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REALIZING THE POTENTIAL OF CONSERVATION EASEMENTS IN NEW YORK STATE: OPPORTUNITIES AND OPTIONS FOR INCENTIVES THROUGH REFORM OF PROPERTY ASSESSMENT

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Patricia E. Salkin, Esq.
Associate Dean and Director

Justina R. Cintrón, Esq.
Staff Attorney

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Appendix A

Executive Summary

In 1999, the Government Law Center received grants from the Prospect Hill Foundation and the Rural New York Grant Program for the purpose of examining the state of the law with respect to the potential incentives for the use of conservation easements as an opportunity for preserving open space, curbing sprawl, and promoting quality communities in New York. It was initially determined that the research would focus primarily on the issue of how lands protected with conservation easements are assessed across the State, as property tax changes could provide powerful incentives for the use of conservation easements. This narrow issue was selected because current state statutes and regulations in New York fail to provide specific guidance, court cases are inconsistent, it was believed that practices by assessors varied from jurisdiction to jurisdiction, and there were lessons to be learned from other states. The lack of coordinated and consistent assessment practices proved to be the most controversial issue tackled in the research and at the symposium that followed.

The Government Law Center worked with an advisory committee consisting of representatives from the Association of Towns of the State of New York, the Land Trust Alliance of New York State, the New York Conference of Mayors, the New York State Assessors Association, the New York State Builders Association, the New York State Department of Environmental Conservation, and the New York State Office of Real Property Services. Representatives from these organizations assisted with the research design, the development of a written survey of all assessors in New York, and a statewide symposium held at the Empire State Plaza in Albany, New York, in December 1999.

This study highlights the results of a fifty state statutory survey of how property tax incentives are used to encourage private landowners to place conservation easements on their land. A review of current case law follows, as well as a discussion of the results of the survey of

municipal assessors. Although the proceedings of the December 1999 symposium are available as a separate publication, where particularly relevant issues are discussed, the proceedings are referenced herein. The report concludes with a series of options for lawmakers and policymakers for providing meaningful property tax incentives for landowners to encourage voluntary conservation of land through these easements.

The Government Law Center is grateful to the many people who assisted with the research and preparation of this report, including Siena College student Kara Bitar and University at Albany student Joy Ewing.

I. Introduction

A conservation easement is a private land use restriction entered into voluntarily for the purpose(s) of preserving open space, important environmental resources, and significant historic, scenic, or architectural conditions.[1] The easement is created when the owner of a piece of land transfers certain rights to a third party, such as a public agency, an historic preservation organization or a land trust, while still retaining other rights.[2] Currently forty-eight (48) states and the District of Columbia authorize the use of conservation easements by statute.[3] The public

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[1]Janet Diehl, et al.,The Conservation Easement Handbook (10th ed. 1998).

[2]Id.

[3]See Ala. Code § 35-18-2 (2001); Alaska Stat. §§ 34.17.010 to 34.12.060 (Michie 2000); Ariz. Rev. Stat. Ann. §§ 33-271 to 33-276 (West 2000); Ark. Stat. Ann. §§ 15-20-401 to 15-20-410 (Michie 1999); Cal. Civ. Code §§ 815 to 816 (West 1982); Colo. Rev. Stat. §§ 38-30.5-101 to 38-30.5-110 (2000); Conn. Gen. Stat. Ann. §§ 47-42a to 47-42c (West 1995); Del. Code Ann. tit. 7 §§ 6901 to 6906 (1999); D.C. Code Ann. §§ 45-2601 to 45-2605 (1981); Fla. Stat. Ann. § 704.06 (West 2000); Ga. Code Ann. §§ 44-10-1 to 44-10-8 (2000); Haw. Rev. Stat. §§ 198-1 to 198-6 (2000); Idaho Code §§ 55-2101 to 55-2109 (2000); 765 Ill. Comp. Stat. 120/0.01 to 120/6 (West 1993); Ind. Code Ann. §§ 32-5-2.6-1 to 32-5-2.6-7 (West Supp. 2001); Iowa Code Ann. §§ 457A.1 to 457A.8 (West 1997); Kan. Stat. Ann. §§ 58-3810 to 58-3817 (1999); Ky. Rev. Stat. Ann. § 382.800 (Banks-Baldwin 2001); La. Rev. Stat. Ann. §§ 9:1271 to 9:1276 (West 1991); Mass. Gen. Laws Ann. ch. 184, §§ 31 to 34 (1991); Md. Code Ann., Real Property § 2-118 (2000); 33 Me. Rev. Stat. Ann. tit. 33, §§ 476 to 480 (West 1998); Mich. Comp. Laws § 324.2140 to § 324.2144 (2000); Minn. Stat. Ann. §§ 84C.01 to 84C.05 (West 1995); Miss. Code Ann. §§ 89-19-1 to 89-19-15 (1999); Mo. Ann. Stat. §§ 67.870 to 67.910 (West 1998); Mont. Code Ann. §§ 76-6-201 to 76-6-211 (2001); Neb. Rev. Stat. §§ 76-2,111 to 76-2,117 (2000); Nev. Rev. Stat. §§ 111.390 to 111.440 (1999); N.C. Gen. Stat. §§ 121-34 to 121-42 (2000); N.H. Rev. Stat. Ann. § 477:45 (2000); N.J. Stat. Ann. 13:8B-1 to 13:8B-9 (1991); N.M. Stat. Ann. §§ 47-12-1 to 47-12-6 (Michie 2000); N.Y. Agric. & Mkts. Law §§ 300 to 309 (McKinney 1991), N.Y. Envtl. Conserv. Law §§ 49-0301 to 49-0311 (McKinney 1997); Ohio Rev. Code Ann. §§ 5301.67 to 5301.70 (West 2000); Okla. Stat. Ann. tit. 60, §§ 49.1 to 49.8 (West Supp. 2000); Or. Rev. Stat. §§ 271.715 to 271.795 (1999); 32 Pa. Stat. Ann. §§ 5001 to 5008 (West 1997); R.I. Gen. Laws §§ 34-39-1 to 34-39-5 (1995); S.C. Code Ann. §§ 27-8-10 to 27-8-80 (Law Co-op. 2000); S.D. Codified Laws Ann. §§ 1-19B-56 to 1-19B-60 (Michie 2000); Tenn. Code Ann. §§ 66-9-301 to 66-9-309 (1999); Tex. Nat. Res. Code Ann. §§ 183.001 to 183.005 (West 1993); Utah Code Ann. §§ 57-18-1 to 57-18-7 (2000); Va. Code Ann. §§ 10.1-1009 to 10.1-1016 (Michie 2000); Vt. Stat. Ann. tit. 10 §§ 821 to 823 (2000); Wash. Rev. Code Ann. § 64.04.130 (West 1994); W. Va. Code §§ 20-12-1 to 20-12-8 (2000); Wis. Stat. Ann. § 700.40 (West Supp. 2000).

