166. *Id.*

167. *Id.* at 609. Similarly, in *YMCA of Washington v. Covington*, members of a branch of a YMCA had standing to contest the branch's closing because "[t]he closing of that building injures them in particular." 484 A.2d at 591–92.

168. 479 N.E.2d 752 (N.Y. 1985).

169. *Id.* at 755–56.

"successor corporation" and its employees sued.[170] The Court of Appeals of New York found the plaintiffs had standing as specially interested parties because they were a part of "a class of beneficiaries which is both well defined and entitled to a preference in the distribution of defendant's funds."[171]

Some courts have embraced an even broader view of standing to enforce charitable trusts. In *Kapiolani Park Preservation Society v. City and County of Honolulu*,[172] the City of Honolulu proposed to lease parkland to a developer to build a restaurant.[173] The plaintiff, a Hawaii nonprofit corporation with members who lived close to and used the park, sued the city to prevent the misappropriation of the charitable trust property.[174] The Supreme Court of Hawaii held that where the attorney general elected to support the alleged breach by siding with the city, "the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court."[175] Notwithstanding this broader view of standing, special interest standing remains the modern majority rule.[176]

3. *Special Interest Standing and Conservation Easements:* Hicks v. Dowd

The question of "special interest" standing to enforce a charitable trust was applied in the conservation easement context in *Hicks v. Dowd*,[177] where the Lowham family donated a conservation easement on their 1,043-acre Wyoming ranch to the Scenic Preserve Trust.[178] In 2001, the company owning the mineral interests underlying the ranch contemplated coalbed methane development.[179] The successor landowners, the Dowds, requested that the board terminate the easement on the grounds that coal development

170. *Id.* at 752, 758.

171. *Id.* at 755.

172. 751 P.2d 1022 (Haw. 1988).

173. *Id.* at 1024.

174. *Id.* The Hawaii Attorney General, despite raising doubts as to whether the transaction was consistent with the trust purpose, chose to support the city. *Id.*

175. *Id.* at 1025. A New Jersey court espoused a similar policy in *City of Paterson v. Paterson General Hospital*, where the court noted that the "manifold duties" of the Attorney General made it understandable that supervision of charitable trusts is "necessarily sporadic." 235 A.2d 487, 495 (N.J. Super. Ct. Ch. Div. 1967). The court proposed that a liberal rule as to standing "seems decidedly in the public interest." *Id.*

176. Schalkenbach Found. v. Lincoln Found., 91 P.3d 1019, 1025 (Ariz. Ct. App. 2004).

177. 157 P.3d 914 (Wyo. 2007).

178. *Id.* at 915–16. The easement was in perpetuity unless "unforeseeable circumstances" made continuing the easement impossible. *Id.* at 916.

179. *Id.* at 917.

made the easement impossible to fulfill; the Board of the Scenic Preserve Trust agreed, adopting a resolution to extinguish the easement.[180]

The plaintiff, a resident and landowner in the county where the ranch was located, sued to enforce the easement.[181] The trial court concluded that the conservation easement had created a charitable trust, a point the Dowds did not challenge on appeal.[182] The issue before the Wyoming Supreme Court was whether the plaintiff had the requisite "special interest" required to confer standing.[183] The court distinguished between "beneficiaries" of an easement and "qualified beneficiaries," concluding that while the plaintiff may have benefitted from the easement, his interest was shared by other members of the public.[184] Therefore, the court dismissed the case for lack of standing.[185] As *Hicks* demonstrates, even if the question of charitable trust formation is settled, the question of standing can greatly influence the easement's enforcement.[186]

II. ANALYSIS

Courts have not yet agreed on whether conservation easements give rise to charitable trusts, and if so, who has standing to enforce these easements.[187] In an area with little direct precedent, courts are in need of guidance for considering this question, which will become more prevalent as land preserved in the 1980s begins to change ownership and subsequent landowners challenge the easement restrictions.[188] This Comment argues that charitable trust doctrine should be applied to conservation easements to bolster the easements' restrictions in perpetuity.[189] Since landowner intent is the benchmark of whether an easement creates a charitable trust, courts should determine intent by considering the objective circumstances sur-

180. *Id.*

181. *Id.* at 916–17.

182. *Id.* at 919.

183. *Id.* at 919–20.

184. *Id.* at 921. The court defined the term "'qualified beneficiary' as analogous to the common law concept of 'special interest.'" *Id.*

185. *Id.* After the case was dismissed, the attorney general filed suit to enforce the easement; and the case settled, with the parties agreeing that the easement was to remain in full effect. *Salzburg v. Dowd Settlement Upholds Easement's Permanence*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-news/salzburg-v.-dowd-settlement-upholds-easement2019s (last visited Mar. 3, 2014).

186. *Hicks*, 157 P.3d at 920–21.

