Keeping the Perpetual in Florida's Conservation Easements

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KEEPING THE PERPETUAL IN FLORIDA’S CONSERVATION EASEMENTS

Nancy A. McLaughlin*

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I. INTRODUCTION

In 2021, in a truly visionary move, the Florida legislature passed the Florida Wildlife Corridor Act, which directs the Florida Department of Environmental Protection to promote investments in areas that protect and enhance the Florida Wildlife Corridor.1 The Florida Wildlife Corridor is a

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statewide network of approximately 18 million acres of contiguous wilderness and working lands crucial to the survival of many of Florida’s imperiled plants and animals.² The corridor runs from Florida’s panhandle at the Alabama state line all the way to the Florida Keys, nearly 800 miles away.³ The Florida Wildlife Corridor Foundation, a charitable organization whose mission is to “champion a collaborative campaign to permanently connect, protect and restore the Florida Wildlife Corridor,” explains that the corridor provides an opportunity to attract the investment needed to keep these natural and rural landscapes connected—protecting the waters that sustain us, the working farms and ranches that feed us, the forests that clean our air, the coastal zones that protect us from storms, and the habitat that all of these lands provide for Florida’s diverse wildlife.⁴

The passage of the Florida Wildlife Corridor Act was the culmination of more than 40 years of conservation efforts that were based in large part on the work of Professors Larry Harris and Reed Noss.⁵ In the 1980s, Harris and Noss recognized that addressing the habitat loss and fragmentation resulting from Florida’s rampant development would require landscape-scale conservation approaches.⁶ They also recognized the importance of wildlife corridors and the need to integrate both protected lands and lands subject to more intensive uses into conservation efforts.⁷ Revelations by one of Harris’s former students—David Maehr—that Florida black bears use habitat corridors that cross both public and private lands helped to inspire a statewide “Florida Wildlife Corridor” campaign.⁸ Maps developed over the years by Harris, Reed, and others identified Florida’s wildlife corridors and ecological

² About the Corridor, FLA. WILDLIFE CORRIDOR FOUND., https://floridawildlifecorridor.org/about/about-the-corridor/ (last visited Sept. 18, 2023); FLA. STAT. § 259.1055(2) (2023).
⁴ FLA. WILDLIFE CORRIDOR FOUND., supra note 2; About the Corridor Foundation, Who We Are, FLA. WILDLIFE CORRIDOR FOUND., https://floridawildlifecorridor.org/about/; Ways To Give, FLA. WILDLIFE CORRIDOR FOUND., https://floridawildlifecorridor.org/impact-report-2021/#:~:text=Gifts%20made%20to%20The%20Florida,%20are%20tax%20deductible.
⁶ Id.
⁷ Id.
⁸ Id.
networks and provided the scientific foundation for the Florida Wildlife Corridor.9

The Florida Wildlife Corridor Act directs the Florida Department of Environmental Protection to, among other things, “[e]ncourage investment in conservation easements voluntarily entered into by private landowners to conserve opportunity areas.”10 Opportunity areas are land and water areas within the corridor that are not yet conserved, including working lands.11

The Florida Wildlife Corridor Foundation reports that 9.6 million acres in the corridor are currently conserved as parks, as wildlife management areas, and through conservation easements on private lands, while the remaining 8.1 million acres—approximately 46% of the corridor—are not protected.12 The Foundation further reports that “[n]early two million acres within the Corridor currently lacking protection are already prioritized for conservation . . . and hundreds of landowners are on waiting lists to sell conservation easements or expand public preserves.”13 To accomplish the Florida Wildlife Corridor Act’s ambitious goal, hundreds of millions of dollars are being invested in efforts to permanently protect lands within the corridor, including through the acquisition of conservation easements.14

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9 Id.

10 FLA. STAT. § 259.1055(5)(b) (2023).

11 Id. § 259.1055(4)(e); FLA. WILDLIFE CORRIDOR FOUND., supra note 2.


13 FLA. WILDLIFE CORRIDOR FOUND., supra note 2.

14 See, e.g., Press Release, Linda Stewart, Sen., Florida Senate, Florida Funds Numerous Environmental Protection Projects Across The State (June 2, 2023), https://www.flsenate.gov/Media/PressReleases/Show/4473 (“Florida’s wildlife corridor will receive $850 million in order to acquire and preserve lands throughout the state.”); Press Release, Staff, Governor Ron DeSantis and Florida Cabinet Invest $141 Million to Protect Florida’s Natural Resources (Sept. 19, 2023), https://www.flgov.com/2023/09/19/governor-ron-desantis-and-florida-cabinet-invest-141-million-to-protect-floridas-natural-resources/ (“Governor Ron DeSantis and the Florida Cabinet approved a $141 million investment to expand Florida’s Wildlife Corridor by more than 42,000 acres.”); Avery Palmer, Florida Wildlife Corridor Foundation Celebrates 119,939 Acres Approved for Conservation Since 2021 Passage of the Florida Wildlife Corridor Act, FLA. WILDLIFE CORRIDOR FOUND. (May 23, 2023), https://floridawildlifecorridor.org/florida-wildlife-corridor-foundation-celebrates-conservation-of-119939-acres-since-2021-passage-of-the-florida-wildlife-corridor-act/ (“Thanks to a unanimous Cabinet vote today, 39,583 more acres of the Florida Wildlife Corridor were approved for permanent protection. . . .”); Staff, Governor Ron DeSantis Announces the Focus on Florida’s Future Budget Recommendations for Fiscal Year 2024-2025, FLA. GOVERNOR (Dec. 5, 2023), https://www.flgov.com/2023/12/05/governor-ron-desantis-announces-the-focus-on-floridas-future-budget-recommendations-for-fiscal-year-2024-2025/#:~:text=The%20Governor%27s%20Budget%20recommends%20more,families%20need%20through%20the%20year. (“The Governor’s Budget . . . prioritizes the protection of Florida’s working agricultural lands and family farms, providing an annual appropriation of $100 million to the Rural and Family Lands Protection Program to enter into perpetual conservation easements.”); see also HOCTOR ET AL., supra note 5, at 4 (from 1990 through 2008, through a program known as Preservation 2000 and then
But just what does it mean to protect privately-owned land in the corridor with a conservation easement? Turns out there is a significant disconnect between the representations being made to landowners and the public regarding the perpetual nature of Florida’s conservation easements and the realities of existing Florida law.

In the short film, *Saving the Florida Wildlife Corridor*, a private landowner spoke about her conveyance of a conservation easement to protect some of her family’s land—the Wind Bend Ranch & Tree Farm. She said “conservation easements are a legacy tool . . . as a landowner, you have put restrictions on that land that last forever.” “Wind Bend,” she said, “will never be a strip mall, it will never be a housing development.” These are sentiments that are often expressed by landowners who convey conservation easements, and they are entirely consistent with the representations being made to Florida landowners and the public regarding conservation easements.

The Florida Department of Environmental Protection is one of the major state agencies involved in the acquisition of conservation easements in the state. On its website, in answer to the frequently asked question “How does a conservation easement work?” the Department explains:

Conservation easements are legal agreements in which a property owner promises to restrict the type and amount of development that can occur on the property, often in exchange for some level of compensation. Most easements “run with the land” meaning they bind the current owner and all subsequent owners in perpetuity to the document’s restrictions . . . . The owner . . . conveys the right to enforce

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16 *Id.*


easement restrictions to a qualified third party, such as a public agency or non-profit organization.\(^{19}\)

The Department similarly represents on its “Conservation Easements” webpage that “[c]onservation easements are perpetual, undivided interests in property to protect natural, scenic, or open space values of real property” and they “bind the current and future owners in perpetuity to the restrictions.”\(^{20}\)

Reinforcing these representations of perpetual protection is the “Florida Forever” moniker given to the state’s “premier conservation and recreation lands acquisition program,” which is run by the Department and through which many conservation easements are acquired.\(^{21}\)

Land trusts, which are charitable conservation organizations that work to protect land through various means, make similar representations regarding the permanence of conservation easements. For example, the Alliance of Florida Land Trusts’ website refers visitors to the description of conservation easements on the website of the Land Trust Alliance (“LTA”), the umbrella organization for the nation’s land trusts.\(^{22}\) LTA explains that a conservation easement is:

Where landowners and a land trust enter a legal agreement to permanently limit the use of an area to protect conservation values. Landowners can either sell or donate the easement to land trusts. Landowners retain ownership of

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\(^{19}\) Conservation Easements FAQs, FLA. DEP’T ENV’T PROT. (Apr. 25, 2023, 3:38 PM) (emphasis added), https://floridadep.gov/lands/environmental-services/content/conservation-easements-faqs.


\(^{21}\) Florida Forever, FLA. DEP’T ENV’T PROT. (Sept. 22, 2023, 9:41 AM) (emphasis added), https://floridadep.gov/floridaforever. The Florida Department of Agriculture and Consumer Services similarly explains that its Rural and Family Lands Protection Program “is an agricultural land preservation program designed to protect important agricultural lands through the acquisition of permanent agricultural land conservation easements.” See Rural and Family Lands Protection Program, FLA. DEP’T AGRIC. & CONSUMER SERVS. (emphasis added), https://www.fdacs.gov/Forest-Wildfire/Our-Forests/Land-Planning-and-Administration/Rural-and-Family-Lands-Protection-Program (last visited Jan. 29, 2024); see also, Artis Henderson, Florida Conservation Easements Are Helping To Preserve Rural Land, GULFSHORE BUS. (Jan. 1, 2024), https://www.gulfshorebusiness.com/florida-is-being-consumed-by-development-but-conservation-easements-are-helping-to-preserve-rural-lands/ (describing permanent protection of a family ranch in Florida with a conservation easement and noting that “thanks to the state’s conservation easement program, this land won’t be developed. . . . Tiger Bay [Ranch] will never become the kind of suburban sprawl that’s eating this state.”); DEMERS & CARTER, supra note 18 (advising landowners that “[a] conservation easement is forever, so it is important to consider as many desired future uses as possible before finalizing the agreement”).