purposes underlying these statutes include protecting and preserving open space, farmland, historically or architecturally significant sites, natural habitats, endangered plants and wildlife, and certain recreational areas.[4]

The use of conservation easements is increasing across the United States. In the ten-year period between 1988 and 1998, land trusts protected 378% more land with conservation easements for a total of 1.4 million acres.[5] The reasons for the increased popularity of easements are varied. Conservation easements often cost less for public agencies to purchase than fee simple interests in land. In addition, conservation easements are flexible and allow protection strategies to be crafted for the specific parcel of land. They are often attractive because the land remains in private ownership, allowing owners to protect the land and to continue to live on the land using it for farming, forestry and other activities. Furthermore, landowners may receive significant income and estate tax benefits by donating a fee simple or less than fee simple interest in their property.[6]

The discussion of conservation easements now is particularly timely given the interest by the Governor and the Legislature in quality communities initiatives.[7] In fact, one of the recommendations contained in the Quality Communities Interagency Task Force report is to "provide a Conservation Donor Credit to further the conservation goals of the State and its local governments by providing a tax credit to encourage landowners to donate real property or other interests in real property, such as conservation easements to nonprofit organizations or to

[4]Kemble Hagerman Garrett, "Conservation Easements: The Greening of America?" 73 KY. L. J. 255 (1984).

[5]Martha Nudel, "Conservation Easements Emerge as the Decade's Top Land Protection Tool," Exchange Newsletter, Land Trust Alliance, Winter 1990, at 5.

[6]Id.

[7]Quality Communities Interagency Task Force, State and Local Government Partnering for a Better New York (January 2001).

governmental entities for conservation purposes."[8] Conservation easements are one significant resource in the smart growth toolbox for protecting threatened lands and resources from unchecked sprawl. Overwhelmingly, people across the country and across New York State continue to reinforce their belief, at the ballot box, that open space is a resource that must be preserved.[9] This is consistent with the national trend as evidenced by the November 2000 ballot initiatives where 257 open space measures yielded a 78.2% passage rate (201 measures passed), up 15.19% from 1988.[10] While open space measures were on six statewide ballots and on local ballots in every region in the country, most were in the northeast.[11]

II. The New York Experience

A. *The State Enabling Statute*

Article 49 of the Environmental Conservation Law, enacted in 1983, authorizes the use of conservation easements in New York. The statute provides broad language in support of the use of conservation easements, stating that its purposes include: the protection of the state's "environmental and man-made resources," the "preservation of open spaces, the preservation, development and improvement of agricultural and forest lands, the preservation of areas that are significant because of their historical, archaeological, architectural or cultural amenities," as well

[8] Id. at 57.

[9] Land Trust Alliance, Voters Invest in Open Space: 1999 Referenda Results (2000). Reporting that of the 102 Referenda in 22 states in 1999, 92 (or 90%) were passed supporting open space measures...three of these referenda were in New York (Suffolk County, the Town of Brookhaven, and the Town of Southold). This number was up from 1998, where 84% of the ballot initiatives passed, including seven in New York (Town of East Hampton, Town of Huntington, Town of Riverhead, Town of Shelter Island, Town of Southampton and Town of Southold) See Land Trust Alliance, Voters Invest in Open Space, 1998 Referenda Results (1999).

