

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**PROPERTY ASSESSMENT AND
CONSERVATION EASEMENTS SYMPOSIUM**
Proceedings of the December 3, 1999 Symposium

DECEMBER 3, 1999



Government Law Center
Albany Law School

80 New Scotland Avenue
Albany, NY 12208
www.als.edu

© Copyright 2000 Albany Law School

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

**PROPERTY ASSESSMENT AND
CONSERVATION EASEMENTS SYMPOSIUM**
Proceedings of the December 3, 1999 Symposium

DECEMBER 3, 1999

© Copyright 2000 Albany Law School

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

*A Transcript of the Presentations
Delivered at*

**THE SYMPOSIUM ON
PROPERTY ASSESSMENT
AND
CONSERVATION EASEMENTS**

December 3, 1999

Empire State Plaza
Albany, N.Y.

© 2000

The Government Law Center of Albany Law School



SPONSORS

The Symposium was made possible through the support of the following sponsors:

The Government Law Center of Albany Law School

Land Trust Alliance of New York

New York State Assessors' Association

Association of Towns of the State of New York

New York Conference of Mayors

New York State Home Builders Association

and with the financial support of:

THE PROSPECT HILL FOUNDATION

THE RURAL NEW YORK GRANT PROGRAM

ACKNOWLEDGMENTS

Special thanks to Symposium facilitator

Karleen Karlson, Esq.
of the Government Law Center's
Program on Public Policy Dispute Resolution

and to the following Symposium speakers:

Andy Beers
Kara Bitar
Hon. Richard Brodsky
Tony Cantore, Esq.
Cathy Conklin
Jeremiah Cosgrove
Kevin Crawford
Robert Davies, Esq.
Joy Ewing
Tom Frey
Philip LaRocque
Edye McCarthy
Patricia E. Salkin, Esq.
Richard Sinnott
Hon. Alexander Treadwell
Tammara Van Ryn

TABLE OF CONTENTS

	<u>Page</u>	
WELCOMING REMARKS	1	
 Hon. Alexander Treadwell, NYS Secretary of State		
INTRODUCTION TO CONSERVATION EASEMENTS: NATIONALLY AND IN NEW YORK	7	
 Tammara Van Ryn, Director <i>Land Trust Alliance, New York Program</i>		
ASSESSING CONSERVATION EASEMENTS IN NEW YORK STATE	19	
 Richard Sinnott, Counsel <i>New York State Office of Real Property Services</i>		19
 Tom Frey, Executive Secretary <i>New York State Assessors' Association</i>		27
 Cathy Conklin, Supervising Appraiser <i>Town of Clarkstown</i>		33
 Joy Ewing, GLC Intern & SUNY-Albany Student		41

Kara Bitar, GLC Intern & Siena College Student	45
Patricia E. Salkin, Esq., Associate Dean & Director <i>Government Law Center of Albany Law School</i>	49
Edye McCarthy, Past-President <i>New York State Assessors' Association</i>	57
Andy Beers, Director of Conservation and Government Programs <i>The Nature Conservancy</i>	63
Jeremiah Cosgrove, Northeast Regional Director <i>American Farmland Trust</i>	71
Kevin Crawford, Counsel <i>Association of Towns of the State of New York</i>	79
ROUNDTABLE DISCUSSION ON FEASIBILITY	85
Hon. Richard Brodsky, Member of the Assembly <i>New York State Assembly</i>	85
Tony Cantore, Esq., Counsel <i>New York State Assembly Real Property Committee</i>	89
Robert Davies, Esq., Senior Attorney <i>New York State Department of Environmental Conservation</i>	93
Tom Frey, Executive Secretary <i>New York State Assessors' Association</i>	97

Philip LaRocque, Executive Vice President
New York State Home Builders Association 99

Richard Sinnott, Esq., Counsel
NYS Office of Real Property Services 103

Tammara Van Ryn, Director
Land Trust Alliance, New York Program 107

Laura Hartman, Counsel-Senate Environmental Committee
New York State Senate 109



WELCOMING REMARKS

HON. ALEXANDER TREADWELL

Secretary of State

Thank you very much for the introduction. Good morning ladies and gentlemen.

How many assessors are here in the room? Please raise your hands. I had lunch with Tom Griffen, Executive Director of the Office of Real Property Services, yesterday and asked him for some ideas on what I might talk about this morning. He told me that 85% of the eligible homeowners have signed up for STAR, the Governor's school tax relief program. Considering that we are just completing the second year of STAR, that is an extraordinary number. The assessors of our state have done a wonderful job helping the homeowners of our state through the STAR program.

I am very pleased to be here with Patty Salkin again. Last winter we were at this same location for a Smart Growth conference co-sponsored by the Government Law Center.

This symposium on property assessment and conservation easements is about preserving open space. We all have our own stories or we have read stories in the newspapers about urban sprawl and what can happen to communities when open space is lost. Just the other day, *The New York Times* ran a big story about Atlanta. You may have read it.

The Government Law Center Symposium on Property Assessment and Conservation Easements

My most vivid story about what happens when open space is long gone comes from a book by one of my heros, Tom Wolfe. When I was a kid in college I wanted to be a journalist and he wrote this amazing book called *The Kandy-Kolored Tangerine-Flake Streamline Baby*. Needless to say, this was in the 60s. Last year, he wrote another great book—*A Man in Full*. One of his main characters, Conrad, is a young guy who is having a tough time in life whose greatest moment was in a community college in northern California, called the Mount Diablo Community College. Conrad, who was not much of a student, was sitting in a civics course when, suddenly, the teacher, Mr. Wildrotsky, asks the students to rename the community where the college was located. The community is Pittsburg, California, but what should it be? Conrad gets a bit of an inspiration when Mr. Wildrotsky asks, “Any suggestions?” His heart thumping over his temerity, Conrad raised his hand and said, “How about 7-Eleven?” He had driven through that whole area, from Vine Hill where he lived on east to Pittsburg and beyond. It was now one vast goulash of condominiums and other new, cheap housing. The only way you could tell you were leaving one community and entering another was when the franchises started repeating and you spotted another 7-Eleven, another Wendy’s, another Costco, or another Home Depot. The new landmarks were not office towers or monuments or city halls or libraries or museums. They were 7-Eleven stores. When giving directions, people would say, “You take the service road down past the 7-Eleven and then” “Mr. Wildrotsky loved it.” The class spent two weeks talking about 7-Eleven land.

To me that excerpt is really vivid. I remember driving in the 80s with my family when my children were young, off the main thruways from Washington to New York City, along the coast. I was really startled at how this beautiful countryside was dotted with billboards and essentially spoiled.

My wife and I have a great friend. Her name is Chris Walford. We all once worked together at *Sports Illustrated* magazine. Chris Walford stayed there much longer than my wife and I did. On weekends she fairly frequently would visit her sister in a town in New Jersey, which I guess I will not name. Every Saturday morning, Chris and her sister would ride bikes from the center of town, where her sister lived, to the countryside. Not too long ago, I was asking Chris about urban sprawl. She said when she and her sister started this ride about 15 years ago, it took ten minutes to get to the countryside. Over the years, it was a longer and longer ride. Now it is a 45-minute ride one way to get out of what was once this little town. This is yet another vivid example of what can happen when open space is lost.

I am very pleased to be part of an administration here in Albany where the environment is one of Governor Pataki's very top priorities. Open space conservation is obviously a very significant and major part of that. The Governor first became an environmentalist when he was a little kid swimming in the Hudson River. When he could not see his feet in the Hudson, he realized people needed to do something to help the River.

In 1998, as I am sure many of you know, the Governor signed the New York State Open Space Conservation Plan. The Plan recognizes the value of conservation easements as an important open space protection strategy. Earlier this year, Governor Pataki announced the purchase of conservation easements on 10,000 acres of Champion International's Adirondack lands. The Adirondack Council said at that announcement that "in a single transaction Governor Pataki protected more forest lands than both Governors had during the previous twenty years." When the Governor announced the 1998 Open Space Conservation Plan, he said the Plan "will insure that New York's irreplaceable open space resources are protected into the

twenty-first century. As this state continues to grow and prosper we are making sure that our rich outdoor heritage is preserved for this and future generations of New Yorkers.” From the smallest inner city parcel to the largest wilderness area, the Open Space Plan documents the tremendous variety and uses to which our open spaces are devoted. Thanks to the \$1.75 billion Clean Water/Clean Air Bond Act and the fully-funded Environmental Protection Fund, there are two very significant pools of dollars for purchasing open space in our state.

New York State has invested over \$100 million to permanently protect open space from the Pine Barrens in Long Island to the Whitney Estate in the Adirondacks, where I come from. Since 1995 when the Governor took office, 28,000 acres of park land have been added. That is an 11% increase. Also since the Governor took office, the state has acquired 91,000 acres of land. And since 1995 this state has acquired 146,000 acres of conservation easements—nearly tripling the total.

My colleagues at the Office of Real Property Services, Tom Griffen—who I have mentioned—and Richard Sinnott, helped me with these statistics and they also told me that, in all, the state pays \$98,751,181 in taxes on land it owns and conservation easements it has acquired. In total, New York State has 232,000 acres of conservation easements—all taxable. I am told by my colleagues that the state has never challenged an assessment on a conservation easement.

The Governor believes that the State should be a partner with local government and that these easements should not erode the local tax base. The Governor believes that Smart Growth and his Open Space Protection Plan only work if they come from the grassroots up. The Open Space Protection Plan was a recommendation from a list of 131 priorities developed by nine regional advisory groups.

I am here with my colleagues from the Department of State—John Bartow, Rick Hoffman and Bernie Schmeltz. Half of what we do at the Department of State is local government. I am so proud of my colleagues. They do a wonderful job working in partnership with local governments. I will give you three brief examples:

The New York City Watershed Agreement is a historic agreement between the cities, counties and communities west and east of the Hudson working together in a very major and impressive way. John Bartow previously worked for the Department's Division of Coastal Resources; he now is the Director of DOS's Office of Local Government. Our Coastal Division has been exercising Smart Growth since it began in 1982 by helping communities in partnership achieve their vision for their waterfronts—not just protection of space, but also where development makes sense. It is a wonderful program: It is Smart Growth and has been for 17 years. Our Department also contains the Division of Code Enforcement and Administration. Just last month, the Building Code Council approved overwhelmingly by a 12-to-1 vote that New York State should adopt the International Family of Building Codes. What this means for downtown revitalization is that once the training is done and the International Code is completely adopted, old buildings can be renovated in a much easier way. This will help revive downtown communities all over our state. It is a major Smart Growth initiative and it is very good news.

I am going to stop now and sit attentively during your first session for a personal reason. My brother and I have this great little farm in upstate New York, and a neighbor suddenly offered to sell us his farm last spring. We bought it, partly for a selfish reason: This land could have been developed and over time we could have seen several houses opposite our land. We also bought it for a less selfish reason: Our town has a wonderful rural quality and we are very interested at looking into

easements as a way to keep our land open space for a long time to come.

I am sure I am going to learn something imminently. Thank you, Patty, and thank all of you in the audience for your attention.

The Government Law Center Symposium on Property Assessment and Conservation Easements

TAMMARA VAN RYN

Director

Land Trust Alliance, New York Program

Good morning I am delighted to be here today and I thank all of you for coming. This is a wonderful turnout.

Today's program is the culmination of a year-long investigation conducted by Albany Law School's Government Law Center. You will have a lot of information presented before you early this morning. This afternoon we want to hear your reactions to the information.

Since Secretary Treadwell is pushing his favorite author, Tom Wolff, I want to push my favorite author, Aldo Leopold. Some of you who know Aldo Leopold know that he was living in northern Wisconsin 50 years ago when he wrote *A Sand County Almanac*. This is a journal that he wrote about his farm in northern Wisconsin. He chronicles what is happening on his farm throughout the year. I am actually going to read a very short selection from "November" to set the stage for today's discussion.

"November," Aldo writes, "is for many reasons the month for the ax. It is warm enough to grind an ax without freezing, but it is cold enough to fell a tree in comfort. The leaves are off the hardwoods, so that one can see just how the branches intertwine and what growth occurred last summer. And without this clear view of the treetops one

cannot be sure which tree if any would need felling for the good of the land.”

He goes on to write:

“I have read many definitions of what is a conservationist, and I have written not just a few myself, but I suspect that the best one is not written with a pen, but with an ax. It is a matter of what a man thinks about when chopping or when deciding what to chop. A conservationist is one who is humbly aware that with each stroke he is writing his signature on the face of his land. Signatures of course differ, whether written with an ax or with a pen, and this is how it should be.”

I would like to repeat the last part one more time:

“A conservationist is one who is humbly aware that with each stroke he is writing his signature on the face of his land. Signatures of course differ, whether written with an ax or with a pen”

When I used to practice forestry, that quote meant a lot to me, because I was out working with the ax, on the land, and tried to be humbly aware that the decisions I was making were going to make a permanent impact on the land. But I suggest to you that those signatures that are written with a pen today, in 1999, here in New York State, are going to have just as much of an impact on the face of the land as

some of the activities I used to engage in when I was actually cutting trees.

We have people here today who are land conservationists. They write their signatures on a conservation easement with a pen and it makes a permanent signature on the landscape as well. We have people here in municipal governments who sign the bottom of the master plan or their zoning ordinances. They, too, are making a signature on the face of the land. The legislature, every time it passes a law, also leaves a signature on the land. We have the opportunity to leave a signature that is a little different than the one that has been described as “Seven-Eleven” land if we take the time to think about it.

So as Aldo says, November—or now moving into December—is a good time to be able to look at the trees and to figure out what needs to be done. What we hope to do here today is give you some information so that you, too, can see what the landscape here is in this particular field of law, and that we can keep in the back of our minds today that what we are talking about is not just law and policy, but signatures on the land.

To do that I think we need to start with a few definitions. A lot of time today will be spent talking about land trusts. For some of you that is a term that you know and for others it is a relatively new term.

When we at the Land Trust Alliance (LTA) and within the land trust community talk about land trusts, we are talking about non-profit organizations, those that are organized under the auspices of New York State as well as registered with the federal government, “that work as all or part of their mission to conserve land.” They work in direct land transactions, meaning that they are either purchasing land or accepting

donations of land or conservation easements. Land trusts work one-on-one with private land owners.

Far earlier in this century, Charles Elliot was among the first conservationists to talk about this idea of conserving land and he said, "just like we have libraries that guard books for the future, and just like we have museums that guard paintings for the future, what we need are organizations that will guard land for the future." That is really the mission and the spirit of what land trusts are: Organizations that will work to guard land for the future.

I run the field program in New York for The Land Trust Alliance which is a national organization founded in 1982. It exists to promote voluntary land conservation and to work with private land owners who voluntarily want to conserve their land. We have three parts to our mission: Providing the leadership, information, skills and resources that land trusts need to conserve land; strengthening the land trust movement; and promoting private voluntary land conservation.