\(^{22}\) Saving Florida’s Lands Together, ALL. FLA. LAND TRS., https://www.allianceoffloridalandtrusts.com/savingflorida (last visited Jan. 29, 2024); What We Do, LAND TR. ALL., https://landtrustalliance.org/what-we-do (last visited Jan. 29, 2024) (noting that LTA has 948 land trust members and that “[l]and trusts are community-led and supported and protect lands and waters that benefit everyone”).
the land, can sell their land in the future or pass it on. But the conservation restrictions remain forever. . . .

Landowners have found that conservation easements offer great flexibility yet provide a permanent guarantee that the land will not be developed.23

The above descriptions make conservation easements sound like the perfect tool to use to ensure the permanent connection, protection, and restoration of the Florida Wildlife Corridor. However, the reality regarding the durability of conservation easements in Florida may not live up to the sunny advertising. Despite the representations being made about conservation easements, and the best intentions of the landowners who are conveying them, there is a very real danger that perpetual conservation easements in Florida may not, in fact, be perpetual.

Various federal and state laws may be implicated when considering the durability of conservation easements and, as one judge astutely noted, “the mix of statute, regulation, and caselaw that defines what ‘perpetual’ means can be confusing and might undermine a great many conservation deeds of easement for reasons their drafters never expected.”24 What are these various laws?

First, many landowners donate conservation easements in whole or in part as charitable gifts and are eligible for a federal charitable income tax deduction provided they satisfy federal tax law requirements.25 These requirements mandate, among other things, that federally deductible conservation easements be extinguishable only in a judicial proceeding upon

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Across America, thousands of landowners who care about their land have partnered with easement holders—nonprofit organizations and public agencies—to ensure the land’s protection in perpetuity. Conservation easements are usually intended to last forever—these are known as perpetual easements. Term easements, although not typically used, may be written for a specified period of years . . . Only gifts of perpetual easements . . . qualify a donor for income and estate tax benefits. Most recipient conservation . . . organizations accept only perpetual easements.

. . . A perpetual easement runs with the land—that is, the original owner and all subsequent owners are bound by its restrictions . . . .


24 See Oakbrook Land Holdings v. Comm’r, T.C.M. (RIA) 2020-54, at *17.

25 See I.R.C. § 170(h); see also Financial Benefits—Bargain Sale and New Tax Benefits, U. FLA. IFAS EXTENSION, https://programs.ifas.ufl.edu/florida-land-steward/planning-and-assistance/conservation-easements/ (last visited Jan. 29, 2024) (“The Internal Revenue Service (IRS) treats gifts of conservation easements in the same manner that it treats other gifts of land to qualified recipients—taxpayers can deduct the present value of their easement gifts as charitable deductions from income.”).
a finding of impossibility or impracticality. There also are federal programs that provide partial funding for the purchase of conservation easements, and these programs place their own limits on the extinguishment of conservation easements.

Furthermore, when conservation easements are donated as charitable gifts in whole or in part, state laws requiring that a donee administer a charitable gift in accordance with its stated terms and purposes are also implicated, and those laws should operate to ensure that both the holder and the current landowner are bound by the easement’s terms. But there also is Florida’s conservation easement enabling statute, which is the law that authorizes the creation of conservation easements in the state. Although this statute authorizes the creation of only “perpetual” conservation easements and states that such easements “shall run with the land and be binding on all subsequent owners of the servient estate,” it also provides that the holder of a conservation easement may “release” (extinguish) the easement, and it is not clear how that release provision interacts with federal tax law requirements, federal easement purchase program requirements, or state laws governing the administration of charitable gifts.

The foregoing mix of laws is confusing, and a Florida trial court’s recent holding illustrates the precarious nature of perpetual conservation easements in Florida. As discussed in more detail in Part II below, the trial court held that a government holder had the right to summarily release an expressly perpetual conservation easement that it had received as a charitable gift to allow the current landowner to sell the subject property for development.

If perpetual conservation easements in Florida are determined to be releasable (extinguishable) by their holders at any time and for any reason under the Florida enabling statute regardless of other applicable laws, the consequences would be dire. Protection of the Florida Wildlife Corridor would be imperiled because all of the ostensibly perpetual conservation easements used to protect portions of the corridor would not, in fact, provide permanent protection, and instead those protections would remain in place only at the pleasure of the holders. The massive amount of public funds being invested in conservation easements would be at risk because there would be

26 See infra notes 65–68 and 76–77 and accompanying text (discussing the federal deduction’s judicial extinguishment requirements).
27 See infra note 89 and accompanying text (discussing the federal purchase program extinguishment requirements). In some cases, conservation easement donors receive federal funding as compensation for part of the easement, donate the remaining value as a charitable gift eligible for the federal deduction, and must satisfy both federal tax law and federal purchase program extinguishment requirements. See id.; infra note 84.
28 See infra Parts III, IV.A, and IV.D (discussing state laws governing charitable gifts).
30 See id. § 704.06(2), (4) (2023).
no guarantee that holders would be appropriately compensated for the release of the easements, or required to use any compensation they might receive for conservation purposes. Landowners in Florida might no longer be eligible for the federal deduction for conservation easement donations or for funding under federal easement purchase programs because it would be impossible to comply with the extinguishment and other requirements of those federal programs. And such an interpretation of the law would directly contradict the representations being made to (and the justifiable expectations of) landowners and the public regarding the permanence of perpetual conservation easements.

This Article raises the alarm regarding the potential lack of durability of conservation easements in Florida, and explains the significant disconnect between what landowners and the public are being told about conservation easements and the realities of existing law. This article also seeks to address these problems by recommending two steps that should be taken now to ensure that perpetual conservation easements in Florida will, in fact, be perpetual.31

Part II of this Article sets the stage for the discussion of the relevant laws by describing a Florida trial court’s recent holding, noted above, that a government holder was free to release an expressly perpetual conservation easement to allow the subject property to be sold for development. Part III explains that protecting a property “in perpetuity” or “forever” with a conservation easement should mean that the easement can be released (extinguished) in only two limited circumstances: (i) in a judicial proceeding where it can be shown to the satisfaction of the court that continued use of the property for conservation purposes has become impossible or impractical or (ii) via condemnation. Part IV explains why there is a significant danger that perpetual conservation easements in Florida may not really be perpetual. Part V recommends two steps that should be taken now to ensure that perpetual conservation easements in Florida live up to their promise of permanent protection. Part VI then briefly concludes.

31 This Article addresses only the problem of durability of conservation easements. There are other challenges associated with relying on conservation easements to accomplish land protection goals, including: (i) the significant variability in the content and quality of conservation easements; (ii) the persistent overvaluation of conservation easements in tax-incentive and purchase programs; (iii) concerns regarding the expertise, resources, and resolve of holders; (iv) the lack of clear rules regarding the interpretation of conservation easements; (v) the lack of tracking systems for conservation easements; and (vi) the displacement of other land protection efforts, including fee acquisitions and regulation.
II. “A TALE OF BETRAYAL AND A LOST BATTLE TO SAVE NATURAL FLORIDA”\[32\]

The very real danger that perpetual conservation easements in Florida may not, in fact, be perpetual is illustrated by a recent case involving the Saint Johns River Water Management District’s (the “District’s”) summary extinguishment of a perpetual conservation easement just eleven years after the easement’s creation and despite the easement’s continued protection of significant conservation values.\[33\] Even more troubling, the District “released” (extinguished) the easement at the behest of a conservation organization—a local chapter of the National Audubon Society—which owned the underlying property and decided to sell it for development when it found itself strapped for funds.\[34\]

This sad tale began in 2007, when Kenneth Rubinson, a retired scientist, sought to permanently protect six acres of century-old forest in Orange County, Florida, as a wildlife preserve.\[35\] This property had been in Mr. Rubinson’s family since the 1930s and he had played in the forest as a child.\[36\]

Mr. Rubinson contacted the Audubon Society of Florida regarding a proposed gift of the property to the organization.\[37\] He was referred to the Oklawaha Valley Audubon Society (“Oklawaha Audubon”), which is a local chapter of the National Audubon Society.\[38\] According to its website,
Oklawaha Audubon “protect[s] birds, wildlife, and the places they need . . . using science, advocacy, and conservation.”

With the help of a Florida attorney and the then President of Oklawaha Audubon, Mr. Rubinson took the steps he thought were necessary to ensure permanent protection of the six acres as a wildlife preserve. In December 2007, he donated a perpetual conservation easement to the District, and he then donated the underlying fee to Oklawaha Audubon. Mr. Rubinson said his attorney told him this was the best way to ensure the property’s perpetual use as a wildlife preserve.

The conservation easement specifically stated that it was granted “in perpetuity over the Property” and its purpose was “to assure that the Property will be retained forever in its existing natural condition and to prevent any use of the Property that will impair or interfere with the environmental value of the Property.” Mr. Rubinson also donated $2,000 to Oklawaha Audubon to place a sign on the property identifying it as the “Pollack-Rubinson Wildlife Preserve,” named in part in memory of his mother. Oklawaha Audubon placed this sign on the property in 2008. Oklawaha Audubon also acknowledged that the evidence clearly demonstrated that Mr. Rubinson donated the property to the organization “for the purpose of preserving the Property in its natural state.”