[10] Phyllis Myers and Robert Puentes, "Growth at the Ballot Box: Electing the Shape of Communities in November 2000," Brookings Institution Center on Urban and Metropolitan Policy (February 2001).

[11] Id. at 21.

as the improvement of "recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state."[12] Under the statute, conservation easements may be of limited or perpetual duration and may only be held by a public body or not-for-profit conservation organization.[13]

There have been several issues identified over the years with respect to the practical application of the statute. One question often asked is how many acres are protected by conservation easements. While the Department of Environmental Conservation (DEC) maintains a registry or written record of all conservation easements in New York State, these easements are also recorded along with a multitude of other land records with the county clerk in the county where the easement is located.[14] Although in many ways the DEC registry is the central registry for conservation easements in the State, it is not perfect since the agency relies on others to voluntarily send in easements not owned by the State for registry purposes. This has made research into the number of easements and the amount of acres protected by these easements somewhat anecdotal. Although the DEC's most recent list contains information relative to approximately 700 easements (including the name of the municipality where the easement is located, the book and page number where is it recorded, and the names of the grantor and grantee),[15] according to surveys conducted by the Land Trust Alliance, there are an unknown number of additional easements in effect across the State. In a 1998 survey of land trusts across the State, the Land Trust Alliance was able to identify that local and regional land trusts had protected 63,000 acres with conservation easements and that national organizations, such as the

[12]N.Y. Envtl. Conserv. Law § 49-0301 (McKinney 1997).
[13]Id. at § 49-0305 (1), (3)(a).
[14]Id. at subdivision 4.
[15]Quality Communities Interagency Task Force, supra note 7, at 57.

Nature Conservancy, had protected tens of thousands more acres.[16]

The placement by a landowner of a conservation easement on his or her property is a voluntary action. Therefore, to be used as an effective tool, the incentives for landowners to voluntarily place development restrictions on their property must be of the level to make it "worth their while" to do so. New York does provide some incentives, including: an income tax deduction for the donation value of the easement[17] and a reduction in the estate tax.[18]

B. *Federal Incentives Applicable in New York*

In addition to the state incentives, the federal government has recognized that a conservation easement can be considered a tax-deductible, charitable gift provided that the easement is perpetual and is donated "exclusively for conservation purposes" to a qualified conservation organization or public agency.[19] Conservation easements may prove to be an effective estate planning tool for those individuals who may have significant wealth in the value of real property. Where a properly placed conservation easement is on land, the heirs to the estate will generally realize a decrease in what might have otherwise been the estate tax burden without the easement. The easement can have the effect of reducing the fair market value of the land because the development rights have been donated or restricted.[20] Although federal tax policy reform is beyond the scope of this paper, federal-state partnerships can be critical for effective private land conservation strategies.

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[16]New York Land Watch, Land Trust Alliance of New York, Vol. 5, No. 3 at 1 (Fall 1998).

[17] N.Y. Tax Law § 1009, Appendix to 26-A § 2522 (a)(1), (a)(2), (d) (McKinney 1999); see also IRC § 170(h).

[18]N.Y. Tax Law Art. 26 Appendix IRC § 2031 (c) (McKinney 2000); see also N.Y. Tax Art. 26 Appendix IRC § 2055(f) (McKinney 2000).

[19]Diehl et al., supra note 1, at 8.; IRC § 170(h)(2)(C); see IRC § 170(h)(4)(A).

[20]Id.; see IRC § 2031(c).

C. *Local Governments Designing Programs of Their Own*

Some local governments have gone so far as to establish their own locally-initiated open space protection programs. Although in certain cases there remain questions regarding legal authority for the implementation of specific measures, these municipalities are making an important statement regarding the value of open space for quality of life and the economy within the locality.

In the past two years, various ballot initiatives supporting open space and conservation programs in New York State were introduced and passed. In 1999, of the 92 referenda passed nationally supporting open space measures, three were passed in New York (Suffolk County, the Town of Brookhaven and the Town of Southold).[21] Just this past year, of the 208 ballot initiatives that have been introduced so far, 175 referenda passed supporting conservation efforts,[22] including twelve (12) in New York.[23] The January 2001 report by the Quality Communities Interagency Task Force recommends, among other things, that the State authorize municipalities to create open space districts whereby landowners who voluntarily place property within the district for ten years would qualify for tax relief.[24]

At least three municipalities in New York have established conservation easement programs by way of local law. The Town of Perinton in Monroe County, the Town of Orchard Park in Erie County and the Town of Clifton Park in Saratoga County each have enacted similar laws[25] which require town assessors to take into consideration conservation easements for real

[21] Land Trust Alliance, Voters Invest in Open Space: 1999 Referenda Results (2000).

[22] Land Trust Alliance, Voters Invest in Open Space: 2000 Referenda Results (2001).

[23] Id. See referenda from the Towns of Bedford, Clarkstown, Irvington, Lewisboro, North Hempstead, North Salem, Oyster Bay, Pound Ridge, Somers, Warwick and Yorkstown.

[24] Quality Communities Interagency Task Force, supra note 7, at 58.