I want to give you a sense of what is happening with land trusts around the country. The first land trust as we know it was founded in 1892 in Massachusetts. It was called the Trustees of Reservations. The land trust movement, as we have come to know it today, started in the late 1960s.

In the late 1960s there were about 100 non-profit conservation organizations around the country. Today there are more than 1,200 land trusts operating across the nation. We are concentrated on the coasts, pretty much where "Seven-Eleven" land is located.

Here in New York State, there are about 80 land conservation organizations. We dot almost every corner of the state, so that landowners throughout New York have a private non-profit they can turn to if they want to voluntarily conserve their land.

It is with those land trusts in New York State that I and my assistant, Tony Colyer-Pendas, work most closely. We provide opportunities for them to talk with each other, we do training programs, and we provide small grants. We do public policy work and, in particular, spend a lot of time working with organizations on how to run a good qualified non-profit, and how to make sure that these land trusts are providing good services to the land owners they work with.

We also need to define conservation easement. Conservation easements, as we think about them today in New York State, are governed by Environmental Conservation Law Article 49. Conservation easements are legally-recorded agreements that protect conservation values on a particular property. They do that by limiting activities that would potentially affect or impact those conservation values.

The law particularly provides that each conservation easement must provide certain conservation purposes. The purposes can be, "maintaining scenic or open space, historical, archeological, architectural, natural conditions on the property."

It is important to remember that every conservation easement in New York State must provide some sort of public purpose.

A less technical aspect of conservation easements is that they are individually negotiated between land owners and the grantee. The grantee, again under New York Law, can be either a qualified conservation organization or a land trust, or a

governmental entity. What happens with the conservation easement is that the land owner still owns the land, but the grantee accepts responsibility for monitoring and enforcing the easement.

Those of you who have studied property rights or who work in the assessing field know that land ownership is a bundle of rights. Pretend for a moment that the bundle of rights is embodied in this handful of pencils. If you want to put a conservation easement on the property, imagine that within this bundle of rights on this piece of land there are some particularly important conservation values. There may be some important wildlife habitat and scenic value wrapped up in this bundle of rights. Perhaps more residential development on that property would not be appropriate and could damage those public benefits. Thus, the land owner may transfer away the ability to put future development on the property, illustrated by my moving one of the pencils from the bundle to my other hand.

The land owner also may, for example, transfer away the ability to do bluestone mining or transfer away portions of their forest management rights if they so choose. The conservation easement documents the transfer of rights. These rights are then held by the land trust or by the municipality, but they are not exercisable by that entity. What that entity, the land trust or the municipality, does is ensure that those rights are never exercised and that those particular activities will not damage the values that are to be protected on the land.

I was very interested in Secretary Treadwell's statistic that conservation easement use by the State of New York has tripled. What we are finding on the private side—again keeping in mind that there are two sides to the conservation easement world: The public easements held by government entities including the State of New

York and many municipalities and then those easements held by private land trusts—is that, between 1988 and 1998, the use of conservation easements quadrupled. There are now 1.4 million acres around the country that are held by private local and regional non-profits. If you add in national non-profits like The Nature Conservancy and Trust for Public Land, that number goes up to 2.4 million acres.

We are finding that within the private land conservation movement and within the public land conservation movement, easements have become the tool of choice and are expanding dramatically. That is why we are here today—because some of the laws in New York State that can impact the use of conservation easements have not necessarily caught up with this ground swell of increase in the use of conservation easements.

In the most northern New England states, there is a lot of conservation easement activity, as there is in California and Pennsylvania, closely followed by New York. But again, we can be proud that here in New York and across the Northeast we certainly have a lot of conservation easement activity.

I want to be specific about activities here in New York State. Land trusts—the private non-profit side of land conservation—hold over 600 individual conservation easements. I remind you all that each land owner transfers a package of their rights with an easement, and that each one of these is an individually-negotiated document. Whether you are transferring just development rights, mining rights, forestry rights or agricultural rights—all are tailored in the easement. Throughout the various registries of deeds in all the counties in New York, there are over 600 individually-negotiated documents. Assessors, therefore, find that each conservation easement is different.

The local, regional, and national organizations in New York have used conservation easements to protect just over 200,000 acres of land. Again, Secretary Treadwell has said that the State of New York now has about 232,000 acres under conservation easement. The private land conservation that is happening is almost equal to what is happening in the public side of land conservation. So, the private side of land conservation is very important to the open space protection in New York State. Why are conservation easements particularly important now? What are some of the community benefits that happen when there are conservation easements or privately or publicly protected land in an area? As mentioned previously by Secretary Treadwell, open space protection is an important community value. We are finding in New York State much more of the "Seven-Eleven" land. There are communities that want to protect their rural character, and conservation easements are certainly a way to do that.

We find conservation easements particularly appropriate in places where the land owner wants to retain the ability to harvest trees, such as in the Catskills or in the Adirondacks, but may not want to have future development on the property. We are using them now with the Clean Air/Clean Water Bond Act and with the Environmental Protection Fund to protect working farms. Particularly in a few areas of the state, such as Redhook, Columbia County, and Washington County, there are efforts to protect a critical mass of farms, so that farming and agriculture can remain viable. What conservation easements allow is the permanent protection of farm land so that you can continue to have agricultural communities.

We have talked a little bit about wildlife habitat, but you can certainly also use easements to protect recreational resources. Communities use them to protect trails, people use them to protect access to waterfronts to our lakes and rivers in New York.

We have some wonderful projects going on to protect the scenic resources in New York. For instance, in Columbia County there is a project to protect the scenic view from the Olana Historic Site.

We see conservation easements being used by communities to enhance tourism and to protect rail-trails. The other thing that conservation easements do, particularly if the rights that are transferred out are residential development rights, is lower the cost of community services in town—the old adage that cows don't go to school. The idea is that for communities concerned about new residential development increasing school costs, conservation easements with willing land owners are one way to ensure that there will be less services required by local government.

Conservation easements also are useful for wetlands or flood plain protection, as we are seeing with New York City. New York City has found that it would be much cheaper to protect their water supply by using conservation easements than putting in a very expensive filtration plant.

The City of Syracuse is also involved in an effort to protect the shores of Skaneateles Lake with conservation easements. After doing an analysis, Syracuse found that it would cost their community less to do that than putting in an expensive filtration plant. Thus, communities get a lot of benefits when open space is protected in their area.

On the private side of land conservation, most of the land owners that land trusts work with are donating these rights. They are voluntarily giving away rights from their bundle of rights to the non-profit. In the cases where the land trusts and the land owners have the ability to tap into the Clean Air/Clean Water Bond Act and

Environmental Protection Fund, these rights are sold. In some cases, the land trusts have the financial ability to purchase those rights. But in many of those 600 cases in New York State, those rights have been given away by land owners and that land is then providing those community benefits, at no cost to the public.

What are the benefits to land owners? Land owners do it because they want to leave their signature on the land. That is the primary motivation. There also are some tax benefits and other incentives that are available. Particularly at the Federal level, a gift of a conservation easement or a gift of land may allow a land owner to deduct a charitable contribution from their federal income tax. Just as if you wrote a hundred dollar check to your local non-profit organization, if you give a conservation easement that is worth \$100,000, that, too, becomes eligible to qualify as a charitable donation.

Many land owners also use conservation easements as an important estate tax planning tool. Farmers whose land value may have escalated over the generations it has been in the family will find that by putting a conservation easement on the property, they can lower its value and transfer it to their heirs without high estate tax value. The heirs do not have to worry about selling off the land to pay prohibitively high estate taxes.

Some of those incentives are available at the state level as well. Here in New York State you can also claim deductions. There also is an effort to provide tax credits for conservation easements at the state level. That has happened recently in North Carolina and also in Colorado.

What happens at the local level is perhaps the most important benefit for land owners. Property tax costs often determine what land owners do with their land each year. What happens at the local level varies tremendously around the country and around New York State. This variability is one of the issues that the Land Trust Alliance wanted to learn more about through this study.

LTA was particularly interested in what was happening with property taxes and conservation easements in New York State. Tony and I get calls frequently from land owners who are interested in donating a conservation easement to a land trust. One of the first questions they will ask us is, "So what happens to our property taxes after we do that?" And we generally respond that in New York State there is no guarantee that a conservation easement will impact your property taxes. In fact, the practices across the state vary. To better answer the landowner questions, the Land Trust Alliance set out to get some specific information from some land owners.

We surveyed land owners in New York. Approximately 500 land owners received our survey and we got 139 responses which is a pretty good response rate. We found that 30% of the land owners that responded to us had seen some sort of change in the value of the assessed value of their property after they had put a conservation easement on their land. Of these 30%, 43% saw their assessment increase and 57% saw their assessment decrease.

We do not have the statistical ability with this particular sample pool to decide whether the increase or decrease is statistically significant. It did, however, tell us that there are a variety of practices in New York State, and there certainly is no way that we can offer any advice to a land owner, or any predictions of what might happen to their property taxes if they put a conservation easement on their property.

Knowing that the use of easements is increasing, that conservation easements provide tremendous community benefits, and that property tax incentives could increase the use of conservation easements, LTA turned to the Government Law Center, with the help of the Prospect Hill Foundation and the JM Kaplan Fund. LTA asked the Government Law Center if it could fill some of the gaps in the data and perhaps provide a forum for discussion of what some of the options might be out there for promoting private land conservation through the use of conservation easements and, in particular, discussing the issue of property assessment. That is why we are here today.

ASSESSING CONSERVATION EASEMENTS IN NEW YORK STATE

RICHARD SINNOTT

Counsel

NYS Office of Real Property Services

When I first came in today I was fairly elated. I picked up my name tag and noticed that the Law School had promoted me to Counsel to the Department of Environmental Conservation, a job that pays substantially more than I am making now. Then Patty took my name tag and gave me back my old job. It was the first time I had been promoted and demoted within the space of ten minutes.

Thank you, Patty, for this invitation to speak. I am glad to be here, and hope this is just the first step in our process. I have already heard a lot of very interesting and challenging ideas.

It was my good fortune that Tom Frey called me about three weeks ago mentioning that he, Cathy and I would be on the same panel and asking had I prepared my speech. I explained that I get these invitations quite frequently and they say speak about anything you want to. Tom then asked me if I had read the letter from Patty. I told him I had perused it. He pointed out that specific topics were assigned on page two of the letter. So, thanks to Tom, I know what my agenda is for today.

The Government Law Center Symposium on Property Assessment and Conservation Easements

Since everyone else has been plugging a book, I would like to put in my two cents about one. It is not as highbrow as the books that Tammara and Sandy Treadwell spoke of, but, as Patty said to me when she saw it in my hands, this should be required reading for everyone in government. It is a book called *The Death of Common Sense* by Philip K. Howard. I agree that this should be required reading for anyone, particularly those who are obsessive about the regulatory environment, and think regulations will solve all of our problems in government, and will eliminate the need for human judgement.

It is not a very expensive book. I would loan you my copy, except I had a bad experience having done that once before, when a colleague borrowed it and then accidentally "returned" my book to his local library. But I do encourage you to pick up a copy of this. I really do think it is a warning to those of us in government that, while there may be a need for regulation in certain areas, regulations are not the answer to every issue.

My assignment today is a little bit off the beaten path. The first half is to talk about the role of the State Office of Real Property Services in regard to assessors and not so much specifically in regard to conservation easements. It is important for everyone to understand that our Office and the assessors have re-established a good, cooperative working relationship with the goals of improving assessment administration and achieving tax equity.

A short time ago, we received a call from an attorney who represents one of the independent power producers who have acquired generating facilities from regulated utilities in this state. He was aware that we have nominal enforcement power in Section 216 of the Real Property Tax Law. But, he obviously had a

misunderstanding of what that means because he wanted us to exercise some of that authority to cajole the assessor to reduce the value of a particular facility to coincide with the price that his company had paid for that generator. Whether he was right or wrong in terms of the value, it is absolutely clear that we do not have that type of authority. I see our role with the assessors breaking down into three basic areas.

First and foremost, our role is to advise and assist assessors and other local officials whose duties relate to assessments. We do this in three primary ways. One way is through the published volumes of opinions of counsel. The Volume 10 opinion, which you will not be able to find in your library yet, is directly related to our subject today because it discusses the case law in New York State regarding current use versus highest and best use. It is an excellent compendium of that case law. If you can not get a copy, call our office and we will be happy to send it to you. It is also available on the ORPS homepage. The Volume 3, Number 10 opinion concerns section 247 of the General Municipal Law, the Open Space Easement Statute. According to that opinion, towns may not enact exemption statutes for the granting of scenic easements.

The second item in which we provide help to assessors and others in the assessment field is the quarterly publication of the Real Property Tax Administration Reporter. That is a compilation of cases, many of them officially reported but some of them not. We have gotten a lot of help from judges who find that some of their opinions may not be published in the official reports. They would like to see them available to the practitioner and they have been sending us copies. And the Reporter also includes opinions of counsel and, from time to time, articles which we believe may be of interest to the assessment community.

The third opportunity is simply face-to-face sessions like this conference, and phone calls. One of our staff members who specializes in handling questions on exemptions takes, on the average, 30 phone calls a day from members of the assessment community.

Our second role in regard to the assessors is as a regulator. Those of you familiar with our agency know we have just recently finished a scaling back of our regulations by about two-thirds of what they used to be. One of the reasons was that the agency used to publish in the rules provisions that were already in state statute. This is improper under the State Administrative Procedure Act, but, more importantly, it led to problems when the statute would be amended and the agency would seek to amend the regulation. We would run into administrative difficulties getting the regulations to conform to the statute. We have substantially reduced our regulations, but one of those relevant to today's session is section 190-1.3 in Title 9 of the New York Code Rules and Regulations. It concerns the assessor's inventory requirements and this particular provision directs the assessor where he or she is made aware of a land use restriction or an assessment restriction or a limitation to identify those in their property record cards or inventory information. Among those specifically denoted in the regulation are various types of easements—the scenic easement that I mentioned before in the context of section 247 of the General Municipal Law and several others including statutory conservation easements pursuant to Title 3 of Article 49 of the Environmental Conservation Law about which we will talk in a few minutes.

From my perspective, the least important role for a variety of reasons in our relationship with assessors is our role as an enforcement authority. Section 216 of

the Real Property Tax Law does provide that where an assessor or other official whose duties relate to assessments fails to comply with the law or rule or regulation or a State Board order, the Board may take action to compel compliance with that law, rule or order.