Approximately eleven years later, however, Mr. Rubinson’s attorney drove past the property and realized that the Pollack-Rubinson Wildlife Preserve was no longer there.
Keeping the Perpetual

Preserve sign had been replaced by a sign offering the land for sale.\(^{47}\) Perplexed, he contacted the listing realtor and was told that there was no conservation easement on the land.\(^ {48}\)

So what happened? Well, in 2018, Oklawaha Audubon decided to divest itself of the property as a cost saving measure.\(^ {49}\) The organization was reportedly required to pay for liability insurance relating to the property, and it was not able find another nonprofit willing to assume ownership of the property.\(^ {50}\) Its then acting President described the organization’s finances at the time as “very stressed.”\(^ {51}\) So the organization’s governing board voted to sell the property and use the proceeds to further its strategic plan\(^ {52}\) and, at the organization’s request, the District released (extinguished) the perpetual conservation easement.\(^ {53}\) The Pollack-Rubinson Wildlife Preserve sign was then removed from the property, and Oklawaha Audubon listed the property for sale for $189,000 with a broker specializing in commercial properties.\(^ {54}\)

Upset by this turn of events, and worried that a developer might turn the property into a gas station,\(^ {55}\) Mr. Rubinson sued Oklawaha Audubon, arguing that the perpetual conservation easement had been improperly released and that the organization was not permitted to sell the property for development absent court approval in a \textit{cy pres} proceeding.\(^ {56}\) Mr. Rubinson requested that the court direct the transfer of the property, subject to a perpetual conservation easement, to a new charitable organization that would ensure the property would continue to be protected as a wildlife preserve in

\(^{47}\) Sun Sentinel Ed. Bd., \textit{supra} note 32.

\(^{48}\) \textit{Id}.


\(^{51}\) Hudak, \textit{supra} note 35.

\(^{52}\) DeJohn, \textit{supra} note 50.

\(^{53}\) Order, \textit{supra} note 41, at 3; Plaintiff’s Complaint, \textit{supra} note 37, at Ex. E; Ray, \textit{supra} note 36.

\(^{54}\) Sun Sentinel Ed. Bd., \textit{supra} note 32; Hudak, \textit{supra} note 35; DeJohn, \textit{supra} note 50.

\(^{55}\) Hudak, \textit{supra} note 35.

\(^{56}\) Plaintiff’s Complaint, \textit{supra} note 37, at 4, 8. For a discussion of the state law doctrine of \textit{cy pres}, pursuant to which a court may modify the purpose to which a charitable asset is devoted if that purpose has become impossible or impractical due to changed conditions, see \textit{infra} notes 71–75 and accompanying text.
perpetuity.\textsuperscript{57} He also asked that the Pollack-Rubinson Wildlife Preserve sign be placed back on the property.\textsuperscript{58}

Oklawaha Audubon, for its part, argued that Mr. Rubinson’s claims were “frivolous” and “patently absurd,” and asked the judge to sanction him and his attorneys for pursuing frivolous claims in bad faith.\textsuperscript{59}

A neighbor, who has lived near the property since 1994, said that the preserve was well-wooded and that “he and his neighbors have seen a wide variety of wildlife coming and going from the property, including gopher tortoises, owls, foxes, quail, bobcats, bears, turkeys, whippoorwills, nesting hawks, rabbits and butterflies.”\textsuperscript{60} Accordingly, it appears that the property was still capable of being used as a wildlife preserve.

Nonetheless, in an Order issued in May 2023, a Florida trial court sided with Oklawaha Audubon.\textsuperscript{61} The court relied on the fact that the deed conveying the property to Oklawaha Audubon did not state that the property was to be preserved in perpetuity in its natural state.\textsuperscript{62} Mr. Rubinson’s attorney presumably felt that it was unnecessary to include such language in the deed because the property was already encumbered by an expressly perpetual conservation easement held by the District. However, the trial court also found that the District had validly released (extinguished) the perpetual conservation easement because Florida’s enabling statute provides that a conservation easement “may be released by the holder of the easement to the holder of the fee.”\textsuperscript{63} Accordingly, based on the trial court’s order, Oklawaha Audubon was free to sell the six acres to a developer and use the proceeds for its general purposes.

Mr. Rubinson appealed the Florida trial court’s holding but the case settled, with a confidential settlement agreement, in early 2024. Because this case implicates two issues that are important to the durability of perpetual conservation easements in Florida, it is discussed further in Part IV.D below.

\textsuperscript{57} Plaintiff’s Complaint, supra note 37, at 10, 12.

\textsuperscript{58} Id. at 10–11.


\textsuperscript{60} Bennett-Kimble, supra note 49.

\textsuperscript{61} Order, supra note 41, at 8.

\textsuperscript{62} Id. at 2, 5. See also Defendants’ Motion, supra note 40, Ex. 7 (General Warranty Deed).

\textsuperscript{63} Order, supra note 41, at 5; FLA. STAT. § 704.06(4) (2023).
III. THE MEANING OF “IN PERPETUITY” OR “FOREVER”

“In perpetuity” means “forever,” which is a very long time. In protecting the conservation values of land “in perpetuity” or “forever” with conservation easements, it should be acknowledged that in some, hopefully rare, circumstances, conditions may change such that it no longer makes sense to continue to protect certain lands for conservation purposes.

The U.S. Department of the Treasury (the “Treasury”) recognized this reality back in the mid-1980s, when it promulgated the regulations governing the federal deduction for charitable gifts of perpetual conservation easements. In Belk v. Commissioner, the U.S. Court of Appeals for the Fourth Circuit explained that these regulations “offer a single—and exceedingly narrow—exception to the requirement that a conservation easement impose a perpetual use restriction.” Specifically, the Fourth Circuit noted:

The regulations provide that in the event that a “subsequent unexpected change in the conditions surrounding the property . . . make[s] impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee’s proceeds . . . from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.”

The Fourth Circuit emphasized that, “absent these ‘unexpected’ and extraordinary circumstances, real property placed under easement must

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64  See, e.g., In Perpetuity, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “in perpetuity” as “[f]orever; without end”).

65  See Treas. Reg. § 1.170A-14 (as amended in 2023); I.R.C. § 170(h) (2023). To be eligible for the federal deduction, a conservation easement must, among other things, be “a restriction (granted in perpetuity) on the use which may be made of the real property” and the conservation purpose of the contribution must be “protected in perpetuity.” I.R.C. § 170(h)(2)(A), (h)(5)(A) (2023). This deduction has been a major driving force behind the tremendous growth in the use of conservation easements as land protection tools in the United States.

66  Belk v. Comm’r, 774 F.3d 221, 225 (4th Cir. 2014).

67  Id. (quoting Treas. Reg. § 1.170A-14(g)(6)(i)). The regulations also require that, following extinguishment, the donee must be entitled to at least a specified percentage of the proceeds from the sale or exchange of the property. Treas. Reg. § 1.170A-14(g)(6)(ii) (as amended in 2023).
remain there in perpetuity in order for the donor of the easement to claim a charitable deduction.”

As to why there is a need to limit the ability of the holder of a perpetual conservation easement and the current owner of the subject land to declare changed circumstances all by themselves, the Tax Court explained that, “[g]etting a judge involved means there will be a third party to monitor whether conditions really have changed.” The court cautioned that “[t]he cynic, or even just the realist can... foresee some probability of collusion between donors and donees of conservation easements if conservation easements could create benefits with both their formation and their destruction.”

While the regulations promulgated by the Treasury set a high bar for the extinguishment of a perpetual conservation easement—judicial approval and a finding of impossibility or impracticality—they also ensure that obsolete land use restrictions can be eliminated, and that the value attributable to those restrictions will be reinvested in conservation elsewhere. Readers familiar with the laws governing charitable gifts will recognize that the federal extinguishment requirements are a regulatory version of the common law doctrine of cy pres, pursuant to which a court is authorized to modify the purpose to which a perpetual charitable gift is devoted when it becomes impossible or impractical to continue to carry out that purpose due to changed conditions.

Donors have for centuries made charitable gifts of assets, including real property, to government entities or charitable organizations to be used for specified charitable purposes in perpetuity, and the recipients have been required to use such gifts in accordance with the donor’s specified terms and purposes. Courts responded to the inevitability that in some cases changed

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68 Belk, 774 F.3d at 225. Belk involved a conservation easement that authorized the landowner and holder to agree to “substitutions” or “swaps,” which involve removing some or all of the originally-protected land from the conservation easement (a partial or complete extinguishment) in exchange for the protection of some other land. Id. at 223–24. The Fourth Circuit held that such an easement violates §170(h)’s “granted in perpetuity” requirement and thus is not eligible for a deduction. Id. at 225–27.

69 Oakbrook Land Holdings v. Comm’r, T.C.M. (RIA) 2020-54, at *17.

70 Id. at *16.


72 See, e.g., In re Scott’s Will, 171 N.E.2d 326, 328 (N.Y. 1960) (“Where a charitable gift was to a corporation but restricted to designated uses[,] the restriction has always been enforced . . . .”); Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 998 (Conn. 1997) (quoting Lefkowitz v. Lebensfeld, 68 A.D.2d 488, 495–96 (N.Y. App. Div. 1979) (“The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the [a]ttorney [g]eneral.”); RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 4.02 cmt. b(1) (AM. LAW INST. 2021)
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conditions may make continuing to carry out a donor’s specified purposes impossible or impractical by applying the doctrine of cy pres.73 Applying a regulatory version of cy pres to tax-deductible conservation easements makes perfect sense given that the donor of such an easement has, by definition, made a charitable gift of an asset to a government entity or charitable organization to be used for a specified purpose in perpetuity.74 Cy pres also ensures that lands that have been protected because they have unique or otherwise significant conservation values will remain protected unless and until it can be shown to the satisfaction of a court that continued protection has become impossible or impractical due to changed conditions.75

Congress affirmed the importance of the federal tax law judicial extinguishment requirements in recent legislation, in which it directed the Treasury to issue safe harbor “extinguishment clauses” and provide taxpayers with a time-limited opportunity to correct deficient clauses in their conservation easement deeds.76 The Congressional mandate to issue these safe harbor clauses signals the importance of the requirement that a tax-deductible easement can be extinguishable only in a judicial proceeding, upon a finding of impossibility or impracticality, and with a payment of a

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74 See I.R.C. § 170(h) (authorizing a federal charitable income tax deduction for a charitable gift of a conservation easement, but only if the easement is “granted in perpetuity” to a government entity or charitable organization “exclusively” for one or more of four specified “conservation purposes,” and the conservation purposes are “protected in perpetuity”).