[25] It is important to note that the easement programs created under these ordinances are not permanent easements within Article 49 of the Environmental Conservation Law as discussed

property tax assessment purposes. In an effort to preserve and enhance valuable natural and scenic resources, these laws promote and encourage the private conservation of open space through tax-based incentives.

For example, under all three programs, an owner who agrees to place a conservation easement on his or her land "agrees to retain the character and use of the land . . . for the term of the easement" by "leaving the land as it is [or] actively engaging the land in agricultural activity."[26] A benefit of participating in any of these three programs is that neither one grants public access to the land subject to the conservation easement nor forces the landowner to give up any of his or her rights as a private landowner.[27] Additionally, in return for placing this restriction on his or her property, the landowner is entitled to preferential treatment by the municipality when his or her property is assessed for real property tax.[28] In all three towns, once a landowner has agreed not to develop his or her property, the assessor is required to "take into account and be limited in limitation on the future use of the land."[29]

While these programs benefit their communities by preserving viable natural resources at little or no cost to local municipalities, they do not "provide a long-term solution to open space needs."[30] Additionally, although a land owner has the right to cease his or her participation in these programs, he or she is required to pay back the tax benefit received as well as a penalty. Moreover, while two of the programs do not have a minimum duration in which the conservation

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earlier in this paper.

[26]Town of Perinton, Open Space for Perinton, Conservation Easements 3 (1996).

[27]Id. at 4.

[28]Id.

[29]Town of Perinton Local Law 103, ch. 65 (1976); Town of Clifton Park, Local Law No. 12 of 1996, ch. 125 Conservation Easement Law (1996); Town of Orchard Park, Local Law No. 1 of 1992, ch. 52 Conservation Easements (1992).

[30]See Town of Perinton, supra note 19, at 4.

restriction must exist on the subject land, the Town of Clifton Park requires a landowner to maintain the conservation easement for a minimum of fifteen years.[31] Therefore, although the tax incentives provided under each of these programs are attractive, landowners may find that the consequences of placing a conservation restriction on their land outweigh the benefit of conservation.

D. *The Value of Land Protected with a Conservation Easement*

One technique that could prove effective in the incentive package is the reduction in assessed value of the land that is protected with the conservation easement. New York lacks both clear statutory and regulatory guidance on this issue, and the public, professional and judicial perceptions about the availability and application of this specific incentive remain confused and seemingly at odds.

Professional real-estate appraisals often show that conservation easements lower the value of the land on which they are placed.[32] This is due to the fact that land on which development is restricted generally has a lower market value than land where development is permitted. However, this decrease in value is not always reflected in the assessment of the land for purposes of the local tax rolls. There is routinely an expectation by landowners that the assessed value of the land will be reduced because their development rights have been restricted. However, there is no clear statutory authority supporting or denying this proposition, and there is no uniform approach by local assessors across the State. To further complicate the matter, case law in New York supports the notion that assessed value is not always decreased by virtue of the

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[31] See Town of Clifton park, supra note 23, at §125-10.

[32] Appraising Easements: Guidelines for the Valuation of Conservation Land and Historic Preservation Easements, Land Trust Alliance and the National Trust for Historic Preservation, 1999.

conservation easement.

In one case, the Appellate Division, Third Department, upheld a finding that a conservation easement on land located in Essex County did not diminish the value of the taxpayers' property since the assessor's determination was supported by evidence that the highest and best use of the land was seasonal recreational.[33] Furthermore, the court found that the subject parcels were unique, and therefore, could not be appraised in comparison with other parcels for assessment purposes. A second case, decided in 1999 by the same court, concerns a conservation easement on a parcel of land in Franklin County.[34] Again, the court reiterated that the easement does not necessarily reduce, for property assessment purposes, the value of the property in question. In analyzing these two cases, several facts were similar: 1) in both cases the landowners reserved certain rights even though they donated easements; 2) both cases involved land in the Adirondack Park; and 3) both cases were decided by the same mid-level Appellate Division, whose jurisdiction is persuasive, but not mandatory, outside of the Third Department.[35]

E. *Survey of Assessors in New York State*

There is no clear rule or formula for assessing conservation easements in New York other than a case-by-case review by locally elected assessors.[36] A survey of New York's 1,464 assessors, conducted in May 1999, yielded a return of 18% (or 269 responses). A copy of the

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[33]Matter of Adirondack Mountain Reserve v. Board of Assessors of the Town of North Hudson, 99 A.D.2d 600 (3rd Dep't 1984).

[34]Matter of Wilhelmina duPont Ross v. Town of Santa Clara, 266 A.D.2d 678 (3rd Dep't 1999).

[35]The Third Judicial Department covers the following counties: Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster.

[36]Comments of Edye McCarthy, Past-President, NYS Assessors Association, The Symposium on Property Assessment and Conservation Easements, December 3, 1999 (proceedings published by the Government Law Center, May 2000).

survey instrument along with the raw data is included as Appendix A.