However, that authority was basically gutted in the 1981 decision of the Court of Appeals, in *State Board v. Kerwick*. Very briefly, that was the case with which some of you may be familiar, where the residents of the Town of Hardenburgh in Ulster County were fed up with their local tax burden and they found a willing ear in an individual who had established the Universal Life Church in California. The Church offered credentials showing that you had become a minister of his church if you mailed him something like \$5 or \$10. Virtually all of the 240 residents of the Town of Hardenburgh became ministers. Then these property owners submitted applications to the assessor for exemptions as non-for-profit organizations—churches. The assessor granted all of the ministers a full exemption from taxation.

As you can imagine the other three taxpayers in the Town of Hardenburgh were rather miffed—the State of New York, a member or members of the Rockefeller family, and a third property owner whose name escapes me at the moment. A request came in for the State Board to undo what the assessor had done. We looked at the statute and it looked like it was a clear violation of the law—the properties clearly did not satisfy the statutory requirements. Thus, an administrative hearing was conducted. Needless to say, the end result of the hearing was that the Board issued an order to the assessor to rescind these exemptions and take them off the assessment roll.

Somewhat to our surprise, the case found its way to the Court of Appeals. The Court

said that the agency did not have any such authority, and had no business being involved in the substantive assessment decisions of local assessors, be they valuation questions or questions of taxable status.

Philosophically, few had a problem with the Court of Appeals decision, particularly when considering our long tradition of home rule in this State. Nonetheless, based on those facts, as you can imagine, there was some concern that this was a classic case of hard facts made, what we perceived to be, bad law. Nonetheless, that is the standard that we work under, although the Court did leave us a trace of authority, saying the agency's enforcement authority had extended to matters within the "ambit of [the agency's] procedural functions."

At the next symposium, I would like to have a group here to explain to me what the "ambit of our procedural functions" might be. The only time that I am aware of that we have attempted to exercise this amorphous authority since then, involved a failure by a county to properly maintain tax maps in accordance with the tax maps specifications and regulations adopted by the Board. The case was *Broome County v. the State Board*. In that case, the Appellate Division, Third Department, did agree that that was an area in which the Board could, in fact, clearly exercise its enforcement authority. But suffice it to say that the exercise of any of that enforcement authority has essentially not been exercised in the past five years or so.

The other half of this presentation is on the ORPS "view" on conservation easements. First of all, keep in mind that both Tom and Cathy have said an easement is an interest in real property, but under the Real Property Tax Law it is not a separately assessable interest in real property except for those conservation easements which have been acquired by the State and are in fact separately assessable in accordance

with both section 543 of the Real Property Tax Law and Title 3 of Article 49 of the Environmental Conservation Law.

Chapter 1020 of the Laws of 1983 was the enactment of the statutory conservation easement law, which previous speakers have already referenced. It created, for the first time, a statutory and enforceable conservation easement with respect to lands in the State of New York and provides, as since amended in 1990, that these easements if acquired by the State of New York have an assessable value and are to be taxed locally. Without going into all the details, the value is based upon a determination by the Commissioner of the Department of Environmental Conservation who determines the allocation factor which essentially is the Commissioner's judgement as to the percentage of the value of the parcel that is attributable to that conservation easement. The State will pay a tax based upon what that percentage represents as a percentage of the value of the underlying parcel. There are provisions in the statute for a grievance by the State Board. The agency may contest the value of the underlying land if we find, for example, that the value of that underlying land has been substantially increased in an unwarranted fashion for the purpose essentially of shifting more of the tax burden to the State of New York. However, as I believe Tammara mentioned, ORPS has not yet contested any values in regard to these lands that are subject to conservation easement. If you would like to know the extent of the numbers of conservation easements and the allocation factors that the Commissioner of DEC has determined, ORPS will provide copies upon request.

There are circumstances fully supporting the court's judgement in the *Adirondack Mountain Reserve* case and the *Ross* case. In those two instances at least, the value of the underlying land was not diminished by the grants given in those circumstances. For example, in the *Ross* case there were substantial rights reserved to the owner of

the land *and* that land was already subject to limitations on development by virtue of the Adirondack Park Agency Regulations. We do, therefore, endorse looking at each particular situation. As an agency, ORPS would not be inclined to suggest that we can resolve this issue through some singular form of regulation that would impose a very mechanical formulaic approach to valuation. Valuation, as mentioned, does involve the judgement of the assessors and there is an opportunity, of course, to seek review of that judgement before the boards of assessment review and in the courts.

At this juncture at least, in the absence of some legislative action, we would suggest that the determination of value for any of these conservation easements that have not been acquired by the State is a matter for the determination by the individual assessor. ORPS would not favor any suggestion—based upon the information at hand—that the answer to the problem, if it is a problem, is for the State Board to conjure up some formulaic regulation that would mandate a “one size fits all” approach for this admittedly difficult valuation issue.

Thank you very much.

TOM FREY
Executive Secretary
New York State Assessors' Association

Good morning everybody.

I am going to speak this morning about the general explanation of land assessment in New York State and hopefully when I get done we will get into more specifics of conservation easements. I am not going to touch on them in any specificity at all.

I am going to speak on the very basics of assessment administration. I believe you need to understand the way the process is intended to work before you can make any decisions on the issue of assessing property with conservation easements. I have provided all of you, I hope, with a little blue book, which is a publication from the New York State Assessors' Association. It is entitled *Understanding Assessments and Property Taxes*. What I would like you to do is take a few moments after today's presentations and just read it through if you have any interest. It is an excellent basic book for property owners and for people who discuss the assessment administration process with property owners. We usually sell these but they are free to those of you here today.

The first thing I want to do is define assessments and property tax. Assessment is a ad valorem tax system, which is based on the principal that the amount of tax paid should depend on the value of the property owned. Assessors are responsible for administering the ad valorem tax system and their chief task is to identify and

appraise all property in their jurisdictions. Real estate is, by definition, immobile and ownership should be registered in official records. Thus, discovery and listing of real estate is not difficult when compared with, for example, personal property which is assessed in states other than New York. However, the valuing of real estate is a difficult and sometimes complex task.

I will speak about the different ways to value property later in this presentation. The property tax was once regarded as the fairest possible tax and was a major source of government revenue in the United States. Today, sales and income tax are more important as revenue sources; however, the property tax remains the major source of local government revenue. Appraised values used for tax purposes must be accurate so that the tax burden will be distributed fairly and the public will have confidence in local tax administration. It is so very important that we can put forth the type of appraisals that the public will have confidence in.

Without this confidence, funding of local services may shift away from the local property tax and no longer be subject to local control. New York State is a state of home rule. A lot of the local municipalities feel very strongly about the ability to control their own destiny and they feel that the assessment process is part of that destiny.

Assessments are based on the market value of real property. The definition of market value in *Property Appraisal and Assessment Administration*, a publication by the International Association of Assessing Officers, is "The most probable sale price of a property in terms of money in a competitive and open market assuming the buyer and seller are acting, prudently and knowledgeably allowing sufficient time for the sale and assuming that the transaction is not affected by undue pressures." There are

numerous definitions in different real property appraisal texts on market value, but this is as good as any.

After the market value has been established, the assessor or the local governing body determines at what ratio the assessment is to be to the market value. It is the local government that has the right to establish the assessment ratio at any fractional portion of the market value. It can be 100% of market value, it can be 50%, or it can be 1%. It does not matter legally what this number is as long as it is a uniform percentage of value.

In other words, as long as all property on the roll is assessed at the same percentage of market value, the assessment is legal and fair. If the local governing body does not make a determination of what the uniform percentage should be, it is the assessors' responsibility to do so. It is my experience that, in most cases, the local town governments do not necessarily want to make that determination and they do leave it up to the assessor to make the determination.

Who assesses property? The local assessor is the public officer responsible for placing the correct property value on the assessment role and all the other duties of assessment administration. Sometimes in New York we refer to it as exemption administration because assessors are unfortunately spending more time administering to different exemptions than they are actually appraising property. It is a small pet peeve that the assessors in the room, I think, will agree with for the most part.

Who is your assessor? It could be a three person elected board of assessors or a sole appointed assessor, or even a sole elected assessor. Sometimes one full-time appointed assessor will hold that position in two or three different towns. If you

happen to live in Nassau or Tompkins Counties, assessing is a function of county government, not the local municipalities. Some assessors are part-timers that have other full-time jobs and they are paid a few hundred dollars a year; other assessors are full-time and some even have large staffs to aid them in doing their job.

The trend over the past twenty years has been toward sole appointed assessors and assessors doing multiple towns. This has come about probably as much as anything due to the educational requirements that have become more stringent as the function of assessing has become more complex. The benefit of this movement is that the tax payer is getting a better educated, more professional person to assess their property for taxing purposes.

Now I am going to talk about methods of assessing land. There are three generally accepted methods to value real property: the cost approach, the market approach and the income approach. The cost approach is based on the idea that the value of an existing property is the value of the land plus the replacement cost of the improvements less any depreciation that has occurred to the improvements. The cost approach is not normally used to value vacant land, so we will not discuss that method. The income approach estimates the income from a property and capitalizes the income into an estimate of current value. While it is possible to use the income to value vacant land, if you can estimate an income stream that is attributable to the land, it is not normally used for this type of property. I was actually surprised to hear other speakers talk about states that had mandated using the income approach for valuing land. That is something I would find hard to do, in all honesty.

Where does that leave us? We have the market approach, which is sometimes referred to as the sales comparison approach. This method of appraisal uses sales

prices as evidence of value of similar properties. The price at which a particular property sells is the price at which the supply and demand curves intersect at the time of sale. If the competitive market conditions were not changed greatly, a similar property would sell at approximately the same price. This is what you would normally run into when you see a market grid on an appraisal. Most of you have seen appraisals.

Since all land is unique, however, a method must be utilized to adjust the prices of sold properties. These would be known as comparables. The known prices are adjusted by adding or subtracting the amount which a given feature appears to add to or subtract from the price of the comparison property. Stated simply, you adjust the known sales prices to be more like the subject property, the subject property being the property that you are trying to appraise or assess.

As an example, if you have a sale of vacant land that has very little road frontage as compared to the subject property, you need to adjust the sale price upward to indicate the greater utility of the subject due to better road access. After you finish with all your adjustments for the differences between the subject and the comparable, you total all the pluses and minuses and arrive at the adjusted sales prices. The adjusted sales prices of all of your comparables are then reconciled and you have an estimate of market value for the subject property. That is probably the quickest explanation for the three approaches to value you will ever hear.

I would like to take just another moment to discuss land valuation in particular. Land's uniqueness stems from its fixed supply and immobility. Land cannot be manufactured or reproduced. Also, land is a factor of production required directly or indirectly in the production of all other goods. Our most basic resource, land is a

source of all other wealth. Although the total supply of land is fixed, the supply for a particular use may increase or decrease.

For example, forest or farm land on the outskirts of a city may be developed for residential use. The increased supply of this land slows price increases; however, we have learned that the practical limits to such development and continued growth and demand lead invariably to higher prices and more intensive use, such as smaller lots or sometimes a substitution for apartments with single family homes.

Zoning and other land use controls have an opposite effect because they limit the available supply of land for a given use. This usually results in higher overall prices, but lower prices for land whose use is restricted. But, beware of this type of general statement. Each property is unique and each situation needs to be analyzed separately.

So, as you listen to the rest of the speakers today, please keep in mind that the appraisal of land is not a one step formula or one size fits all.

CATHY CONKLIN
Supervising Appraiser
Town of Clarkstown

Thank you very much. First, I need to do a little bit of clarification. I do have a boss. I am not the Assessor; I am the Supervising Appraiser, which means that I am the one who gets to do all the work.

When I came here this morning, I thought I had a pretty good idea of what I wanted to say to you. Although I do have a tendency to do a lot of talking off the cuff, I am not so sure that my direction is quite as clear as it was when I first walked through the door this morning.

There are a lot of interesting points that have been raised and a lot of people that have spoken on issues that I was going to spend some time on, like the bundle of rights and having to know how that affects value. I am going to reiterate a couple of important points that have been raised and I am going to talk about a few examples in the town that I work for—the Town of Clarkstown. And I will give you a little bit of an overview of the type of community it is.

The laws in this State have defined how we assess property whether it be subject to a conservation easement or not. It may not be quite as easy to read or to locate as it would be in other states, where it has a heading that says this is what you do for lands that are subject to a conservation easement. But between the laws and the rulings of the courts, we do have some pretty specific guidelines or regulations to live

by.

Section 305 of the Real Property Tax Law states that we need to assess all properties at a uniform percentage of value. That may be pretty simplistic, but the courts have defined value as being market value and they further defined value as being current use value as opposed to highest and best use. That is probably the biggest area where assessors and appraisers take different roads to some extent because we cannot look at a property and devise what the property would be if it were developed to its highest and best use, but rather we have to devise the value of the property in the use that it currently exists in.

Obviously, in the case of vacant land, they become the same again because you have to look at it in terms of highest and best use. But, when you have land that is already improved, that part of the equation has already been taken care of for us.

If we are going to determine the market value of any particular property, particularly one that has been subjected to a conservation easement, as the speakers on the first panel pointed out, you have to know exactly what portion of the bundle of rights have been taken away from the ownership of that property because, obviously, the value of the property comes from the various uses to which it can be put. Thus, we need to know exactly how it has affected the property. Some of the things we need to take into consideration are whether the easement—or the rights that have been taken away—have been taken away forever, or whether they have been taken away for a given period of time, or whether they have been taken away but can be redeemed at some point in the future by mutual agreement. The different circumstances lead to different conclusions and a different way of reviewing what one would anticipate is the loss of value from the giving up or diminution of rights.

We also have to take a look at the texture of the community and the neighborhood that the individual property is located in because, without a doubt, what pressures are on land for development or not for development are going to have an effect on how the conservation easement affects the value of that piece of property.

The Town of Clarkstown is about 25 miles north of New York City so, as you can imagine, we are rather densely populated and there has been a substantial amount of intensive land use. Highest and best use in my town for virtually every piece of land is going to be for residential development. We are a bedroom community of the New York Metropolitan area.

The prices that are paid for residential development lands are quite astounding, and probably more than some people in this area are paying for a house. You could easily spend upwards of \$150,000 to \$250,000 for a buildable lot, and by that I do not mean acreage.

A conservation easement that has taken away the development rights has significant impact on the value of that piece of property in my community. However, I have had the luxury in an earlier life of working in a variety of communities in Upstate New York where there is not that same type of pressure for development that there is in the area that I am working in now.

A piece of property on the top of a mountainside may have a spectacular view, but no access or public utilities. Taking away the development rights of that piece of property, that for the foreseeable future could never be developed anyway, is not going to have an effect on the value of that land. Thus, you have to take into

consideration what are the needs of the community, what are the pressures of the community, and then also look at the individual piece of land.