75 In the cy pres context, the standards of “impossible” and “impractical” (the latter sometimes referred to as “impracticable”) cannot be used to nullify a purpose that is possible to accomplish. RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 3.02 cmt. d (AM. L. INST. 2021). For example, those standards do not authorize a court to change the donor’s designated charitable purpose to one that the donee’s governing board or the court happen to believe is “better” or “more deserving of support.” Id. The doctrine of cy pres may be applied even though it is technically “possible” to continue to carry out the donor’s specified purpose but only if to do so would not accomplish the donor’s charitable objective, or would not do so in a reasonable way. Id. (citing RESTATEMENT (THIRD) OF TRS. § 67, cmt. c (AM. L. INST. 2003)). In such a case, it is “impractical” to carry out the donor’s specified purpose. Id. Examples of “impractical” include a charitable gift to establish and maintain an institution of a particular type, but a similar institution already exists and is sufficiently effective that the donor’s plan would serve no useful purpose, or if the donor provides funds to establish or support an institution but directs the conduct of the institution in manner that seriously undermines its usefulness. RESTATEMENT (THIRD) OF TRS. § 67, cmt. c (AM. L. INST. 2003). In addition, in applying cy pres, a court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the donor’s designated purpose or falls within the donor’s general charitable intention. See, e.g., RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 3.02 (AM. L. INST. 2021); RESTATEMENT (THIRD) OF TRS. § 67 (AM. L. INST. 2003); RESTATEMENT (SECOND) OF TRS. § 399 (AM. L. INST. 1959).

share of the proceeds to the holder to be used in a manner consistent with the conservation purposes of the original contribution.\textsuperscript{77}

Conservation easements are also generally subject to condemnation.\textsuperscript{78} Accordingly, if it is determined that the best place to locate a public works project is on land that is protected by a conservation easement, the easement can generally be condemned, which would render the continued protection of the property’s conservation values impossible or impractical. The Treasury recognized that condemnation is a possibility and provided in the Treasury Regulations that the donee must receive a share of the proceeds from such an involuntary conversion.\textsuperscript{79}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{77} Although the opportunity to correct was time limited, donors may use the safe harbor clauses in conservation easement deeds going forward because the IRS has indicated that those clauses satisfy the federal deduction judicial extinguishment requirements provided they are not negated or undermined by other provisions. I.R.S. Notice 2023-30, 2023-17 I.R.B. 766. To avoid having the safe harbor extinguishment clauses negated or undermined by other provisions in a conservation easement deed, the extinguishment provision in the deed could incorporate the safe harbor clauses as follows:

  \textbf{Notwithstanding any other provision of this Conservation Easement, this Conservation Easement can be extinguished in whole or in part only as provided in the following clauses:}

  \textbf{Extinguishment Clause.} Pursuant to Notice 2023-30, Donor and Donee agree that, if a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation of the perpetual conservation restriction renders impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if (1) the restrictions are extinguished by judicial proceeding and (2) all of Donee’s portion of the proceeds (as determined below) from a subsequent sale or exchange of the property are used by the Donee in a manner consistent with the conservation purposes of the original contribution.

  \textbf{Determination of Proceeds.} Donor and Donee agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in Donee, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction, at the time of the gift, bears to the fair market value of the property as a whole at that time. The proportionate value of Donee’s property rights remains constant such that if a subsequent sale, exchange, or involuntary conversion of the subject property occurs, Donee is entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

  \textit{See id.} § 4.01. On the power of a “notwithstanding” clause, see Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) (“[U]se of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.”). IRS Notice 2023-30 also includes a safe harbor “boundary line adjustments clause” that requires a judicial proceeding to resolve a bona fide dispute regarding a boundary line’s location. \textit{See IRS Notice 2023-30, 2023-17 I.R.B.} 766, Section 4.02.

  \item \textsuperscript{78} \textit{See Nancy A. McLaughlin, Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation, 41 U.C. Davis L. Rev.} 1897, 1929 (2008).

  \item \textsuperscript{79} \textit{See Treas. Reg.} § 1.170A-14(g)(6)(ii).
\end{itemize}
\end{footnotesize}
IV. **WHY FLORIDA’S PERPETUAL CONSERVATION EASEMENTS MAY NOT BE PERPETUAL**

Perpetual conservation easements are advertised to landowners and the public in Florida as *permanently* limiting the use of the subject properties to protect their conservation values, as binding the current and all subsequent owners in *perpetuity or forever* to the documents’ restrictions, and as providing a *permanent guarantee* that the subject lands will not be developed. In addition, as discussed in Part III, almost four decades ago the Treasury recognized that a perpetual conservation easement should protect the property it encumbers for as close to forever as you can get under U.S. law—that is, unless and until (i) it can be established to the satisfaction of a court that continued use of the subject property for conservation purposes has become impossible or impractical (in other words, the easement is extinguished pursuant to a regulatory version of the *cy pres* doctrine applicable to perpetual charitable gifts) or (ii) the property is condemned for a public use that is incompatible with the conservation easement.

Given the foregoing, why is there a significant danger that perpetual conservation easements in Florida may be far less protective of the properties they encumber? There are four reasons.

First, Florida’s conservation easement enabling statute is woefully deficient when it comes to protecting the public interest and investment in perpetual conservation easements because the statute does not contain any express limits on extinguishment or amendment. It also is not clear how the statute’s “release” provision interacts with federal tax law requirements, federal easement purchase program requirements, or state laws governing the administration of charitable gifts. Second, a recent decision from the U.S. Court of Appeals for the Eleventh Circuit might be misinterpreted as permitting the holder and current landowner to agree to amend a perpetual conservation easement in manners that are contrary to the public interest and harm conservation values. Third, the pressures on government and nonprofit holders to agree to amend or extinguish perpetual conservation easements will only increase over time and, absent clear limits on extinguishment or amendment, holders will find such pressures difficult to resist. Finally, Florida has case law that mistakenly implies that a written trust agreement is required to create valid and enforceable restrictions on a charitable gift, and this may make it difficult to argue that conservation easements conveyed as charitable gifts must be administered in accordance with their stated terms and purposes.

Each of these four points is discussed in more detail below.

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80 *See supra* notes 19, 20, 23 and accompanying text.
A. Florida’s Flawed Conservation Easement Enabling Statute

Florida’s conservation easement enabling statute provides that “[c]onservation easements are perpetual” and “shall run with the land and be binding on all subsequent owners of the servient estate.”81 The statute also provides, however, that “[a] conservation easement may be released by the holder of the easement to the holder of the fee,”82 and there are no express limits on such releases.

A “release” is the method ordinarily used to extinguish an easement, and a release (or extinguishment) may be partial or complete.83 Accordingly, at first glance, it appears that under Florida law, the government or nonprofit holder of a nominally “perpetual” conservation easement may be free to extinguish that easement in whole or in part at any time and for any reason, even if the easement was conveyed as a charitable gift, the donor benefited from the federal deduction or a federal easement purchase program, and the easement continues to protect important wildlife habitat or other conservation values.

The Florida enabling statute is also silent regarding whether the holder would be entitled to compensation for “release” of a conservation easement, though such an action could significantly increase the value of the underlying property and thereby confer an economic windfall on the property owner. Such an action could also result in a significant loss to the public of the funds invested in the easement.

Of course, the Florida enabling statute may not be the only applicable law. If a conservation easement is conveyed in whole or in part as a charitable gift, as many are,#84 the holder should be required to administer the easement

81 FLA. STAT. § 704.06(2), (4).
82 Id. § 704.06(4).
83 See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.3 cmts. a, b (AM. L. INST. 2000) (“A release is the method ordinarily used to effectuate a formal extinguishment of the rights of a servitude beneficiary. . . . A servitude beneficiary may give a partial release as well as a complete release.”). However, the Restatement sets forth special rules applicable to conservation servitudes enforceable by public bodies or conservation organizations because of the public interest and investment involved. See, e.g., id. §§ 1.6, 4.6(1)(b), 7.11, 7.16(5), 8.5.
84 Because of the generous federal charitable income tax deduction available under Internal Revenue Code § 170(h), many landowners convey conservation easements as charitable gifts to government or nonprofit entities. See, e.g., ADAM LOONEY, CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3 (Econ. Stud. at Brookings 2017), https://www.irs.gov/pub/irs-soi/17resconlooney.pdf (“The deduction has proved to be a popular and successful tool for encouraging the conservation of environmentally important land . . . and the tax benefit to donors is often seen as a key component in making a conservation deal come together.”). In addition, many conservation easement purchase programs are structured to involve “bargain-sales,” in which the landowner sells a portion of the conservation easement and claims a federal deduction for the portion donated as a charitable gift. See, e.g., Agricultural Land Easements, USDA, https://www.nrcs.usda.gov/programs-initiatives/ale-
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in accordance with its stated terms and purposes, as with any charitable gift, regardless of the seemingly permissive “release” provision in the Florida enabling statute. Like the Uniform Conservation Easement Act (UCEA), it appears that the Florida enabling statute “leaves intact” existing Florida case and statutory law as it relates to the enforcement of charitable gifts. And like the drafters of the UCEA, the drafters of the Florida enabling statute presumably intended to enable Florida landowners to make charitable gifts of perpetual conservation easements that would qualify for the federal deduction.

agricultural-land-easements (last visited Nov. 2, 2023) (explaining that the USDA’s Natural Resource Conservation Service may contribute up to fifty or seventy-five percent of the fair market value of an agricultural land easement in this purchase program); Financial Benefits—Bargain Sale and New Tax Benefits, supra note 25 (explaining that easements are conveyed in bargain sales “to achieve a mix of tax benefits and cash”).

See supra note 72 and accompanying text; Carpenter v. Comm’r, T.C.M. (RIA) 2012-1, at *6 (quoting Michael M. Schmidt & Taylor T. Pollock, Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds, 31 Colo. Law 57, 58 (2002)) (noting that the gifts of deductible conservation easements constituted restricted charitable gifts, which are “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations”). See also RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 4.02 cmt. a (AM. L. INST. 2023) (“A specific restriction on a charitable asset can be created whether the asset is donated in full to a charity or is conveyed to a charity in a part sale, part gift transaction (sometimes referred to as a ‘bargain sale’).”).

See UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (UNIF. L. COMM’N 1981) (“The UCEA leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.”). The reference to charitable trusts in the UCEA is attributable to the vintage of that act, which was adopted in 1981 when many jurisdictions referred to charitable gifts made for specific purposes in either trust or nontrust form as charitable trusts. See, e.g., State v. Rand, 366 A.2d 183 (Me. 1976) (holding that a gift of land to a city to be forever maintained as a public park in memory of donor’s parents constituted a charitable trust). See also K. King Burnett, The Uniform Conservation Easement Act: Reflections of A Member of the Drafting Committee, 3 Utah L. Rev. 773, 780 (2013) (despite the UCEA provision stating that a conservation easement may be “released . . . in the same manner as other easements,” . . . [t]he Act was not intended to affect other laws that might condition or limit a holder’s ability to release . . . a conservation easement, including the laws applicable to . . . organizations soliciting and accepting charitable gifts for specific purposes (in some jurisdictions referred to as ‘charitable trusts’)). For when a statute changes the common law, see id. at 782, n. 71; Miami Leak Detection & Servs. LLC v. Great Lakes Ins. SE, No. 9:23-CV-80999, 2023 WL 6856755, at *5 (S.D. Fla. Oct. 18, 2023) (citing Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990)) (“[U]less a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.”).

UNIF. CONSERVATION EASEMENT ACT, Prefatory Note at 3 (“[T]he Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code.”); id. § 2 cmt. (“The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate the easement in accordance with the principles of law and equity . . . . Allowing the parties to create such easements . . . enables them to fit within federal tax law requirements that the interest be ‘in perpetuity’ if certain tax benefits are to be derived.”). See also Florida Forever Frequently Asked Questions, FLA. DEP’T OF ENV’T PROT., https://floridadep.gov/lands/environmental-services/content/florida-forever-frequently-asked-questions (last visited Jan. 30, 2024) (“A conservation easement . . . allows the owner to receive certain tax advantages.”).
Accordingly, if a conservation easement in Florida is donated in whole or in part as a charitable gift and drafted to include judicial extinguishment and proceeds clauses that comply with federal deduction requirements, the holder and current landowner should be bound by those terms, despite the seemingly permissive “release” provision in the Florida enabling statute.88 Similarly, if a conservation easement is acquired in part with funds from a federal purchase program, and the easement incorporates the extinguishment and other requirements of that program, the holder and landowner should also be bound by those terms.89 And if a conservation easement donated in whole or in part as a charitable gift is silent regarding extinguishment, the holder should not be permitted to release (extinguish) the easement, thereby changing the stated charitable purpose of the gift, without receiving court approval in a cy pres proceeding.90

It is not clear, however, that Florida courts unfamiliar with conservation easements or the various laws that may be implicated in their administration and enforcement would so hold. A court might interpret the Florida enabling

88 See supra notes 65–68 and 76–77 and accompanying text (discussing the federal deduction’s judicial extinguishment requirements).

89 The USDA Natural Resources Conservation Service provides mandatory minimum deed terms for agricultural land easements acquired with funding through its agricultural conservation easement bargain-program, including:

4. Extinguishment, Termination, and Condemnation. The interests and rights under this ALE Deed may only be extinguished or terminated with written approval of the Grantee and the United States. Due to the Federal interest in this ALE, any proposed extinguishment, termination, or condemnation action that may affect the United States’ interest in the Protected Property must be reviewed and approved by the United States. . . .

If this ALE is extinguished, terminated, or condemned, in whole or in part, then the Grantor must reimburse Grantee and the United States an amount equal to the Proportionate Share of the fair market value of the land unencumbered by this ALE . . . .

5. Amendment. This ALE Deed may be amended only if, in the sole and exclusive judgment of the Grantee and United States, by and through the Chief of NRCS, such amendment is consistent with the Purpose of the ALE and complies with all applicable laws and regulations . . . . Any purported amendment that is recorded without the prior approval of the United States is null and void.

U.S. DEP’T OF AGRIC., AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP) AGRICULTURAL LAND EASEMENT (ALE) MINIMUM DEED TERMS FOR THE PROTECTION OF AGRICULTURAL USE 10–11 (2020), https://www.nrcs.usda.gov/sites/default/files/2022-10/2020%20Minimum%20Deed%20Terms.pdf. For similar mandatory deed terms for conservation easements purchased in part with funds from the federal Forest Legacy Program (FLP), see U.S. DEP’T OF AGRIC., FOREST LEGACY PROGRAM IMPLEMENTATION GUIDELINES 48–56, 77–84 (2017), https://www.fs.usda.gov/sites/default/files/forestry/medias/files/forest-service-legacy-program-508.pdf. In some cases, the requirements of both a federal purchase program and the federal charitable income tax deduction must be met. See id. at 13 (“The FLP projects for which the landowner expects to receive tax benefits are subject to complex Federal and/or State tax law requirements that must be met in addition to the requirements of the FLP.”).

90 See, e.g., St. Joseph’s Hosp. v. Bennett, 22 N.E.2d 305, 308 (N.Y. 1939) (a charity “may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands”).
statute’s “release” provision as authorizing holders to unilaterally extinguish perpetual conservation easements in whole or in part regardless of (i) the status of a conservation easement as a charitable gift, (ii) clauses included in the easement deed to comply with federal tax law or purchase program requirements, or (iii) the easement’s continued protection of significant wildlife habitat or other conservation values. If Florida courts were to so hold, it could render conservation easements in the state ineligible for the federal deduction or funding under federal easement purchase programs because it would be impossible to comply with the requirements of those programs.91 Such a holding would also be contrary to the representations being made in Florida to landowners and the public regarding the permanence of conservation easements.

B. Improper Amendments

In a recent case, Pine Mountain Preserve, LLLP v. Commissioner, the U.S. Court of Appeals for the Eleventh Circuit held that an amendment clause included in three conservation easement deeds did not render the easements ineligible for the federal deduction.92 The amendment clause at issue provided that the holder and landowner “shall mutually have the right, in their sole discretion, to agree to amendments to this Conservation Easement, which are not inconsistent with the Conservation Purposes” and expressly forbade the holder from agreeing “to any amendments . . . that would result in the Conservation Easement failing to qualify . . . as a qualified conservation contribution under Section 170(h).”93

In Pine Mountain, the Eleventh Circuit did not consider that the conservation easements at issue had been conveyed as charitable gifts to be used for the purposes specified in the deeds in perpetuity, or the centuries of law in the United States requiring that the donee of a charitable gift administer the gift in accordance with its stated terms and purposes.94 Under the law governing charitable gifts, the parties to the Pine Mountain easements—the holder and current landowner—are free to agree to only a specific class of amendments: those that “are not inconsistent with the
[easement’s] Conservation Purposes” and would not “result in th[e] Conservation Easement failing to qualify . . . as a qualified conservation contribution under Section 170(h).”

The Eleventh Circuit’s opinion in Pine Mountain unfortunately focused solely on real property law concepts governing traditional easements, like right-of-way easements between neighbors, even though conservation easements are fundamentally different from traditional easements. This misguided and crabbed focus caused the court to make statements that might be misinterpreted as permitting the holder and current landowner to agree to amend or extinguish a deductible conservation easement without limitation, despite the clear limits on amendment set forth in the Pine Mountain easements’ amendment clauses and the numerous federal deduction requirements intended to ensure protection of a subject property’s conservation values in perpetuity.

Pine Mountain should not be so interpreted given the Eleventh Circuit’s narrow holding regarding amendments—that inclusion of the amendment clause described above in the conservation easement deeds did not render the easements ineligible for a deduction. Interpreting the court’s holding in Pine Mountain to permit the holder and current landowner to agree to amend or extinguish a deductible conservation easement without limitation would also conflict with: (1) the Fourth Circuit’s holding in Belk that extinguishment requires a judicial proceeding and a finding of impossibility.

95 See supra note 93 and accompanying text.

96 For a discussion of the fundamental differences between traditional easements and conservation easements, and the cases in which courts have recognized these differences and ruled accordingly, see Nancy A. McLaughlin, Enforcing Conservation Easements: The Through Line, 34 GEO. ENV’T L. REV. 167 (2022).

97 Internal Revenue Code §170(h)(5)(A) mandates that the conservation purpose of a deductible conservation easement be “protected in perpetuity,” and compliance with the protected-in-perpetuity requirement requires compliance with numerous component requirements: I.R.C.§170(h)(5)(B) (the no-surface-mining requirement); Treas. Reg. §1.170A-14(c)(1)-(2) (the eligible donee and restriction-on-transfer requirements); id. §1.170A-14(c)(2)-(3) (the no-inconsistent-use requirement); id. §1.170A-14(g)(1)-(6) (the general enforceable-in-perpetuity, mortgage subordination, future defeating events, mining restrictions, baseline documentation, donee notice, donee access, donee enforcement, judicial extinguishment, and proceeds requirements). Cf. Pine Mountain Pres., 978 F.3d at 1209 (incorrectly stating that “[p]arties to a bilateral contract—which is all a conservation easement is—can always agree after the fact to amend their agreement” and “‘perpetuity’—as used in connection with conservation easements—draws on the term’s common-law meaning and denotes only that the granted property won’t automatically revert to the grantor, his heirs, or assigns”). For a prediction as to how courts like the Eleventh Circuit might go astray in this context, see Michael Allan Wolf, Conservation Easements and the “Term Creep” Problem, 33 UTAH L. REV. 787, 800 (2013) (explaining that a “‘conservation easement’ is, for many purposes, an easement in name only” and that “it is probably asking too much of the members of our over-burdened judiciary (many of whom are decades away from their initial introduction to servitudes law) to perceive the outcome-determinative difference between a ‘real’ easement and the statutory hybrid bearing the same name”).

