

March 9, 2016

MEMORANDUM

TO: Massachusetts Land Trust Coalition

FROM: Beveridge & Diamond, P.C.

RE: Charitable Trusts and Their Application to Conveyances of Fee-Owned Land to Land Trust Organizations in Massachusetts

Charitable trusts are one of several legal “tools” that may be used to protect and preserve land. The following memorandum is intended to serve as a resource for understanding how a charitable trust may be created in the context of a conveyance of the fee interest in real property to a nonprofit land trust, and the implications of managing land that has been transferred in trust. This memo is intended to provide guidance and suggested language to land trusts considering whether to impugn a fee property with a charitable trust. However, this memo does not in any way opine on whether a charitable trust exists on land trust fee-owned lands because that is a fact specific determination. Land trust organizations applying these concepts to real-world situations should seek additional legal advice, as more complex situations may implicate legal concepts not discussed herein.¹

Charitable Assets: Unrestricted, Restricted, and in Trust

Historically, Massachusetts courts applied trust law principles in determining the powers and limitations of charitable organizations in managing donated assets.² Today, however, courts generally analyze the powers and obligations of charitable corporations under corporate law principles rather than under charitable trust principles. In Massachusetts, charitable corporations are governed by M.G.L. c. 180, which requires a charitable corporation to identify the purposes for which it was formed and provides it with relatively broad corporate powers to further its purposes, including, for example, the power to convey land to which it has legal title. *See* M.G.L. c. 180, §§ 4 & 6. Whether under the historical view or the modern day view, the result is essentially the same: a charitable corporation must apply gifts in furtherance of its purposes.

Unrestricted charitable gifts to a charitable organization do not give rise to charitable trusts, although assets donated outright to a charitable organization must nevertheless be used in furtherance of the organization’s charitable purposes. The manner and means by which the organization chooses to use the assets are at the organization’s discretion. Thus, while trade lands are not on their own held for conservation purposes, they are nevertheless held as

¹ For example, this memorandum does not address conservation restrictions governed by Mass. Gen. L. ch. 184, ss. 31-33, Article 97 lands, eminent domain, or tax implications for donors.

² *See Hillman v. Roman Catholic Bishop of Fall River*, 24 Mass. App. Ct. 241, 242-243, n.3 (1987) (“A gift with a general charitable intent ... imposes a trust of a sort in the sense that the grantee may not use the assets for private, personal purposes; the assets must be used for charitable purposes consistent with those of the designated charity”).

investments, the proceeds from which will ultimately further the organization's conservation purposes. In contrast, restricted gifts must be managed by a charitable organization in accordance with the terms of the gift. Property donated to a land trust for a specific purpose or with specific restrictions on use may not be converted to other uses or sold unless the terms of the gift are modified, even if the other uses or proceeds would be in furtherance of the organization's charitable purposes. Mismanaging restricted charitable gifts could expose a charitable organization to enforcement by the Massachusetts Attorney General.

Similar to restricted gifts, a land trust holding fee land subject to a charitable trust must manage the land in accordance with the terms of the trust. When land is transferred in trust for a specific charitable purpose to a land trust, the creation of a charitable trust establishes a fiduciary relationship with respect to that land. Thus, a land trust's conduct with respect to land it holds and manages under a charitable trust is limited by the land trust's fiduciary duties. The limits of conduct of a land trust over land it owns subject to a charitable trust will depend on the terms of the trust and the specific charitable purpose(s) for which the trust was created. A land trust would not, for example, have the power to convey and sell the land unless that power is specifically provided for in the instrument creating the trust, or it is otherwise clear from the language and/or purpose of the trust that the land trust has this power.

Principles of Charitable Trust Interpretation

Determining whether a gift of land to a land trust creates a charitable trust is a matter of interpretation. There is no particular language, format, or structure that is required to create a valid charitable trust, however, the language used by the donor must clearly establish the donor's intent to place the property in trust. Where an instrument of conveyance does not specifically employ the words "in trust" together with a clear statement of the use to which the land must be put, a court would likely only conclude that a charitable trust was created if the language clearly establishes the donor's intent to place the property in trust for a specific charitable purpose. To make this determination, a court will look at the language of the instrument(s) that contain the restrictions and indications of donor intent.³