Another example might be a piece of wetlands/swampland that can not be developed just by the nature of the land itself. It would not support development. That might be a unique instance in my area where you do not have a significant impact on the value of the property as a result of the conservation easement.

One also has to take into consideration the use of the property, specifically in terms of property that is encumbered by a conservation easement. For instance, West Branch Conservation is a group in the Town of Clarkstown that has existed and been active for a number of years. They have attempted to either receive donations of development rights or to purchase land outright to protect the West Branch River which is part of our watershed. Frequently, what they end up taking are the development rights for future and further development of the property. But there is already a residence located on the property and they may very well retain the right not only to maintain the residence that already exists but also to be able to add on to that residence and essentially use it as a single family. They simply cannot take advantage of any further subdivision that might be allowed by our local zoning laws.

Certainly in terms of value in my area, again, the bulk of the value for that property is already in the residence itself and the fact that that residence exists. The diminution of the value in that instance would be basically to excess or residual land that I already would not have valued highly simply because, again, I cannot value on the basis of highest and best use, but rather I have to value it on the basis of current use. It might be a single family residence sitting on two acres of land and that additional land is not of much value until it has been subdivided and as long as it has

that capability still.

As mentioned, we do tend to focus on the subject property, but there also may very well be some sort of an impact on adjacent properties. Although this did not involve a conservation easement, I will tell you about an instance that gives rise to this point.

We had several homes that sat around Lake Deforest, which is a reservoir. There was a piece of property that had an access strip coming off of the main road and then opened up along the waterfront. It served very nicely as a buffer zone and as some privacy acreage for the neighboring properties. They loved it because they had all the advantages of that property, such as the privacy and the nature, but they did not own it and they did not have to pay taxes on it. Those neighbors were very much up in arms when the owner of that property wanted to go in and build a house for himself. The owner of the property did give them an opportunity to purchase the land, if they wanted to retain that little piece of country in the city shall we say, but no one was willing to expend the money or pay the additional taxes. They wanted somebody else to do that and not have the rights to use their land.

The other thing we have to keep in mind is that the real estate market is not static and the effects of a conservation easement or anything else on a given piece of property is subject to change over time. When I talk about that piece of property that is sitting up on top of the mountain and really is not going to be developed any time in the foreseeable future, there is not a great deal of diminution to the value of that because development rights might be taken off of it some hundred years from now. When we have more intensely and easily developed land, there might be a different pressure on that piece of property or there may have been changes that have been made that give it access to roadways or put utilities into the property. So you

can make a decision now and it may not be the same decision that you would make five or ten or fifty years later. One has to keep an open mind that it will change or that it has the potential of changing over time and that, once a decision is made, it is not necessarily a permanent decision.

We have a range of conservation easements in the Town of Clarkstown. Probably the vast amount of conservation easements are easements on very small pieces of land that are put on at the time of subdivision by our planning board. Generally, what it requires or what it ends up with is you may have a lot that is three-quarters of an acre where the typical lot in there is four-tenths of an acre but the additional third acre of land is subject to a conservation easement. To most of the tax payers in the Town it is, excuse me, a pain in the ass. They cannot do anything with it, they don't have that room to put in the pool that they want, and they are not allowed to cut down the trees. When I was first introduced to the Town of Clarkstown, we kept hearing complaints from all these people that this land that they had was absolutely worthless, it had no value because they could not do anything with it and all it had was trees on it. One of the hearing officers, who happened to be my father, who had been an assessor for thirty years, who had lived in the middle of the woods and loved it there, could not resist the impulse eventually to say "If you don't like the trees why don't you cut them down?" Of course, that is how we found out about these little conservation easements that did not allow them to cut down the trees. But they resent having to pay a tax on it. It does give them something in return. I should think that it is going to have some real value that they have a little bit of privacy acreage. Right now I live in the middle of the woods on three acres of land. I have a neighbor who is on three and a half acres of land. I really resent the fact that I can see in his family room window in the wintertime when the foliage comes off the trees. With the land that we have got that is not the situation I should be living with right

now, but nevertheless I am.

One should think that when you are living in a residential subdivision that is about as close as you can get to living in a condominium complex or an apartment complex that somebody would have a little bit of appreciation for that extra breathing room. In fact, there are some people, probably starting with the native Rocklanders, who remember it before the farms were growing houses, and it does have value. That most certainly is something that is occurring in my town as our few remaining farms are now growing houses instead of crops for the most part. The owners are getting older and their children have found more lucrative careers. They are selling what is their retirement account to developers because obviously prime farm land is also prime development land.

I have mentioned about West Branch Conservation and some of their endeavors to try and protect the West Branch River feeding into the watershed. They do typically take development rights from properties or at least the further development rights. They have occasionally purchased property outright and stripped it. One of the other things that was raised this morning that I found rather interesting is that, because I know that they have one property that they are trying very much to purchase and that they are basically going to strip that property of every single right that it has, obviously it will have to remain in their name because there is no chance they could ever sell it. But they want to strip that property to the extent that the only thing you can do is stand at the street and look at it. You can not walk on it, you can not enjoy it, there is no passive park use they would permit. If they accomplish that then what is going to be left of the value of that property is defined by the fact that it needs to be there in order to hold the rest of the world together. Obviously there is not a great deal of value that is left under those circumstances.

I happen to be a proponent that we do not need a great deal of legislation or regulation on how to assess lands that are subject to conservation easements. I think of myself as a country girl. I love the land, I do not want to see all of our state turned into the bedroom suburb of the town that I work in. I am very very happy to leave Clarkstown at the end of a day and go home where there is more space to breath and I am surrounded not only by my land but I am surrounded on two sides by an 150-acre apple orchard. I can tell you right now, eventually when they cannot sell a three-quarter bushel of apples for \$12.95 on pick your own and they start growing condominiums on that property, I am certainly going to cry. So, I am a believer in the conservation of our land and retaining the beauty of New York State, but I do not think we need more legislation and I don't think we need more regulations on how to assess property. We need more common sense. If we, as assessors, make use of common sense and take a look at exactly what our community is made up of and exactly what rights have been taken away and determine how that has affected the value of that property, whether it be negatively or positively or perhaps no effect whatsoever, and we are in a position to be able to defend that, then we are doing our job as assessors and we are also doing our job to maintain land conservation in the State of New York and to reach the goals of so many of these dedicated organizations.

Thank you very much.

JOY EWING
GLC Intern & SUNY-Albany Student

Good afternoon. My name is Joy Ewing. I will be presenting to you the property assessment of land survey results.

What I will be showing you are charts just from the raw data of the information that we received.

In the Spring of 1999 the Government Law Center, working with a project advisory committee, began a study to determine how land protected with conservation easements are assessed. The study was precipitated largely by interest from the land trust community and from the assessors themselves. This is due in part to the fact that New York currently does not have guidelines for assessors to follow when they assess land protected with conservation easements.

A survey of New York's 1,454 assessors was conducted in May 1999 and it yielded a return of 18%. The survey results confirmed some suspicions and raised new issues. Just under 15% of the responding assessors were uncertain as to whether there were any recorded conservation easements in their jurisdiction.

More than half of the respondents did not answer the question as to how they are notified of the existence of a conservation easements on a piece of property in their municipality. Most of the assessors indicated that they were notified about the easements by either the county or the land owner.

The overwhelming majority of assessors confirmed that their municipality has neither a local ordinance nor guidelines addressing property assessments of land subject to these conservation easements.

Several assessors indicated that local guidelines exist. That is one of the issues that I believe we are going to touch upon this afternoon as far as the feasibility of the options that are going to be presented.

This information shows us that when assessors are confronted with a conservation easement they usually assess the value of the land based on a case-by-case basis. There are very few cases when they actually stayed consistent with their choice to either increase or decrease the value of the land.

There were questions as to whether agricultural or forestry easements are viewed differently than open space easements. This data suggests that the agricultural easements and the forestry easements laws are very clear and that there does not seem to be a bias between these types of easements and open space easements such as conservation easements.

With respect to assessment practices, 64% indicated that whether a conservation easement affects a parcel's market value is to be determined on a case-by-case basis. Approximately 21% believed that a conservation easement would decrease the value and one respondent indicated it would increase the value.

I divided the survey into two parts when reviewing the results. The first half contains very specific information about the actual municipalities, whether or not they have an easement and if so how much the total assessed values were and so on. The other

part of the survey dealt more with the opinions of the assessors about conservation easements. This suggests that these factors—benefits and the restrictions—have an effect on the value of the property when it is assessed.

Almost 85% of the responding assessors were of the opinion that some level of government should provide this guidance as far as assessing lands subject to conservation easements, with a more than 2 to 1 ratio believing that the State should provide guidelines as opposed to the locality.

Approximately 50% of the respondents suggested that guidelines should be developed by the office of Real Property Services and 43% indicated that more education was needed on the subject.

As to assessments on land adjacent to those protected by conservation easements, more than 63% of those responding indicated that the easement should not affect the market value of adjacent land. Of the remaining 36% who believe that there would be some effect, by a margin of almost 5 to 1 the assessors believe the market value of adjacent land would increase when a conservation easement exists on abutting property. This simply indicates whether or not they felt the assessed land would change on the adjacent property.

The first part of the survey asks how many acres there were of lands with conservation easements in their municipalities. For the most part, although they knew there were lands, they did not know how much, nor did they know the value of the land at the time. So, it was definitely difficult to put together any sort of scale to determine the value and acres and the correlation between the two.

We also asked how long these assessors had served as assessors. Twenty-seven percent have been assessors for more than 15 years and eleven percent for more than 25 years. In all, we received responses from 57 municipalities.

Based on the results of the survey it is clear that guidance on assessing land with conservation easements is being sought by assessors and is needed on this issue in New York.

Conservation easements have become increasingly important as a tool to preserve open space, and hopefully this afternoon we will present some options that we have been working on within the project and then later discuss the feasibility of the options that we present.

KARA BITAR

GLC Intern & Siena College Student

Good morning. As part of the Conservation and Property Taxation Exploring Incentives Project, I worked six weeks this past summer at the Government Law Center at Albany Law School researching conservation easements.

Specifically, I researched how land with a conservation easement placed on it is assessed for property tax purposes, what states provide guidelines to assessors when assessing such land and, if so, what these guidelines are.

In order to determine this, Joy Ewing and I examined all 50 states including New York, to see if they had successful guidelines for assessors to follow at the state or local level.

This involved locating state statutes which addressed this issue of assessment of land subject to a conservation easement, speaking to state agencies that are responsible for implementing the statutes, and finding programs, rules, and regulations established by state agencies, local communities, or other organizations such as land trusts used to guide assessors when dealing with land subject to a conservation easement.

There are two programs in particular that we found that I would like to explain. They come out of Jefferson County, Washington, and New Hampshire.

Jefferson County, Washington, on August 12, 1991, adopted the Jefferson County Open Space Tax Program. This provides for a reduced assessment for land based on the public benefit derived from the land. In order for land to be eligible for a reduced assessment, an application must first be made for classification as agricultural, timber, or open space land. Applications must then be approved by the Jefferson County Assessor's Office or the Jefferson County Planning and Building Department, depending on what kind of classification is sought.

Once the land receives the necessary classification and is approved for a preferential tax assessment, which under the Jefferson County Open Space Tax Program is a current use assessment, the assessment will be based on the public benefit that will be derived from the land. In other words, the current use value of the land will be correlated with the public benefit received from the preservation of the land.

Property taxes on some lands will be lowered as a result of this program. Hence, the tax burden will shift to those not involved in the program. However, this is offset by the public benefit received from the land.

In order to establish the current use value in accord with the degree of public benefit gained from the preservation of the land, a Public Benefit Rating System was established. According to the Public Benefit Rating System, a range of points is assigned to various environmental factors that are considered to be of value to the public. This is then used to determine the percentage of reduction in the assessed valuation.

The maximum number of points possible is 12, which will lead to a current use value of 10% of the market value. The points are calculated by taking into account the

following: the resources on the land, the access to the land, the transfer of development rights or a conservation easement, and the county policy goals. For example, if a resource on a piece of land is considered high priority, it is awarded two points. If the public access to the land is unlimited, it is awarded three points. If the transfer of development rights is recorded with the auditor, it is awarded six points. Finally, if it furthers a county policy goal of implementing parks, recreation, and open space, it is awarded one point, for a total of 12 points. Since the maximum number of points possible is 12, this would lead to a current use value of 10% of the market value.

Once the land is approved for and receives a preferential tax assessment, the land must not be applied to any other use for a minimum of ten years. After eight years the landowner may request that all or part of the land be withdrawn from the classification. This request is irrevocable and the Board of County Commissioner is to be notified by the assessor of the request. Once two years have elapsed after the request, the land will be withdrawn from the classification. Apart from this, the County Assessor may determine that the land is no longer eligible for a preferential tax assessment because the land is no longer being used in the way that it was when it was granted the classification.

The County Assessor may also determine that the land in its current use severely degrades the water quality. Once the land is removed from its prior classification, it will be subject to an additional tax, interest, and penalty.

The New Hampshire laws dealing with reduced assessment for those who choose not to develop their land are not as detailed as the Jefferson County Open Space Tax Program, but do provide incentives for those who choose not to develop their land.

In an effort to encourage the preservation of open space, New Hampshire enacted the Current Use Taxation Law (RSA 79-A) and the Conservation Restriction or Conservation Easement Assessment Law (RSA 79-B).

The Current Use Taxation Law (RSA 79-A) provides for assessment of land based on its current use. Under this law, a Current Use Board is established annually which sets the current use values for the upcoming year, and establishes criteria for classifications of land that this law aims to protect. The Board is an attachment within the Department of Revenue administration.

The Conservation Restriction Assessment Law (RSA 79-B) applies current use value, established by the Current Use Board, to lands that are restricted for conservation purposes. Landowners who want to classify their land as conservation restricted or with a conservation easement under this law, must apply for classification on or before April 15 of said year. In order for land to qualify for classification as conservation restricted, it must provide a public benefit as cited by the Conservation Restriction Assessment Law. Note that a conservation restriction under New Hampshire law is the same as a conservation easement under New York law.

The public benefits include the following: preserving land for outdoor recreation by the general public or for the education the general public; reserving a relatively natural habitat for fish, wildlife, plants, or similar ecosystems; preserving open space; and preserving land that is historically important.

Upon receiving the necessary classification, the assessor will assess these lands at values based on permanent restriction, but never greater than those values determined by the Current Use Board.

PATRICIA E. SALKIN, ESQ.
Associate Dean & Director
Government Law Center of Albany Law School

Let me add a few thoughts to what Kara has laid out for us, and share with you some language from other state statutes and regulations.

