

# THIRD-PARTY ENFORCEMENT OF CONSERVATION EASEMENTS

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## INTRODUCTION<sup>†</sup>

The recently released Land Trust Alliance Census tells us of the success of private land conservation efforts: over fifteen hundred local and

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<sup>†</sup> This article expands upon the concept of third-party enforcement of conservation easements originally raised in an article written by this author, entitled: *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW. 441 (1999) and revisited in another article co-written by this author: Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373 (2001). The framework for this article stems from an unpublished memorandum of law prepared for the Legal Roundtable on Third-Party Standing at the 2003 Land Trust Alliance Rally by this author and Robert J. Levin, Esq. The memorandum was not a product of exhaustive legal research and was intended only to generate discussion at a national gathering of practitioners to explore how various mechanisms might provide standing for third parties to enforce conservation easements.

regional land trusts have partnered with private landowners nationally to conserve working landscapes such as farms and ranches, environmentally significant and sensitive ecosystems, plant and wildlife habitat, historic properties, and scenic vistas across the country.<sup>1</sup> The successful partnership between local and regional nonprofit groups and private landowners effectively has doubled the land acreage protected nationally over the last five years, which, as of December 31, 2003, totaled over nine million acres.<sup>2</sup> To meet the growing need for conservation partners, local and regional land trusts are forming at a rate of approximately two per week, with the West experiencing the fastest growth of land trusts.<sup>3</sup>

The predominant means of protecting land privately between land trusts and landowners includes fee acquisition and voluntary agreements known as conservation easements.<sup>4</sup> Over five million acres of land have been protected with nearly eighteen thousand conservation easements over the last half-decade.<sup>5</sup> Land trusts, as the holders of conservation easements, are charged with perpetually enforcing the terms of the conservation easements they hold. While many land trusts maintain exclusive rights to enforce the terms of the conservation easements they hold, with the prevalence of the use of conservation easements as a tool for land protection, one might query: what happens if a land trust is unable to enforce the terms of a conservation easement it holds? And its corollary: who else may stand in the land trust's shoes to assist in enforcing the easement, and have standing to enforce the easement, on the land trust's behalf if and when it will not, or cannot, enforce?

The obvious answers include any co-holders of the easement, parties to the original conservation easement transaction, and parties identified in the

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1. See LAND TRUST ALLIANCE, 2003 NATIONAL LAND TRUST CENSUS (2003) [hereinafter LTA CENSUS], available at <http://www.lta.org/aboutlt/census.shtml>. The National Land Trust Census, the nation's only tabulation of the achievements of the private, voluntary land conservation movement, describes how people in their own communities are helping to safeguard water quality, preserve working farms and ranches, and protect wildlife habitat and other natural areas. *Id.*

2. Local and regional land trusts have now protected 9,361,600 acres of natural areas nationally, a land mass four times the size of Yellowstone National Park. *Id.* This is double the 4.7 million acres protected as of 1998. *Id.* Although this Census tallies data only from local and regional land trusts, national land trusts have protected an additional 25 million acres. *Id.* "A record 5 million acres were protected through voluntary land conservation agreements, more than triple the amount (1.4 million acres) protected just five years ago." *Id.* In 2003 1,526 local and regional land trusts were in operation, a 26% increase over the number that existed (1213) in 1998. *Id.*

3. *Id.* Acreage protected by conservation easements has increased 266% since 1998, from 1,385,000 to 5,067,929 in 2003. *Id.* The total number of conservation easements is 17,847, up from 7,392 in 1998. *Id.*

4. *Id.* "Typically land trusts either buy land outright or work out private agreements that limit future development." *Id.*

5. *Id.*

conservation easement deed as having an enforcement right in lieu of, or in addition to, the holder's enforcement right. But the query remains, the answer to which is less obvious: do parties who are not holders or co-holders of a conservation easement, not parties to the original conservation transaction, nor identified by the conservation easement deed as having an enforcement right, have the authority or standing to enforce a conservation easement? The answer to the latter question varies from state to state and lies within each state's conservation easement enabling legislation, common law doctrines, case-law, and statutory laws, and is the subject of this article.

What is not the subject of this article is judgment of whether it is beneficial or detrimental to create, provide for, or recognize a third-party right of enforcement or standing for a third-party right. In some cases, a third-party right of enforcement will be welcomed; in others, it will not. Rather, this article seeks to explore, and understand the support for, third-party enforcement of conservation easements by persons who are not parties to the conservation easement, not the holder or co-holder of the conservation easement, nor identified in the conservation easement deed as having a third-party enforcement right.

## I. ENABLING LEGISLATION AND THIRD PARTY ENFORCEMENT OF CONSERVATION EASEMENTS

### A. *Framework Provided by the Uniform Conservation Easement Act*

The Uniform Conservation Easement Act (the UCEA) provides the framework for many states' conservation easement enabling legislation.<sup>6</sup> The UCEA was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1981, as a means to enable the creation of binding, perpetual, "durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources," and to "maximize[] the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them."<sup>7</sup> The drafters believed the adoption of the UCEA by state legislatures would facilitate the enforcement of conservation easements in the public interest, and in furtherance of this goal, they provided for a "third-party right of enforcement" of conservation

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6. UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996) [hereinafter UCEA].

7. *Id.* prefatory note.

easements to be created within the language of the conservation easement deed itself.<sup>8</sup>

Section 1 of the UCEA defines a third-party right of enforcement as “a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder” of the conservation easement at issue.<sup>9</sup> The drafters of the UCEA also acknowledged the third-party right of enforcement that permits parties to a conservation easement to anticipate and provide for an enforcement right in persons or entities that are not parties to the conservation easement by, “structur[ing] [them] into the transaction[.]” but they intended to limit this enforcement right to use by governmental bodies, charitable corporations, associations, or trusts.<sup>10</sup>

Section 3 of the UCEA recognizes four categories of persons eligible to bring judicial actions to enforce, modify, terminate, or otherwise affect conservation easements and the property they burden: “(1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement; or (4) a person authorized by other law.”<sup>11</sup>

8. *Id.* § 3.

9. *Id.* § 1(3). “Holder” is defined by the UCEA as “a governmental body empowered to hold an interest in real property under the laws of this State or the United States[.]” or a charitable corporation, association, or trust created for the purpose of protecting “natural, scenic, or open-space values of real property . . . for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.” *Id.* § 1(2). “Conservation Easement” is defined by the UCEA as

a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

*Id.* § 1(1).

10. *Id.* § 1 cmt.

11. *Id.* § 3; *see also id.* § 3 cmt.

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners’ use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the [conservation] easement itself, the

As evidenced by the first three categories of Section 3, parties to a conservation easement, parties recognized in a conservation easement, and owners of property burdened by a conservation easement typically have standing to sue over the conservation easement's terms. The unreported Connecticut case of *Conrad v. Mattis* exemplifies this right.<sup>12</sup> Conrad sued neighbor Mattis, "the Town of South Windsor and certain town officials alleging [Mattis's] violation of a Conservation Easement" extending over both Conrad's and Mattis's properties.<sup>13</sup> Conrad alleged that the Town and its officials failed to enforce the easement's provisions against Mattis and that Mattis clearly violated the conservation easement that required landowners to maintain the "natural scenic and open condition of the property" when Mattis cut trees, dumped soil, cleared 7,000 square feet for a garden, used motorized vehicles as part of the process, and built improvements on property subject to the easement.<sup>14</sup> The conservation easement specifically prohibited "clear cutting" and the use of "motorized recreational vehicles."<sup>15</sup> Mattis and five adjoining property owners whose parcels were subject to the same conservation easement and who subsequently became defendants in the action, along with the other parties, "[sought] a declaratory judgment interpreting the [Conservation] Easement with respect to the rights of individual property owners to cut down trees and to maintain gardens, lawns, riding trails and ski trails within the area of the Easement."<sup>16</sup>

The court denied the declaratory judgment, but held that the property owners could create gardens, lawns, and trails, and cut trees within the conservation easement area and occasionally use motorized equipment thereon.<sup>17</sup> The court reasoned that "[t]he "purpose of this easement [was] to perpetually retain the Easement Area predominantly in its natural, scenic and open condition and to protect the natural and watershed resources of the Town of South Windsor."<sup>18</sup> "[O]f course" the conservation easement "specifically permit[ted] the use of the affected land for farming and

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Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

*Id.*

12. *Conrad v. Mattis*, 28 Conn. L. Rptr. 566 (Conn. Super. Ct. 2000), available at 2000 WL 33115395.

13. *Id.* at \*1.

14. *Id.* at \*1-3.

15. *Id.* at \*2.

16. *Id.* at \*1.

17. *Id.* at \*3-4.

18. *Id.* at \*2.

gardening, as well as jogging and horseback riding trails and paths.”<sup>19</sup> The court further reasoned that the creation and maintenance of a garden in the conservation easement area did not violate the purpose of the conservation easement because “[a] garden is natural, scenic and open and [therefore,] specifically permitted by the Easement.”<sup>20</sup> As such, the court posited, the development of gardens fell within the original intent of the easement’s drafter.<sup>21</sup>

*Conrad* is illustrative of the property owners’ legitimate right and opportunity to raise concerns about the conservation easement’s impact on their land subject to the conservation easement’s restrictions, as evidenced by the court’s willingness to recognize and hear them. The court stated that the standing and immunity issues raised in the pleadings were either waived or not pressed, because “all the parties, including the Town, [had] stipulated that [the] action [was] to be treated as one seeking a declaratory judgment interpreting the Easement with respect to the rights of individual property owners.”<sup>22</sup> In deference to the parties’ united front seeking clarity regarding the easement’s application, the court characterized the action as an effort to clarify the conservation easement’s impact on the affected property owners, and not an action to enforce the conservation easement.<sup>23</sup>

Enforcement of the conservation easement consistent with the application of its terms, however, cannot be ignored as subtext to the court’s discussion of the conservation easement’s impact. Even though the court never reached the question of standing, there can be little doubt that it would have recognized the parties in the case, the property owners and the Town, as falling into categories of parties to a conservation easement, owners of property burdened by a conservation easement, and parties acknowledged in a conservation easement, the first three categories

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19. *Id.* at \*3.

20. *Id.* at \*4.

21. *Id.* The court reasoned further that if the term “natural” is construed to exclude a garden because of the artificial aspects of clearing, planting, watering and weeding or if the term “scenic” is construed to favor trees and brush over a garden, the garden in this case would not detract from [the land’s] remaining natural and scenic condition. Photographs . . . of the garden . . . show that the area, as a whole, retains its woodland character.