There is little case law interpreting the applicability of charitable trust law to conveyances of land to nonprofit organizations. We have not found any indication that cases involving "public charitable trusts" would not apply equally to conveyances of land under trust to land trusts. These cases generally appear to apply the term "public charitable trust" to charitable trusts managed by governmental entities or public institutions. However, there are some exceptions to this rule, including cases involving educational and religious institutions. *See, e.g., Attorney General v. President & Fellows of Harvard College*, 350 Mass. 125, 137 (1966) (suggesting that gifts to Harvard College may constitute "public charitable trusts in private educational hands"). Although a reviewing court could hold otherwise, the parallel nature of land protection by land trusts as by governmental entities supports the application of public charitable trust principles to land trust organizations. *See, e.g., Weston Forest and Trial Ass'n, Inc. v. Fishman*, 66 Mass. App. Ct. 654, 660 (Mass. App. Ct., 2006) ("...although the

³ *See Cohen v. City of Lynn*, 33 Mass.App.Ct. 271, 275 (Mass. App. Ct., 1992), *citing Jewett v. Brown*, 319 Mass. 243 (1946) ("The intent of the creator of the trust is to be ascertained from a study of the instrument as a whole in the light of the circumstances attending its execution... Due weight should be attributed to all the language ...").

WFTA is not a government entity, for purposes of enforcing a conservation restriction that is in the public interest, there is no difference between a governmental body and a private entity”). Further, conservation organizations are generally recognized “as essential partners in Statewide conservation efforts,” and their work is considered as “lessening the burdens of government.” *New England Forestry Foundation, Inc. v. Board of Assessors of Hawley*, 468 Mass. 138, 153-154 (2014).

Thus, while not dispositive, Massachusetts case law (including cases involving public charitable trusts) is instructive on the following points with respect to interpreting the creation of charitable trusts:

- An instrument gifting a parcel of land “for the use of [a specific charitable organization],” or “for [general charitable purposes]” without more, is not enough to demonstrate that the donor intended to transfer the property in trust.⁴
- A written instrument that uses the words “in trust” together with a specific statement as to the purpose of the trust presents the strongest case for the creation of a charitable trust.⁵
- A court is more likely to hold that a charitable trust is created if the grantor states that the land is to be used for a particular purpose “forever” or “in perpetuity.”⁶
- If the language in a deed describing the use to which the land should be put is capable of being read as either a description of the grantee’s contemplated use or as a restriction imposing a trust obligation, a court is more likely to hold that the language is merely descriptive and that a charitable trust was not created.⁷

⁴ *See, e.g., Hillman v. Roman Catholic Bishop of Fall River*, 24 Mass.App.Ct. 241 (Mass. App. Ct., 1987) (holding that a parcel of land deeded to the Roman Catholic Bishop of Fall River “for the use of St. Mary’s Parish for educational, religious or recreational purposes” was an unrestricted gift and not subject to a charitable trust); *Sullivan v. Roman Catholic Bishop of Boston*, 368 Mass. 253 (1975) (holding that farm property devised under a testator’s will to the Archbishop of Boston “to be devoted to such charitable uses as he may select” was not subject to a charitable trust; there was no indication that the testator intended for the property itself to be used for charitable purposes, and therefore the Archbishop was not restricted from selling the land and applying the proceeds of the sale to charitable uses).

⁵ A deed conveying a 20.5 acre parcel of forested land that was “granted, released, and dedicated to the Town of Mattapoisset in trust” and to be “used for the purposes authorized by (a) G.L. c. 40 § 8C and (b) other Massachusetts statutes relating to conservation” was held to have created a charitable trust. *Tinkham v. Town of Mattapoisset*, 22 Mass.L.Rptr. 635 (Sup. Ct. Mass., 2007).

⁶ *Dunphy v. Commonwealth*, 368 Mass. 376, 378 (1975). *See also Salem v. Attorney General*, 344 Mass. 626, 627 (1962) (holding that a will devising land to the City of Salem “to be used forever as Public Grounds for the benefit and enjoyment of the citizens of said City” clearly showed an intent to create a charitable trust).

⁷ *See Loomis v. City of Boston*, 331 Mass. 129, 132 (1954) (holding that the language “for the purposes of a public park” was descriptive of the city’s intended use of the land and did not clearly manifest an intention to create an enforceable trust); *Opinion of the Justices*, 369 Mass. 979, 985 (1975) (stating that the Justices could not “discern from ... [the] wording [of the deed] any restriction on the land’s use which it could fairly be said was ‘an essential factor in the scheme of benefaction’”), *citing Adams v. Plunkett*, 274 Mass. 453, 459 (1931).