There are, first of all, a whole host of issues as you know that arise when dealing with conservation easements. We fielded a tremendous amount of phone calls when the brochure for this program went out because people wanted to know, "Are you going to deal with other issues besides assessing conservation easements?" We had decided to limit the topic to conservation easements. As you could tell from the Secretary's remarks and from Tammara's remarks, there is a growing interest in the whole area of conservation easements. Many people with different interests had indicated an interest in the topic.

We focused on the narrow issue of assessment, which was really a challenge in our research.

A common viewpoint we encountered in our reading, and one that was mentioned by almost every speaker so far this morning, is that land protected with conservation easements should be assessed at a lower value because the development rights have been removed, or at least some of those "bundle of property rights" have been given away.

I spoke with people all over the country as part of this research project, and there were people who said without an absolute doubt the assessed value goes down if there is a conservation easement. Other people felt equally strong on the other side. Looking at case law, we found in New York and around the country that there was not necessarily one uniform approach.

Let me share with you two New York cases. One of them was a 1984 case decided by the Appellate Division Third Department. It upheld the lower court's finding that a conservation easement on land in Essex County did not diminish the value of the tax payers' property since the assessor's determination was supported by evidence that the highest and best use of the land was seasonal recreational. In addition the Court found that the subject parcels were unique and therefore could not be appraised in comparison with other parcels for assessment purposes. Ergo our problem. And, as Tammara said, the easements are unique. So how do you go about assessing this? How do you deal with the public perception, and with perhaps some policy moving in that direction but not necessarily with statutory or regulatory words behind it, that the assessment ought to go down? But yet, we have an Appellate Division case in New York, not a Court of Appeals case, but at least the Appellate Division Third Department—covering the Adirondacks—that says it does not necessarily have to go down.

This case is the *Matter of the Adirondack Mountain Reserve v. the Board of Assessors of the Town of North Hudson*, 99 A.D. 2d, 600 (1984).

However, another Adirondack case was decided by this same Court four weeks ago. *Matter of Wilhemina duPont Ross v. Town of Santa Clara* concerns a parcel of land in Franklin County, also in the Adirondacks. The Court again reiterates that a

conservation easement does not necessarily reduce, for tax assessment purposes, the value of the property in question. A copy of this case is found on page 29 in your materials, and I am sure that at least two other speakers later on are going to address it.

The conservation easement in both cases was not what I am going to refer to as a “pure” easement. I think Tammara did a good job illustrating with the pencils that easements are individually negotiated, there is not one and only one type of easement. You have to look at what is and is not being protected here. In both cases, the landowners reserved certain rights even though the easements had been donated. For example, in the *Wilhemina* case, the landowners among other things reserved the right to exclude the public from portions of the land—not the whole land because there has got to be some public purpose—but, they reserved the right to timber on the land, they kept the mineral rights, they maintain the right to construct, repair, and replace existing structures and the rights to build up to ten new residences. So a lot of the bundle of rights were retained here, but we do have potentially or in reality a conflict. Is it only that the assessed value does not decrease when the assessment is not “pure,” or might it still not decrease? We only have two mid-level cases in New York, both saying the same thing, and both with similar kinds of facts.

If assessed value does not go down with the presence of a conservation easement, have we lost a powerful incentive for land owners to use the easement, particularly land owners who are donating their easements? This is not the case with land owners who are selling their easements. One must recognize, of course, that there are other incentives, most notably the Federal Internal Revenue Code, that recognize the donation of the easement as a qualified Charitable Donation.

In the supplemental materials that are included in your book, there are materials photocopied from the Land Trust Alliance. I want to read you a passage from their Winter 1999 Exchange Newsletter:

In Georgia, for example, the law says that if you place a conservation easement on your land you may qualify for property tax reduction, but land owners want to be certain of that before they sign a conservation easement.

Another question, not really answered nor adequately discussed, is the impact of conservation easements on the assessment of adjacent non-easement parcels. We are going to talk more about that this afternoon.

The focus in the literature seems to be on the land that has the conservation easement on it and little on how to assess those lands. We need to discuss how to deal with adjacent lands that do not have conservation easements on them, but may benefit or may not benefit from the fact that an easement is placed on the land next door.

Kara explained how one state and one local jurisdiction in another state provide some guidance to assessors on what to do with property carrying a conservation easement. In Maryland, under a 1986 law, if a land owner donates a conservation easement to the Nature Conservancy, or to a government or governmental unit, the statute provides:

Any land subject to an easement shall be assessed on the basis of its value as required by the subtitle, but the value

shall be adjusted by the effect of the easement on the land.

In a procedure opinion based on the valuation of easements revised by the Department of Assessments and Taxation in 1995 it says the Assessor should attempt to determine if the existence of public or private easements have any impact on market value. Some easements may impose severe restrictions and have measurable affect on value. Others may not have a measurable impact, but require some recognition by the assessor based upon the principal of substitution. In the case of private easements, the assessor must also consider if the restriction is self imposed and easily removable. If so, the effect on market value may be negligible, even if the restrictions are severe.

Maryland also offers property tax credits on unimproved conservation lands during the first fifteen years after the easement was first established.

The State of Virginia's Conservation Easement Act provides:

Assessments on the fee interest in land that is subject to a perpetual conservation easement shall reflect the reduction in the fair market value of the land that results from the inability of the owner of the fee to use such property for uses terminated by the easement.

The statute continues:

"[T]o ensure that the owner of the fee is not taxed on the value of the interest of the holder of the easement, the fair

market value of such land 1) shall be based only on uses of the land that are permitted under the terms of the easement, and 2) shall not include any value attributable to the uses or potential uses of the land that have been terminated by the easement.

In California, the Property Taxation Assessment Law specifically sets forth factors that a county assessor shall consider when valuing enforceably restricted open space land. The statute provides that assessors shall not consider sales data on lands, whether or not enforceably restricted, but shall value these lands by the capitalization of income method. Then the statute goes on to provide four pages of detail on how to do this.

In North Carolina, to find the true value of property subject to a conservation easement, a determination must be made as to the market value prior to the granting of the easements. This value is then by statute reduced by applying what is called a damage factor caused by the granting of the conservation easements.

The statutes in Alaska say

Land that is subject to a conservation easement created under this statute and used consistent with the conservation easement shall be assessed on the basis of full and true value for use subject to the conservation easement and may not be assessed as though it was not subject to the conservation easement.

Lastly, we have other states that dismiss the assessment of lands with conservation easements in one sentence. For example, Idaho's code says the opposite of what the last state's code said:

The granting of a conservation easement shall not have an effect on the market value of property for ad valorem tax purposes and when the property is assessed for ad valorem tax purposes, the market value shall be computed as if the conservation easement did not exist.

Compare this to the Minnesota statute that provides:

Real property which is subject to a conservation restriction or easement shall be entitled to reduced valuation.

These are a few highlights. What our research demonstrates is that there are many approaches and options for addressing these issues. There is no national trend or uniform approach on how to assess lands protected with conservation easements. Many states, like New York, acknowledge conservation easements in state statute, but fail to provide the guidance as to what assessors are supposed to do with that. You will hear more this afternoon about the survey that was sent to many of you in the room to find out exactly what the practice is at the grass roots level in New York.

Thank you for being here with us today to discuss these important issues.

The Government Law Center Symposium on Property Assessment and Conservation Easements

EDYE MCCARTHY

Past-President

New York State Assessors' Association

I would like to thank you for having us here today. Before I heard the panel of speakers this morning and then again early this afternoon I did not realize how important it was for assessors to be here.

Before I start my part of the presentation, I would just like to tell everybody in the audience that assessors are human. I know that, in particular if you own property and you have been in one of our offices, you probably do not think so—but we are.

My portion of today's presentation is regarding three different issues. The first is the option of the New York State Assessors' Association in regard to developing guidelines for assessors on dealing with land protected with the conservation easement as well as the opportunity for providing education and establishing the best source of instruction. I also want to touch on what our potential options are for policy reform.

I am going to try really hard to touch base on a couple of the comments that were made throughout today. I could probably stand up here for the next fifteen minutes and just argue some of your points, but I am going to try and be politically correct.

The first is the development of the option of the State Assessors' Association in regard to developing these guidelines for assessors in dealing with the land protected

with conservation easements. As far as the property tax is concerned, assessors are mandated by law, as most of you already know, to assess land when vacant at its highest and best use, or value in use when improved. Some conservation easements restrict the property's use and, hence, sometimes decrease the property value or, due to these restrictions, increase the property value.

There is case law discussed this morning that conservation easements do not reduce property values. The particular case talked about was the *Adirondack Mountain Reserve*. On the other hand, there is case law that states that conservation easements do diminish property values. Later in the presentation we will discuss the possibilities of reimbursement from the State for the loss of revenues. Currently, you and I are paying for the differences in these easements.

When we assess an improved property, for instance, we will use the market approach; that is, find comparable properties that have sold—hopefully within the last year—and analyze them and make the adjustments accordingly. This is done on a case-by-case basis. The method to be used to appraise vacant land is typically the same. The methodology is the same when appraising property with a conservation easement. You must find properties that have sold with easements. As pointed out, they are relatively new, so we do the best that we can.

I know that it all sounds simple; however, trust me—it is not. There really is no black and white method for assessing property with a conservation easement other than reviewing them case by case. The one issue barely touched upon this morning was the properties that are abutting the subject with the conservation easements—the adjacent properties. Do they increase or decrease in value because there is easements next to them? The Scenic Hudson Easement can be used as an example. If I own

property behind that, would my property value increase or decrease? More than likely it would increase because of the enhanced views.

In conclusion, basically, there is no concrete evidence to establish guidelines for assessing land with conservation easements. They must be reviewed on a case-by-case basis.

Someone just brought up the issue of education. Assessors do concede that education is very important. There are a lot of factors to take into consideration when appraising property with conservation easements. Currently, there are very few options for assessors to get training. There are and have been one-day seminars offered throughout the state by the Institute of Assessing Officers on "How to Appraise Conservation Easements." As a matter of fact, one of our instructors is in the room today.

One of our recommendations is to review the educational curriculum on assessing lands with conservation easements and perhaps discuss the possibilities of adding optional courses to continuing educational requirements for assessors. We do not feel at this time that courses about conservation easements should be a requirement because not all municipal officials have to deal with easements.

As far as the potential for policy reform, there are recommendations that can and should be made. Our recommendations or options come, in part, from the survey that was discussed earlier and some possible alternatives taken into consideration.

I also am going to open the floor for participation from you. For example, the notification to assessors of new conservation easements should be more specific and

in a timely fashion. Perhaps it should be a requirement that the appraisals made to establish the conservation easements must be submitted to the assessor to aid us in the valuation process. Allow assessors to not only decrease the values from conservation easement, but to increase them, and also to be able to change the assessments on the adjacent properties if the value is affected.

The next three options that I am going to bring up came from the survey. I will state for the record that the assessors do not necessarily agree with these, but I just want to bring them to your attention.

The first one is providing a system for assessing lands with conservation easements similar to the farmers school tax credit program. Provide specific statutory authorization for municipalities to develop local ordinances or laws dealing with how conservation easements are to be valued in a locality. Adapt current use laws, such as forestry assessment and agricultural assessment in New York State to conservation easements. Incorporate education on the subject of conservation easements into training but our recommendation for this, again, is to make this program voluntary. Government funding is an important way to support and promote the use of easements; however, as an end result—and this is key—all assessments placed on property with conservation easements should be valued on a case-by-case basis. Also, any properties adjacent to the subject should be reviewed on a case-by-case basis.

The depletion of the property tax revenue is probably at a minimum; however, with all the other reductions that are here and will continue to occur, it would be a reasonable request to ask the State Legislature for some financial support in some of these areas.

It is not that development is bad or good, or that conservation easements are bad or good. The point is that the private or public properties should make decisions about development and conservation based on their needs and goals, not that it is going to reduce their income taxes or property taxes.

Thank you.

ANDY BEERS

Director of Conservation and Government Programs

The Nature Conservancy

Thank you. I have been asked to talk about New York's forestry tax program, Real Property Tax Law §§ 480 & 480-a. This program has come up several times in discussion already today.

I am going to go very quickly in describing the 480 and 480-a programs. This is not a session about that program per se. I'd be happy to answer questions later if you have them. In your booklet there is a copy of the statute and background materials that you can refer to for more information.

Beginning in 1926 with the passage of the Fischer Forest Tax Law, New York State decided that it was good public policy to give partial property tax exemptions to land owners who were committing to the long term management of lands for forestry purposes.

In 1959 the Fischer Act was codified into Section 480 of the Real Property Tax Law. Then, in 1974, the enrollment to that program was ended and a new program, Real Property Tax Law Section 480-a, was established. I am going to talk primarily about the 480-a program for the remainder of my session.

Under 480-a, if you are a private forest land owner of at least 50 acres who is willing to commit to managing forest land according to a DEC approved forest management

plan for a period of ten years, you will receive a property tax exemption at 80% of the assessed value of the forest land. This is a rolling commitment, so that each year the landowner enrolls in the program and commits to managing the property for forestry purposes for ten years. Then the next year, the landowner enrolls again for the next ten years, and so forth on a rolling enrollment.

This 80% tax exemption, depending on how you want to look at it, either is a loss of tax revenue to local government and school districts or is a tax shift, where that tax burden is shifted onto the other land owners in the taxing jurisdiction. Any way you look at it, the impact is similar. The only compensation to the local government and school districts occurs when timber is harvested on the property. At that time, the landowner pays a 6% stumpage fee; 6% of the income received from timber harvesting is returned back to the taxing units. Most local governments in New York say today that that 6% stumpage fee does not begin to compensate for the loss of tax revenues through this program.

The land owner can take their land out of this program at any time, but there are significant financial penalties for doing so. Basically, the landowner must pay back the ten years of taxes saved, times a penalty based on a percentage of tax savings. So there are very significant economic incentives to retain 480-a land in forestry and open space use.

Today in New York State, according to information from DEC, there are about 311 parcels in 480 enrollment, the old tax law that encompasses about 815,000 acres. There are almost 1,700 parcels encompassing about 480,000 acres in 480-a. So between the two programs, 1.2 to 1.3 million acres of land are receiving forest tax exemptions in New York State.

Enrolled lands are spread across all of Upstate New York. Almost every county has some level of enrollment, but the highest enrollments are in the Adirondacks, the Catskills and the lower Hudson Valley. However, the 1.3 million acres enrolled today is estimated to be something less than 10% of the lands that are actually eligible under the technical guidelines of this program.

So, on the one hand, 1.3 million acres is a lot of land to have in this program which would lend some stability to land ownership and conservation values. On the other hand, 480-a is not addressing all forest lands in New York State.

There are current concerns with 480-a. One of the primary issues is the lack of reimbursement to local governments and school districts as a result of the tax loss or shift from the program. From the local government perspective, 480-a has both local and statewide benefits. There are clear statewide benefits to conserving forest land and assuring an orderly flow of wood products off these lands. Local governments and school districts, however, bear the entire cost of this benefit.