187. *See supra* Part I.C–E.

188. McLaughlin, *supra* note 6, at 676–77; *see also* Lindstrom, *supra* note 5, at 26 (arguing that the "growth of land protected by private land trusts . . . makes it likely that the termination and modification of conservation easements will become a legal issue confronted increasingly by practitioners" in the coming years).

189. *See infra* Part II.A.

rounding the easement conveyance, including the language of the easement deed, the benefits the landowner received, and the statutory framework of the easement program.[190] To best comport with landowners' expectations and to limit future litigation, courts should construe "special interest" third-party standing narrowly.[191]

A. Charitable Trust Doctrine Is Beneficial to Ensure Conservation Easements Remain Perpetual

Just as courts have not agreed on whether conservation easements should create charitable trusts,[192] commentators have weighed in on both sides of the issue.[193] Some argue the benefits of applying charitable trust doctrine, noting that the promise of land preservation for future generations is a "key selling point" to conservation easement donors, who are given assurance that their easement will survive even if the grantee land trust ceases to exist.[194] They note that charitable trust doctrine, through *cy pres*, prevents modifications that may harm the conservation values without court approval.[195] In the event a conservation easement is terminated for impracticability, *cy pres* ensures the party who owns the land at the time the easement is terminated does not receive a windfall.[196] They also note that splitting legal and beneficial title ensures courts weigh the public's interest in the conserved property.[197] Additionally, where both the landowner and the land trust agree to modify an easement, as in Myrtle Grove and *Hicks*, the existence of a charitable trust confers standing on the state attorney general to ensure the easement's terms are upheld.[198]

Other commentators argue, however, that conservation easements should not be construed to create charitable trusts.[199] They note that com-

190. *See infra* Part II.B.

191. *See infra* Part II.C.

192. *See supra* Part I.C–D.

193. *Compare* McLaughlin, *supra* note 6, at 683 ("Whenever any interest in real property, whether it be fee title to land or a conservation easement, is donated to a municipality or charity for a specific charitable purpose, both state real property law and state charitable trust law should apply."), *with* Lindstrom, *supra* note 5, at 83 ("[I]ncorporating the doctrine of *cy pres* is an inappropriate response to what thus far has been so minor a problem as to be nearly theoretical.").

194. McLaughlin, *supra* note 6, at 676.

195. *See* Arpad, *supra* note 12, at 145 (presenting the benefits of applying charitable trust principles in conservation easement cases).

196. *See id.* at 147–48 (describing how a landowner who purchased the property at a price reflecting its limited development potential, and then sells the property without the easement's restrictions, could receive an unjust gain).

197. *Id.* at 124.

198. *See supra* Part II.C.

199. *See* C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397, 398 (2009) (arguing that application of charitable trust doc-

bining the separate doctrines creates an ill fit between property law and trust law and that *cy pres* has more potential to harm conservation interests than to help them.[200] They point out that *cy pres* is a means to "second guess" land trusts, inviting more scrutiny for well-meaning land trusts that find that circumstances require them to modify or terminate an easement.[201] Moreover, these commentators argue that charitable trust doctrine, and the potential expansion of standing to enforce the easement, does not comport with the expectation of landowners, who "would be surprised to learn that they have made a bargain with anyone but the organization or agency to which they granted the easement."[202] *Cy pres*, they contend, is a "sword in the hands of landowners and developers" and is an unnecessary pressure on land trusts, which are discouraged in other ways from amending easements to weaken protections.[203]

As a general principle, charitable trust doctrine should apply to conservation easements.[204] Charitable trust doctrine provides two mechanisms—*cy pres* and attorney general standing—that ensure the land trust and subsequent landowners are accountable to conservation interests.[205] *Hicks* and Myrtle Grove portend a likely future for conservation easement

trine to conservation easements is "not well understood in the land trust community"); *see also* Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 506 (2013) (arguing that charitable trusts and *cy pres* "may decrease the flexibility of conservation easements, subject the government to litigation expenses, and perhaps even replace the government holder's vision of the easement with the view of a third party.").

200. Lindstrom, *supra* note 199, at 398.

201. *See* Lindstrom, *supra* note 5, at 63–64 ("In considering this possible expansion of standing, it must be borne in mind that standing to enforce is, essentially, standing to 'second guess' the decisions of a land trust and landowner that result in the termination, or any modification, of a conservation easement"(emphasis omitted)).

202. *Id.* at 61.

203. *Id.* at 82. Lindstrom contends that the scrutiny the IRS gives tax-deductible easements is sufficient pressure on land trusts to deter impropriety. *Id.* at 78.

204. *See* Arpad, *supra* note 12, at 143–49 (presenting the benefits of charitable trust doctrine in the conservation easement context).