- The creation of a possibility of reverter would likely be considered by a court as an indication that a charitable trust was not intended.⁸
- Consideration is not required to create a charitable trust; conversely, the payment of substantial consideration does not prevent a grantor of property from transferring property in a way that establishes a charitable trust.⁹ However, there is some indication in Massachusetts case law that the payment of fair market value for a parcel of land will weigh against the creation of a public charitable trust at the time the land is conveyed.¹⁰ Further, where a deed's language provides that the conveyance is made "in fee simple forever" without prescribing a specific use or purpose to which the subject property is to be applied, and the conveyance is supported by substantial consideration, no charitable trust arises.¹¹

Writing

In Massachusetts, if trust property includes land, or if the trust otherwise concerns land, the trust instrument must be in writing and signed. M.G.L. c. 203, § 1. If the written instrument is recorded in the registry of deeds or the registration office of the land court in the county or district where the land is located, the recording of the instrument provides constructive notice of the trust to any persons who may claim an interest in the land. M.G.L. c. 203, § 2. Consequently, while there is no requirement to record a document that creates a charitable trust, when land is held in trust it is a good practice to record the instrument and we would recommend it.

Fiduciary Duties

A land trust serving as trustee over land it owns in trust has a fiduciary duty to protect the trust property, and to enforce and defend the trust property against claims. A land trust would therefore have standing to defend the property (and thereby "enforce" the terms of a trust) against third party claims.

⁸ See *Opinion of the Justices*, 369 Mass. at 984-985 ("The creation of a possibility of reverter is inconsistent with an intent to create a public trust in perpetuity"). It is unclear, however, whether this principle is limited in application to land conveyed to governmental entities, or, alternatively, whether it is limited to deeds that do not otherwise specify a duration or timeframe (*i.e.*, no "forever" language or other identification that a trust is being created for a limited duration).

⁹ See *Parker v. Dungan*, 2009 WL 5174982, *7 (Mass. Land Ct., Dec. 31, 2009) (holding that payment of substantial consideration for property by a Town, a portion of which was gifted by anonymous donors, did not impede establishment of a public charitable trust given that it did not represent fair market value of property); *Cohen*, 33 Mass. App. Ct. at 276 ("[w]e have found no authority ... to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust").

¹⁰ *Brooks v. City of Boston*, 334 Mass. 285, 286 (1956) (holding that property obtained for presumably full market value did not impose a charitable trust on the land simply because the land had thereafter been maintained as a public park by the City); *Loomis*, 331 Mass. at 132 (holding that deeds granting the City of Boston property "for the purposes of a public park" did not impose charitable trusts on the property because the record indicated that the land was either paid for or taken by eminent domain; and further noting, "[i]t would be unusual ... for vendors to restrict by a trust to a single use land which the vendee had fully paid for").

¹¹ *Jacobsen v. Parks & Recreation Comm'n. of Boston*, 345 Mass. 641, 643 (1963).

As against trustees of a charitable trust, members of the general public do not generally have standing to enforce the terms of a deed creating a charitable trust, except under very limited circumstances. Rather, the Massachusetts Attorney General is considered to be the public's representative. *See* M.G.L. c. 12, §§ 8 & 8G; *Weaver v. Wood*, 425 Mass. 270, 275 (1997) (“...only the Attorney General can bring an action alleging the misuse of charitable assets”). The exception to the rule is that a person who benefits under a charitable trust in a way that is greater than or different from members of the general public may bring an action to enforce the terms of a charitable trust. For example, if a trust is created for the benefit of a specific charitable corporation, the charitable corporation may have standing to bring a suit to enforce the terms of the trust benefitting it.¹² Note, however, membership in a charitable organization is not sufficient to give individual members standing to maintain an action.¹³

Claims by the Attorney General for breach of fiduciary duty by trustees of a charitable trust have been held to be exempt from the three-year statute of limitations period for tort actions under M.G.L. c. 260, § 2A. *See* *Lifespan Corp. v. New England Medical Center, Inc.*, Civil No.,06-cv-421-JNL (D. Rhode Island, Sept. 20, 2010) (citing *Davenport v. Atty. Gen.*, 361 Mass. 372 (Mass. 1972), and other Massachusetts cases). Further, actions for breach of fiduciary duty are considered equitable in nature.¹⁴

Amending a Charitable Trust

Assuming that a deed creates a charitable trust, a land trust would need to seek judicial approval to amend or modify the terms of the trust. Amendment of a charitable trust involves one of two concepts: (1) amendment of the administrative provisions of the trust (“administrative deviation”),¹⁵ or (2) amendment of the purpose of the trust (“cy pres” doctrine).

Administrative Deviation

Under both common law and statute, a court “may modify the administrative or dispositive terms of a trust ... if, because of circumstances not anticipated by the settlor, modification ... will further the purposes of the trust” or “if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.” M.G.L. c. 214, § 10B. For these purposes, “administrative provisions” refers to the subordinate terms of a trust that restrict or dictate the means and methods for carrying out the settlor’s charitable purpose. Therefore, to obtain authorization to deviate from an administrative provision of a trust, a land trust would need to show that, as a result of unanticipated conditions, modification of the trust will further the trust’s purposes, or that the trust’s administration has become impracticable or wasteful as a result of adherence to the restrictions.