*Id.* The court found that “selective removal of trees is permitted for reasons of safety or disease control or because such removal is necessary to effectuate any of the uses specifically authorized in the Easement.” *Id.* The court stated that the cutting of trees on the property for gardens is “hardly the kind of clear-cutting found to be objectionable[.]” *Id.* at \*3.

22. *Id.* at \*1.

23. *See id.* (classifying the action as one seeking declaratory judgment).

described by the UCEA as persons eligible to enforce conservation easements.

While the first three categories of enforcers under Section 3 of the UCEA derive standing from the conservation easement terms themselves, the fourth category of enforcer has murkier origins: a person who, in contrast to the first three categories identified by the UCEA, remains unidentified at the time of the conservation easement grant, may still be “authorized by other law” to bring a judicial action affecting the conservation easement in question.<sup>24</sup> The UCEA drafters defined “other law” to include states’ applicable laws, and acknowledged that these laws may have the potential to authorize and “create standing in other persons[,]” such as attorneys general, citizens, or neighbors, to enforce, modify, terminate, or otherwise affect conservation easements and the property they burden.<sup>25</sup> As the Comment to Section 3 of the UCEA states:

In addition to these three categories of persons who derive their standing from the explicit terms of the [conservation] easement itself, the Act also recognizes that the state’s other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.<sup>26</sup>

It is this category of person “authorized by other law”—a person not party to the easement, nor burdened by the easement, nor (necessarily) contemplated or recognized by the language of the easement—that is the subject of this article. In particular, this article strives to identify who is “authorized by other law” to enforce a conservation easement if the holder of that conservation easement is not willing or able to enforce it. Are attorneys general, citizens, neighbors, anyone or no one else empowered by other law to enforce it? The clearest answer is reflected in state enabling legislation that makes specific reference to third parties permitted to enforce conservation easements.

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24. UCEA § 3(a), 12 U.L.A. 177 (1996).

25. *Id.* § 3 cmt. An example given by the UCEA of “a person authorized by other law” is the right of an attorney general to enforce a conservation easement in her capacity as supervisor of charitable trusts with the state. *Id.* For a discussion of the charitable trust doctrine, see *infra* Part II.B.

26. *Id.*

*B. Express Mention of Third-Party Standing or Enforcement in Enabling Legislation*

States that have adopted the UCEA verbatim or in spirit are the most likely to identify rights for third-party enforcement of conservation easements. Among those states *not* adopting the UCEA, most either neglect to articulate, or expressly prohibit, a third-party right of enforcement.<sup>27</sup> Since the UCEA was approved, approximately twenty-one states have adopted conservation easement enabling legislation based on the UCEA model, and approximately twenty-five states have drafted and enacted their own enabling legislation.<sup>28</sup> The remaining states either enacted enabling laws prior to the creation and approval of the UCEA, including California, Colorado, Connecticut, Massachusetts, and Vermont,<sup>29</sup> or have not created any enabling legislation prior or subsequent to the approval of the UCEA, such as Wyoming.<sup>30</sup>

Because conservation easements are creatures of state law, standing to enforce them varies from state to state. New York has a third-party right of enforcement based loosely on the UCEA.<sup>31</sup> Parts of the original conservation easement statute provided that a conservation easement could be enforced by the grantor, the holder, (which, as defined by ECL 49–0305(3), must be a public body or not-for-profit corporation),<sup>32</sup> the state’s attorney general, or an “organization designated in the [conservation] easement as having a third party enforcement right” as defined by ECL 49–

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27. At least three states not formally adopting the UCEA do provide for third-party enforcement: Arkansas, New Mexico, and New York. These states either passed new legislation or revised their existing conservation easement enabling legislation to include a third-party right of enforcement in response to passage of the UCEA. *See* ARK. CODE ANN. § 15-20-409 (Michie 2003) (“An action affecting a conservation easement may be brought by . . . [a] person having a third-party right of enforcement . . . .”); N.M. STAT. ANN. § 47-12-4 (Michie 2004) (“An action affecting a land use easement may be brought by . . . a person having a third-party enforcement right.”); N.Y. ENVTL. CONSERV. LAW § 49–0305 (McKinney 1997) (“A conservation easement may be enforced in law or equity by its grantor, holder or by a public body or any not-for-profit conservation organization designated in the easement as having a third party enforcement right . . . .”); *see also* Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 26, 48–50 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (tabulating the states which allow for third-party enforcement of conservation easements).

28. Roderick H. Squires, *Introduction to Legal Analysis*, in *PROTECTING THE LAND*, *supra* note 27, at 69, 71.

29. *See id.* at 72–73 (tabulating the dates of enactment of various states’ enabling legislation).

30. *Id.*

31. N.Y. ENVTL. CONSERV. LAW §§ 49–0301 to 49–0311 (McKinney 1997).

32. *See id.* § 49–0305(3)(a) (defining “holder” as “a public body or not-for-profit conservation organization”).

0305(5).<sup>33</sup> As amended by Chapter 292 of the Laws of 1984, the statute now provides that a conservation easement is enforceable only by the “grantor, holder or by a public body or any not-for-profit conservation organization designated in the [conservation] easement as having a third party enforcement right.”<sup>34</sup>

The New York state court in *Friends of Shawangunks, Inc. v. Knowlton* denied standing to the Friends of Shawangunks (hereafter “Friends”), a non-profit group seeking third-party standing to enforce a conservation easement to prohibit use of the property encumbered by the conservation easement to be considered in determining permissible density for a related cluster zoning development.<sup>35</sup> The court permitted the land held by the easement to be counted in measuring the number of residences allowed on the unencumbered area even though it was not buildable land.<sup>36</sup>

The conservation easement at issue was granted to the Palisades Interstate Park Commission in 1977, prior to the passage of New York’s conservation easement enabling legislation; the court referred to the conservation easement as a “common-law easement appurtenant” because the property burdened by the conservation easement was adjacent to the unburdened property.<sup>37</sup> The court stated further, in dicta, that pursuant to New York’s amended conservation easement enabling legislation, Friends also lacked standing because they were not the holder, grantor, nor were they mentioned in the conservation easement as a third-party enforcer.<sup>38</sup>

When the legislature has expressly designated who may enforce conservation easements, such as a holder, grantor, or an organization designated in the conservation easement deed as having a third-party enforcement right, then presumably a court will look first for that specific designation before conferring standing, as demonstrated by the court in *Friends*.<sup>39</sup> But where are courts to look for guidance when the state has no enabling legislation, or the enabling legislation makes no mention of third-party rights of enforcement?

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33. *Id.* § 49-0305(5).

34. *Id.*

35. *Friends of the Shawangunks, Inc. v. Knowlton*, 476 N.E.2d 988, 988–89 (N.Y. 1985).

36. *Id.* at 989. The Palisades Interstate Park Commission consisted of 240 acres in the scenic Lake Minnewaska area of Ulster County and later sold as part of a 450 acre parcel. *Id.*

37. *Id.* at 991.

38. *Id.*

39. *But see Friends of the Shawangunks, Inc. v. Clark*, 585 F. Supp. 195, 199–200 (N.D.N.Y. 1984) (finding that the plaintiff did have standing using a citizen suit analysis). See discussion *infra* Part II.C for citizen suit analysis.

*C. When Enabling Legislation is Silent as to Third-Party Standing or Enforcement*

There is no mention of third-party enforcement in the enabling legislation of several states, mainly those with enabling legislation that pre-dates the UCEA, and also those that have chosen intentionally to exclude the express third-party right of enforcement provided by the UCEA when adopting the provisions thereof.<sup>40</sup> The Connecticut and Massachusetts legislatures each passed conservation “restriction” (also known as “easement”) legislation in 1971 and 1969, respectively,<sup>41</sup> in advance of the

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40. See Mayo, *supra* note 27, at 48–50 (discussing third-party enforcement rights under state enabling legislation).

41. CONN. GEN. STAT. § 47–42a (West 2004); MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1996). The Connecticut enabling legislation provides in relevant part:

§ 47–42a. Definitions

For the purposes of sections 47–42b and 47–42c, the following definitions shall apply:

(a) “Conservation restriction” means a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use.

CONN. GEN. STAT. § 47–42a. In 2004, the legislature amended the statute by inserting “including, but not limited to, the state or any political subdivision of the state,” in subsections (a) and (b), as well as making other nonsubstantive changes. 2004 Conn. Acts 04–96 (Reg. Sess.). The Massachusetts enabling legislation provides in relevant part:

§ 31. [Restrictions, defined]

A conservation restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid or limit any or all (a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

. . . .

An agricultural preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to

UCEA. Because neither state amended its statute specifically to conform to the UCEA thereafter, the case-law evolving in these two states provides some guidance as to how courts may interpret third-party rights to enforce conservation easements absent any specific language in either state's enabling legislation.

In the Connecticut case of *Burgess v. Breakell*, a conservation easement on Breakell's land required that his property be "maintained as an area of wild, natural and semi-natural open space for scientific, educational, scenic, environmental, aesthetic and cultural purposes, for the preservation of its natural features."<sup>42</sup> Burgess, an adjacent landowner and neighbor, alleged that Breakell was violating the terms of the conservation easement by engaging in commercial logging on the property and defying the easement's purpose.<sup>43</sup> Breakell argued that the court should dismiss Burgess's complaint for lack of standing because Burgess was not the holder of the conservation easement on Breakell's property.<sup>44</sup>

The court agreed with Breakell, finding that Burgess did not have standing to bring the action against Breakell to enforce the terms of a conservation easement to which Burgess was not the holder or otherwise a party.<sup>45</sup> In the absence of specific third-party enforcement language in Connecticut's conservation easement enabling legislation or any interpretation of the statute by Connecticut's appellate courts, the Superior Court acknowledged: "the question of who may enforce a conservation restriction is not clearly resolved by the statutory language" which states that "restrictions may be enforced by injunction or proceedings in equity."<sup>46</sup> The court pointed to the language of Connecticut's statute as an indication

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retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any or all (a) construction or placing of buildings except for those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's overall future agricultural potential; and (c) other acts or uses detrimental to such retention of the land for agricultural use. Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices.

MASS. GEN. LAWS ANN. ch. 184, § 31.

42. *Burgess v. Breakell*, No. 95-0068033, 1995 Conn. Super. LEXIS 2290, at \*1 (Conn. Super Ct. Aug. 7, 1995).

43. *Id.* at \*1-2.

44. *Id.* at \*2-3. The Connecticut Conservation Commission held Breakell's easement. *Id.* at \*2.

45. *Id.* at \*8.

46. *Id.* at \*5 (quoting CONN. GEN. STAT. § 47-42c).