205. Naturally, the attorney general may not always choose to defend conservation interests, or it may not have the resources to involve itself in every lawsuit. *See* Kapiolani Park Pres. Soc. v. Honolulu, 751 P.2d 1022, 1024 (Haw. 1988) (noting that the Hawaii Attorney General chose to support the government's proposal to develop a portion of a public park). As the supervisor of charitable trusts, however, the state attorney general is charged with representing the donor's intent. RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 411 (3d ed. 2005). It is thus more likely than not that the attorney general will align itself with the side defending the conservation easement's restrictions. *See id.* ("[T]he Attorney General . . . has been chosen as the protector, supervisor, and enforcer of charitable trusts."). *But see* Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 REAL PROP. PROB. & TR. J. 705, 738 (2006) (examining shortcomings of state attorneys general in enforcing charitable trusts and concluding that standing to enforce charitable trusts should be expanded).

litigation—a subsequent landowner is confronted with an unforeseen difficulty (in *Hicks*, the proposed coalbed methane mining; in Myrtle Grove, the financial burden of maintaining historic buildings) and successfully petitions a land trust to weaken or terminate the conservation easement.[206] Charitable trust doctrine provides a mechanism for the donor's intent to carry forward into perpetuity regardless of the circumstances that change or the intentions of the subsequent landowner.[207] The public also has a real, pecuniary interest in defending conservation easements—over time, U.S. taxpayers have subsidized a considerable income tax deduction for conservation easement donations[208] as well as funded direct purchases of conservation easements.[209] Applying charitable trust doctrine represents the interest of the public, as well as the donor, in an existing framework understood by the courts.[210]

B. In Considering Whether a Particular Conservation Easement Creates a Charitable Trust, Courts Should Consider Concrete, Objective Evidence of the Landowner's Intent at the Time of the Easement Conveyance

Settlor intent is the "guiding light" of trust creation[211]—in order for a conservation easement to create a charitable trust, the settlor must evidence his intent to create a trust, as courts will not find a trust exists where the grantor did not intend to create one.[212] The easement document, however, need not say "trust" explicitly, as long as the easement document contains

206. *See supra* Parts I.D, I.E.3.

207. *See* McLaughlin, *supra* note 83, at 1059 (explaining the argument in the Myrtle Grove case that the charitable trust and *cy pres* framework limiting easement modification protects the intent of the donor).

208. *See* I.R.C. § 170(h) (2013) (defining a "qualified conservation contribution" for income tax deductions); *see also* Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 239 (2013) ("Taxpayers also have a strong interest in the perpetuity of conservation easements that they have subsidized through income tax deductions enjoyed by donors. Easements represent a significant segment of charitable gifts in total dollars even though donated by comparatively few taxpayers, so all taxpayers bear a financial burden in the creation of easements.").

209. *See* Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 680, 46 A.3d 473, 500 (2012) (noting that in 2003, MALPF received 17.05% of Maryland's real estate transfer taxes and two-thirds of its agricultural transfer taxes to fund easement purchases), *aff'd*, 432 Md. 292, 68 A.3d 843 (2013).

210. *See* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 649–50 (1819) (adopting common law charitable trust principles under the Constitution's contract clause).

211. Kaufman, *supra* note 205, at 712.

212. *See* RESTATEMENT (SECOND) OF TRUSTS § 351 (1959) ("A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.").

the essentials of a trust.[213] Because the law does not require the easement document to contain any "magic words," courts are left to divine landowner intent through a variety of means.[214]

1. The Language of the Conservation Easement Document

Long-established rules of contract interpretation give primary significance to an easement document in determining grantor intent.[215] If a conservation easement is clear on its face regarding landowner intent, then no extrinsic evidence may be admitted.[216] The clearest example of this kind of intent language is seen in Myrtle Grove, wherein the landowners stated that the easement aimed to preserve the "historic, architectural, cultural, and scenic values . . . for the continuing benefit of the people of the State of Maryland and the United States of America."[217] This type of language demonstrates general charitable intent, and although it does not say "trust" explicitly, it adequately describes the principle of a charitable trust. The *LGVA* court pointed to the lack of this type of donative language, as well as provisions limiting the parties with rights to enforce the easement, and concluded that the easement lacked evidence that the Prigels intended for MALPF to manage the property for the benefit of others, a required element of a charitable trust.[218]

While "public benefit" language such as that in Myrtle Grove may aid a court in divining landowner intent,[219] it is far from the exclusive means of determining whether a conservation easement evinces charitable intent. Most conservation easements are negotiated from the starting point of the land trust's model easement.[220] While a landowner has power to negotiate the terms of the easement, she is more likely to negotiate terms related to the physical management of the property, such as development and subdivision, than a "boilerplate" term such as the "for the benefit of the people" term in Myrtle Grove.[221] Perhaps more compelling evidence of the land-

213. *See id.* § 24 ("No particular form of words or conduct is necessary for the manifestation of intention to create a trust.").