¹² *See, e.g.*, *Trustees of Dartmouth College v. City of Quincy*, 331 Mass. 219, 225 (1954) (holding that Trustees of Dartmouth College had standing to bring an action for a declaratory ruling on the rights and obligations of Quincy’s administration of a charitable trust because the trust’s gift-over provision to the College in the event that the trust was not properly maintained gave the College a special interest).

¹³ *See Wood*, 425 Mass. at 275 (holding that membership in a public charity is not sufficient to give persons standing to sue as beneficiaries of a trust).

¹⁴ *See e.g.*, *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 527, n.32 (1997).

¹⁵ Administrative deviation is also referred to as “reasonable deviation” and “equitable deviation.”

Cy Pres Doctrine

The common law doctrine of cy pres¹⁶ applies when the purpose of a charitable trust has become impossible, impracticable or illegal. M.G.L. c. 214, § 10B. A trustee can seek application of the cy pres doctrine in order to devote the trust property to a charitable purpose that is “as near as possible” to the trust’s original charitable purpose.¹⁷

There are certain limitations to the application of the cy pres doctrine. First, the cy pres doctrine is only applicable if the trust instrument indicates that the settlor had a general charitable intention to devote trust property to charitable purposes. In Massachusetts, gifts made for charitable purposes are presumed “to have been made with a general charitable intention to devote property to public charitable purposes, unless otherwise provided in a written instrument of gift.” M.G.L. c. 12, § 8K. If a donor clearly intended only to benefit a specific object or institution, a court will find that the donor had a specific, or narrow, charitable intent and may decline to apply the cy pres doctrine.¹⁸ Second, the cy pres doctrine will not apply to a trust whose terms expressly state what must happen with the trust property if the trust’s purpose fails.¹⁹ Third, the cy pres doctrine may only be applied if the trustee demonstrates that the trust’s purpose has become impossible or impracticable to carry out.²⁰

The judicial powers of administrative deviation and cy pres are vested in courts of general equitable jurisdiction. In Massachusetts, the Superior Court is a court of general equitable jurisdiction. *See* M.G.L. c. 214 §§ 1 & 10B. A land trust could therefore seek to amend the terms or purpose of a trust by filing a complaint in the Superior Court. Note, the Massachusetts Attorney General is a necessary party to judicial proceedings seeking deviation from the terms of a trust or the application of the cy pres doctrine to a trust’s charitable purpose. *See* M.G.L. c. 12, § 8G.

Comment on Restricted Gifts versus Charitable Trusts

There do not appear to be significant differences in the means of creating restricted gifts of land and the means of creating charitable trusts involving land. A gift of land to a land trust

¹⁶ “Cy pres” is old Norman French. “Cy pres que possible” translates to “as near as possible.”

¹⁷ *See, e.g.,* Attorney General v. Briggs, 164 Mass. 561, 568-569 (1895) (“The promotion of education in that neighborhood [Fairhaven] was his [the testator’s] object, and the charity is of such a kind that his general purpose must be carried out as nearly as possible in accordance with his design, even though the result reached differs in minor particulars from that intended. ... [I]t is the duty of the court to frame a scheme which shall accomplish the general purpose of the testator as nearly as possible according to the terms prescribed by his will.”); Town of Milton v. Attorney General, 314 Mass. 234, 240 (1943) (referring the case to a single justice for application of cy pres to settle the application of charitable funds “as nearly as possible in accord with the charitable intent of the testator”).

¹⁸ *See, e.g.,* Selectmen of Provincetown v. Attorney General, 15 Mass. App.Ct. 639, 646-647 (Mass.App.Ct. 1983) (holding that cy pres could not be applied to devise of real property transferred to Town to be used as a library because the gift lacked general charitable intent); *c.f.* Rogers v. Attorney General, 347 Mass. 126, 134 (1964) (holding that “the absence of a gift over provision if the trust should fail does carry significance as indicating a general charitable intent”).

¹⁹ *See, e.g.,* Phipps v. Barbera, 23 Mass.App.Ct. 1, 6-7 (Mass.App.Ct. 1986) (holding that cy pres could not be applied to a gift of paintings to a nonexistent museum where testatrix included a gift over clause in the event that the paintings were not accepted).