1. Knowledge of the Existence of a Conservation Easement

One of the criticisms regarding assessment of conservation easements is that there is no reporting system to inform appropriate local officials of the existence of an easement.[37] Conservation easements must be recorded in the county registry of deeds and a copy of the easements must be sent to the State Department of Environmental Conservation. There is no similar notification requirement at the town, city or village level. While, arguably, the landowner who has voluntarily placed the easement on his or her property (and who would likely desire a lower property assessment) might notify the assessor himself or herself, there is no uniformity of process. This was evident by the survey results, with just under 15% of the responding assessors indicating that they were uncertain as to whether there were even 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 easement on a piece of property in their jurisdiction. Most assessors indicated that they were notified about the easement by the county or a landowner.

2. Guidance to Deal with Assessing Land Protected with an Easement

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

[37]New York Environmental Conservation Law § 49-0305 (4) requires conservation easements to be "recorded in the office of the recording officer for the county or counties where the land is situated...." Under Real Property Law § 333, the recording officer shall not record or accept for recording any conveyance of real property unless accompanied by a transfer report. Recording in compliance with this section is then forwarded to the local assessor pursuant to Real Property Law § 574, thereby giving him or her notice of the easement. Under the regulations, "conveyance" for purposes of recording does not include easements. Therefore, where the assessor would be privy to notice of other recorded transfers of real property, there is no automatic notification system for recording of easements. See 9 NYCRR 185-1.1 (a)(61).

easements. Several assessors indicated that local guidelines exist. Almost 85% of the responding assessors were of the opinion that some level of government should provide this guidance, with a more than two to one ratio believing that the State should provide guidance as opposed to the locality. Approximately 50% of the respondents suggested guidelines should be developed by the Office of Real Property Services, and 43% indicated that more education was needed on the subject.

3. Assessment Practices Lack Uniformity in Approach

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 only one respondent indicated that it would increase the value. As to assessments on lands adjacent to those lands protected by conservation easements, 63.5% of those responding indicated that the easement should not affect the market value of adjacent lands. Of the remaining 36.5% who believe that there would be some effect, by a margin of almost five to one assessors believe that the market value of adjacent land would increase when a conservation easement exists on abutting property.

III. Views from Other Jurisdictions

Most states provide statutory authorization for the use of conservation easements.[38] Unfortunately, too many of these, like New York, fail to squarely address the issue of how land protected with these easements is to be valued for purposes of property assessment. For example, in Georgia, the law provides that if a conservation easement is placed on land, the landowner

[38] Supra note 3.

may qualify for a property tax reduction.[39] In Maryland, if a landowner donates an 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."[40] The Maryland law is further explained in a 1995 procedure opinion issued by the Department of Assessments and Taxation and provides that the assessor should attempt to determine whether the existence of public or private easements has any impact on market value.[41] The opinion goes on to explain that some easements may impose severe restrictions and have a measurable effect on value, while others may not have a measurable impact but may require some recognition by the assessor based upon the principal of substitution.[42] The opinion further provides that in the case of private easements, the assessor must consider whether the restriction is self-imposed and easily removable.[43] While providing some guidance, a typical landowner may still be unable to conclusively predict how the easement would, if at all, affect the assessed value of the property.

There are some states, however, that do provide specific language either within the statute or within implementing regulations. For example, Virginia's Conservation Easement Act provides:

> Assessments of the fee interest in land that is subject to a perpetual conservation easement . . . shall reflect that 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. To 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 (i) shall be based only on

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[39]Ga. Code Ann. §44-10-8 (2000); Land Trust Alliance, Winter 1999 Exchange Newsletter.

[40] Md. Code Ann., Tax-Property § 8-219 (2000).

[41]State of Maryland, Department of Assessment and Taxation, Procedure Opinion on Valuation, Issued 9/4/85.

[42]Id.

[43]Id.

uses of the land that are permitted under the terms of easement and (ii) shall not include any value attributable to the uses or potential uses of the land that have been terminated by the easement.[44]

The Property Taxation Assessment Law[45] in California 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."[46] The statute then provides four pages of detail on how to compute 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.[47] This value is then reduced, by statute, applying what is called a "damage factor" caused by the granting of the conservation easements.

An implied reduction in assessed value is found in the Alaska statute that provides:

> 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 the use subject to the conservation easement and may not be assessed as though it was not subject to the conservation easement.[48]

In Minnesota, the statute specifically indicates that, "Real property which is subject to a conservation restriction or easement shall be entitled to reduced valuation,"[49] yet no details are provided as to how much of a reduction or how assessors are supposed to compute the reduction.

Only one state specifically indicates in statute that conservation easements do not affect

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[44]Va. Code Ann. § 10.1-1011 (Michie 1998).
[45]Cal. Revenue and Tax Code § 423 (West 1999).
[46]Id.
[47]N.C. Stat. § 105-283 (1998).
[48]Alaska Stat. § 29.45.062 (Michie 2000).
[49]Minn. Stat. Ann. § 273.117 (1998).

property assessment. The Idaho laws provide that, "The granting of a conservation easement across a piece of property 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."[50]

This survey of state authorizing acts demonstrates that while, in theory, public policy supports the use of conservation easements (since forty-eight states and the District of Columbia make specific statutory provision for such), and while it is true that almost half of the states have adopted the Uniform Conservation Easement Act,[51] there is no uniform approach to the assessment of land protected with conservation easements. Furthermore, from a review of the secondary source literature, while trends support the use of easements as an effective tool for preserving critical and important open space lands, lawmakers, advocates, assessors and other stakeholders have overlooked the necessity of detailing how the real property protected by these politically popular easements is to be assessed for tax roll purposes. Addressing the issue of real property assessment for lands protected with these easements calls into play the inter-jurisdictional dynamics and state-level policies that may have the effect of reducing the municipal tax rolls absent other measures to deal with the implementation of a policy supporting across the board reductions in assessed value. It is timely to examine these issues now since the use of easements is still relatively new and state statutes and regulations may not have caught up to their growing popularity. These issues will be discussed in greater detail in the following section on options for reform.