214. *Id.*

215. *See* Miller v. Kirkpatrick, 377 Md. 335, 351, 833 A.2d 536, 545 (2003) ("In construing the language of a deed, the basic principles of contract interpretation apply. The grant of an easement by deed is strictly construed.").

216. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 314, 68 A.3d 843, 856 (2013).

217. Complaint for Declaratory Relief, *supra* note 83, at 3 (emphasis omitted).

218. *Long Green Valley Ass'n*, 432 Md. at 320, 68 A.3d at 859.

219. McLaughlin, *supra* note 83, at 1043–58.

220. *See, e.g.*, *Model Grants of Conservation Easement*, PA. LAND TRUST ASS'N, http://conserveland.org/modelconservationeasements (last visited Feb. 21, 2014) (presenting different easement templates used by the Pennsylvania Land Trust Association).

221. McLaughlin, *supra* note 83, at 1043.

owner's intent lies in the other terms the *LGVA* court focused on, namely, who had access and enforcement rights, as this is something the landowner likely paid close attention to in the easement negotiation process.[222] While the donative language of the deed plays an essential role in divining landowner intent, it is not the exclusive means at the court's disposal to determine whether an easement document manifests charitable intent.

2. Consideration

In conveying a conservation easement, a landowner may be paid directly,[223] or he may donate the easement for no consideration.[224] No bright-line rule exists for determining whether the payment of consideration precludes the creation of a charitable trust. Some commentators have concluded that the payment of consideration defeats charitable intent, arguing that a transaction that results in private benefit, by its very nature, cannot be charitable.[225] This view was adopted in *Three Bills, Inc. v. City of Parma*,[226] where an Ohio court concluded that a developer who was required to deed a portion of the subdivision land to the city for a park was paid "valid consideration," and therefore the developer had made no "dedication" required for a charitable trust.[227] Other courts and commentators contend that a charitable trust may exist even if the grantor was compensated, often emphasizing the benefit to the public irrespective of the nature of the transaction.[228] A Massachusetts court expressed this view in *Cohen v. City of Lynn*,[229] where the court concluded that a property sold to a municipality "forever for park purposes" created a charitable trust, as a charitable trust may be supported by consideration when a potential beneficiary "confers a benefit on the settlor" to induce him to create the trust.[230]

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222. *See Long Green Valley Ass'n*, 432 Md. at 319, 68 A.3d at 859 (concluding the easement did not evidence intent to create a charitable trust because only MALPF had the right to access the property and enforce the easement).

223. *See, e.g.*, *id.* at 300, 68 A.3d at 847 (indicating the landowners were paid $796,500 for the easement conveyance).

224. *See, e.g.*, Huber v. Kenna, 205 P.3d 1158, 1159 (Colo. 2009) (en banc) (indicating the landowners donated a conservation easement and recouped tax credits).

225. *See* RESTATEMENT (SECOND) OF TRUSTS § 376 (1959) ("A trust is not a charitable trust if the property or the income therefrom is to be devoted to a private use.").

226. 676 N.E.2d 1273 (Ohio Ct. App. 1996).

227. *Id.* at 1275.

228. *See* McLaughlin, *supra* note 6, at 702 (arguing that "members of the public as well as prospective easement grantors are unlikely to think that the method of acquisition should be relevant to the question of whether the easement should continue to be enforced").

229. 598 N.E.2d 682 (Mass. App. Ct. 1992).

230. *Id.* at 684–85 (quoting RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 202 (2d ed. 1992)).

The case law is unclear on the role of consideration in charitable trust creation. On one hand, the fact that the landowner received a substantial benefit may undermine his charitable intent; on the other hand, the public is unlikely to care about the mode of easement acquisition in its expectation that the easement be upheld.[231] The intermediate appellate court in *LGVA* reasoned that because the Prigels were paid a substantial amount and permitted to continue profitable farming, the easement was "obviously beneficial" to the Prigels; and from the court's viewpoint, "any benefit to the public was incidental."[232]

As a practical matter, all landowners who convey conservation easements are likely to see significant financial benefit, through direct payment, an income tax deduction, or both.[233] Although donated easements often explicitly take into account the public's interest,[234] the tax deduction for easement donations makes it potentially very lucrative for wealthy landowners to donate an easement.[235] The distinction between donated and purchased easements may thus be specious as evidence of landowners' intent. Private land conservation transactions do not cleave neatly into landowners encumbering their land for their own benefit and landowners conveying easements for the good of society. Moreover, the public benefits regardless

231. *Compare Three Bills, Inc.*, 676 N.E.2d at 1275 (finding payment of consideration precluded creation of a charitable trust), *with Cohen*, 598 N.E.2d at 685 (finding a charitable trust in spite of payment of consideration).

232. Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 683, 46 A.3d 473, 501 (2012), *aff'd*, 432 Md. 292, 68 A.3d 843 (2013).

233. *See The Enhanced Easement Incentive*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/policy/tax-matters/campaigns/the-enhanced-easement-incentive (last visited Jan. 5, 2014) (crediting the enhanced tax incentive with increasing the pace of land conservation by one-third nationwide). Although compensation of the full fair market value of a conservation easement will always be more lucrative to the landowner than a tax deduction for the same value, many easement programs lack funds to pay full market value for conservation easements. *See* Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 298–99, 68 A.3d 843, 846 (2013) (noting that MALPF's easement purchase program is "quite competitive" and many landowners accept discounted payments for easements). Some wealthy landowners may in fact prefer the tax write-off from a donated easement, especially with generous carry-over provisions that were in place through 2013. *See* Carpenter v. Comm'r, T.C.M. (RIA) 2012-001, 5 (2012) (noting amounts of charitable tax deductions, as indicated on the landowners' tax returns). Relying on the tax deduction as proof of intent brings up an evidentiary issue, however, as the purchase price of an easement is likely to be on the face of the easement deed, while the quantity of a charitable tax deduction is found only in extrinsic evidence. *Id.*

234. *See* I.R.C. § 170(h)(4) (2013) (outlining the means by which a donated easement may benefit the public, including outdoor recreation, scenic enjoyment, or historic preservation).

235. *See Tax Incentive for Conservation Easements*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/policy/tax-matters/campaigns/how-you-can-help (last visited Jan. 5, 2014) (noting that the enhanced easement tax incentive allowed some qualified farmers and ranchers to deduct one hundred percent of their annual gross income with a sixteen-year carryover).

of whether the easement was purchased or donated.[236] The payment of consideration should create a presumption against a charitable trust, but the presumption may be rebutted with other evidence of intent.[237]

3. Statutory Framework

Another possible metric of landowner intent is the overarching purpose of the grantee land trust. In the case of a government land trust, its purpose is found in the enabling statutory framework; in the case of a nonprofit land trust, the purpose is found in its charitable mission. The *LGVA* court put this issue at the center of its analysis, finding that MALPF's purpose was not to benefit the public but rather to promote profitable farming.[238] *LGVA* distinguished between MALPF's statutory scheme and a scheme for the "charitable preservation of land for public use and enjoyment."[239] Considering the purpose of the easement program can be a helpful means of divining landowner intent for two reasons. First, landowners may have several options of easement programs from which to choose, and thus the nature of the grantee land trust can demonstrate the purpose they intended in conserving their land.[240] Second, the grantee's purpose is likely stated on the face of the easement document itself, thereby comporting with the evidentiary requirements of deed interpretation.[241]

The Prigels entrusted MALPF to monitor their easement in perpetuity,[242] a leap of faith they would be unlikely to take without the intent to support MALPF's mission. In light of the historically broad view of what constitutes charity, which includes "substantially any scheme or effort to better the condition of society or any considerable part thereof,"[243] the MALPF easement in question in *LGVA* likely met the test for a charitable

236. *See* McLaughlin, *supra* note 6, at 702 (positing that the public expects easements to be enforced, regardless of how they were acquired).

237. *See* Arpad, *supra* note 12, at 138–39 ("Receiving consideration is certainly no bar to forming a charitable trust, but the existence of consideration may make a court less likely to find an implied charitable trust to protect the intentions of the grantor." (footnote omitted)).

238. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 322–23, 68 A.3d 843, 861 (2013).

239. *Id.* at 322, 68 A.3d at 861.

240. *Compare* MD. CODE ANN., AGRIC. § 2–501(a)(1) (West 2013) (stating that the purpose of the Maryland Agricultural Land Preservation Foundation is to "[p]rovide sources of agricultural products within the State for the citizens of the State"), *with* MD. CODE ANN., NAT. RES. § 3–201 (West 2013) (providing that the purpose of the Maryland Environmental Trust, a different state-affiliated land trust that accepts conservation easements, is "to conserve, improve, stimulate, and perpetuate the aesthetic, natural, health and welfare, scenic, and cultural qualities of the environment").

241. *See, e.g.*, *Long Green Valley Ass'n*, 432 Md. at 314, 68 A.3d at 855–56 (examining the rules of construction in the context of deed interpretation).

242. *Id.* at 302, 68 A.3d 848.

243. Wilson v. First Nat'l Bank, 145 N.W. 948, 952 (Iowa 1914).

purpose.[244] Under this broad definition of "charitable," it is difficult to see how MALPF's aims to preserve farmland and to maintain agriculture as a profitable enterprise are not charitable. The fact that the *means* of implementing this scheme involve payments to private landowners does not indicate the *purpose* of the easement program is not charitable. Moreover, the public, through allocation of a portion of its real estate transfer taxes, has subsidized these easement payments, presumably through a shared view of the desirability of undeveloped farmland and a viable agricultural economy.[245] By choosing to convey an easement to an entity with a public purpose, the Prigels objectively demonstrated charitable intent.