“that the legislature, while recognizing the public benefit that such [conservation] restrictions provide, intended to limit the enforceability of conservation restrictions to the holder or owner of the restriction.”<sup>47</sup> The Superior Court substantiated its interpretation of the Connecticut statute and the lack of third-party standing to enforce conservation easements with a law review article and a Massachusetts Supreme Judicial Court decision interpreting Massachusetts’s own conservation easement statute, justifying the latter by stating: “the Connecticut statutes closely resemble and appear to be modeled after the Massachusetts conservation [easement] statutes.”<sup>48</sup>

In reaching its decision in *Burgess v. Breakell*, the Connecticut Superior Court considered the opinion of the Massachusetts Supreme Judicial Court in *Bennett v. Commissioner of Food & Agriculture*.<sup>49</sup> Even though the *Bennett* case did not concern the issue of third-party standing, because the conservation easement at issue there was being enforced by the holder of the easement, a state agency,<sup>50</sup> the Connecticut court found the Massachusetts court’s reasoning compelling.<sup>51</sup> In *Bennett*, the court explored whether an agricultural preservation restriction (APR) and its enabling statute provided authority for the Commissioner of Food and Agriculture to approve the location of dwellings on property subject to the APR.<sup>52</sup> *Bennett*, the second-generation owner of a 250-acre farm subject to an APR located in western Massachusetts, proposed locating a large, new home on the top of a hill thereon, a location the Commissioner denied because it would cause erosion and the loss of two acres of farmland.<sup>53</sup> *Bennett* sued the Commissioner, asserting that the Massachusetts statute conferring approval authority upon the Commissioner was unenforceable because common law property rules required privity of estate and privity of contract in order for the Commissioner to enforce a servitude.<sup>54</sup>

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47. *Id.* at \*7; see also Russell L. Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231, 240 (1976) (stating that “[a]s in the case of Massachusetts, this spare provision leaves open the question of who may enforce the restriction and what must be shown”) (emphasis omitted) (citing CONN. GEN. STAT. § 47-42c).

48. *Burgess*, 1995 Conn. Super. LEXIS 2290, at \*6 (citing Brenneman, *supra* note 47, at 238, 240; *Bennett v. Comm’r of Food & Agric.*, 576 N.E.2d 1365 (Mass. 1991)).

49. *Id.*

50. *Id.* at \*8; see also *Bennett*, 576 N.E.2d at 1366-65 (allowing the Commissioner of Agriculture to enforce a conservation easement).

51. *Burgess*, 1995 Conn. Super. LEXIS 2290, at \*6.

52. *Bennett*, 576 N.E.2d at 1366, 1368 (citing MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1996)).

53. *Id.* at 1365-66. The Commissioner offered *Bennett* five other building sites in lieu of the hilltop location, which *Bennett* rejected. *Id.* at 1366.

54. *Id.* at 1366.

The *Bennett* court upheld the Commissioner's approval authority as related to location of buildings on properties encumbered by APRs, reasoning that "the Legislature has recognized the enforceability of certain easements in gross by public officials and charitable entities where the public purpose of the restriction is clear" and where the beneficiary of the conservation easement is the public.<sup>55</sup> The court noted that the appropriate question was whether enforcement of a conservation easement is reasonable and consistent with public policy.<sup>56</sup>

Extending the *Bennett* court's reasoning to its own first legal review of third-party enforcement of conservation easements, the *Burgess* court used the *Bennett* court's statements to support its conclusion that conservation easements are enforceable only by the entities qualified to hold them, stating: "By limiting the entities that may acquire such interests, it follows that the legislature also intended to limit the enforceability of the restrictions to those same entities . . . ."<sup>57</sup> The *Burgess* court notably ignored the *Bennett* court's framing of the question of whether enforcement is reasonable and consistent with public policy, and several of the court's statements about clear public purposes and the public as the beneficiary of conservation easements. Recalling that the purpose of the conservation easement at issue in *Burgess* was to protect "scenic, environmental, aesthetic and cultural" values of the property, it is reasonable to speculate that a commercial logging operation might have damaged these protected conservation values and negatively impacted the neighbors and public in general.<sup>58</sup> Nevertheless, pursuant to the *Burgess* court's reasoning, only the holder of the conservation easement had standing to make this argument and enforce a conservation easement, and the arguments of, and impacts upon, the non-holder neighbors, citizens, or public in general were not to be recognized.<sup>59</sup>

It remains to be seen what the appellate courts in Massachusetts and Connecticut will do with the issue of third-party standing to enforce conservation easements. Massachusetts, in particular, presents a unique example for this inquiry, due to the fact that it requires a significant amount of public and governmental involvement in the approval of individual conservation easements: "[i]n all cases, a conservation [easement] must be approved by the secretary of environmental affairs to have the statutory

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55. *Id.* at 1367.

56. *Id.*

57. *Burgess*, 1995 Conn. Super. LEXIS 2290, at \*7.

58. *Id.* at \*1.

59. *See id.* at \*6-7 (limiting enforcements of easements to holders, certain public officials, and charities).

benefits of G.L. c. 184, §§ 31–33.”<sup>60</sup> Similarly, “[a]n agricultural preservation [easement] must be approved by the commissioner of food and agriculture, a historic preservation [easement] by the chairman of the Massachusetts Historic Commission and a watershed preservation [easement] by the commissioner of the Metropolitan District Commission.”<sup>61</sup> And further, “[w]here the recipient is a conservation organization, approval of the selectmen (mayor and council in cities) is also required.”<sup>62</sup> This level of local, regional, and statewide governmental involvement in the conservation easement contribution process is largely unseen elsewhere.

As a corollary to the rigorous public approval process of conservation easements in Massachusetts, it is unsurprising that the Attorney General is very involved in the enforcement of conservation easements there. Not only is public involvement there prior to and during a conservation easement grant great, so too is the public’s involvement and representation after the easement grant, as evidenced by the fact that the conservation easements in Massachusetts are protected by their holders and the state’s Attorney General, as the government agency charged with law enforcement on behalf of the public in general. Moreover, it is equally unsurprising that the attorneys general of both Massachusetts and Connecticut have indicated their willingness to enforce conservation easements held by private, non-profit land trusts on the holders’ behalf, which willingness begs the question of when and if other states’ attorneys general have the authority and standing to enforce conservation easements in their own states, absent pronounced public involvement in the conservation easement process, and language in their enabling legislation facilitating such enforcement.<sup>63</sup>

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60. Daniel A. Taylor & Bruce Wickersham, *Taxation Law and Conservation Gifts*, in MASSACHUSETTS ENVIRONMENTAL LAW § 7.4(c) (Gregor I. McGregor ed., 1999).

61. *Id.* (citing MASS. GEN. LAWS ANN. ch.184, § 32 (1996)).

62. *Id.*

63. *Gleanings: Massachusetts Ready to Enforce Restriction*, EXCHANGE: J. LAND TR. ALLIANCE, Winter 1998, at 17; see Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW. 441 (1999):

Massachusetts prepared to step into its first enforcement action in 1997 when the Attorney General’s office wrote to landowners who were violating the terms of their conservation easements and indicated [the A.G.’s] intent to become involved in the case. The landowners settled out of court shortly thereafter. It is thought that the perceived threat of government involvement in the enforcement action was enough to encourage these landowners to resolve the issue before legal action was taken. . . .

. . . The chair of the land trust involved in the Massachusetts example urges other land trusts and states to encourage more government involvement in the conservation easement field, stating that “I hope this causes other land trusts to

## II. ATTORNEY GENERAL STANDING TO ENFORCE CONSERVATION EASEMENTS

### A. Enabling Legislation and Attorney General Enforcement

Of the states with conservation easement enabling statutes, about half are entirely silent on the subject of third-party standing to enforce conservation easements, including mention of attorney general enforcement, while the other half adopt the UCEA's provision allowing "a person authorized by other law" to bring an action affecting a conservation easement.<sup>64</sup> The "person authorized by other law" language neither authorizes nor prohibits attorney general standing, but instead defers the question of attorney general enforcement to each state's statutory or common law. Comment to Section 3 of the UCEA makes clear that the reference to "other law" includes the potential right of attorneys general to enforce conservation easements pursuant to the charitable trust doctrine, a right discussed hereafter, and some states recognize the attorney general's right to enforce explicitly in their enabling legislation.<sup>65</sup>

Although states with enabling legislation generally do not expressly deny nor grant attorneys general third-party standing to enforce conservation easements, several exceptions are worth noting.<sup>66</sup> Mississippi's statute explicitly grants standing to its Attorney General and the Department of Wildlife, Fisheries and Parks to enforce conservation easements.<sup>67</sup> Illinois's statute grants standing to enforce conservation easements to the federal, state, and local governments, the holder of the conservation easement, and "the owner of any real property abutting or

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evaluate how important government approval of conservation [easements] is . . . . It's an extra layer of defense."

*Id.* at 471–72 (footnotes omitted) (final omission in original) (quoting *Gleanings, supra*, at 17).

64. UCEA § 3(a)(4), 12 U.L.A. 177 (1996).

65. *Id.* § 3 cmt.

66. See Mayo, *supra* note 27, at 48–50 (discussing third-party enforcement rights under state enabling legislation).

67. MISS. CODE ANN. § 89-19-7 (Supp. 2004). The statute reads in relevant part: § 89-19-7. Actions affecting easements.

- (1) Any action to enforce a conservation easement may be brought by:
  - (a) An owner of an interest in the real property burdened by the easement;
  - (b) A holder of the easement;
  - (c) A person having a third-party right of enforcement;
  - (d) The Attorney General of the State of Mississippi;
  - (e) The Mississippi Department of Wildlife, Fisheries and Parks; or
  - (f) A person otherwise authorized and empowered by law.

*Id.*

within 500 feet of the real property subject to the conservation [easement].”<sup>68</sup> Maine’s statute grants state and local governments standing to intervene in, but not initiate, actions affecting conservation easements.<sup>69</sup>

Although Maryland’s enabling statute makes no reference to attorney-general standing,<sup>70</sup> the Maryland Attorney General takes an active role in

68. 765 ILL. COMP. STAT. ANN. 120/4 (West 2001). The statute reads in relevant part: 120/4. Enforcement of conservation right

§ 4. A conservation right created pursuant to this Act may be enforced in an action seeking injunctive relief, specific performance, or damages in the circuit court of the county in which the area, place, building, structure or site is located by any of the following:

(a) the United States or any agency of the federal government, the State of Illinois, or any unit of local government;

(b) any not-for-profit corporation or trust which owns the conservation right;

(c) the owner of any real property abutting or within 500 feet of the real property subject to the conservation right. Any owner of property subject to a conservation right who wilfully violates any term of such conservation right may, in the court’s discretion, be held liable for punitive damages in an amount equal to the value of the real property subject thereto.