[50]Idaho Code § 55-2109 (1998).

[51]Uniform Laws Annotated Vol. 12 Civil Procedure and Remedial Laws.

IV. Options for Reform

This section of the report highlights the options for reform that were identified through the Center's research, including consideration of approaches in other states, feedback from the survey conducted of all assessors in New York, and comments from the December 1999 symposium held for the purpose of discussing these issues.[52]

A. *Amend State statute to provide specific guidance and/or formulas for assessing lands protected with conservation easements, as well as adjacent lands*.

One option that would provide clear direction to assessors, as well as provide landowners with notice as to anticipated assessments, would be to provide specific guidance and/or a formula to be used by assessors in valuing land protected with conservation easements. This approach has many positive features, including memorializing state policy with respect to the appropriate valuation of land protected with a conservation easement. After all, proponents assert that the voluntary placement of a conservation easement on private property yields a significant public benefit. It would also remove some, although not all, of the wide discretion and varied approaches that are currently employed across the State.

The drawbacks, however, to such an approach are many. The ability to reach consensus through the legislative process with so many stakeholders may not prove fruitful. Even if a compromise, legislative approach could be reached, statutory language once adopted is often difficult to revisit. While proponents of this approach might prefer to see the assessment practices legislated or regulated with minimal amounts of discretion left to assessors, the fact remains that each parcel of land is unique; unique to itself and unique to its surroundings. This aspect of valuation for assessment purposes by its very nature is exactly what assessors are

[52] Separate published proceedings are available from the Symposium.

trained and retained to do. Therefore, it is unlikely that a statutory approach will truly address the crux of the concerns that have been raised by some of the stakeholders. Furthermore, the State Legislature has already adopted broad authorizing legislation for conservation easements and for real property assessment, leaving it to the Department of Environmental Conservation and the Office of Real Property Services to address the appropriate details through the rule making process.

B. *Promulgate regulations setting forth guidance and procedures for assessors who encounter lands protected with conservation easements.*

Under section 202 of the Real Property Tax Law, the Office of Real Property Services (ORPS) has the authority to "furnish assessors with . . . information and instructions as may be necessary or proper to aid them in making assessments, which instructions shall be followed and compliance with which may be enforced by the board." To that end, ORPS has the authority to "adopt and amend . . . rules, regulations, orders and determinations, not inconsistent with the law, as may be necessary for the exercise of its powers and the performance of its duties." Under the auspices of its authority in section 202, ORPS has established guidelines and procedures for assessors and assessment in New York through regulations[53] and agency rules.[54]

A second option would be for ORPS to promulgate regulations establishing procedures and guidelines for assessors to value lands protected with conservation easements. By providing guidance through regulation, there would be a uniform, statewide approach to assessing conservation easements without the need for legislative approval. A drawback to this option is that there is currently no meeting of the minds on how to provide for these guidelines and

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[53]N.Y. Comp. Codes R. & Regs. tit. 9, §§ 185 to 201 (2000).

[54]Office of Real Property Services, Rules for Real Property Tax Administration parts 185 to 201, at http://www.orps.state.ny.us/legal/rules/index.htm (visited February 2001).

procedures. However, one suggestion might be for ORPS to set up an advisory committee to provide proposed guidelines and/or recommendations to the Chair of ORPS for consideration as an amendment to the current regulations. In addition ORPS could include training on valuing lands with conservation easements within its current continuing education requirements.

C. *Amend the regulations to include conservation easements in the definition of "conveyance," requiring landowners to file a transfer report containing the necessary data for assessment purposes.*

As noted earlier, New York Environmental Conservation Law § 49-0305 (4) requires conservation easements to be "recorded in the office of the recording officer for the county or counties where the land is situated . . . ." Pursuant to Real Property Law § 333, the recording officer shall not record or accept for recording any conveyance of real property unless accompanied by a transfer report. Where a landowner properly records a conveyance of real property in compliance with this section, a copy of the transfer report containing the necessary information for tax assessment purposes is then forwarded to the local assessor giving him or her notice of the easement.[55] However, under the regulations, "conveyance" for purposes of recording does not include easements.[56] Therefore, where the assessor would be privy to notice of other recorded transfers of real property, there is no automatic notification system for the recording of easements.