Viewing conservation easements as charitable trusts, rather than merely private contracts between the landowner and the land trust, carries significant benefits for ensuring the perpetuity of land conservation. Applying charitable trust doctrine accords with landowners' expectation that the restrictions will be enforced in perpetuity and represents the public's interest in upholding the easement restrictions. In order to best divine the landowner intent required to create a charitable trust, courts should consider objective, practical evidence such as the easement terms, consideration paid, and the purpose of the grantee organization.

C. In Order to Comport with Landowners' Expectations, Courts Should Construe Narrowly the "Special Interest" Allowance for Third-Party Standing

In the charitable sector, many commentators have observed the modern trend of expanded standing, a departure from the traditional rule that only the state attorney general has the right to enforce charitable trusts.[246] The expansion of standing relies on solid policy grounds, as attorneys general are often pressed for resources or subject to political pressure, leaving many trusts without oversight.[247] Many commentators, however, have advocated

244. *See* RESTATEMENT (SECOND) OF TRUSTS § 368 (1959) (including "governmental or municipal purposes" as well as "other purposes the accomplishment of which is beneficial to the community" among the purposes that qualify as "charitable"). The generality of permissible charitable uses is based on the oft-cited Elizabethan Statute of Charitable Uses, enacted in 1601. *Id.* at cmt. a.

245. *See* Brief of Appellants at 16, Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 68 A.3d 843 (2013) (No. 65) ("[F]ew programs are so completely infused with a public purpose and function, are so dedicated expressly to benefiting and protecting the public, and are so specifically tailored to provide these public benefits with the cooperation and support of the public itself [as MALPF is].").

246. *See* CHESTER, BOGERT & BOGERT, *supra* note 205, § 414 ("If Attorney General enforcement remains lax, the number of specially interested beneficiaries granted standing to sue can be expected to increase.").

247. *See, e.g.*, Kaufman, *supra* note 205, at 726–28 (detailing the potential problems of attorney general oversight).

a narrow view of "special interest" standing, noting the potential for "frequent, ill-considered suits leading to unnecessary litigation."[248]

1. The Need for Narrow Construction of "Special Interest" Standing in Conservation Easements

Although charitable trusts are often thought to be a benign way to ensure future enforcement of conservation easements,[249] *LGVA* represents the potential downside of liberal standing in charitable trust enforcement. The interests of the easement donor and the party seeking standing may be opposed.[250] Myrtle Grove may represent the ideal scenario for the use of charitable trust doctrine—a subsequent landowner attempting to unencumber the land for pecuniary gain.[251] *LGVA*, however, represents a stickier scenario—neighbors who arguably qualify as "special interest" holders,[252] suing to enforce the easement during the ownership of the original easement seller. *LGVA* demonstrates the potential danger of burdensome litigation resulting from applying charitable trust doctrine to conservation easements.[253]

While the expansion of standing to enforce charitable trusts may have general benefits in strengthening enforcement, conservation easements' root in property law differentiate them from other charitable transactions.[254] Unlike, for example, the cases of a university faculty position[255] or a home for elderly widows,[256] adjacent landowners such as the Yoders have an existing property interest and a host of legal remedies outside the trust context.[257]

248. CHESTER, BOGERT & BOGERT, *supra* note 205, § 414.

249. *See* McLaughlin, *supra* note 6, at 712 (advocating for application of charitable trust principles to conservation easements to "ensure that the public interest and considerable investment in perpetual conservation easements is appropriately protected").

250. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 296, 68 A.3d 843, 845 (2013); *see also* Lindstrom, *supra* note 5, at 66–67 (noting the disadvantages of expanded standing by applying charitable trust doctrine to conservation easements).

251. *See* McLaughlin, *supra* note 83, at 1045–50 (detailing the developer's attempt to amend the Myrtle Grove conservation easement to permit further development).

252. *See* Grabowski v. City of Bristol, 780 A.2d 953, 955 (Conn. App. Ct. 2001) (finding a landowner adjacent to a public park had standing to sue in the absence of the attorney general's participation).

253. *See* CHESTER, BOGERT & BOGERT, *supra* note 205, § 414 ("The courts usually require that suits for enforcement be brought by the established representative of the charity, the Attorney General, so that the trustees may not be vexed by frequent, ill-considered suits leading to unnecessary litigation.").

254. *See* Arpad, *supra* note 12, at 109 (examining the nature of the property right conveyed in a conservation easement).