*Id.*

69. ME. REV. STAT. ANN. tit. 33, § 478 (West Supp. 1999). The statute reads in relevant part: § 478. Judicial actions

1. Action or intervention. An action affecting a conservation easement may be brought or intervened in by:

A. An owner of an interest in the real property burdened by the easement;

B. A holder of the easement; or

C. A person having a 3rd-party right of enforcement.

2. Intervention only. An action affecting a conservation easement may be intervened in by the State or a political subdivision of the State in which the real property burdened by the easement is located.

*Id.*

70. MD. CODE ANN., REAL PROP. § 2-118 (2003). The absence of specific third-party enforcement language is apparent in subsections (a) and (c) of the statute, which read in relevant part:

(a) *Creation and enforcement of conservation easements for certain purposes.*

—Any restriction prohibiting or limiting the use of water or land areas, or any improvement or appurtenance thereto, for any of the purposes listed in subsection (b) of this section whether drafted in the form of an easement, covenant, restriction, or condition, creates an incorporeal property interest in the water or land areas, or the improvement or appurtenance thereto, so restricted, which is enforceable in both law and equity in the same manner as an easement or servitude with respect to the water or land areas, or the improvement or appurtenance thereto, if the restriction is executed in compliance with the requirements of this article for the execution of deeds or the Estates and Trusts Article for the execution of wills.

....

(c) *Easement in gross.*—If the restriction is not granted for the benefit of any dominant tract of land, it is enforceable with respect to the servient land, both at law and in equity, as an easement in gross, and as such it is inheritable and assignable.

defending and enforcing conservation easements in concert with the Maryland Environmental Trust (MET), a public agency that holds or co-holds most of the conservation easements in the State.<sup>71</sup> Case in point, the office of the Attorney General recently provided full legal representation for MET in a lawsuit initiated by a disgruntled conservation easement donor trying to rescind a conservation easement in *Maryland Environmental Trust v. Gaynor*.<sup>72</sup>

*Maryland Environmental Trust v. Gaynor* involved an action filed by landowners against MET alleging fraud by MET in its acquisition of a conservation easement on the owners' property.<sup>73</sup> A court of special appeals affirmed the decision of a lower circuit court, holding that MET's representative had purposefully omitted information from correspondence with the landowners regarding the MET Board of Trustees' position on the issue of subdivision.<sup>74</sup> The court of special appeals agreed with the circuit court's conclusion that MET had defrauded the landowners of their property by including the subdivision prohibition in their conservation easement.<sup>75</sup>

On petition for writ of certiorari, Maryland's Court of Appeals contemplated whether "MET unlawfully induced [the landowners] into granting a conservation easement on their land by not disclosing that MET would have accepted the easement without also requiring them to surrender their right to subdivide their property."<sup>76</sup> The Court of Appeals reversed the lower court's decision, holding that the landowners failed to produce clear and convincing evidence that MET committed fraud in inducing them to donate a conservation easement.<sup>77</sup> The Court reasoned that even when viewing the facts in the light most favorable to the landowners, their communications with MET's representative were not sufficient as a matter of law to constitute fraud; there was no fiduciary duty or confidential relationship between the landowners and MET; and, more importantly, that MET had no duty to disclose to the landowners that it would accept the conservation easement without the inclusion of the subdivision restriction.<sup>78</sup>

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*Id.* § 2-118(a), (c).

71. MD. CODE ANN., NAT. RES. I §§ 3-201 to 206 (2000). The Maryland Attorney General's office currently has two assistant attorneys general whose major responsibility is drafting and enforcing easements.

72. Md. Envtl. Trust v. Gaynor, 780 A.2d 1193 (Md. Ct. Spec. App. 2001), *rev'd*, 803 A.2d 512 (Md. 2002).

73. *Id.* at 1193-94.

74. *Id.* at 1194.

75. *Id.* at 1198.

76. Md. Envtl. Trust v. Gaynor, 803 A.2d 512, 513 (Md. 2002).

77. *Id.* at 517.

78. *Id.*

The active role of the Maryland Attorney General in the *MET* case indicates that even without explicit statutory language identifying the Attorney General's role in conservation easement enforcement, Maryland seemingly has recognized the Attorney General as a legitimate third-party enforcer of conservation easements.

While New York's enabling statute originally included the Attorney General as an authorized enforcer of conservation easements, the statute subsequently was amended to eliminate any mention of the Attorney General.<sup>79</sup> Even so, because New York's Attorney General is charged with overseeing enforcement related to public charities, enforcement of conservation easements by the Attorney General on land trusts' behalf in New York may be permissible pursuant to the Attorney General's responsibilities under the charitable trust doctrine.<sup>80</sup> Connecticut law is similar to New York law, in that it provides that its Attorney General "shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes."<sup>81</sup> Because most land trusts are organized as public charities, the attorneys general in New York and Connecticut may have the power to enforce conservation easements pursuant to their responsibility to protect the public under the charitable trust doctrine. The question therefore arises: when conservation easement enabling statutes are not as specific or clear as they are in Mississippi, Illinois, or Maine, but instead are vague or silent as to standing for third-party conservation easement enforcement, how do these statutes interact with an attorney general's common law or statutory right to protect a trust pursuant to the charitable trust doctrine?

### *B. The Charitable Trust Doctrine and Attorney General Enforcement*

A charitable trust is defined as "a fiduciary relationship with respect to property arising as a result of a manifestation of intention to create it," evidenced by the document creating the trust and "subjecting the person who holds the trust property 'to equitable duties to deal with the property for a charitable purpose.'"<sup>82</sup> The existence of at least three components,

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79. *Friends of the Shawangunks, Inc. v. Knowlton*, 476 N.E.2d 988, 991 n.4 (N.Y. 1985) ("As amended by chapter 292 of the laws of 1984, the statute now provides that a conservation easement is enforceable only by the grantor, holder or a not-for-profit conservation organization designated in the easement as having third-party enforcement rights.").

80. See Part II.B for a discussion of the charitable trust doctrine.

81. CONN. GEN. STAT. ANN. § 3-125 (West 2000).

82. Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?* 10 S.C. ENVTL. L.J. 23, 37 (2002) (quoting RESTATEMENT (SECOND) OF TRUSTS § 348 (1959)). While it is not the purpose of this article to provide a thorough analysis of the

based on the principles of fiduciary duty and property held in trust, are necessary for the creation of a charitable trust: the “intention to create a trust, trust property, and a charitable purpose” that benefits the public in general, as opposed to private individuals.<sup>83</sup> According to the Restatement of Trusts, “[a] trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust.”<sup>84</sup> Further, the express or implied intent and purpose of the trust’s creator in creating the charitable trust is of paramount importance to the qualification, perpetuation, and protection of that charitable trust.<sup>85</sup>

Because a charitable trust is recognized as a vehicle to hold trust property for the general public’s benefit, a charitable trust typically is enforceable by a state’s attorney general, who is empowered to oversee a state’s public charities and to act as the general public’s representative to oversee gifts to public charities and charitable activities in general.<sup>86</sup> Notwithstanding that the trust property is held for the benefit of the general public, the charitable trust doctrine’s grant of enforcement power generally is limited to state attorneys general or “by a person who has a special interest in the enforcement of the charitable trust” and does not extend to potential beneficiaries or individual members of the general public,<sup>87</sup> and some states, such as Massachusetts, recognize and grant standing to the attorney general and additional persons having “special interest” in the performance of a charitable trust, permitting them to partner with the

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charitable trust doctrine’s application to conservation easements, it is the purpose of this inquiry to examine whether third parties, including the attorney general, might use the doctrine as a means to establish standing to enforce conservation easements.

83. Williams, *supra* note 82, at 37.

84. RESTATEMENT (SECOND) OF TRUSTS § 375 (1959).

85. *See id.* § 348 (“A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it . . .”).

86. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959) defines a trust as “a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.” *Id.* Note that although it is called the “charitable trust doctrine,” the principle applies to public charities of all types, including trusts, associations, or nonprofit corporations. State attorneys general may be granted power to enforce the terms of and conservation easements themselves by statute or common law as trustee of a charitable trust on behalf of the public. *Id.* § 391 cmt. a.

87. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) (“A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.”); *see also* MASS. GEN. LAWS ANN. ch. 12, § 8 (West 2000) (giving the Massachusetts Attorney General the power to enforce public charities); *Hinton v. City of St. Joseph*, 889 S.W.2d 854, 859 (Mo. Ct. App. 1994). For a discussion of the *Hinton* case, see Part III.D, *infra*.

attorney general to enforce the trust, provided that the person's interest is "distinct from those of the general public."<sup>88</sup>

The definition, interpretation, and application of the charitable trust doctrine varies significantly from state to state because each trust must be interpreted and enforced consistent with the intent of its creator, its own unique creation document, the facts and circumstances surrounding the trust property, and variations in each state's common law and statutory law construction of the charitable trust doctrine. Some states grant their attorneys general authority to oversee public charities pursuant to the charitable trust doctrine, like New York and Connecticut, as previously discussed, and California.<sup>89</sup> California broadly defines the public charities its attorney general has authority to protect under the charitable trust doctrine as "any corporation . . . which has accepted property to be used for a particular charitable [corporate] purpose as distinguished from the general purposes of the corporation."<sup>90</sup> Other states, such as Maine, have codified and expanded the charitable trust doctrine in recent years in response to perceived abuses by health care nonprofit corporations and to capture enforcement of these non-profits by the attorney general.<sup>91</sup> Maine's and California's statutes are intentionally broadly worded to grant their attorneys general the authority to investigate and penalize nonprofits for a variety of misdeeds.<sup>92</sup>

The applicability of the charitable trust doctrine to conservation easements as a means of creating enforcement power and standing for a state's attorney general is not beyond comprehension, particularly in light of the UCEA's explicit reference to the charitable trust doctrine's qualification as "other law," although persons with a "special interest" in enforcing conservation easements are harder to envision. Such applicability depends upon a state's specific public charity statutory or common laws involving charitable trust property, the grantor's intent, and the property subject to the trust. A simplified (perhaps overly so) analysis of the charitable trust doctrine could yield an argument that the doctrine

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88. *Weaver v. Wood*, 680 N.E.2d 918, 922–23 (Mass. 1997).

89. CAL. GOV'T CODE § 12581 (West 1992).

90. *Id.* § 12582 (West Supp. 2005). The language of California's statute is so broadly worded that it would appear to define conservation easements as public charities worthy of attorney general enforcement, provided that the conservation easement at issue has set forth specific charitable purposes in its recitals.

91. *See, e.g.*, An Act Regarding Public Charities, Nonprofit Corporations and Conversions of Nonprofit Entities to For-Profit Entities, 2001 Me. Laws 550 (granting the attorney general widespread authority to oversee the activities of charities).