From a conservation impact, the lack of local reimbursement also is a shortcoming. There is plenty of anecdotal evidence of landowners not enrolling in the program because of concerns or pressures at the local level not to take the 80% property tax exemption. There are landowners who will say that while they receive the exemption on the forest land, their assessment on their buildings and structures seem to go up.

Furthermore, clearly for large forest landowners that own a significant portion of their town's land base, shifting large amounts of property tax onto other property owners in their jurisdiction is counter productive to the program. We believe, to make it a better environmental program, reimbursement of lost tax revenues to local

governments is an appropriate mechanism.

Another concern from the environmental community regarding 480-a is that the landowner has to harvest trees to enroll in the program. When the forest tax program was originally conceived in the 1920s, it was not an environmental program or a forest protection program. It was a program to ensure the orderly flow of wood products into New York State's economy. Today, we recognize that forests provide many values: wood products, clean water, clean air, wildlife habitat, open space, and quality of life. From the environmental community's prospective, we believe that land owners who are willing commit to manage their land for a ten year rolling period for forest stewardship, according to a DEC forest stewardship plan (DEC now supports forest stewardship plans that do not include timber harvesting), should also be allowed to enter into 480-a without actually being required to cut trees.

We recognize that to make that happen politically in New York and considering the fairness issue, we would couple enrollment by "open space" landowners with a proposal to reimburse heavily impacted localities from both the existing 480-a and this new class of enrollments.

The final concern with 480-a among many land owners is the level of DEC oversight of their forest management activities. Many people believe that DEC is too restrictive or too involved in the day-to-day forest management activities on these land. The conservation community is willing to also accept that there should be some level of streamlining of DEC's approval and oversight of forest management plans.

What are some of the remedies that are being discussed? One is to reimburse local

governments, heavily impacted local governments at least, from 480-a. There has been a bill in the Legislature for the last couple of years that would reimburse any town, county or school district that experiences a tax loss or shift of more than 1% by the State of New York for lost revenues above that 1% tax shift. And in fact, that legislation has been endorsed by a broad coalition including the Nature Conservancy and other environmental groups, the Associations of Towns, the School District Association, the Association of Adirondack Towns and Villages, the Farm Bureau, and the Adirondack Landowners Association. A very large and unusual coalition has come together to agree that this is an environmental fairness issue.

As I mentioned earlier, another potential remedy would be to allow the enrollment into 480-a of landowners who are willing to commit to an improved forest stewardship plan even if that plan does not include timber harvesting. Again, this remedy would be coupled with reimbursement.

The third option, which I throw out as a possibility, would be to grant any landowner who donates a permanent conservation easement to an IRS qualified, non-profit or public agency automatic enrollment into 480-a, providing the landowner an 80% tax reduction. This mechanism would provide significant financial incentives for land conservation in New York State, and a much more straightforward system that would keep us out of the courts. The obvious concern or criticism of this approach would be: why give everyone an 80% reduction or exemption? We in the land conservation community fully understand that, depending on where a property is located, its physical limitations, and the market in that region, an easement may reduce the value of land by 90%, 50%, 10%, or some other amount, so why give them an 80% exemption across the board? My response is: why do we give forest landowners enrolled in 480-a an automatic 80% exemption? There is no tie in the existing 480-a

program to measure whether a landowner who commits to ten years of forestry management is getting some measurable deduction in the value of their property. I would argue that land conservation is a public benefit in the State of New York for many, many reasons and that, therefore, the State of New York should establish a policy to provide property tax incentives to landowners in the same way that we provide income tax incentives with charitable gifts today. But that cost should be born by the State of New York through reimbursement to local governments.

What are the lessons to be learned? First, there is great interest in improving 480-a. From the local government perspective the program should be improved by reimbursing towns and school districts for the loss of tax revenues. From the environmental communities' perspective, we would like to see greater enrollment in this program.

Furthermore, even from the local government perspective, landowner enrollments in 480-a are going up dramatically as we speak. According to the DEC, over the last five years there has been a 72% increase in the number of parcels statewide enrolled in 480-a, and about a 50% increase in acreage. They expect this to continue and so the current status quo of desire to protect additional forest land, coupled with lack of reimbursement, may create some opportunity here to solve both problems at once.

Finally, we in the environmental community recognize that any proposal that creates additional classes of real property exemptions will meet significant opposition from school districts, towns, and counties. They have strong policies on this and therefore we are supportive of trying to find a mechanism to help local governments obtain reimbursements for lost revenues.

I do want to take the opportunity while I am here to address one other issue that is not related to 480-a per se. It goes back to the question I asked at the beginning of the day—what is the standard for assessment in New York State? Is it fair market value as demonstrated by appraisal, or is it current use? They are two very different approaches. Today, from our perspective in the land trust community, when we look at that issue, whether it is statewide or in a particular jurisdiction, the way a particular piece of property is handled seems inconsistent. I have listened closely. I have heard current use. I have heard fair market value. I have heard that an assessment is the exact same as an appraisal. I have heard that it is not. I have heard market conditions should set the assessment. From our perspective we see the need for two things. One would be state legislation to improve programs like 480-a, that provide automatic enrollment or an automatic property tax exemption for landowners. Second, through education and other methods, we would like to create a clearer picture and see a more consistent and understandable standard for appraisal in New York State.

I would say that the proposal that we have advanced to allow landowners who do not wish to harvest trees to enter the 480-a program is still predicated on the fact that they would be required to adopt a DEC approved forest stewardship plan. Today, DEC's forest stewardship plans, even for those who choose to harvest timber, speak to issues of water quality, wildlife habitat, wetland, and other unique features on the property. Although you would not have to cut trees to receive 480-a enrollment, you would still have to manage your property according to a DEC approved plan.

The Government Law Center Symposium on Property Assessment and Conservation Easements

JEREMIAH COSGROVE
Northeast Regional Director
American Farmland Trust

I am going to talk about some other tax programs that affect agricultural land. I will give you a little bit of background on those programs and then a few discussion points for the next round table and perhaps some question, answer and comment on how some of these programs might be potentially used as models for treating lands encumbered by conservation easements.

I work with American Farmland Trust. We are a national farmland conservation group founded in 1980. I work in New York and New England on farmland conservation issues. I am going to put in a little plug for an upcoming book that we have coming out on farmland protection. It is a wide-ranging publication on all issues of farmland protection. It is due out in February and you can contact our office if you are interested in getting a copy. Before I start, I also want to remind you, notwithstanding some of the comments that we heard this morning about the status of agriculture in the lower Hudson Valley, that agricultural is alive and well in New York State. It is a \$3 billion industry. It is a very strong sector of the state's economy, both from the agricultural perspective, but also as a base for our tourist economy especially in areas like the Hudson Valley.

The Legislature has over the years enacted a number of provisions that directly affect agricultural lands. I will go through some of those provisions and give you a little bit of background on them—how they affect agricultural lands and how they are treated

for property tax purposes.

The first provision that I will just mention was enacted in 1960—General Municipal Law 247. It talks about open space and agricultural lands, and has been used as the legislative authority for a number of initiatives around the state at the local level to provide for both protection and property tax relief of agricultural land.

The environmental conservation law creating statutory conservation easements was enacted in the 1980s. That provision covers all sorts of conservation lands, but also includes, agricultural lands. We as an organization work with a variety of local land trusts, local governments, and private land owners drafting and implementing agricultural conservation easements which are particularly specialized types of conservation easements. It is worth noting again that the tax treatment of conservation easements by governments does vary depending on where you are in the state. On state held conservation easements in the Adirondack Park and the Catskill Park, taxes are paid by the State for those easements. The New York City Department of Environmental Protection is going to be paying property taxes on conservation easements that they hold within the New York City Watershed.

Most familiar, certainly to the assessors in the audience and individuals involved in agriculture, is our Agricultural Districts Law. The law was enacted in 1971 and created agricultural assessment. The only comment I will make with respect to the ongoing debate over current versus highest and best use is to query whether we would even need an agricultural assessments provision in our state law if assessors were in fact utilizing current use as defined by the courts.

The reality is that the agricultural assessment provides over \$60 million in property taxes saved from assessed value on the rolls as compared with the agricultural assessment. To be eligible for agricultural assessment, the land has to be in active agriculture, a minimum of 10 acres and \$10,000 gross sales from a particular parcel or a minimum of \$50,000 gross sales on parcels smaller than 10 acres. Rental land can qualify if a farmer whose operation qualifies is renting the land from the landowner.

There is a rollback payment for landowners who convert their land after having received the agricultural assessment. They have to pay five times the last year's tax savings if the land is actually converted. The law requires actual conversion in order to trigger the roll back payment.

It is essentially a use value based on the average capitalized value of production for the preceding eight years. It is adjusted by land classification, basically a formula that takes into account soil productivity and economic returns from agricultural products.

Land owners must apply each year to their local assessor on an application put out by the Office of Real Property Services and they need not necessarily be in an agricultural district or have signed any individual commitment. That requirement was changed a few years ago. Again, the basic eligibility requirement is that the land be 10 acres and producing \$10,000 in value. I would note that several years ago there was legislation proposed by legislators on Long Island that would have created an automatic enrollment in the Ag-assessment program for land encumbered by a conservation easement.

It also is worth noting here that these three programs (with the exception of the areas where the state pays the value of the conservation easement in property taxes) all do involve, as Andy explained, a local tax shift. The local taxable value is reduced by these programs and the tax burden is shifted under these programs to other properties in the locality.

The last program that I am going to talk about is a recent enactment, enacted in 1996, and signed into law by Governor Pataki that year, that we are estimating is providing an additional \$50 million in tax relief for farmers. It is known as the Farmer's School Tax Credit. It differs drastically from the agricultural assessment approach. It is a refundable tax credit for school taxes paid by essentially full-time farmers. It applies to land, structures and buildings used in agriculture. It does not apply to residences or facilities used for farm markets.

In order to be eligible, two-thirds of the farmers' excess gross income has to be from farming. Basically what this means is, if you earn less than \$30,000 and you make some money from farming, it is likely that you will qualify for this program. It is designed now to help both full-time farmers as well as part-time farmers who do not earn a lot of money off the farm. That is where the \$30,000 threshold comes in. The base acreage for this program is 250 acres. You get a full tax credit on your school taxes for the first 250 acres that you own, you get a 50% credit on acreage over 250 acres. There is a phase-out if your adjusted gross income exceeds \$100,000, and essentially the tax credit phases out completely if your gross income exceeds \$150,000.

The thinking in drafting the legislation was that this program was going to be designed to provide additional property tax relief for farmers. I think the agricultural

community recognized that increasing the level of tax shift at the local level, as Andy pointed out, was going to be politically unacceptable.

The other reality is that there are some farmers in this state financially who really do not need additional property tax relief, while there are many that do. So that is why the income cap was put into the program. If you want more information about this to hand out to your local farmers or just for your own information, Tax and Finance has a publication called Tax Publication 51 that has a very good Q&A format, answers a lot of questions on the program and also explains the forms that you need to use to apply for this tax credit.

Let me talk about some of the wider issues in terms of applying these types of programs to conservation easement protected land. The first issue is the public benefit. I do not think we should lose sight of the fact that these programs have been enacted because the state legislature has decided that there is public benefit in conserving land. Obviously, the legislature has found that there is public benefit in protecting and conserving agricultural land among others. The General Municipal Law 247, the Ag Districts Law and the Environmental Conservation Law all reflect that statement of public policy. The Farmers' School Tax Credit is a little bit different in that it really gets more at a tax fairness issue. Precipitating the Farmers' School Tax Credit legislation was a study that showed that New York farmers were taxed more heavily than their counterparts in competitor states such as Pennsylvania and Michigan. From an economic perspective they were being put at a disadvantage. Also there was a recognition of the whole cost of services rational, the fact that as owners of large tracts of land, farmers do not receive back in services anything near proportionate to the amount of money that they pay in property taxes based on allocating property taxes according to land uses. Again, there was an element of fiscal

fairness in the legislation as well.

We have heard a lot about the issue of valuation. Kevin will probably talk about general municipal law which does contain a statement about value. But again, it is language in a statute that is difficult to apply in practice. In conservation easements, as we have heard, there is no statutory language that addresses the issue and it has clearly been addressed case-by-case.

Agricultural assessment is a lot easier. The values are published each year by the Office of Real Property Services. The table of values is based on the capitalized value of the various classes of agricultural land. Basically all farmers need to do is figure out how much of their acreage falls into which classification category, and then simply do the math.

One of the important things to remember about the Farmers' School Tax Credit is that it is based on property taxes paid. There is no impact on local governments under that program. The farmers pay their taxes (obviously many of them are also in the Ag Assessment Program) and then to the extent they pay school taxes that are eligible for the tax credit or refund, they have to apply to the state and receive either a tax credit or a refund that is financed by the state as a whole.

Eligibility is another issue. Again, in the Ag Districts Law there are specific statutory requirements. They are set out in the statute. General Municipal Law is much less clear in terms of what property is actually going to qualify. Also, under the Environmental Conservation Law, to have an easement that complies with the law you have to meet the standards set forth in the statute. They are fairly broad based and not particularly specific, but they do give guidance in terms of the State's clear

statement that there is a public benefit to a broad range of conservation purposes and the State has made that policy statement. And lastly, for eligibility for the Farmers' School Tax Credit, you have to be a full-time farmer or a lower income part-time farmer.

With respect to the issue of tax credits, we have heard today loud and clear from the local communities that there are problems with more exemptions. This tax shift issue can be very difficult and already is in many communities that are dealing with it. One of the advantages of the tax credit approach is that if you can get the legislation and the funding from the state level you really avoid this rather contentious local issue.

Tax credits could be refundable but do not have to be. They could be carried forward. Many tax credits are not refundable, they are carried forward for a number of years. So it does not necessarily involve cutting checks and sending them back to tax payers. Obviously the Farmers' School Tax Credit uses a cap on income for eligibility, recognizing that a program like this may not be necessary for higher income landowners.

Lastly, as with the Farmers' School Tax Credit, you can single out certain types of taxes. The farming community felt that the school tax was the most onerous tax that they were facing. As stated this morning, cows and crops do not go to school but, by and large across the state, somewhere between fifty and sixty percent of all farmers' tax bills were school taxes. So the agricultural community decided to focus on the school tax as something from which they wanted some relief.

That is a brief outline of some of the tax programs that affect agricultural land. I would certainly be happy to answer any specific questions. I have tried to provide some ideas or some options as to how those programs might be thought of as potential models for providing additional incentives for protecting land with conservation easements.

KEVIN CRAWFORD

Counsel

Association of Towns of the State of New York

Good afternoon.