255. Warren v. Bd. Of Regents, 544 S.E.2d 190 (Ga. Ct. App. 2001).

256. Hooker v. Edes Home, 579 A.2d 608 (D.C. 1990).

257. *See, e.g.*, Ray v. Mayor of Balt., 430 Md. 74, 85, 59 A.3d 545, 551 (2013) (noting that in a zoning appeal case, a landowner is "*prima facie* aggrieved when his proximity makes him an adjoining, confronting, or nearby property owner").

As the Maryland Court of Special Appeals noted, the Yoders were *prima facie* aggrieved as adjacent landowners under a theory of special harm, and could have demonstrated facts of the creamery's negative impact on remand.[258] A cause of action for special harm confers standing on a landowner "whose personal or property rights are adversely affected by" a governmental land use decision and, thus, provides a more general cause of action to object to land use decisions that affect one's property.[259] If the goal of expanding standing is to guarantee a day in court for those who object to the management of a trust, in the conservation easement context "special interest" standing may be duplicative and merely another tool in the arsenal of disgruntled neighbors.[260]

2. A Proposed Balancing Test to Evaluate Special Interest Standing

In order to balance the competing interests of ensuring future enforcement of charitable trusts and deterring excessive litigation, courts should adopt a balancing test to evaluate "special interest" standing.[261] The factors, as proposed by Professors Blasko, Crossley, and Lloyd, are: (1) the extraordinary nature of the acts alleged; (2) the presence of bad faith; (3) the availability of the attorney general; and (4) the nature of the benefitted class.[262] This test was applied to assess third-party standing in the case of *Schalkenbach Foundation v. Lincoln Foundation*.[263] In that case, the Arizona Court of Appeals found the plaintiffs did not have standing because there was no "sharply defined" class to which the plaintiffs belonged, the actions alleged (improperly transferring funds to organizations that did not follow the trust's distinct purpose) were not sufficiently extraordinary, and the attorney general's lack of involvement was not due to a neglect of the public interest.[264] Applying similar factors to arrive at an opposite conclusion, the New York case of *Alco Gravure, Inc. v. Knapp Foundation*[265] found that the

258. Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 689, 46 A.3d 473, 505 (2012), *aff'd*, 432 Md. 292, 68 A.3d 843 (2013).

259. *Ray*, 430 Md. at 81, 59 A.3d at 549 (quoting Bryniarski v. Montgomery Cnty. Bd. of Appeals, 247 Md. 137, 144, 230 A.2d 289, 294 (1967)).

260. *See* Lindstrom, *supra* note 5, at 66–67 (presenting expanded standing as a potential drawback of applying charitable trust doctrine to conservation easements).

261. *But see id.* at 81 (arguing that limiting standing is insufficient to protect land trusts from unnecessary litigation).

262. Mary Grace Blasko, Curt S. Crossley & David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 61–74 (1993). The *Blasko* test includes a fifth element, "subjective factors and social desirability," which the authors acknowledge "should not be overemphasized." *Id.* at 74. Due to its subjectivity and potential to detract from the other elements, that element is omitted here.

263. 91 P.3d 1019 (Ariz. Ct. App. 2004).

264. *Id.* at 1026–28.

265. 479 N.E.2d 752 (N.Y. 1985).

proposed dissolution of the charity was sufficiently drastic and the benefitted class sufficiently defined to confer standing.[266]

3. Using a Balancing Test to Assess Special Interest Standing in LGVA

The balancing test thus provides an administrable framework for courts to consider whether a particular third-party plaintiff has standing to enforce a charitable trust. In applying the balancing test to *LGVA*, it is likely that even if the Maryland Court of Appeals had determined a charitable trust had been created, the Yoders and LGVA would not have had standing. The first factor is perhaps the most determinative—the act of constructing a 10,000-foot creamery on a 199-acre property,[267] in accordance with a conservation easement term allowing structures associated with the sale of agricultural goods, is simply not as egregious as the acts alleged in many charitable trust cases.[268] The *LGVA* court was arguably influenced by the relarelative mildness of the allegations; one can imagine that if the facts had mirrored Myrtle Grove's proposed subdivision or *Hicks*'s proposed coalbed methane development, the court would have been more inclined to expand standing.

Regarding the second factor of fraud or bad faith, the Yoders and LGVA did not allege that the creamery was proposed in bad faith, weakening their argument for standing.[269] Turning to the third factor of attorney general involvement, in *LGVA* the attorney general was an integral part of the case, albeit in its capacity defending the state agency that held the easement, not overseeing the charitable trust.[270] In the final factor, the nature of the benefitted class, the Yoders' strongest argument for standing emerges. While a conservation easement is unlikely to have a "sharply defined" class

266. *Id.* at 755–56.

267. Long Green Valley Ass'n v. Bellevale Farms, Inc., 432 Md. 292, 302–03, 68 A.3d 843, 849 (2013).

268. *See, e.g.*, *In re* Milton Hershey Sch., 911 A.2d 1258, 1261 (Pa. 2006) (observing that the charity's alleged misappropriation of funds impeded the charitable purpose such that there was no risk of vexatious litigation).