92. *See id.* It is possible that these statutes could also justify attorney general standing in the enforcement of conservation easements.

potentially supports attorney general standing to enforce conservation easements when and if a conservation easement is characterized as property held in trust for the public's benefit, akin to any other property of a charitable trust. Extending the doctrine further, a conservation easement grantor's intent in perpetually protecting his or her property through use of a conservation easement would need to suffice as, or be substituted with, the trust creator's intent to create a charitable trust. Further, the land trust holding the conservation easement would have to fit the definition of a public charity or charitable trust in order for the analogy of a conservation easement donated by a property owner to a land trust to property placed in a charitable trust for the public's benefit to be viable.

Extending the charitable trust doctrine's application to conservation easement enforcement may be bolstered by showing that the public has in some way "invested" in, contributed to, or otherwise supported the conservation easement in question. Such investment, contribution, and support could come in a variety of ways: the original grantor donates the conservation easement and receives a charitable contribution deduction against his or her federal and state income taxes, or an income tax credit against the taxpayer's income tax; the original grantor and subsequent landowners receive a property tax reduction due to the conservation easement's decrease in the property's appraised and assessed value; or the original grantor sells the conservation easement, which conservation easement is purchased by a public agency or a nonprofit using public acquisition funds. In these cases, the public investment in the conservation easement has occurred through the public's subsidization of the tax benefits flowing from the conservation easement, and reduction in property taxes, or the public's direct payment for the conservation easement with public moneys.

The charitable trust doctrine may yet apply to conservation easement enforcement even when no instances of public subsidization, or express purchase of conservation easements exist; that is, when a conservation easement is sold to a land trust without any government or state involvement or funding, or when a conservation easement is donated to a land trust and the donor claims no publicly subsidized tax benefits. Application of the doctrine arguably might still be appropriate due to one important principle of the charitable trust doctrine: that a grantor's express and implied intent be honored. A conservation easement donated by a grantor who intends that the property underlying the grant be perpetually protected, therefore, is to be honored and protected by the holder land trust and any other person empowered to enforce the conservation easement.

An attorney general might have standing, then, to initiate or intervene in an action to enforce a conservation easement absent enabling legislation defining such authority, provided that: the state's statutory or common law-defined charitable trust doctrine permits conservation easements to be characterized as held in trust for the public's benefit and, therefore, provides a means to accomplish enforcement of the conservation easement in the public's interest; and the facts and circumstances surrounding the conservation easement, its grantor's intent, and its holder all support the conservation easement being held in charitable trust for the public's benefit.

The language of a state's common law or statutory charitable trust authority, taken in conjunction with the language of the conservation easement deed itself, should guide an individual, attorney general, or court contemplating attorney general standing. In the absence of specific statutory language or case law relating to applicability of the charitable trust doctrine to conservation easement enforcement, a court might yet grant an attorney general standing to enforce a conservation easement if such enforcement is shown by the attorney general clearly to be in the public's interest.<sup>93</sup> Or, in a circumstance where the public entreats the attorney general to become involved in a case on its behalf for the protection of that property arguably held in charitable trust, whereby a court is persuaded to grant standing to the attorney general as a third-party enforcer. Compelling facts and persuasive legal arguments, public outcry or support, and little opposition from either the easement holder or the landowner subject to the easement might prove to be the necessary ingredients for a court to determine that a conservation easement is held in trust for the public's benefit and to grant an attorney general the power to enforce that conservation easement.<sup>94</sup>

Yet another potential platform for third-party enforcement of conservation easements by the attorney general is the public trust doctrine. Not to be confused with the charitable trust doctrine, even though property subject to conservation easements is sometimes characterized as being held in the "public's trust," the public trust doctrine is wholly distinct from the charitable trust doctrine. The trust property itself and the standing requirements for the public trust doctrine, among other issues, distinguish it

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93. It is hard to conceive that a court might make such a decision without some precedent, foundation in the state's legislation, or a compelling argument by the attorney general herself.

94. More difficult to conceive is the circumstance where a person with a "special interest" in enforcement of a conservation easement based on a charitable trust argument is granted standing to enforce an easement they would not otherwise be qualified to enforce, although Ms. Kurtz's beneficiary status in *Tennessee Environmental Council*, discussed hereafter, seems to have persuaded the court in that case that she had the right to enforce the conservation easement in question.

from the charitable trust doctrine.<sup>95</sup> Where the charitable trust doctrine provides standing for the attorney general, and in certain circumstances, for persons with a special interest in enforcing a conservation easement, the public trust doctrine potentially provides standing for attorneys general, citizens, the general public, or any beneficiaries of the “public trust” to enforce conservation easements, provided that the conservation easement at issue covers property defined by the doctrine as “public trust” property.

### C. *The Public Trust Doctrine and Attorney General Enforcement*

The ancient Roman origins of the public trust doctrine provide that the public is entitled to access water, the sea, rivers, shorelines, and air, because these resources were imperative to human survival dependent upon navigation, commerce, and fishing.<sup>96</sup> The American adaptation of this doctrine arose in the context of navigable waters and commerce, and directed the government to act as trustee of the public who are the beneficiaries of the trust, in relation to land under navigable waterways and below the ocean’s low tide mark.<sup>97</sup> Broadly stated, the public trust doctrine today provides that a state holds “public trust lands, waters and living resources . . . in trust for the benefit of all of the [citizens of the state], and establishes the right of the public to fully enjoy public trust lands . . . for a wide variety of recognized public uses.”<sup>98</sup> Because the state holds these certain public lands in trust for its citizens, the state and its attorney general, as its agent, are charged with the affirmative duty “to hold and use the [trust] property for the exclusive benefit of the beneficiary, and where that benefit involves conservation objectives, the government [and its attorney general] must act affirmatively to achieve its realization.”<sup>99</sup>

Much has been written about the application of the public trust doctrine to matters of environmental law and the protection of natural resources

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95. See Williams, *supra* note 82, at 37 (noting that while “[t]he charitable trust doctrine and the public trust doctrine incorporate similar concepts, specifically, a public purpose, a government trustee, and generalized beneficiaries[,] . . . the two concepts present at least one crucial difference, [that of standing]” (quotations omitted)).

96. THE INSTITUTES OF JUSTINIAN 2.1.1 (J.B. Moyle, ed., Clarendon Press 5th ed. 1913). As with the charitable trust doctrine, a thorough analysis of the public trust doctrine’s application to conservation easements is beyond the scope of this article; rather, the inquiry focuses on whether, if the doctrine applies to conservation easements, which third parties might be enabled by the doctrine to enforce conservation easements.

97. COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 3–7 (2d ed. 1997) (discussing the “special nature of public trust lands” as relating to navigable waters).

98. *Id.* at 3.

99. Edward Berlin et al., *Law in Action: The Trust Doctrine*, in LAW AND THE ENVIRONMENT 166, 171 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970).

beyond navigable waters.<sup>100</sup> Nonetheless, expansion of the doctrine remains limited as it relates to the enforcement of conservation easements, even though the public trust doctrine arguably creates standing for both the attorney general and members of the public to enforce conservation easements as third parties, and not just those who have a special interest, or an interest distinct from the general public (as with the charitable trust doctrine), but citizens, residents, or taxpayers.<sup>101</sup>

While some courts remain circumspect about expanding standing requirements under the public trust doctrine to apply to the public in general, others are less hesitant. The Illinois Supreme Court, for example, granted standing to a group of citizens challenging the state's management of the public trust in two parks, even though the court found the citizens to have no special interest in the parks, justifying its position by stating:

If the “public trust” doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.<sup>102</sup>

Even so, the extent of the expansion of the doctrine as applied to conservation easement enforcement remains limited, to say the least, based in part on the unlikely classification of all conservation easement lands as

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100. For a detailed discussion of the expansion of the doctrine in various states as a matter of state law, see *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (explaining how some states, like Massachusetts, have chosen to abrogate the common law public trust doctrine for tidelands in favor of recognizing private interests); see also Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L.J. 629, 640–43 (2002) (discussing the changing nature of the public trust doctrine as being the result of court decisions, which have broadened geographic protections). For a discussion of the expansion of the public trust doctrine to environmental issues, see David L. Callies, *Nuisance And Background Principles: The Lucas Exceptions*, SJ052 ALI-ABA 473 (2004); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 (1986); Peter Manus, *To A Candidate In Search Of An Environmental Theme: Promote The Public Trust*, 19 STAN. ENVTL. L.J. 315 (2000); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556 (1970) (stating that the “[p]ublic trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals”); Williams, *supra* note 82.

101. See Williams, *supra* note 82, at 38 (“Under the public trust doctrine, standing can be conferred on plaintiffs as residents or taxpayers in a trust of public lands, not simply to those who have a benefit unlike benefits to which the general public is entitled.”).

102. *Paepcke v. Pub. Bldg. Comm’n*, 263 N.E.2d 11, 18 (Ill. 1970). In addition to providing a broad common-law enforcement right pursuant to the public trust doctrine, recall also that Illinois creates a specific statutory right of enforcement of conservation easements for landowners within 500 feet of conservation easement property. 765 ILL. COMP. STAT. ANN. 120/4(c) (West 2001).

public trust lands to support an interpretation consistent with creating standing to enforce a conservation easement.

And yet, there does exist the rare statute that explicitly applies the public trust doctrine to conservation easement properties. In New Hampshire, for example, fee simple land and conservation easements purchased through a particular state funding program are declared to be held in public trust by the state.<sup>103</sup> Moreover, in the rare circumstance that land subject to a conservation easement held in the public trust due to its beachfront or waterfront location prior to being subjected to a conservation easement, it will remain so after the imposition of a conservation easement, and therefore continue to be available for enforcement by the public and the attorney general—a result that stems not from the conservation easement itself, but from the land’s status as being held in the public trust prior to the conservation easement grant.

These unusual circumstances aside, the application of the public trust doctrine to create standing in third parties for attorneys general and citizens in enforcement of conservation easements remains an unlikely occurrence, unless the conservation easement property prior to the imposition of the easement was public trust property and continues to be after the imposition of the easement. Much like the application of the charitable trust doctrine to conservation easements, one might surmise that the facts, circumstances, public outcry, and legal arguments would have to be significant and persuasive to compel a court to find a conservation easement property not previously designated as such to be public trust property eligible for third-party enforcement by the attorney general or the public. Notwithstanding what appears to be a fairly limited third-party enforcement right under the public trust doctrine and what may be perceived by the easement holders as uninvited and unwanted third-party enforcement of conservation easements, it is not unreasonable to speculate that members of the general public, including citizens and neighbors, may yet attempt to establish standing pursuant to that doctrine.