A third option would be to amend title 9, subpart 185-1.1(61) of the Code of Rules and Regulations to include conservation easements for purposes of recording, providing that landowners with conservation easements fill out transfer reports which are then forwarded to the assessor notifying him or her of the easement for real property tax purposes. The benefit of this

[55]N.Y. Real Prop. Law §574 (McKinney 2000).
[56]N.Y. Comp. Codes R. & Regs. tit. 9, §185-1.1(a)(61) (2000).

option is that where a landowner wishes to have his or her conveyance of the easement properly recorded, a transfer report would be included in the record and sent to the assessor giving notice of the conservation easement. In addition, municipalities could maintain a more accurate record of the amount of lands being protected through these easements in their communities.

D. *Adapt "current use" laws, such as the forestry assessment and/or agricultural assessment laws in New York to conservation easements*.

The Forest Tax Law (Section 480-a) and the New York Agricultural District Law were enacted in the 1970's to encourage farmers and forest stewards to maintain the agricultural use of their lands, and to protect the socio-economic stability and growth of local communities.

A fourth option for New York would be to amend the eligibility requirements of Real Property Tax Law section 480-a to include land that is protected with a conservation easement according to Article 49 of the New York State Environmental Conservation Law to receive similar benefits. There could, in the case of a conservation easement, be a minimum acreage requirement (perhaps a ten acre minimum) and a management plan; there would be no requirement for harvesting. Assessors would apply the same formula used for 480-a to determine the reduction, which would give a property owner a property tax exemption of up to 80% of the assessed value of the land. Additionally, the eligibility requirement of the Agricultural District Law could be amended to encompass land that is protected with a conservation easement pursuant to Article 49 of the Environmental Conservation Law. Assessment values would be computed in the same manner as those set out in the agricultural assessment program.

While "there are clear statewide benefits to conserving forest land and assuring an

orderly flow of wood products off these lands,"[57] local governments and school districts lose tax revenue from these properties and neighboring landowners bear the burden of a tax shift. Landowners who would like to participate in the program may not enroll "because of concerns or pressures at the local level not to take the property tax exemption," while those who do participate and receive the exemption complain that the "assessment on their buildings and structures seems to go up."[58]

To adapt these "current use" programs to conservation easements, politics would likely require some level of reimbursement by the State to localities heavily impacted by a loss of revenue or tax shift. A reimbursement program could be statutorily authorized detailing requirements and methods for appropriation and allocation.

E. *Create a program similar to the Farmer's School Tax Credit providing for a tax credit to owners of land that is protected by a conservation easement.*

The Farmer's Protection and Farm Preservation Act, signed into law in 1996 by Governor George E. Pataki, provides an income and business tax credit to farmers for school property taxes paid on farmland and buildings. Under the program, a tax credit may be taken by an "eligible farmer,"[59] who receives at least 2/3 of his or her excess federal gross income from farming.

To take advantage of the credit, the land must be "qualified agricultural property," and the amount of the credit equals 100% of school taxes paid where acreage does not exceed the

[57]Comments of Andy Beers, Director of Conservation and Government Programs, The Nature Conservancy, The Symposium on Property Assessment and Conservation Easements, December 3, 1999 at 65 (proceedings published by the Government Law Center, May 2000).

[58]Id.

[59]An eligible farmer includes: a corporation subject to the corporate franchise tax, an individual, an estate or trust, or beneficiaries of an estate or trust, a partner or a shareholder of a New York State S Corporation that owns property used in agricultural production.

base acreage amount, and 50% of the school taxes paid on acres in excess of the base acreage amount. Unused credits can either be refunded or carried over to future tax years.

The New York Farmer's School Tax Credit program is neither a real property tax exemption nor part of the State's agricultural assessment program, and is fully funded by the State. Because of this State funding, the credit program does not affect the revenue received by local school districts and, thereby, does not shift the school tax burden to the farmer's neighbors.

The Land Trust Alliance has recently drafted a proposed income tax credit similar to the Farmer's Tax Credit program. Like these other programs, the Conservation Landowner Tax Credit offers a state income tax credit for a portion of the property taxes paid on land that is permanently protected with a conservation easement. To qualify for the credit, a landowner, who is either an individual or corporation, must: file an annual income tax return in New York State; own land in New York State protected by a permanent conservation easement held by a qualified nonprofit land trust or a state, local government or federal agency; and certify that the easement conforms to the requirements of Article 49 of the Environmental Conservation Law. In addition, the landowner's credit would be equal to 25% of school taxes paid on the property during the previous tax year and capped at $5,000 for each qualified tax payer. Finally, the qualifying conservation easement is required to be filed with the DEC pursuant to Article 49 of the Environmental Law.