98 Pine Mountain Pres., 978 F.3d at 1210.
or impracticality;\(^9^9\) (2) the Sixth Circuit’s statement in *Hoffman Properties II LP v. Commissioner* that “[t]he [p]arties can always reserve the right to make changes [to a conservation easement]” provided they are “consistent with the conservation purposes of the donation;”\(^1^0^0\) and (3) the Sixth Circuit’s holding in *Oakbrook Land Holdings, LLC v. Commissioner*, that “[p]erpetuity is vital to the statutory scheme. . . . [T]he donation of an easement will not qualify for a charitable deduction unless the taxpayer can guarantee that both the grant of the interest and the conservation goals which it serves will endure for quite a long time—forever, to be exact.”\(^1^0^1\)

The Tax Court has also recognized the need for guardrails on amendments, explaining that

the general power of parties to servitudes, like parties to every other contract, to change their terms [would not work with conservation easements] . . . . Conservation easements are usually clothed with assertions of a significant public interest, not only because their enforcement preserves valuable land for public benefit, but also because “their creation is subsidized indirectly by tax deductions and directly through purchases by public agencies and nonprofit corporations.” . . . Permitting an unrestricted right to modify a conservation easement, or terminate one altogether, could result in a loss of the public’s investment.\(^1^0^2\)

Absent clarification, however, there is a danger that holders and landowners will feel emboldened by *Pine Mountain* to agree to amendments

\(^9^9\) See *supra* notes 66–68 and accompanying text for a discussion of Belk v. Comm’r, 774 F.3d 221 (4th Cir. 2014).

\(^1^0^0\) *Hoffman Props. II LP v. Comm’r*, 956 F.3d 832, 833–34, 836–37 (6th Cir. 2020) (explaining that “in perpetuity” means “endless duration; forever” and “[f]orever is a really long time—no less so in tax law”). *Hoffman* involved a façade easement on a historic structure that contained an “automatic approval” clause, pursuant to which the property owner could request permission from the holder to change the appearance of the façade. If the holder failed to act within forty-five days, the request would be automatically approved and *Hoffman* could proceed with the change—even if it turned out to be inconsistent with the conservation purpose of the easement. *Id.* at 834. The Sixth Circuit held that the easement failed to satisfy the deduction’s requirement that the conservation purpose be protected in perpetuity because, if the holder of the easement failed to respond to a request from the property owner within forty-five days for any reason, the holder could lose its ability to enforce some or many of the restrictions in the easement. *Id.* “[T]here’s a world of difference,” said the Sixth Circuit, “between restrictions that are enforceable ‘in perpetuity’ and those that are enforceable for only 45 days.” *Id.* See generally Nancy A. McLaughlin, *Amendment Clauses in Easements: Ensuring Protection in Perpetuity*, 168 TAX NOTES FED. 819 (2020) (discussing *Hoffman* and amendments).

\(^1^0^1\) *Oakbrook Land Holdings, LLC v. Comm’r of Internal Revenue*, 28 F.4th 700, 706 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 626 (2023).

that are not consistent with the conservation purposes of an easement and that harm conservation values.

C. Increasing Pressures on Holders

Another reason why perpetual conservation easements in Florida may not, in fact, turn out to be perpetual is that the pressures on government and nonprofit holders to agree to extinguish or amend the easements are only going to increase over time. As protected lands change hands, a succession of new landowners who were not involved in the creation of the conservation easements are likely to seek to free themselves from what they perceive as burdensome restrictions. And absent clear limits on extinguishment or amendment, government and nonprofit holders may oblige. The holder of a conservation easement is essentially in a partnership with whoever happens to own the underlying land from time to time, and it is in the holder’s interest to try and maintain good relations with such landowners and avoid being sued. Moreover, the amendment or extinguishment of a conservation easement can be very lucrative for both the holder and the landowner.

In addition, if there are no clear limits on extinguishment or amendment, as development pressures in Florida increase, the temptation by both public and private actors to seek to extinguish or amend conservation easements to make way for new roads and residential and commercial developments will be irresistible. In other words, if holders are permitted to “release” conservation easements at any time and for any reason, lands protected by conservation easements may become the path of least resistance for new development.103 Accordingly, there is a very real danger that perpetual conservation easements in Florida will be modified in manners that harm conservation values or extinguished in whole or in part despite their ostensible “perpetual” nature.

D. Florida Law Regarding Charitable Gifts

A final reason why perpetual conservation easements in Florida may not, in fact, turn out to be perpetual is some misguided case law in Florida regarding charitable gifts. Mr. Rubinson’s charitable gifts of a perpetual conservation easement and the underlying fee to the Saint John’s River Water Management District and Oklawaha Audubon, respectively, as discussed in Part II, provide the perfect backdrop to discuss this issue. Those gifts implicate two issues important to the durability of perpetual conservation easements in Florida: (i) how valid and enforceable restrictions on charitable gifts can be created and (ii) whether the perpetual conservation easement donated by Mr. Rubinson constituted a restricted charitable gift that the District was not free to extinguish without court approval obtained in cy pres proceeding.

1. Creation of a Valid and Enforceable Restriction on a Charitable Gift.

As noted in Part II, a Florida trial court found that the deed by which Mr. Rubinson conveyed the underlying fee to Oklawaha Audubon did not state that the property was to be preserved in perpetuity in its natural state.\textsuperscript{104} In holding that Oklawaha Audubon was therefore not obligated to maintain the property as a wildlife preserve in perpetuity, the trial court relied in part on Persan v. Life Concepts.\textsuperscript{105} In Persan, the court held that a charitable gift of real estate made via a deed that contained no conditions, restrictions, or language indicating an intent to create a trust operated to convey the real estate “free and clear” to the donee charitable organization, despite circumstances indicating that the donor intended the real estate to be used as the site of group homes for disabled persons, the donee’s knowledge of that intent, and the donee’s solicitation of funds from the community to cover the cost of construction of the homes.\textsuperscript{106}

Persan, and the similarly decided Developmentally Disabled v. Step by Step, imply that a “written trust agreement” is required to create a valid and enforceable restriction on a charitable gift in Florida.\textsuperscript{107} However, such a

\textsuperscript{104} See supra note 62 and accompanying text. The deed did include a legal description of the property followed by “A/K/A POLLACK-RUBINSON PRESERVE.” See Defendants’ Motion, supra note 40, Ex. 7 (General Warranty Deed).


\textsuperscript{106} Id. at 1010–12.

\textsuperscript{107} See id. at 1010, 1012; In Found. for the Developmentally Disabled v. Step by Step Educ., 29 So. 3d 1221, 1222, 1225 (Fla. Dist. Ct. App. 2010), the court held that funds donated to a charitable
requirement is not consistent with the laws governing charitable gifts. The Restatement of the Law, Charitable Nonprofit Organizations explains that a valid and enforceable restriction on a charitable gift can be created by (1) the terms of a gift instrument, which can take many forms (such as a deed, contract, cover letter, notation on a check, pledge card, subscription agreement, or inscription on tangible property), and is not limited to a written trust agreement; (2) a solicitation by a charity; or (3) circumstances surrounding the donation of the asset, but usually only in combination with (1) or (2). Notably, there was a strong dissent in Persan, and the Florida attorney general argued in Developmentally Disabled that Persan was wrongly decided.

An analysis of whether Mr. Rubinson’s charitable gift of the six acres to Oklawaha Audubon was subject to a valid and enforceable restriction that the property be maintained as a wildlife preserve in perpetuity is beyond the scope of this Article. What is important, however, is dispelling the notion that the only way a valid and enforceable restriction on a charitable gift can be created is via a “written trust agreement.” That is not the law in other states and should not be interpreted as the law in Florida. In contemporary society, many charitable gifts are made to charitable corporations in nontrust form but are nonetheless subject to restrictions on their use. Requiring a written trust organization to purchase land to be used for a specific purpose but without a written agreement detailing the parties’ intentions and expectations did not create an enforceable trust.

108 Restatement of Charitable Nonprofit Orgs. § 4.02(a) (Am. L. Inst. 2021). For discussion of the many forms a gift instrument can take, see id. § 4.02 cmt. (b)(1). See also supra note 72 and accompanying text, explaining that donors have for centuries made charitable gifts of assets to government entities or charitable organizations to be used for specified charitable purposes in perpetuity, and the recipients have been required to use such gifts in accordance with the donor’s specified terms and purposes.

109 Persan, 738 So. 2d at 1012–14 (Harris, J., dissenting) (objecting to the notion that the parties intended the gifts of the real estate and funds to build the group homes to have no strings attached, and noting that if the charity believed the purpose was no longer feasible, it could petition the court for release).

110 Developmentally Disabled, 29 So. 3d at 1225 n.3. Florida courts have enforced charitable gifts expressly made for specific purposes in other cases, authorizing their modification only pursuant to the doctrine of cy pres. See, e.g., Reno v. Hurchalla, 283 So. 3d 367, 371 (Fla. Dist. Ct. App. 2019) (applying the Uniform Trust Code’s cy pres provision); SPCA Wildlife Care Ctr. v. Abraham, 75 So. 3d 1271, 1276–77 (Fla. Dist. Ct. App. 2011) (applying the common law doctrine of cy pres). For a discussion of the complex landscape of laws governing gift restrictions given the adoption of the Uniform Trust Code and the Uniform Prudent Management of Institutional Funds Act in many states, see Nancy A. McLaughlin, Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification, 70 UCLA L. Rev. Discourse 2 (2023).

111 The Restatement of the Law, Charitable Nonprofit Organizations provides a relevant illustration: Gabriel Johnson donated funds to Hilltop University, a charity that is a corporation. The gift instrument specifies that the funds are to be used for the purpose of providing need-based merit-scholarship aid to students attending Hilltop University for medical-related education. The gift instrument does not contain any words suggesting that the funds are to be held as a trust. Hilltop
agreement to create a valid and enforceable restriction on a charitable gift would create a trap for the unwary charitable donor in Florida and could chill charitable donations in the state.