### III. CITIZEN AND NEIGHBOR STANDING TO ENFORCE CONSERVATION EASEMENTS

Examination of state conservation easement enabling statutes and case law suggests that in the vast majority of instances, neither citizens nor neighbors have been given standing to enforce or challenge conservation easements as third parties. That being said, several examples when citizens

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103. N.H. REV. STAT. ANN. § 486-A:13 (2001).

and neighbors have been given standing to enforce conservation easements bear mentioning.

A. *Enabling Legislation, the Charitable and Public Trust Doctrines, and Citizen and Neighbor Enforcement*

As we have seen herein, with one significant exception,<sup>104</sup> state enabling statutes either remain silent as to third-party standing to enforce conservation easements, or adopt the basic Uniform Conservation Easement Act framework.<sup>105</sup> In those states adopting the UCEA framework as enabling legislation, citizens and neighbors likely will not fall into the first three categories of section 3 of the UCEA (describing owners of the property subject to the easement, holders of the easement, or persons having a third-party right of enforcement of the easement), as eligible to bring judicial actions to enforce, modify, terminate or otherwise affect conservation easements and the property they burden.<sup>106</sup> “Persons having a third-party right of enforcement” are defined by the UCEA as governmental entities or charitable organizations which, although eligible to be the holder, are not the holder of the conservation easement at issue.<sup>107</sup> The drafters of the UCEA acknowledge that parties to a conservation easement can create a third party right of enforcement in persons that are not the owners or holders of the easement by incorporating them into the easement as third

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104. Illinois’s enabling statute grants enforcement standing to “the owner of any real property abutting or within 500 feet of the real property subject to the conservation right.” 765 ILL. COMP. STAT. ANN. 120/4(c).

105. See Squires, *supra* note 28, at 71–74 (discussing the adoption of the UCEA by twenty-one states).

106. See UCEA § 3, 12 U.L.A. 177 (1996) (delineating the “owner of an interest in the real property burdened by the [conservation] easement”; the “holder of the [conservation] easement”; and “a person having a third-party right of enforcement” of the conservation easement, as those who have standing to enforce the provisions of a conservation easement).

107. *Id.* § 1(3). “Holder” is defined by the UCEA as “a governmental body empowered to hold an interest in real property under the laws of this State or the United States[,]” or a charitable corporation, association, or trust created for the purpose of protecting “natural, scenic, or open-space values of real property . . . for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.” *Id.* § 1(2). “Conservation Easement” is defined by the UCEA as

a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

*Id.* § 1(1).

party enforcers, but the UCEA drafters intended to limit this enforcement right to use by governmental entities and charitable organizations.<sup>108</sup> The question then becomes whether a citizen or neighbor falls into the fourth category described by section 3 of the UCEA and is, “a person authorized by other law” to bring such an action.<sup>109</sup>

The drafters acknowledge in the comment to section 3 of the UCEA, that the phrase “authorized by other law” may confer upon attorneys general standing to enforce conservation easements through the charitable trust doctrine, and some arguments have been made that the same might be true under limited circumstances pursuant to the public trust doctrine. However, this same language does not necessarily confer standing to citizens or neighbors seeking the right to enforce conservation easements.<sup>110</sup> The Comment makes no mention of the charitable trust doctrine’s provision for enforcement by persons with a special interest in enforcement of the trust, or the public trust doctrine per se, as providing for enforcement rights in persons other than the attorney general.

As stated previously, “other law” could include statutory laws governing conservation easements, or a state’s common law.<sup>111</sup> With several exceptions, few state conservation enabling acts or other statutes relevant to conservation easements—such as those defining tax treatment of donors granting conservation easements, tax incentives to contribute easements, or publicly funded conservation easement programs—shed much light on or even address the question of citizen or neighbor standing to enforce conservation easements.<sup>112</sup> Illinois explicitly creates standing for conservation easement enforcement in persons owning property within 500 feet of the conservation easement property,<sup>113</sup> and as described hereafter, Tennessee’s conservation easement enabling statute has been interpreted to create standing for all its state’s residents to enforce conservation easements.<sup>114</sup>

As to the common law, one place to look for guidance regarding citizen or neighbor standing is the Restatement (Third) of Property: Servitudes, a

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108. *Id.* § 1 cmt.

109. *Id.* § 3(a)(4).

110. *Id.* § 3 cmt.

111. *Id.*

112. See Mayo, *supra* note 27, at 48–50 (discussing third-party enforcement rights under state enabling legislation).

113. 765 ILL. COMP. STAT. ANN. 120/4 (West 2001).

114. Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., No. E2003-01982-COA-R3-CV, 2004 WL 419720, at \*1 (Tenn. Ct. App. Mar. 8, 2004), *appeal denied*, (Tenn. Oct. 4, 2004).

widely recognized authority on common law application of conservation easements.<sup>115</sup>

*B. The Restatement of Property: Servitudes and Citizen and Neighbor Enforcement*

The recently revised Restatement (Third) of Property: Servitudes, sets forth the general common law standing rule for traditional easements, which states that only the parties to the easement, their successors, and any third-party beneficiaries have standing to enforce them.<sup>116</sup> Section 8.1 of the Restatement provides, however: “A person who holds the benefit of a servitude under any provision of this Restatement has a legal right to enforce the servitude.”<sup>117</sup> The Comment to Section 8.1 of the Restatement explains what is meant by “person who holds the benefit of a servitude”:

*b. Beneficiaries entitled to enforce servitudes.* Only current beneficiaries are entitled to seek judicial enforcement of servitudes. Persons who are not beneficiaries and former beneficiaries who have lost their interest in a servitude by transfer, or otherwise, are not entitled to sue to enforce servitudes, even if enforcement would be beneficial to them, individually, or as property owners. Beneficiaries may be identified expressly or by implication in the transaction that created the servitude. Additional enforcement rights may be created by statute.<sup>118</sup>

Section 8.5 of the Restatement addresses specifically the enforceability of non-traditional servitudes that are conservation easements, providing “coercive remedies” and “other relief” intended to support and sustain the purpose of the conservation easement.<sup>119</sup> The Comment to Section 8.5 commences with the rationale for the Section, which is identified first and foremost as the strong public interest in conservation easements.<sup>120</sup> The drafters of the Restatement included—in addition to the public’s interest, statutory support, public subsidy, and fragile resources protected by conservation easements—that conservation easements “should be vigorously protected by the full panoply of remedies available to protect

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115. RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

116. *Id.* § 8.1 cmt. a.

117. *Id.* § 8.1.

118. *Id.* § 8.1 cmt. b.

119. *Id.* § 8.5.

120. *Id.* § 8.5 cmt. a. (“There is a strong public interest in conservation servitudes.”).

property interests,” which language is meant to encourage courts to enforce conservation easements “as vigorously as possible.”<sup>121</sup>

While the statutory note to section 8.5 makes reference to the UCEA’s enforcement provisions, the Restatement makes no mention of the validity of third-party enforcement of conservation easements, and acknowledges that both the UCEA “and most other statutes leave the matter of remedies to the general remedial law of the state.”<sup>122</sup> Although matters of third-party enforcement of conservation easements are not explicitly discussed in the Restatement, it makes several compelling and strongly worded arguments for the overall enforcement of conservation easements and describes the rights of beneficiaries who may be identified expressly or by implication in the transaction that created the servitude,<sup>123</sup> which brings our examination to the language of the conservation easement document itself.

Although the parties to a conservation easement rarely, if ever, identify or intend citizens or neighbors to be beneficiaries of the conservation easement (in fact some drafters go so far as to state there shall be *no* third-party or other beneficiaries<sup>124</sup>), what if the parties to a conservation easement *did* explicitly identify citizens or neighbors as the beneficiaries of the easement—would the parties have created rights of enforcement in those beneficiaries? What if the parties identified citizens or neighbors explicitly as third-party enforcers in the easement document—would the citizens and neighbors qualify as properly structured into the transaction as “persons with third-party enforcement rights,” even if they were not anticipated as such by the UCEA or enabling legislation? The question then becomes whether a court might recognize citizens or neighbors as beneficiaries with third party rights of enforcement in reliance on the easement language, or in the absence of easement language, the charitable trust doctrine, the public trust doctrine, or enabling legislation statutory interpretation.<sup>125</sup>

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121. *Id.*

122. *Id.* statutory note.

123. *Id.* § 8.5 cmt. a.

124. For example, one such clause reads: “No Third Party Beneficiaries. This Easement is entered into by and between Landowner and Land Trust, and is solely for the benefit of Landowner and Land Trust and their respective successors and assigns, and it is not intended to, nor does it, create rights or responsibilities in any third parties as beneficiaries or otherwise for the purpose of this Easement.” Conservation easement on file with author. Query how or if this statement contradicts the purpose for the grant and that which makes it eligible for tax deductions and credits and the public’s significant interest in and benefit from the property’s protection.

125. The exception to this rule arises when a conservation easement is granted over several properties in a subdivision, whereby each property owner becomes a beneficiary of the conservation easement on their own and neighboring properties. See discussion *supra* Part I.A and accompanying notes for the *Conrad v. Mattis* case, where neighbors had the right to ask for clarification of a

Citizens or neighbors may add strength to their standing arguments by proving that they derive an economic benefit from the existence of a nearby conservation easement, by claiming beneficiary status when the purpose of the conservation easement is to add to already-protected property such as a public park or a preserve, or showing that the easement in question is a charitable or public trust and that they are persons with a special interest in enforcing the easement that is a charitable trust, or that they are constituents or taxpayers of a public trust that includes the easement-encumbered property,

Keeping in mind that the comment to section 8.5 of the Restatement opens with recognition of the public interest in conservation easements and their enforcement,<sup>126</sup> it should not be surprising that several courts have recently confronted arguments of citizens and neighbors that if conservation easements provide such obvious benefits to the public, why not allow those members of the public who are most interested in protecting them, such as environmentally conscious citizens or watchful neighbors, the right to enforce them on the public's behalf? Until recently, few such arguments passed muster with courts.

### C. Citizen Enforcement of Conservation Easements

Several citizens and citizen groups have attempted to enforce conservation easements pursuant to the UCEA's "other law" provision included in many states' enabling legislation, by using arguments that merge the public benefit of conservation easements and the public interest in seeing conservation easements enforced with a non-federal application of the citizen suit theory.<sup>127</sup> The term "citizen suit" refers to the type of legal action authorized by many federal and state environmental statutes passed in the early 1970's.<sup>128</sup> Such provisions have been effective in ensuring that statutes enacted for the public's and the environment's benefit are enforced when government regulators lack the resources or the willingness to take

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conservation easement's terms by virtue of the fact that the neighbors' properties also were burdened by the conservation easement. *Conrad v. Mattis*, 28 Conn. L. Rptr. 566 (Conn. Super. Ct. 2000), 2000 WL 33115395.

126. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 cmt. A (2000) ("There is a strong public interest in conservation servitudes.").

127. See UCEA § 3(a)(4), 12 U.L.A. 177 (1996).

128. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 733-40 (1972) (recognizing standing for nonprofit organizations whose members can show a particularized injury resulting from a federal land use action); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 686-90 (1973) (granting standing to third-party citizens with an interest that could be harmed or impaired by the outcomes of federal actions).

action, and the same approach has been borrowed successfully in a few citizens cases brought to enforce conservation easements.<sup>129</sup>

State statutory “other law” enabling citizen suits is exemplified by a Massachusetts statute that permits ten or more persons to bring an action alleging violation of any statute “the major purpose of which is to prevent or minimize damage to the environment.”<sup>130</sup> In Massachusetts, therefore, the relevant question for citizen-suit standing and conservation easements is whether the state’s conservation easement enabling statute’s major purpose is to “prevent or minimize damage to the environment,” such that a violation of a conservation easement is akin to a violation of the statute, and therefore provides the citizens with a right to enforce.<sup>131</sup> To date, no cases have been brought in Massachusetts to enforce conservation easements that derive standing from this statute.

Although citizen suits to enforce conservation easements are largely untested in state courts, several reported cases do exist. Notwithstanding the statutory provision creating standing for citizens concerned about the environment in Massachusetts, the appeals court in *Knowles v. Codex Corp.*<sup>132</sup> determined that a town’s resident-voters lacked standing to challenge a development project involving a conservation easement, even though the resident-voters argued they were harmed by misrepresentations concerning the developer’s initial statements that he intended to conserve part of the land involved in the project.<sup>133</sup>

Prior to a town meeting on the development, the developer had distributed a brochure to all the resident-voters of the town that included plans for the development as well as a conservation component.<sup>134</sup> After the town voted to permit the development with its conservation component, the developer put into place a different plan, namely, one without the conservation component.<sup>135</sup> Certain of the town’s resident-voters felt duped, sought an invalidation of the town vote or an injunction for compliance with the original plan, and based their arguments on the citizen-suit theory. The court found that the resident-voters lacked standing because they did not qualify as private individuals litigating questions of public nuisance or the “wrongful use of public or private lands” under

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129. See, e.g., *Allens Creek/Corbetts Glen Pres. Group, Inc. v. Caldera*, 88 F. Supp. 2d 77 (W.D.N.Y. 2000) (recognizing a suit by local residents that challenged a development project that included a conservation easement as part of state approval of the project).

130. MASS. GEN. LAWS ANN. ch. 214, § 7A (West 1999).

131. *Id.*

132. *Knowles v. Codex Corp.*, 426 N.E.2d 734 (Mass. App. Ct. 1981).

133. *Id.* at 737.

134. *Id.* at 735.

135. *Id.* at 736.

applicable state statutes.<sup>136</sup> In particular, the court rejected the resident-voters' citizen-suit argument, noting that the courts in the federal cases used to support the standing argument relied upon "adversely affected or aggrieved" language in 5 U.S.C. § 702 to find standing, and that the resident-citizens had not shown that they were so similarly affected.<sup>137</sup>

Though unpersuasive in the *Knowles* case, certain of these federal cases might resonate with courts contemplating citizen-suit arguments, and be difficult to ignore as precedent. In *Friends of the Shawangunks, Inc. v. Clark*, a federal district court granted standing to the same Friends of the Shawangunks discussed previously, allowing Friends to challenge a proposed amendment to a conservation easement held by the Palisades Interstate Park Commission that would permit significant development of the land subject to the conservation easement.<sup>138</sup> Friends stated that it had been formed ten years earlier "to ensure the preservation and prudent development of the Shawangunk Mountains in Ulster County, New York as a natural resource for all to enjoy" and that development of the land subject to the conservation easement would "adversely affect" the "use and enjoyment" of the land for the more than 600 members of Friends of the Shawangunks.<sup>139</sup> The court was persuaded, and granted the Friends standing, probably in part because of the fact that the Palisades Interstate Park Commission was funded by the Land and Water Conservation Fund, a federal funding program, and in part because of evidence of the profound

136. *Id.* at 737.

137. *Id.* at 737 n.13.

138. *Friends of the Shawangunks, Inc. v. Clark*, 585 F. Supp. 195, 199 (N.D.N.Y. 1984).

139. *Id.* at 199 (emphasis omitted). The salient language of the opinion is:

Friends of the Shawangunks was organized over ten years ago to ensure the preservation and prudent development of the Shawangunk Mountains in Ulster County, New York as a natural resource for all to enjoy. Moreover, it is alleged that

Friends of the Shawangunks has approximately 600 members, many of whom live in the environs of Lake Minnewaska and almost all of whom use the Lake Minnewaska for recreational purposes including hiking, swimming, cross-country skiing, etc. The conversion of the scenic conservation easement located at Lake Minnewaska which was acquired pursuant to Land and Water Conservation Fund assistance will adversely affect many of Friends of the Shawangunks' members' use and enjoyment of Minnewaska State Park and other lands open to the public for recreational use and which are adjacent to Lake Minnewaska.

*It is beyond question that these allegations suffice to confer standing upon Friends of the Shawangunks in this action.*

*Id.* (citations omitted) (emphasis added) (quotations omitted).

effect that development of the conservation easement property would have had on the members of Friends and the public. The court stated, “It is beyond question that these allegations suffice to confer standing upon Friends of the Shawangunks in this action.”<sup>140</sup>

In a more recent case without persuasive federal issues or a federal program, a Wyoming citizen brought a citizen suit to enforce a conservation easement against a county-owned and managed “Scenic Preserve Trust” (the “Trust”) for terminating a conservation easement without following proper procedures, for less than fair market value, and in contravention of the conservation easement’s express termination provisions.<sup>141</sup> Among other causes of action, the plaintiff–citizen alleged breach of fiduciary duty, identifying himself as a beneficiary of the Trust due to his status as a citizen and resident of the county that owned and managed the Scenic Preserve Trust.<sup>142</sup> Although the case is still in its early stages, and no conclusions from it can yet be drawn, it is notable that the court did extend an offer to the State’s Attorney General to represent the public interest in the case, likely pursuant to the charitable trust doctrine implied by the plaintiff, but the Attorney General declined to be involved on the public’s behalf or otherwise.<sup>143</sup>

In perhaps the most surprising and expansive citizen enforcement decision to date, given the difficulty of establishing standing for citizens, the Tennessee Court of Appeals held in *Tennessee Environmental Council v. Bright Par 3 Associates*, pursuant to the state’s enabling act that “any resident of Tennessee is a beneficiary of the [conservation] easement, and thus has standing to enforce it.”<sup>144</sup> The case involved a conservation easement held by the City of Chattanooga on property along the South Chickamauga Creek in Chattanooga, Tennessee, which easement property was adjacent to property zoned for business use.<sup>145</sup> The Tennessee Environmental Council and one citizen of Tennessee, Ms. Kurtz, alleged that the development and construction activities, including development of a Wal-Mart Supercenter and strip mall, on the property adjacent to the easement property were negatively impacting the easement property. As such, the citizens argued that the activities on the property adjacent to the easement were prohibited and unlawful under the terms of the conservation

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140. *Id.*

141. *Hicks v. Dowd*, No. 2003-0057 (4th Jud. Dist. Wyo. July 2, 2003).

142. *Id.*

143. *Id.*

144. *Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs.*, No. E2003-01982-COA-R3-CV, 2004 WL 419720, at \*1 (Tenn. Ct. App. Mar. 8, 2004), *appeal denied*, (Tenn. Oct. 4, 2004).

145. *Id.*

easement, even though the ostensibly prohibited activities at issue were not taking place on the easement property itself, but next door on unencumbered property.<sup>146</sup> While a lower court dismissed the plaintiffs' claim, stating that they had no standing to enforce the conservation easement against their neighbors, whose property was not subject to the conservation easement, the Court of Appeals interpreted Tennessee's conservation easement enabling legislation to find Ms. Kurtz, the citizen-plaintiff, to have standing to enforce the conservation easement.<sup>147</sup> The court pointed out that the Tennessee Conservation Easement Enabling Act stated that conservation easements could be enforced by "holders and/or beneficiaries."<sup>148</sup> The court therefore focused its inquiry on the meaning of the word "beneficiaries" with respect to its application of standing to the citizen-plaintiff.<sup>149</sup>

The court not only determined that both Ms. Kurtz and the Tennessee Environmental Council had standing as "beneficiaries" of the conservation easement in question pursuant to the language of the Tennessee enabling legislation that stated conservation easements were "held for the benefit of the people of Tennessee,"<sup>150</sup> in a sweeping statement the court also held that *any* resident of Tennessee would have standing to enforce conservation easements in Tennessee.<sup>151</sup> The court based its reasoning on the Tennessee legislature's apparent decision to exclude the UCEA language limiting standing and enforcement of conservation easements to governmental bodies, charitable corporations, and associations with specific rights granted within a conservation easement, which it construed to mean that the legislature intended for the grant of standing to be broader than that created by the UCEA.<sup>152</sup> In a footnote, the court further recognized that of the other states enacting enabling legislation based on the UCEA, Tennessee appeared to be the only state to grant "enforcement power to 'beneficiaries' of the easement."<sup>153</sup> The court's opinion dealt only with the issue of standing, and made no findings on the merits, but reversed and remanded

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146. *Id.* at \*2.

147. *Id.*

148. *Id.* (citing TENN. CODE ANN. § 66-9-307 (2004)). The Act provides that "[c]onservation easements may be enforced by injunction or proceedings in equity by the holders and/or beneficiaries of the easement, or their bona fide representatives, heirs, or assigns." TENN. CODE ANN. § 66-9-307.

149. *Tenn. Envtl. Council*, 2004 WL 419720, at \*3.

150. TENN. CODE ANN. § 66-9-303.

151. *Tenn. Envtl. Council*, 2004 WL 419720, at \*3.

152. *See id.* (determining that "beneficiary" should be given "liberal construction").