²⁰ *See Tinkham*, 22 Mass. L. Repr. 635 at *10 (declining to apply cy pres doctrine because trustees failed to show that protection of forested parcel of land had become impracticable).

that restricts the use to which the land trust may put the land or otherwise restricts the disposition of the property may create a charitable trust. While we cannot broadly conclude that a charitable trust is created every time there is a restricted gift to a charity, at a minimum, it is clear that certain trust law principles apply to restricted gifts. For example, charities seeking to modify or release donor restrictions (as a result of impossibility or impracticability) may seek court approval for the modification and/or termination of the restrictions under the doctrines of cy pres and administrative deviation, which are common law charitable trust principles. *See, e.g.*, Office of the Attorney General, [Modification of Institutional Funds & M.G.L. Ch. 180A, § 5\(d\)](#) (Apr. 2011) (explaining the administrative deviation and cy pres doctrines for modifying donor-restricted institutional funds). Further, the Attorney General has oversight of charities just as the Attorney General has enforcement authority over the administration of charitable trusts. *See* M.G.L. c. 12, §§ 8 – 8N.

Examples: Unrestricted Gift, Restricted Gift, or Charitable Trust?

To demonstrate the above principles, we provide the following examples of deed language and possible interpretations.

- A deed transferring a 20-acre property “to the Land Trust.”
 - Category: Unrestricted gift.
 - Implication: The Land Trust may sell or otherwise convert the property and use the proceeds in furtherance of its charitable purposes. No court approval would be required.
 - Enforcement: Generally, the AG has standing to enforce the misapplication of charitable assets.

- A deed transferring a 20-acre property “to the Land Trust to be held for conservation purposes.”
 - Category: Ambiguous, but an argument could be made that this is an unrestricted gift, especially if Land Trust’s charitable purposes include conservation.
 - Implication: The Land Trust may sell or otherwise convert the property and use the proceeds in furtherance of its charitable purposes. No court approval would be required.
 - Enforcement: Generally, the AG has standing to enforce the misapplication of charitable assets.

- A deed transferring a 20-acre property “to the Land Trust in trust for conservation purposes in perpetuity.”
 - Category: Strong argument that this transfer would create a charitable trust. The “in trust” terminology, perpetual condition, and the reference to conservation purposes suggest that charitable trust law principles would apply.
 - Implication: The Land Trust would need to manage the property for conservation purposes and would not be able to sell or otherwise convert the property to other uses or assets. To modify the terms of the trust, notice to the AG and court approval would be required. The Land Trust would need to

- show impracticability or impossibility to meet the terms or purpose of the trust.
 - Enforcement: The AG may enforce the terms of the gift.
- A deed transferring a 20-acre property “to the Land Trust for the purpose of providing public walking trails for bird watching.”
 - Category: Ambiguous, but an argument could be made that this is a restricted gift and would not create a charitable trust. There is no “in trust” or “perpetual” language, but the deed does restrict the use to which the property may be put.
 - Implication: The Land Trust would need to manage the property to provide the public with walking trails for bird watching. Modification of the terms of the gift could be requested of the donor, or, if the donor is unavailable, court approval would need to be sought. If court approval is needed, the Land Trust would likely need to show impracticability or impossibility to meet the terms or purpose of the gift restrictions.
 - Enforcement: The AG may enforce the terms of the gift.
- A deed transferring a 20-acre property “to the Land Trust in trust forever for the purpose of providing public walking trails for bird watching.”
 - Category: The combination of the trust language (“in trust”), the perpetual nature of the transfer (“forever”), and the narrow purpose to which the land must be used strongly suggests that charitable trust law would apply.
 - Implication: The Land Trust would need to manage the property to provide the public with walking trails for bird watching. The Land Trust would not be able to sell or otherwise convert the property to other uses or assets. To modify the terms of the trust, notice to the AG and court approval would be required. The Land Trust would need to show impracticability or impossibility to meet the terms or purpose of the trust.
 - Enforcement: The AG may enforce the terms of the charitable trust.
- A deed transferring a 20-acre property “to the Land Trust in trust for the purpose of providing public walking trails for bird watching, but if the Land Trust fails to perform, this deed shall become null and void.”
 - Category: Likely a restricted gift. The possibility of reverter back to the grantor would probably prevent application of the charitable trust doctrine. Contract law principles would likely apply instead of trust law principles, unless charitable giving rules apply.
 - Implication: The Land Trust would need to manage the property to provide walking trails to the public for bird watching.
 - Enforcement: It is not clear whether the donor would have standing to enforce the terms of the deed if the Land Trust failed to perform or converted the property to other uses. Under contract principles, the donor would have standing to sue to enforce the terms of the gift, though under charitable giving principles, it is likely that only the AG would have standing to enforce the terms of the trust.

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