2. Status of the Perpetual Conservation Easement as a Restricted Charitable Gift.

Mr. Rubinson appears to have conveyed the perpetual conservation easement to the District as a charitable gift. He also appears to have claimed a federal charitable income tax deduction with regard to both the charitable gift of the conservation easement and the charitable gift of the underlying fee.

The purpose of the charitable gift of the conservation easement, as expressed in the deed conveying the easement to the District (the gift instrument), was “to assure that the Property will be retained forever in its existing natural condition and to prevent any use of the Property that will impair or interfere with the environmental value of the property.” The deed also stated that any activity on or use of the property inconsistent with the purpose of the easement was expressly prohibited. The deed further provided that the covenants, terms, conditions, and restrictions of the easement “shall be binding upon . . . the parties hereto and their respective personal representatives, heirs, successors and assigns and shall continue as a servitude running in perpetuity with the property.”

As explained in Part IV.A above, if a conservation easement is conveyed in whole or in part as a charitable gift, the holder should be required to administer the easement in accordance with its stated terms and purposes, as with any charitable gift, and regardless of the seemingly permissive “release” provision in the Florida enabling statute. In addition, where the

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112 Defendants’ Motion, supra note 40, at Ex. 6 (Conservation Easement). Although the conservation easement states that it was conveyed as a condition of a permit issued by the District, the District could find no evidence of such a permit, and the reference to a permit in the conservation easement appears to be an error. See id.; Plaintiff’s Complaint, supra note 37, at Ex. E (Release of Regulatory Conservation Easements).
113 Defendants’ Motion, supra note 40, at 5.
114 Id. at Ex. 6 (Conservation Easement).
115 Id.
116 Id.
117 See supra notes 72, 85–87 and accompanying text.
conservation easement is silent regarding extinguishment, the holder should not be permitted to release (extinguish) the easement, thereby changing the charitable purpose of the gift, without receiving court approval in a cy pres proceeding.\textsuperscript{118} Accordingly, the District should not have been permitted to summarily release (extinguish) the conservation easement. Rather, it should have been required to obtain court approval in a cy pres proceeding, and such approval is unlikely to have been granted given that the original purpose of Mr. Rubinson’s charitable gift of the conservation easement—to retain the property in its existing natural condition and prevent any use of the property that would impair or interfere with the environmental value of the property—does not appear to have become impossible or impractical.\textsuperscript{119}

In his concurrence in Developmentally Disabled, which involved funds donated to a charitable organization to be used for a specific purpose but without a written agreement documenting the parties’ intentions and expectations, Judge Silberman explained:

This type of dispute may have been avoided through a more detailed understanding, appropriately documented, as to the parties’ intentions and expectations and the duration of any agreement obligating the Foundation to continue supporting the Step By Step program.\textsuperscript{120}

Mr. Rubinson’s charitable gift of the conservation easement did not suffer from the problems Judge Silberman identified regarding the charitable gift in Developmentally Disabled. The conservation easement deed (the gift instrument) appropriately documented the parties’ intentions and expectations regarding the gift—“to assure that the Property will be retained

\begin{footnotes}
\item[118] See supra note 90 and accompanying text.
\item[119] The Restatement of Charitable Nonprofit Organizations provides a relevant illustration: Margaret Doyle conveyed a perpetual conservation easement encumbering her 160-acre property fronting on Chilmark Bay to Regional Land Trust as a charitable gift. The purpose of the gift is to preserve and protect the conservation and scenic values of the property, and to prevent subdivision and development of the property, in perpetuity. Regional Land Trust has monitored and enforced the easement for many years and through a succession of landowners, and the easement continues to protect important conservation and scenic values many generations later. The current board of Regional Land Trust and the current landowner seek court application of the cy pres doctrine to permit extinguishment of the conservation easement, sale of the property for limited subdivision and development, and payment of a share of the proceeds from the sale to Regional Land Trust to allow it to acquire conservation easements on other properties in a nearby county that would be more consistent with the Regional Land Trust’s newly developed strategic plan. A court should not apply the cy pres doctrine to permit extinguishment of the conservation easement because it has not become illegal, impossible, impractical, or wasteful to continue to carry out the charitable purpose specified by the donor. Restatement of Charitable Nonprofit Orgs. § 3.02 cmt. d, illus. 3 (Am. L. Inst. 2021)
\end{footnotes}
forever in its existing natural condition and to prevent any use of the Property that will impair or interfere with the environmental value of the property.” 121 It also appropriately documented the duration of the District’s obligation—to retain the property “forever” in its existing natural condition. 122

Unfortunately, given the misguided case law extant in Florida regarding the creation of charitable gift restrictions, and the likely confusion over the interaction of federal deduction requirements, state laws governing charitable gifts, and the Florida enabling statute, whether a Florida court would find the above reasoning persuasive is uncertain.

V. THE PATH FORWARD

As noted in the Introduction, if perpetual conservation easements in Florida are determined to be releasable (extinguishable) by their holders at any time and for any reason under the Florida enabling statute regardless of other applicable laws, the consequences would be dire. Protection of the Florida Wildlife Corridor (as well as other conservation easement protected lands) would be imperiled, the massive public funds invested in conservation easements would be at risk, and landowners in the state may no longer be able to benefit from the federal deduction or federal easement purchase programs. Additionally, allowing perpetual conservation easements to be unilaterally released by their holders would be directly contrary to the representations made to, and the justifiable expectations of, both the landowners granting easements and the public subsidizing their acquisition.

To address this problem, two steps should be taken now to keep the perpetual in Florida’s conservation easements: (i) Florida’s conservation easement enabling statute should be revised to, among other things, place clear limits on the extinguishment and amendment of perpetual conservation easements, and (ii) conservation easements should be drafted to more clearly articulate the parties’ intentions and expectations regarding the permanence of the protections.

A. Revise Florida’s Conservation Easement Enabling Statute

Three states have revised their conservation easement enabling statutes to require a judicial proceeding to extinguish a conservation easement: Colorado, Maine, and Rhode Island. 123 Two of these states—Maine and

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121 Defendants’ Motion, supra note 40, Ex. 6 (Conservation Easement).
122 Id. The conservation easement was also expressly granted “in perpetuity.” Id.
Rhode Island—also revised their statutes to place limits on the amendment of a conservation easement.\textsuperscript{124} Using these states’ revisions as a model, but improving upon them, Florida should consider revising its enabling statute to delete the “release” provision in section 704.06(4)\textsuperscript{125} and replace it with the following subsections:

(a) **Extinguishment.** A conservation easement may be extinguished in whole or in part only in a judicial proceeding upon a finding by the court that a subsequent unexpected change in the conditions surrounding the property has made impossible or impractical the continued use of the property (or the portion of the property to be removed from the easement) for conservation purposes, and the attorney general shall be notified of such proceeding and given an opportunity to be heard to represent the public interest in the continued protection of conservation values. For purposes of this section, extinguishment refers to the release or other removal of all or any portion of the encumbered land from the conservation easement, whether characterized as a release, termination, extinguishment, swap, substitution, reconfiguration, migration, modification, amendment, or otherwise, and the terms impossible and impractical shall be interpreted as under the common law doctrine of \textit{cy pres} applicable to charitable assets.

(b) **Amendment.** A conservation easement may be amended by agreement of the holder of the easement and the owner of the property encumbered by the easement only if the proposed amendment will not materially detract from any of the conservation values intended for protection. A conservation easement may be amended in such a manner as to materially detract from a conservation value intended for protection only with the prior approval of the court and the attorney general shall be notified of such proceeding and given an opportunity to be heard to represent the public interest in the continued protection of conservation values. An amendment that would materially detract from a conservation value intended for protection may be approved only when it is found by the court that the proposed amendment is consistent with the conservation purposes


\textsuperscript{125} The release provision in § 704.06(4) provides: “A conservation easement may be released by the holder of the easement to the holder of the fee even though the holder of the fee may not be a governmental body or a charitable corporation or trust.”
expressed by the parties in the easement and the public interest in the continued protection of conservation values. For purposes of this section, an amendment refers to a change in the terms of a conservation easement that does not constitute an extinguishment.

(c) **Holder Compensation.** If the value of the landowner’s estate is increased by reason of the extinguishment or amendment of a conservation easement, that increase shall be paid over to the holder, or to such governmental body or charitable corporation or trust as described in subsection (3) as the court may designate, to be used in a manner consistent with the conservation purposes of the conservation easement.126

(d) **Instrument and Section Interaction.** Any provision in a conservation easement that limits or otherwise restricts the extinguishment or amendment of the easement must be complied with in addition to the provisions addressing such actions in this section.

Subsection (a) above adopts the judicial extinguishment requirements of federal tax law.127 Adopting such requirements is desirable for a number of reasons. First, it would avoid having two sets of requirements apply to the extinguishment of conservation easements for which a federal deduction was sought,128 and such easements are common.129 Second, it would set a high bar for the extinguishment of all perpetual conservation easements in the State, and that high bar would be consistent with the goals of Florida Wildlife Corridor Act and the representations being made to landowners and the public about the permanence of conservation easements.130

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126 Subsection (3) refers to the subsection of Florida’s conservation easement enabling statute that indicates the entities eligible to acquire conservation easements.

127 See supra notes 65–68 and 76–77 and accompanying text (discussing the federal deduction’s judicial extinguishment requirements).

128 The judicial extinguishment requirements in the Colorado, Maine, and Rhode Island revised statutes do not precisely mirror the federal tax law requirements, which necessitates compliance with two sets of requirements to extinguish federally-deductible conservation easements in those states: (i) the federal tax law extinguishment requirements, which are typically incorporated into the conservation easement deed, and (ii) the extinguishment requirements in the state enabling statutes. See Oakbrook Land Holdings v. Comm’r, T.C.M. (RIA) 2020-54, at *17 (tax-deductible conservation easements “typically have clauses . . . that provide ‘[i]f a change in conditions makes impossible or impractical any continued protection of the Conservation Area for conservation purposes, the restrictions contained herein may only be extinguished by judicial proceeding’”).