I wanted first to respond to a couple of comments that were made by the counsel from ORPS this morning. Rich mentioned the Kerwick case, saying that at the office it is referred to as the “Holy Land” case. At the Association, we talk about it as the “Birth of Common Sense” case. We do, therefore, have a different perspective on it.

I also want to get back to the comments that Andy made on the forestry issues. We were really pleased and happy that the environmental community did support and recognize the concerns of local government in that particular debate. We were concerned about the impact of that program in the larger context of other exemptions and conservation programs and their impact on the local property tax base. So it was really rewarding to have some friends with us in the legislature trying to make that point. We hope that we are able to continue with that relationship on future issues. It was one of the very positive things about that debate the last two years.

On the forestry issue, not only is it as some argue that the stumpage tax is not enough to cover the loss of property tax revenue, it also is the problem that you never know when you are finally going to get that stumpage tax. So your budget is starving during that period of time between when it goes into 480-a and when the trees are finally harvested. If we talk about expanding 480-a to those who never intend to

harvest the trees, then towns are never going to get the stumpage tax, meaning that having additional revenues is even more important.

I wanted to just take a few minutes to talk about Section 247 the General Municipal Law which authorizes local government to participate in conservation of open spaces. It is a single section of the General Municipal Law applying to all general purpose local governments and it is a very broad statute. It says:

For purposes of this chapter, “open space” or “open area” is any space . . . that would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

Thus, it is a very broad enabling legislation for local government to use to get into the game of conserving important open space.

An important piece of that statute talks about acquiring a fee or any lesser interest. You do not have to acquire the whole bundle of rights that we have been talking about today. Local governments have authority to acquire some lesser level of those rights in order to protect the amenity that they see as worthwhile in their community.

Subdivision 3 of 247 provides that after acquisition of any such interest pursuant to this Act, the valuation placed on such an open space or area for purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land. Again, that general statement—without actually putting it into a formula like the 480-a forestry statute we talked about earlier—is leaving it to the assessor to make the determination recognizing that there is probably going to be some

reduction.

In your materials you will see some local laws that take advantage of GML Section 247. Orchard Park is an example of where they parrot that exact language of 247(3). In the Clifton Park example, they went a little bit further and actually went into a formulation. They have a table based upon the amount of years you are going to dedicate some of these development rights and there is a formulation there. That may be a little bit in conflict with the ORPS opinion that Rich referred to earlier. We will have to wait and see.

Since section 247 is self executing, why are towns adopting these local laws? I think it is because they wanted to define the process of identifying which are the important lands in the community, which are most important to use our limited local resources to protect. Each of them has a process which involves, for example, a historic architectural review board or a historic commission, open space commissions, and other advisory bodies at the local level to identify important properties, evaluate them, and make recommendations to the town board as to whether they should use public funds to make an acquisition of a fee or less than fee interest. That is what these local laws are doing—putting that type of local process in place.

The local laws do something else that the statute really does not address. What if somebody violates the agreement and starts to develop property in some way that is contrary to what they have promised in their easement? The local laws have an enforcement provision that talks about penalties that would apply.

The last point I want to make is about the shift of tax burden. It is one thing for the

State to acquire the property and to step up to the bat as Secretary Treadwell pointed out and to make up any loss in assessed valuation. It is another thing for the local government itself to make a determination that this is a very important piece of property, or open space or other amenity that we need to use our resources to acquire. But, the rest of it is happening in private-to-private transactions, with no control over it and no predictability to it. As we heard from previous speakers, we have had a quadrupling of conservation easements in the past ten years. What if this continues to grow and the problem becomes such that there is more than a \$2.50 per property owner impact on the tax base? When we talk about doing something at the State level in terms of legislation, we need to keep that in mind.

Statistics from the most recent ORPS report show we are well over 25% and approaching 30% of all the land value being subject to some sort of exemption. So we have a shrinking tax base on which our Association's members rely almost exclusively for their revenues. They still have to perform essential functions such as take care of the roads that support the number one industry in Upstate New York, agriculture. Eighty-five percent of our road system is on the local system. The principal component of most town budgets is that road and bridge system that agriculture relies upon to get that product to market. We have to continue to be able to maintain that system to support this very important industry. That cost will not go away. To do that we need salt storage sheds so we are not otherwise polluting ground water and the environment. Towns need more funds to pay assessors better because they have to do all this exemption work, including the Star Program.

So it is not as if towns can watch their tax base reduced and just turn around and reduce the town budget. We do not have other sources to turn to. So that is why looking at the revenue side of the equation is critical for any of us who are interested

in any program that deals with the real property tax base. Town governments and school districts in New York use this as their principal source of revenue. Towns have lost all their federal revenue sharing, 75% of their state revenue sharing and they have not gotten it back in these good budget years. We were at \$132 million, now we are down to \$30 million in state revenue, and it has not come back. Increasingly, therefore, we go to that property tax base.

The question was asked this morning about the landowner survey—did their assessment go up or did their taxes go up? It may have been the case that their assessment went down but, when all these other factors weigh in, they continue to pay greater taxes despite the appropriate assessment reduction that might have been applied to that property.

A previous speaker said that if we do a good job of protecting open space, this will bring in other revenues. That may be true. While I would not argue that point, the question still remains—who does the revenue go to? In many communities and in many counties there may be a sharing of sales tax, so in that case it would come back to the community. That is certainly the case in Saratoga County, where the Town of Clifton Park sits, and that is why they were able to do some of their open space initiatives as evidenced by their local law. But that is not always the case, and so we have to keep that in mind as well.

Thank you.

The Government Law Center Symposium on Property Assessment and Conservation Easements

ROUNDTABLE DISCUSSION ON FEASIBILITY

HON. RICHARD BRODSKY

New York State Assembly

I am going to try to keep my remarks very brief. To do that I need your help. Assume for a second that I have now taken equal credit with the executive for every good thing that has ever happened in the area of open space conservation easements and the other areas. I will not bother you with the details of all the wonderful things that the Assembly has done over the years except to say, as author of the Bond Act, as author of the Environmental Trust Fund, as author of as yet unpassed legislation on easements, they have been an extraordinarily important part of the arsenal of government to protect the character of our state and we look forward to using it again and again and again.

I may have the advantage of not having a detailed understanding of where everyone has been throughout the course of the day, if only in that it enables me to speak about some very basic concepts that may be helpful in focusing on what we in the legislature might need to listen to and decide on as the day unfolds.

The fundamental question is—if you do not like the way conservation easements are assessed today, how would you change them? Do you want a centralized set of written standards which would be applied to every easement? Assessors probably

would not want that, but in the wider community, the environmental community, maybe within the departments, there may be that push.

Personally, I am a little skeptical on the methods. We are, of course, dealing with income, comparable properties, and cost minus depreciation as the tools assessors use for valuing property. If those tools are somehow inadequate to conservation easements, they are then probably inadequate to 75 other kinds of controversies when it comes to valuing property. Someone had got to make the case as to why just for conservation easements we should come in and somehow change the way in which the system works generally.

I have not yet heard that argument made—that the current system is so dysfunctional for the purpose of enhancing our ability to get conservation easements, that we do need to make those changes. That argument is going to have to be put forward in a very organized and coherent way to get our attention.

If indeed conservation easements do increase value by whatever system you are looking at, then we are going to have property owners rewarded by the market place for the decision to enter into a conservation easement agreement. Should we incorporate in that the tax benefits that may or may not come with the donation of that valuable property? If it is tax deductible on a federal and state income tax return, does that mean that the value of the property itself must go down since something of value has been given? If it is market driven, and when assessments are done the value goes up in a reasonable and defensible way from the point of view of the law, that might be the single best motivation to encourage people to enter into the system.

If the value of the property goes down, an interesting additional policy question is raised—should there be some sort of defraying of the costs of that decrease in value by the public? I think that is a problematic judgment to make. There is the question of what sort of state revenues are available for that encouragement. Should we buy it and then pay you back for the loss in value to your property? Is the loss in value to your property included in whatever value we give you for the actual purchase? It is clearly a complicated matter from the point of view of the law and from point of view of the application of the law.

In the end, setting valuation formulas by the government is a problematic exercise. It may not work, and it opens a door for others to come in and say “you did this for them, now do it for us.” I do not know that we want the conservation easement process to be the camel’s nose under the tent that rewrites the way we assess property in New York. If it is, we ought to make that explicit. We have not done that yet, and I look forward to this being the beginning of that debate.

Thank you very much.

The Government Law Center Symposium on Property Assessment and Conservation Easements

TONY CANTORE, ESQ.

Counsel

New York State Assembly Real Property Committee

Thank you. I am delighted to be here today also on behalf of our Chairman of the Assembly Real Property Tax Committee, Assemblyman Marty Luster from the Ithaca-Cortland area. These symposiums are very helpful to legislative staff as well as to the members. But, it is the staff who are responsible for the routine work of the committees. Mr. Brodsky, for instance, just asked me to look into that last proposal we were addressing.

We really are thrilled to have this kind of questioning and the information about conservation easements which you present.

I had prepared an outline of what I wanted to review with you. However, as happened to many of the speakers this afternoon, the tax policy goals I was prepared to cover were really talked about at every point during the day. As staff of the legislative committee, in our case Real Property Tax, we look primarily at tax policy goals. Well, we have been discussing that all day and there is no need for me to reiterate all the policy issues.

Obviously, with bills relating to conservation easements and forest land tax exemptions, the Real Property Tax Committee has to work closely with the Environmental Conservation Committee. We have two Chairs involved and, of course, once the two Committee Chairs finally decide on a course of action, we then

have to refer such bills to our Ways and Means Chair. Overseeing all of them is the Speaker of the Assembly. And then there's the Senate and the Governors Office.

I do want to give you some idea of the review process when such issues are brought to the Legislature's attention and the kinds of things that legislators must consider and confront. There is no question, there is a fiscal determination that has to be made. If you decide that we want to make forest land tax exemption programs under Real Property Tax Law, §480-a, revenue neutral to localities, there is a fiscal effect to the State. That is an appropriation that has to be made in the local assistance budget.

An important part of the Committee and staff's consideration, and this is something I try to convey to the assessors through their association's director, Tom Frey, and to the county real property tax service directors, is that our Chair and we really do care about the local administration of the Real Property Tax Law. We have heard the assessors' complaints about being exemption administrators and one of the problems in this area, as has been brought out today, is the complexity of even something that really forms a very tiny part of the real property tax system in this State, that is, conservation easements or the preservation of open spaces. So that will give you some idea of the considerations we give in dealing with legislation of this type.

There is another similar issue I want to present as an example of the legislative process, and I really won't do it in much detail since this has been mentioned in a number of instances during the day. Chapter 2 of the Laws of 1997 which provided for the conveyance of agricultural and watershed conservation easements to protect the New York City Watershed is a good legislative model to examine because if I recall correctly, and I think Rich Sinnott can concur, we needed only about four or five negotiating meetings on it in the Legislature. It was presented by the Governor as

a result of the Memorandum of Understanding among the parties involved. New York City really needed to have this legislation in order to avoid expensive filtration of its water supply. A draft bill was presented by the Governor to the Legislature and the City committed the necessary money to pay for the local tax revenues lost as a result of the easements. I think our experts at the Office of Real Property Services, as well as some other interested parties, developed the legislation with that kind of impetus and need and with all of the tax, fiscal and environmental policy questions answered, such as have been discussed today with respect to conservation easements in general. After all of that, it took us four or five weeks to get that bill passed by the Legislature and signed into law by the Governor. So it can be done. It is just that it has to be presented in a way in which legislators and the staff can respond with positive action.

I also wanted also to mention something about Assemblyman Luster's purpose in drafting his bill on conservation easements. He believes, and he concluded this long before he ever became Chair of the Real Property Tax Committee, that introduction of his bill was a way of at least hi-lighting the need for an assessor to take a closer look at a situation where a conservation easement is granted. The Bill is Assembly 7142, and it will probably be included in your materials; it is very short. But, at least it starts the process of the assessor's looking at a particular conservation easement and making a determination individualized to that property.

Thank you, and I really look forward to the results of our discussion today and to what we in the Legislature can do to respond to your concerns.

The Government Law Center Symposium on Property Assessment and Conservation Easements

ROBERT DAVIES, ESQ.

Senior Attorney

New York State Department of Environmental Conservation

Thank you. I would like to start off by saying that I am neither an appraiser nor an assessor so my comments will be brief.

I have been listening to the conversations today with all the experts that are actually in the audience and it seems clear to me that there really is no concurrence among the different parties that are here today on what actually needs to be done if anything.

If you look at the results of the survey that was done by the Government Law Center, they talk in terms of a large majority of the assessors feeling as though the current guidelines that were available today could be used for assessing conservation easements. The survey also found that a very large majority believe that the conservation easements should be dealt with on a case-by-case basis, but even a larger majority felt a need for further guidance. So really there is not a sure answer to this question. The Government Law Center's program here is a good beginning to deciding on how we should proceed with either guidelines or regulations or legislation. Accordingly, I think it is a big jump and inappropriate to be discussing proposed legislation at this time. We do not know if legislation will do the trick.

I am coming here today to discuss how the New York State Department of Environmental Conservation approaches the issue of assessment and appraisal of

conservation easements. Under the conservation easements statute and the environmental conservation law, the DEC is required to provide an allocation factor for all the conservation easements that are acquired by the state in the Adirondack and Catskill parks. Jim Jensen, who is here today, and staff at the Real Property Bureau, some of whom are here today, are the individuals who actually perform the surveys and the appraisals and the assessments of those conservation easements and all the other acquisitions that the state acquires across the state.

It is my understanding that the Real Property Bureau, in trying to appraise the conservation easements that the state does acquire in the parks, uses a combination of standard guidelines that are on the books with the common law guidelines and case law that exists. It is their opinion that the existing system works well, and that there may not be a need for any kind of guidelines for further instruction on how to assess these conservation easements.

From a lay person's point of view, I have heard many times today that what is needed is a common sense approach. And that makes sense to me. There are different factors and different circumstances that apply to these lands that would be very difficult to try to standardize into one regulation or legislation. It must be dealt with on a case-by-case basis. There may be a need for some type of standardized guidelines because, even if there is a common sense approach, what your common sense approach is may differ from my common sense approach. The standardization might include what elements and criteria should be considered when assessing or appraising these conservation easements. Whatever those guidelines are, you have to build in a case-by-case approach and allow that kind of subjective approach to occur.

As an aside point, in the Wilhelmina case, which has been discussed a couple of times

today, the Appellate Division found that there was no decrease in value to property burdened by a conservation easement. The Court found that the property in question was classified under the Adirondack Park Agency regulations, as a very strict classification and therefore the development of that property would have been very difficult to begin with. When you looked at the easement, it appeared as though the easement was redundant to what the APA regulations already had on the book. Therefore, as a result there was no decrease in the value or the assessed value of that property.