The benefits of this tax credit are many. It encourages the conservation of valuable natural resources, relieves some of the tax burden of landowners with limited incomes who are unlikely to benefit from existing income tax deductions and, like the farmer's tax credit, the program would not result in lost revenue to the locality or a shift of the tax burden to the

landowner's neighbors. A drawback to this program would be an annual expenditure by the State. The Land Trust Alliance estimates the annual cost of the program to be $1.2 million, with a projected increase of 10% each year. A similar recommendation has recently been offered by the Governor's Interagency Quality Communities Task Force.[60]

F. *Provide specific statutory enabling authorization for municipalities to develop local ordinances/laws creating tax incentives and abatement programs to encourage conservation initiatives at the local level.*

Section 247 of the General Municipal Law was enacted to:

> provide a means whereby a county, city, town, or village may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property [including conservation easements] in order to preserve . . . limitation of their future use, open spaces and areas for public use and enjoyment.[61]

With regard to real property taxation, subsection (3) of the statute 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." There has been some debate about whether section 247, subsection (3) of the General Municipal Law enables local government to authorize, by way of local law, an exemption or partial exemption from real property taxation for lands protected with a conservation easement.[62]

Three towns in New York have enacted local laws parroting the language of section 247, subsection (3) of the General Municipal Law, providing a real property tax abatement or

[60]Quality Communities Interagency Task Force, supra note 7, Recommendation 16, at 57.
[61]N.Y. Gen. Mun. Law. §247, Historical and Statutory Notes (McKinney 1999).
[62]According to the Office of Real Property Services in an Opinion Letter dated November 17, 1993, "Section 247 of the General Municipal Law does not authorize localities to provide tax exemption or tax abatement for real property. It is merely a direction to the assessor to consider the encumbered use of the real property when determining its assessment . . . ."

exemption to a landowner with a conservation easement on his or her property.[63] One town, in addition to including the language of subsection (3) in its ordinance, provides a table of tax assessment outlining the percentage of pre-easement value remaining taxable. While there has not been a challenge to the authority of these municipalities to enact these local laws, some argue that "the authority to grant exemptions from taxation is vested with the legislature and municipalities may not enact local laws granting exemptions or abatements from taxation in the absence of legislative authorization."[64] In addition, it has been argued that the legislature has vested, by statute, the responsibility of determining the value of property and assessing the property at a uniform percentage of value with the assessors.[65]

Because of the ambiguity of the enabling function of the statute, localities that may have considered adopting local laws governing conservation easements have not followed suit. A sixth option would be to provide specific statutory enabling authorization to municipalities to adopt local ordinances/laws creating tax incentives and abatement programs to encourage conservation initiatives at the local level. This type of legislation empowers local governments to participate in the conservation of spaces they have identified to be valuable to their communities and worthy of using their limited local resources to protect.[66] This recommendation is also consistent with the recently released Quality Communities Report.[67]

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[63]Perinton in Monroe County, Clifton Park in Saratoga County and Orchard Park in Erie County.

[64]Id.

[65]Id.

[66]The Comments of Kevin Crawford, Counsel to the Association of Towns of New York State, The Symposium on Property Assessment and Conservation Easements, December 3, 1999 at 81 (proceedings published by the Government Law Center, May 2000).

[67]Quality Communities Interagency Task Force, supra note 7, Recommendation 17, at 58.

G. *Incorporate education on the subject of conservation easements into the routine training required for all assessors*.

Assessors (including certified appointed and sole elected) are required, by the Office of Real Property Services (ORPS), to complete 24 hours of continuing education on an annual basis.[68] The content of this training, however, is often left to the service providers who must seek the approval of ORPS staff certifying that the content is appropriate for assessor education. Assessors clearly indicated in the survey that more education about conservation easements and assessing techniques was desirable. There would be no fiscal implication to the State nor to the assessor education program to simply suggest and/or urge that this topic be routinely addressed.

As to the specifics of the curriculum/training, the NYS Assessors' Association could consider taking the lead to facilitate a task force, working cooperatively with the statewide conservation and municipal associations in the development of appropriate curriculum guidelines. Once this training program is developed and certified by the ORPS, it can be made available to all education providers for consideration in their offerings.

In addition to the curriculum, the task force could consider developing written materials, perhaps in the form of a technical memorandum, for assessors that could be distributed statewide. The material could summarize the issues and offer suggested methods of dealing with lands (and adjacent lands) that are protected with conservation easements. Distribution could be in print format and sent from the New York State Assessors' Association and the ORPS, and/or it could be made available in "pdf" format and posted on the web sites of interested organizations and agencies. Ideally, it would be posted only in one location with links available

[68] NYS Office of Real Property Service, Rules for Real Property Tax Administration §188-2.8 at http://www.orps.state.ny.us/assessor/assrtrn/00train/continue/conedu.htm (visited February 2001). County directors are also required to complete the continuing education requirements. See §188-4.8.

from other sites.

It is also important to remember that although training may be primarily for assessors, municipal officers and landowners will also benefit if the information is made available to them. Educating all of the potential stakeholders may result in a better understanding of the process and reduction in the tension and disagreement that exists in some parts of the State.

A good education campaign includes keeping the issue in front of the affected/interested constituencies. This can be accomplished through periodic articles and information published in newsletters and magazines catering to these groups, as well as through ongoing sessions and workgroups in a variety of geographic locations across the State. These sessions need not focus solely on this topic as a stand-alone program (although they could if resources permit), but they can be incorporated into already planned events sponsored by the statewide, regional and local organizations that have an interest in the topic.

V. Conclusion

New York has an opportunity to emerge as a leader in private land conservation efforts by making strategic reforms and implementing new policies with respect to the already authorized conservation easement program. The options discussed herein present an array of actions that could be taken together or individually to strengthen New York's commitment to open space preservation.