153. *Id.* at \*3 n.5.

the case for further proceedings consistent with its determination.<sup>154</sup> Further appeals related to this case have been denied.<sup>155</sup>

The holding of the *Tennessee Environmental Council* case is based on the court's statutory interpretation of the state's conservation easement enabling legislation.<sup>156</sup> The broad language of the court's opinion is predicated on the state's broad statutory enforcement language; whether it was the intent of the Tennessee legislature in providing standing for "holders and/or beneficiaries" of conservation easements is not abundantly clear, but as it now stands, it appears that if the legislature disagrees with the court's interpretation of its legislation language, it will need to amend the relevant language to narrow the definition of "beneficiary" established by the court.<sup>157</sup>

The precedent set by the court not only enables citizens as residents of Tennessee to enforce conservation easements against other citizens regardless of the enforcing resident's relationship to the easement in question, it also creates standing for citizens and neighbors to enforce conservation easements against owners of property *adjacent* to and *unencumbered* by conservation easements for their impacts to the easement property. The court permits a resident of Tennessee not only to sue to enforce a conservation easement to which she is not a party, but also to sue to enforce a conservation easement against a property that is not subject to the easement itself. While reasonable practitioners, professionals, and scholars disagree as to the importance and validity of citizen enforcement of conservation easements, most agree that citizens should not be able to sue their neighbors to enforce conservation easements that do not encumber either their own, or their neighbor's property.

#### D. Neighbor Enforcement of Conservation Easements

The unwritten rule that neighbors lack standing to enforce or challenge conservation easements has been upheld in the several instances in which the issue was litigated, although if combined with a persuasive charitable trust doctrine argument and, in certain specific cases, a public trust doctrine argument, the neighbors' arguments might begin to carry more weight in conservation easement enforcement cases, especially if the neighbor can prove she is a person with a special interest in enforcing a conservation easement covering her own property, her neighbor's property, or both, or if

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154. *Id.* at \*3.

155. *Id.*

156. *Id.*

157. *Id.*

she is a constituent or taxpayer of the public trust that includes the conservation-easement-encumbered property.<sup>158</sup> We have yet to see such a confluence of events, facts, or arguments, but several cases reveal neighbor attempts to enforce conservation easements against their neighbors.

In *Cluff Miller v. Gallop*,<sup>159</sup> a trial court recently invoked the standing provision of Maine's conservation easement enabling legislation to dismiss a neighbor's action to enforce a conservation easement.<sup>160</sup> The standing provision the court relied on was patterned on the UCEA language of Section 3(a), but, notably, did not include the final category of standing to enforce conservation easements for "a person authorized by other law."<sup>161</sup> The neighbor to property subject to a conservation easement initiated the action because fill material had been placed on the easement property in possible violation of the conservation easement, and that caused runoff to, and flooding of, the neighbor's property.<sup>162</sup> The neighbor brought nuisance and trespass actions against the owner of the property subject to the conservation easement, and fulfilling an easement holder's worst nightmare, also sued the land trust holding the conservation easement for failing to enforce the conservation easement.<sup>163</sup> The court dismissed claims against the holder land trust based on Maine's statutory language, which based on the UCEA, lists only the holder, grantor, and any contractual third-party as authorized to enforce conservation easements, but the nuisance case against the owner of the conservation easement property remains.<sup>164</sup>

When faced with a similar issue, New York's high Court interpreted its state conservation easement enabling statute to preclude neighbor standing, noting that to "allow[] nearby landowners to block [development] as contrary to the conservation easement, the class of persons having standing

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158. In *Hinton v. City of St. Joseph*, 889 S.W.2d 854, 857-59 (Mo. Ct. App. 1994), which was argued pursuant to the public trust doctrine, neighbors sought to bring an action against the City and the trustees of property held in trust (not conservation easement property), to block the sale of the trust property back to the trustees to be used for commercial purposes even though with a restriction requiring any proceeds derived from the sale to be used for future city parks and recreation. *Id.* Plaintiffs—neighbors claimed that they had standing as taxpayers and as nearby property owners to challenge the handling of the public property, however, the Missouri Court of Appeals ultimately rejected this claim. *Id.* at 861.

159. *Cluff Miller v. Gallop*, No. RE-03-022 (Me. Sup. Ct. July 8, 2003).

160. ME. REV. STAT. ANN. tit. 33, § 478(1) (West 1999).

161. *See id.* (limiting the class of persons able to bring an enforcement action to owners of the property, holders of the easement, and persons with a third-party right of enforcement); UCEA § 3(a), 12 U.L.A. 177 (1996) (allowing suit by owners of the property, holders of the easement, a person having a third-party right of enforcement, and a person authorized by other law).

162. *Cluff Miller v. Gallop*, No. RE-03-022.

163. *Id.*

164. *Id.*

to enforce a conservation easement will have been expanded significantly beyond the limits deliberately set by the Legislature in the [enabling statute].”<sup>165</sup> Like the Maine statute, New York’s statute lists only the holder, the grantor, and any contractual third-party as authorized to enforce a conservation easement, and makes no mention of “persons authorized by other law.”<sup>166</sup>

In another New York case, *Bleier v. Board of Trustees*, the court held that an abutting landowner to a property protected with a scenic easement also lacked standing to enforce the easement under a separate statute governing town-held scenic easements.<sup>167</sup> Each of these cases involved matters of statutory interpretation, and although none of the opinions discuss the issue of neighbor standing at length (presumably because the statutes governing standing were considered to be unambiguous), the issue likely would have been addressed had the statutes included the UCEA’s broad “person authorized by other law” language, which likely would have been found to be ambiguous.

Unlike the Maine and New York cases, the Connecticut case of *Burgess v. Breakell*, discussed previously,<sup>168</sup> dealt with the standing issue in some detail when a neighbor was denied standing because he was not the holder of the easement.<sup>169</sup> The summary of the court’s reasoning is that the Connecticut legislature must have intended to limit the enforceability of conservation easements to governmental bodies or charitable corporations or trusts, just as the legislature had limited who may hold a conservation easement to the same entities.<sup>170</sup>

The court in the Ohio case *Weber v. Village of Gates Mills* was confronted with issues of neighbor standing when Weber sued the Village to challenge a plan to exchange Village property under conservation “restrictions” for other acreage for the purpose of constructing a sanitary sewage treatment facility on the conservation easement property.<sup>171</sup> Weber argued that as an owner of property adjacent to the land to be exchanged, and the special beneficiary of the conservation restrictions on the use of the land, he had standing to sue to enforce the conservation restrictions and prevent the exchange of land.<sup>172</sup> The Court of Common Pleas dismissed

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165. *Friends of the Shawangunks v. Knowlton*, 476 N.E.2d 988, 991 (N.Y. 1985).

166. N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney 1997).

167. *Bleier v. Bd. of Trs.*, 595 N.Y.S.2d 102, 103 (N.Y. App. Div. 1993).

168. *See supra* Part I.

169. *Burgess v. Breakell*, No. 95-0068033, 1995 Conn. Super. LEXIS 2290, at \*8 (Conn. Super. Ct. Aug. 7, 1995).

170. *Id.* at \*7.

171. *Weber v. Vill. of Gates Mills*, 744 N.E.2d 1243, 1243 (Ohio Ct. App. 2000).

172. *Id.* at 1244.

Weber's claim.<sup>173</sup> Weber appealed to the Court of Common Appeals to determine whether he had standing to pursue his claims as an owner of property adjacent to the land at issue, and as a special beneficiary of the conservation restrictions on the use of the land.<sup>174</sup> The court found that Weber did not have standing due to fact that he had failed to produce any evidence that he was an adjacent property owner.<sup>175</sup> One has to wonder what the court would have found had Weber produced evidence of his abutter's status.

Several general observations grow out of the scant case-law and statutory references to citizen and neighbor standing to enforce conservation easements available for review. First, citizen suits and citizen or neighbor arguments for standing may be more persuasive if the conservation easement at issue is held on the public's behalf and if the conservation easement states expressly that it is established "for the benefit of the general public." Second, standing for citizens to enforce conservation easements is more likely to be granted if the public has a stake in the enforcement of the conservation easement, such as if it is donated in exchange for tax deductions or credits subsidized by the public taxpayer, purchased directly using public funds, or if it allows public access. Finally, citizen suits seem likely to have better odds of success when the state enabling statute is either silent on the issue of standing or contains the broad "person authorized by other law" language that arguably might permit citizens or neighbors to enforce conservation easements and provided that the same legislation does not specify that an enforcing party be qualified to hold the conservation easement at issue.

Conversely, if the goal is to discourage suits by citizens or neighbors to enforce conservation easements, one could argue that conservation easements not explicitly held on the public's behalf and granted "for the benefit of the general public"; subsidized by tax benefits associated with donating a conservation easement; purchased with private funds; and that prohibit public access, ought not to be considered eligible for enforcement by citizens or neighbors in their own or the public's interest. Last, a state or conservation community responding to a constituency wanting to foreclose citizen or neighbor conservation easement enforcement opportunities would be well advised to explore explicitly defining in its state enabling legislation who has a third-party right to enforce conservation easements, whether those rights are pursuant to a charitable or public trust doctrine, and either

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173. *Id.*

174. *Id.*

175. *Id.*

excluding, or more narrowly defining, the “person authorized by other law” language of the enabling legislation.

#### CONCLUSION

It is foreseeable that in certain circumstances, a third-party right to enforce conservation easements when the easement holder is unavailable or unwilling to so do may exist or be recognized. Whether the third-party right will be welcomed by the easement holder or broader conservation community remains to be seen and will no doubt be influenced by the facts and circumstances surrounding each particular enforcement action.

For those easement holders, judges, legislators, attorneys, neighbors and citizens seeking clarification of the potential for third parties to enforce conservation easements within their state, the following inquiries should shed some light on the potential for a third-party enforcement right: first, a careful review of the state’s conservation easement enabling legislation to determine if third parties are expressly or implicitly permitted to enforce conservation easements, and, if so, how are third parties defined; second, understand the common law or statutory application of the charitable trust doctrine and the public trust doctrine, as either may empower the state’s attorney general or citizens to enforce conservation easements; third, recognize that citizens and neighbors may derive standing from federal citizen suit arguments or statutory and contract interpretation of the public’s status as a beneficiary and stake in the conservation easement.

For those seeking to either better define or defeat third-party rights to enforce conservation easements legislatively, a look to the legislation of Illinois, New Hampshire, Maine, Mississippi, Massachusetts, and California should provide guidance on how to structure state statutes to either create or foreclose third-party rights of enforcement for attorneys general or citizens through the codification of the charitable or public trust doctrines, or express statutory creation or prohibition of a citizen’s right to enforce.

For those seeking guidance regarding citizen or neighbor enforcement rights, a look to the case law evolving in New York, Massachusetts, Connecticut, Maine, Tennessee, and Wyoming should reveal the different common law approaches to citizen and neighbor standing.

As previously stated, the purpose of this article is not to pass judgment on whether third-party enforcement of conservation easements has positive or negative repercussions for the conservation community; varying facts and circumstances themselves will influence reactions and interpretations of the third-party right. Rather, this article strives to shed light on the potential for third-party enforcement of conservation easements under current

statutory and common law regimes, and to examine the law and doctrines related to such third-party rights.