269. *Long Green Valley Ass'n*, 432 Md. at 308–10, 68 A.3d at 852–53.

270. *Id.* at 295, 68 A.3d at 844. The position of MALPF in this case demonstrates a potential conflict peculiar to Maryland, where eighty-one percent of easements are held by state agencies, so the attorney general will be involved in litigation irrespective of whether there is a charitable trust. NAT'L CONSERVATION EASEMENT DATABASE, http://www.conservationeasement.us/reports/easements (last visited Mar. 18, 2014). Maryland's conservation easement scheme differs strikingly from other states, like Wyoming, for example, where 87.2% of easements are held by private land trusts. *Id. See also* Arpad, *supra* note 12, at 143–44 (differentiating Maryland conservation easement precedent from states with primarily privately held easements).

of beneficiaries mentioned in the trust instrument,[271] an adjacent landowner does indeed benefit particularly from his neighbor's conservation easement and may likewise be particularly harmed by a neighbor's decision to build a creamery.[272] These issues, however, are separate from the enforcement of a charitable trust and are adequately addressed in the land use context. Had the *LGVA* court applied a balancing test such as the *Blasko* test,[273] it is unlikely that it would have conferred standing on LGVA and the Yoders.

By interpreting "special interest" standing narrowly, courts can limit the litigation exposure of well-meaning landowners who grant conservation easements, thereby promoting the social good of land preservation. If the *LGVA* court had treated standing as a threshold issue and reasoned that even if the easement had created a charitable trust, the Yoders and LGVA did not meet the standard for having a special interest by the balancing test described above, it could have dismissed the case without a lengthy, complex debate about charitable trust doctrine.[274] Had the Yoders and LGVA been successful, the litigation would have developed in three parts, at great expense to all parties: determining whether there was a charitable trust, whether the plaintiffs had standing as specially interested parties, and only then whether there was a legitimate easement violation. The public has expressed, through subsidizing tax deductions and easement purchase programs, that land preservation is a social good.[275] Courts should adopt a policy that encourages, rather than chills, the conveyance of conservation easements. No landowner would grant an easement with the expectation of giving his neighbor standing to sue him for his land management decisions.[276] If landowner intent is truly the "guiding light" of charitable trust administration,[277] courts should construe standing very narrowly in this are-

271. *Alco Gravure, Inc.*, 479 N.E.2d at 755.

272. *See* Long Green Valley Ass'n v. Bellevale Farms, Inc., 205 Md. App. 636, 689, 46 A.3d 473, 505 (2012) (granting the Yoders "neighbor property owner standing" to prove the creamery specially harmed them on remand), *aff'd*, 432 Md. 292, 68 A.3d 843 (2013).

273. *See* Blasko, Crossley & Lloyd, *supra* note 262, at 61–74 (using five factors to evaluate "special interest" standing).

274. This procedure mimics the structure of other land use claims, including special harm, in which standing is treated as a threshold issue. *See* Ray v. Mayor of Balt., 430 Md. 74, 99, 59 A.3d 545, 560 (holding that the residents challenging the construction of a development had not proved the specialized harm required for standing).

275. *See* I.R.C. § 170(h)(4) (2013) (listing the public benefit standards for tax-deductible conservation easements).

276. *See* Lindstrom, *supra* note 5, at 66 (arguing that applying *cy pres* "will complicate the enforcement of conservation easements because enforcement may involve multiple parties and the attendant increase in the time and cost of litigation").

277. Kaufman, *supra* note 205, at 712.

na. The more efficiently these cases are handled, the less likely they are to have a chilling effect on future easement donations.[278]

III. CONCLUSION

Land conservation in the United States is on the cusp of a defining legal era. With over 100,000 easements covering the equivalent of the area of South Carolina, legal challenges are inevitable as preserved land changes hands.[279] To face these impending challenges, courts need an administrable legal framework that both carries forth the intent of landowners who conveyed easements and encourages future easements.[280] Applying charitable trust doctrine is a positive step toward strengthening easement enforcement, but it must be administered in a manner that does not encourage cumbersome, expensive litigation for landowners.[281] Such efficient litigation can be accomplished by a strict construction of third-party standing, which will ensure landowners who previously conveyed easements are not sued unnecessarily, while conferring standing on those defending the easement grantor's vision of his land.[282]

278. *See* Lindstrom, *supra* note 199, at 412 (noting the "uncertainty and potential bureaucratic burden on the daily administration of conservation easements that could arise from a broad application of the charitable trust doctrine").

279. *See NCED at a Glance*, *supra* note 1.

280. *See supra* Part II.B.

281. *See supra* Part II.A.

282. *See supra* Part II.C.