So I think what you need to emphasize here is that when you are entering into these conservation easements you need to make sure, to use the analogy that Tammara used before, that the pencils you give up need to be able to write. That the rights that you get are useful and beneficial to the public and that they are in perpetuity because if you are looking for some kind of a tax deduction from the IRS that is something that they are going to look at.

I think that a very good example of an extremely useful and beneficial conservation easement to the state is the Champion Easement that was recently entered into by the State and that is attached to the back of your package and I would recommend that you take a look at that. It is extremely detailed and I think that the benefits that the public will get from that easement are clear.

Thank you.

The Government Law Center Symposium on Property Assessment and Conservation Easements

TOM FREY
Executive Secretary
New York State Assessors' Association

There is some confusion out there among assessors about the definitions of highest and best use, and current use, for a very obvious reason. Assessors have been trained for the past 200 years that they will assess at highest and best use. About four years ago, it was determined that New York State was a current use state and we were then told that now we have to use current use. It has caused some confusion out in the assessing field.

I tend to agree that if everyone is at current use, then there is no reason for the ag-assessment program. The only concern I have is I am not entirely sure that the ag-assessment values set through a mechanical process through the Office of Real Property Services are correct. Perhaps if we had enough farm-to-farm sales, we could find out what those values really were instead of depending on what type of soil we are looking at.

I am very happy to see the number of assessors that are attending this symposium today. This is an indication that the assessors want training on this type of valuation—not necessarily guidelines, but training—so that they know how to do their job.

Thank you.

The Government Law Center Symposium on Property Assessment and Conservation Easements

PHILIP LAROCQUE
Executive Vice President
New York State Home Builders Association

I represent 3,500 people who produced \$3 billion of revenue for the State of New York as builders. We are at the podium representing one of the stakeholders. I was on the advisory committee for the survey, and have tried to be constructive. There are a few comments that I would like to make here.

The New York State Builders Association is made up of 3,500 builders, developers, renovators, home improvement people, suppliers, associates, and others who employ over 200,000 people. So the comment about having the developers pay for it is totally ridiculous, ludicrous, and outrageous, and we would oppose such an initiative.

I am going to pick on a good friend for a second. I agree that “cows don’t go to school,” but cows do feed the kids that do go to school. If you take that kind of comment to its logical conclusion it suggests that society as a whole does not benefit from our education system and our society as a whole should not pay for that education system. So, I cannot agree with some of my good friends in the environmental and land trust movement in that regard.

I understand that speakers have raised the issue of the cost of community service. I have to refute those kinds of studies, and I have a report that can challenge the methodology used in the cost of community services across the board. My dad

taught me a long time ago that there are two sides to every story. Before you believe that the COCS method is like the Bible—that clearly development costs more for communities to provide services to than open space—talk to me because there is another side to the story. Dr. Ann Davis, an economist at Marist College, came up with just the opposite results. Her study showed that development and growth opportunities clearly provides a positive aspect to the community. As I said, there are two sides to every story, and I am speaking as much as to the policy makers here as to the assessors.

Growth is important to us as an organization but, more importantly, it is extremely important to the State of New York. I have read Andrew Cuomo's comments about the Northeast, as some of you have I am sure, and the economic differences if you carve the State into two. I do not like doing that, to be very honest, because we have a state organization with very strong membership Downstate from Long Island to New York City, as well as up to Niagara Falls. The last thing that I would like to do is disjoin this State, but sometimes you have to do so to make a point. Growth is a joke in Upstate New York, and the kind of comments about how the developer community pays the bill is unacceptable for that reason. We do not have growth in Upstate New York. If you took Upstate New York as a separate economy in this country we would be ranked 49th in economic growth in the country. There is something wrong with that equation. So let us keep those thoughts in mind as we go forward and talk about assessment values and who is going to pay the difference in the shifting of taxes and so on.

We have to look at balancing the extensive land acquisition that the state and local governments have with the ability and desire to enhance conservation easements. The State has a fairly aggressive bond acquisition program—local governments are

getting more and more into this. We also have to look at the value of the tax payer supported acquisition of open space for protection purposes versus the private subsidy, or the private payment if you will.

We have extremely flexible zoning provisions—cluster zoning, incentive zoning, high density bonuses, conservation easements, transfer and purchase of development rights. We do not use those tools enough. That is my message here today.

On the Land Trust Alliance's own report are three examples. I realize it is not exhaustive. One example is if the farmer in Washington County donated 400 acres for an easement, a retired financial planner donated a conservation easement of 1,000 acres near Cooperstown, and another farm family in the Tughill Region donated 600 acres. Where are the developers, significant land owners, in the conservation easement discussions? We are not there. We are not there because, quite frankly, there has not been a focus for us, there has not been real incentives for us to do it. Quite frankly, they are not educated on it and I have been trying to do some of that. But, until those things happen—until we have true tax policy, tax incentives, reasonable stewardship fees by land trusts and conservation easements and better direct contact with my 19 local affiliates around the state with the variety of land trust organizations in this state at the local level—it is not going to happen on our side of the equation. My members own a lot of land in this state. I would like to promote conservation easements as a legitimate tool to preserve open space and wildlife habitat.

We also have to be looking not just at total parcels of land, but reorganizing how subdivisions are designed. We talked about that at an open space seminar a year ago or so at Albany Law School.

You can design a 100 unit, a 50 unit, subdivision on 100 acres a lot more land efficient than you do now. With higher density on 50 acres for all those homes and keeping 50 acres put aside in a conservation easement, not enough emphasis has been placed on partial property easements. That is the kind of tool my membership would be looking at, whether it is because of the pressures in the eastern townships of Long Island or the growth spurts in Monroe County in southern suburbs, or Saratoga or in Westchester, or Rockland, or Dutchess County, those are the kind of tools we should be looking at more. We have a track record of being positive in a lot of these land use tools, and we will continue to be positive.

If everyone, however, keeps talking about how it is obviously very clear that open space costs less to maintain, that is what I am going to spend time on fighting and I do not want to have to do that. Let us get beyond that rhetoric and talk about the land use tools that are going to provide and preserve open space in this state.

Thank you very much.

RICHARD SINNOTT, ESQ.
Counsel
NYS Office of Real Property Services

I know it is late in the day and you would like to get going but, given the importance of this subject, there are a couple of assumptions that have been made today. Whether they have been stated or unstated, I would like to challenge them.

Number one, there have been several references to the supposed analogy between the granting of an income tax break or reduction for the value of the conservation easement and a real property tax exemption for the granting of a conservation easement. If you look at the *Ross* case you will see that the Ross family was able to claim their income tax break over a three-year period, probably on the advice of their accountant rather than taking it in one year, in the form of a charitable contribution of \$1.18 million. Apply that same amount as a real property tax exemption now: if you take that amount and say that is the value of the conservation easement for real property tax purposes, and you treat that as exempt from local taxation, remember that you are then creating a *perpetual* exemption for \$1.18 million. I suggest to you that it is an unfair analogy to say that because you can get a charitable contribution for the grant of a conservation easement for income tax purposes you should be entitled to a comparable exemption for real property tax purposes.

Secondly, I would like to question the discussion earlier today about the lack of a correlation in some circumstances between government services provided to particular parcels of real property and the taxable assessed value of that real property. The real

property tax in New York State today remains an ad valorem tax; we could go to a user fee or a user-based service system, but that is a much larger issue than the one we are discussing here today and it is an issue for the state's elected representatives. Clearly there is no necessary correlation under our current system of taxation between the amount you pay in taxes and the value of the governmental services that you may receive.

Earlier today, I heard someone say that as much as one-third of all real property is now exempt from taxation, and I just want to point out that, in 1933, New York State abandoned the personal property tax when the law got to the point where there was more personal property exempt than taxable. I think we really have to keep that in the back of our minds as we proceed down the path that every time there is some non-tax related issue the answer is an exemption for real property from the local tax base. Obviously there is no real present threat that the real property tax will be abolished but, as you assessors know better than most of us, there has been a substantial erosion of the local tax base due to the increase in the number of exemptions over the past ten to twenty years.

Finally, I would like to add an apology from my own agency because part of the confusion over highest and best use versus current use that Tom alluded to came right from the State Board. For the longest time, the stated but unsubstantiated assumption throughout the agency was that the standard in New York State was that of "highest and best use." When we were finally asked to render a formal opinion though, we found that for many years the courts had uniformly said that the standard in New York State is value based on current use except in that limited circumstance, mentioned previously, of vacant land that is lying idle and unused. Hopefully we can move forward, get this straightened out and work with you and our

own appraisal staff to ensure the routine application of this standard in both local and state appraisal matters.

Thank you very much.

The Government Law Center Symposium on Property Assessment and Conservation Easements

TAMMARA VAN RYN

Director

Land Trust Alliance of New York Program

I started out talking this morning about ‘writing our signature on the land,’ and Sandy Treadwell talked about what Tom Wolff sees as our signature on the land, which, as he calls it, is “Seven-Eleven Land.” With all due respect to everyone in New York who talks about what fine laws we have on the books, SEQRA and our innovative land use controls are failing us today in the face of the unprecedented growth that we have in this State. We cannot buy it all with the Clean Water/Clean Air Bond Act, or with the EPF. We cannot zone it all even with innovative land use controls. If we keep thinking that our old laws and rules are going to work for the kind of growth that we are facing today, we are going to end up with a landscape signature that says “Seven-Eleven” or whatever the convenient store du jour will be in New York State.

I do not think that this is a landscape that we want to have and a signature that we want to leave. So, I submit to you that what we have to do is think about adding some tools to our arsenal in order to write a more land ethic-based signature on the land.

Conservation easements provide one such tool. As I talked about earlier today, there are over 200,000 acres of privately protected land in this state. These acres came at almost zero cost to the municipalities, and at almost zero cost to the State of New York. The private land conservation groups, funded with private philanthropic

dollars, bear the management responsibility for these lands and the private landowners have given their rights to the public. The amount of land that is privately protected in New York is almost equivalent to the amount of acreage the State has under easement.

The land that is privately protected in New York is equivalent to about 75% of the entire New York State park system and, to-date, it has been protected because land owners are willing to give up those rights. But, land owners are not able to do everything for free either, just like our municipalities are not and our State government is not. What we found out today is that to provide more incentives for land owners we do not just need a technical fix such as how to work with assessors on whether the easement is on the assessment card, or what standards and practices the assessors are using for assessment. It goes beyond the technical issues of assessment to questions directly of public policy, to our state legislature and to our state governor. The question is, do we want to have more tools in our arsenal and do we want to do something more so that we write a landscape, a picture, a signature on the landscape that we can be proud of?

Today some very real options for new tools were put forward: the ability to grant municipalities the right to do their own exemption legislation like Clifton Park, setting up some sort of State-funded reimbursement program so that landowners are not bearing all the cost of providing these benefits to the communities, and others.

We have had a great discussion here today. I really appreciate everyone's ability to be candid and not to take things personally. If we can continue this dialog we can come up with the tools that will leave the landscapes we will be proud of.

LAURA HARTMAN

Counsel–Senate Environmental Committee

New York State Senate

Well it is tough to go last, and I know everybody is probably tired. I am very happy to hear so much use of common sense today. I hope everybody, as we go on through this process, continues to find common sense so important.

When I first started law school, in orientation they make you sit in your first mock class to introduce you to the Socratic method. A very imposing professor started our orientation to the Socratic method. We had been assigned a contract in which the dissenting opinion was written by Justice Cardozo. I remember it talked about the ‘punctilio of honor’ and it was all about fiduciary duty. The professor called on me and asked what I thought the state of the law was, based on the case, and I said “Well I don’t know what the law is, but common sense tells me” I did not get much further than that. He was so excited that he practically jumped out of his skin, and said “That is great and I hope you keep that through your whole career.” He ended up hiring me as a research assistant almost, I think, based on that one interchange. He was so excited that I had common sense or was at least willing to try to use it.

The point was made that there are two main issues that we have been discussing today. One is the issue of whether the State should be providing additional guidance. Working on the Senate Environmental Conservation Committee, obviously for me the issue is whether the people would like some additional State

guidance and whether Senator Marcellino, chairman of the Senate Committee and who I work for, should be looking at that issue.

I was very glad to hear Assemblyman Brodsky say that he was skeptical about additional State legislation because that is my initial reaction as well. I am going to hold onto that skepticism based on what I have heard today. It does not sound like what we really are looking for is something that we have put in at the statutory level, at least not as a state statute. One of the morning speakers talked about not having a “one size fits all” solution. Based on what I have heard today, it sounds like there already is a uniform approach and that it is exercised or implemented on a case-by-case basis. I do find myself wanting to know a lot more about what education assessors currently receive. It does seem to be a big issue—the whole problem of the current use versus the highest and best use and whether people really feel like they have all the tools they need to use in a way that works for conservation easements. The assemblyman, as far as I am concerned, is right on target about perhaps not singling out conservation easements. There are a lot of factors that can reduce or add to the values of these properties. I want to know a lot more about the education issue and whether there is something we can do at the state level to help assessors deal with this issue working within the structure that already exists. Assemblyman Brodsky was heading in one direction, trying to find out if there is additional information that we can be collecting and making available or perhaps additional money is needed for education. I do not know who pays for the education that you get right now and how that really happens, so I have a lot of questions. I will have to keep in touch with Patty Salkin and the Government Law Center to find out more.

The other issue was the shift in the tax burden, which is, obviously, the more emotional if not the more difficult and complicated issue. I almost hate to go there,

it is such a touchy issue. We have been jumping back and forth between talking about the situation where you have a private land owner who has donated an easement on their own back yard, essentially on fairly small properties, to situations where the State is going in and buying very large easements that are designed to provide, as Rob Davies was pointing out, very well laid out public benefits as we did in the Champion purchase. I find it a little difficult to reconcile those in terms of who should pay. It is obviously very different—not all open space is created equal.

As big a fan and supporter I am of open space, whether the State would want to come in and pay for any landowner who wants to give away the development rights on their property I think is questionable. It would almost need a process, where you go in and sit and say well yes, these are either priority parcels or meet priority objectives within this area. And if that particular case meets those objectives, say we have a water quality or a historic preservation issue in that area, then maybe there are some opportunities for state monies.

Andy and Tammara said they would like to see either an extension of the 480a program or the creation of something similar. Obviously, it is very difficult because you have got to come up with the money to pay for that somehow and the localities clearly do not want it to come just off their backs. I look forward to hearing more on this. It is a very different issue from the question of are we making conservation easements work in the private sector and is the assessment process helping or hindering that process. The more basic questions of whether there is not enough education or enough tools or enough comparable sales available for comparisons are easier issues to get our hand around.

Thank you very much.