129 See supra note 84 and accompanying text (explaining that many conservation easements are donated in whole or in part by landowners interested in claiming the federal deduction).

130 For the representations being made about permanence, see supra Part I.
The Maine and Rhode Island revised statutes require that the state attorney general be made a party to any extinguishment proceeding or “materially detracting” amendment proceeding. In recognition of the limited resources of the state attorney general and the possibility of conflicts of interest, subsections (a) and (b) above require only that the attorney general be notified and given the opportunity to be heard. Those subsections also mandate that the attorney general represent the public interest in the continued protection of conservation values to make clear that the role of the attorney general in such a proceeding is to protect conservation values.

Subsections (a) and (b) above define the terms “extinguishment” and “amendment.” Absent definitions of these terms, the distinction between them may not be understood. In addition, the parties may seek to circumvent the extinguishment requirements by removing property from a conservation easement’s protections via an “amendment,” “substitution,” “reconfiguration,” or otherwise, thus rendering the statutory limits on extinguishment meaningless.

Pursuant to subsection (b) above, which is based in part on the amendment provisions in the Maine and Rhode Island revised statutes, a conservation easement may be amended by agreement of the holder and landowner only if the amendment will not “materially detract” from any of the conservation values intended for protection.\footnote{ME. REV. STAT. ANN. tit. 33, § 477-A.2.B (2023); R.I. GEN. LAWS § 34-39-5(c) (2023).} If an amendment would so “materially detract,” court approval and notification of the Attorney General is required. As a practical matter, these statutory limits are likely to cause governmental and nonprofit holders of conservation easements to be cautious in agreeing to amendments, and to seek court approval of any amendment that might be viewed as “materially detracting” in order to avoid challenges by the attorney general or some other party with standing.

Subsection (c) above is drawn directly from the Maine and Rhode Island revised statutes.\footnote{ME. REV. STAT. ANN. tit. 33, § 477-A.2.B (2023); R.I. GEN. LAWS § 34-39-5(c) (2011).} This “holder-compensation” provision would ensure that landowners do not have a financial incentive to seek to extinguish or amend conservation easements.\footnote{See Nancy A. McLaughlin & Jeff Fidot, Conservation Easement Enabling Statutes: Perspectives on Reform, 3 UTAH L. REV. 811, 830–31 (2013) (discussing the Maine statute’s holder-compensation provision).} It also would help to ensure that the extinguishment or amendment of a conservation easement would not result in a loss of conservation assets that benefit the public.

Subsection (d) provides that any provision in a conservation easement that limits or otherwise restricts the extinguishment or amendment of the easement must be complied with in addition to the provisions addressing such actions in the revised statute. This provision would ensure that landowners in
Florida can create conservation easements that satisfy the requirements of any existing or subsequently enacted tax incentive or easement purchase program.

Placing statutory limits on the extinguishment and amendment of conservation easements as proposed above would have a number of salutary effects.

- It would help to ensure that conservation easement protections will not be eroded over time as development pressures increase, public and private actors look to conservation easement-protected lands as the potential site of new developments, and a succession of new landowners seek relief from easement restrictions that they had no part in crafting and find burdensome.
- It would facilitate the proper administration of conservation easements by allowing government and nonprofit holders to point to the statute when declining requests to extinguish easements or amend them in manners that would materially detract from the conservation values intended for protection.
- It would help legitimize the rare extinguishment or materially-detracting amendment by ensuring that such action is not simply agreed to by the two parties with a financial interest in the action (the holder and current landowner).
- It would provide—for all conservation easements in the state—protections that are consistent with the goals of the Florida Wildlife Corridor Act and the representations being made to landowners and the public about the permanence of conservation easements.
- It would ensure that there would be no more Mr. Rubinsons, who in good faith attempt to protect property that has special meaning to them, their families, and their communities in perpetuity with a perpetual conservation easement, only to discover that such an easement actually provides little or no meaningful protection of the property.

B. Draft Conservation Easements to Emphasize Permanence

Perpetual conservation easements should be drafted to include provisions expressly limiting the manner in which the easements can be amended or extinguished. These limits should reflect the parties’ intentions
and all applicable laws, such as the federal deduction’s judicial extinguishment requirements and the requirements set forth in federal purchase programs. In addition, to minimize confusion and clarify the parties’ intent, landowners granting perpetual conservation easements in whole or in part as charitable gifts should take the following precautionary steps.

First, the conservation easement should be titled on the first page “Deed of Charitable Gift of Conservation Easement.” Such a title will make it clear that the conveyance involved a charitable gift and will signal that the easement is fundamentally different from a traditional easement between private parties, like a right of way easement between neighbors. Such a title will also support the argument that the easement should be entitled to the same protections afforded to all charitable gifts, including that the gift be administered in accordance with its stated terms and purposes.

Second, the conservation easement should include a clause expressly stating that it was conveyed as a restricted charitable gift, and that the parties intend the limits on extinguishment and amendment in the easement to be legally binding on the donor, the donee, and each of their successors in interests in perpetuity. Such a clause might look something like this:

Charitable Gift Subject to Enforceable Restrictions. Donor and Donee agree that: (i) Donor conveyed this Easement to Donee [in whole or in part] as a restricted charitable gift for the purpose specified herein; (ii) Donor imposed restrictions on this gift, including the restrictions herein that limit the manner in which this Easement can be extinguished or amended; (iii) Donor and Donee intend that such restrictions will be legally binding on both Donor and Donee and each of their successors in interest in perpetuity, and that Donor and Donee and their successors in interest must comply with the terms of this Easement, including such restrictions, notwithstanding and in addition to any provisions that may address the release, extinguishment, amendment, or other alteration of a conservation easement under Florida law; (iv) Donee expressly accepts the gift of this Easement subject to such restrictions and assumes the fiduciary obligation to administer this Easement in accordance with its stated terms and purpose in perpetuity on behalf of the public; and (v) the stated terms and purpose of this Deed of Charitable Gift of

134 See supra notes 65–68, 76–77 and accompanying text (discussing the federal deduction’s judicial extinguishment requirements).

135 See supra note 89 and accompanying text (discussing the federal purchase program requirements).
Conservation Easement are enforceable by the courts on behalf of the public as with any charitable grant.

Attorneys in Florida would need to consider whether it would be prudent to also provide that it is the parties’ intent that the conservation easement be held by the donee “in trust” for the benefit of the public in perpetuity given the Persan and Developmentally Disabled decisions discussed in Part IV.D.

Finally, the conservation easement should be signed by both the donor and the donee. While a donee’s acceptance of a conservation easement should indicate its agreement to administer the easement in accordance with its stated terms and purpose, having the donee sign the easement document will make it more difficult for the donee to argue to the contrary.

While the above precautions may not be sufficient to prevent holders from summarily releasing perpetual conservation easements in Florida in whole or in part under the enabling statute’s current “release” provision, such precautions may make such releases less likely and, if they occur, easier to challenge.

C. Climate Change Red Herring

Some may object to the recommendations made in this Part, arguing that due to climate change, more flexibility is needed to adapt to changing conditions. That argument is a red herring.

If certain species migrate off of permanently protected lands due to climate change, others are likely to migrate onto those lands. If continued use of a property for conservation purposes becomes impossible or impractical due to changed conditions, a court can authorize extinguishment of the easement and the holder’s use of its share of the proceeds to accomplish similar conservation purposes elsewhere. The parties would be able to agree to amend the terms of a conservation easement provided the amendments do not materially detract from the conservation values intended for protection and could seek court approval of amendments that do not meet this standard. Furthermore, if it is determined that easement-protected property is needed for a more necessary public use than conservation, condemnation is an option.

Perpetual conservation easements as described in this Part would not lock in obsolete land use restrictions to the detriment of the public. Rather, they would benefit the public by shielding properties with significant conservation values from economic, political, and development pressures, while at the same time allowing for obsolete land use restrictions to be modified or removed from the land and the value attributable thereto reinvested in conservation elsewhere.
Finally, it is important to note that it is the development of land, rather than the conveyance of perpetual conservation easements, that will significantly reduce the choices available to future generations. The destruction of wildlife habitat and ecosystems, of scenic and historic sites, and of rural agricultural communities as a result of development is almost always substantially irreversible. On the other hand, the protection of land through the use of perpetual conservation easements holds far more options open for future generations because conservation easements do not involve physical changes to the land and, as explained herein, such easements can be extinguished in appropriate circumstances either in a court proceeding or through condemnation.

VI. CONCLUSION

Hundreds of millions of dollars are being invested in the protection of the Florida Wildlife Corridor. One of the primary tools being used to accomplish this protection is the perpetual conservation easement, which is touted to landowners and the public as providing a permanent guarantee that the subject lands will never be developed. Yet there is a very real danger that perpetual conservation easements in Florida may not, in fact, be perpetual, and the protections put in place today will vanish over time—along with the public funds invested therein—as holders “release” the easements in whole or in part in the face of economic, political, and development pressures. Florida landowners may also find themselves unable to benefit from the subsidies offered through the federal tax incentive and purchase programs due to an inability to comply with the requirements of those programs.

This unfortunate state of affairs should be remedied by revising the Florida enabling statute to place clear limits on the amendment or extinguishment of conservation easements, as has been done in several other states. In addition, conservation easement should be drafted to include limits on amendment and extinguishment, and to make clear that the terms of the easement are legally binding on the grantor, grantee, and their successors in interest.

With hundreds of landowners reportedly waiting to grant perpetual conservation easements to protect the Florida Wildlife Corridor, the time to


137 See supra note 14 and accompanying text.
act is now. As the Sun Sentinel Editorial Board warned in its discussion of Mr. Rubinson’s summarily extinguished perpetual conservation easement:

More is at stake here than the fate of six acres in Orange County. . . . [I]t is about the meaning of the words “preserve” and “forever.” In a state that has invested billions of taxpayer dollars in conservation lands, the stakes couldn’t be higher.138