

EVALUATING THE EFFECTIVENESS OF CONSERVATION EASEMENTS IN WETLANDS PRESERVATION

ERIK B. BLUEMEL*

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* Law Clerk, 2004-05, to the Honorable Barefoot Sanders, Northern District of Texas; Member, 2003-04, Task Force on Access and Benefit-Sharing and Traditional Knowledge, United Nations Development Programme (UNDP); Vice-Chair, 2003-04, Committee on Environmental Law, New York County Lawyers' Association; Member, 2003-04, Standing Committee on Environmental Law, Association of the Bar of the City of New York; Editor-in-Chief, Fall 2003, *New York University Environmental Law Journal*; J.D. candidate, 2004, New York University School of Law; B.A. (political economy), *honors*, 2000, University of California, Berkeley. This Article, while derived from analysis and research conducted as part of an earlier report, ERIK B. BLUEMEL ET AL., N.Y. COUNTY LAWYERS ASS'N, COMMENT ON A04231 (2003), <http://www.nycla.org>, reflects the views of the author only and does not necessarily reflect the views of any of the author's institutional affiliates, their composite organs, or their staffs.

INTRODUCTION

The use of conservation easements as legal tools to protect wilderness areas has grown in recent years. This growth is attributable to declining farm incomes in relation to tax liabilities, the increasing purchasing power of conservation groups, and the increasing commitment of government agencies to preserve open spaces and wilderness areas. This Article analyzes the effectiveness of conservation easements to protect wilderness areas from development and environmental policies inimical to habitat conservation through the lens of wetlands. This Article uses wetlands preservation to understand the use of conservation easements both in the wetlands context and in the greater wilderness lands context. Wetlands are extraordinarily important ecological resources, their preservation being crucial to the continued health of many ecosystems. Although this Article focuses on the preservation of New York wetlands in the face of development pressures and ecologically insensitive agency actions for the purposes of providing an in-depth analysis of the issues related to conservation easements, the issues and concerns are both exportable to and recognized by other jurisdictions, and will be mentioned accordingly throughout the Article.

Part I of the Article discusses the importance of preserving wetlands and identifies recent government actions that threaten wetlands preservation. Part II analyzes the incentives to donate conservation easements under current law and illustrates some of the shortcomings in the current conservation easement system with respect to wetlands preservation. Part III discusses some of the core proposals of recent legislative bills to modify the incentives for establishing conservation easements and discusses the impact such proposals may have upon the preservation of wetlands and wilderness areas as well as other unintended consequences. The Article concludes with the finding that the current incentive system for conservation easements is

preferable to the proposed legislative amendments, despite its shortcomings and proposes some adjusted compensation standards which may enhance the effectiveness of conservation easements as tools of preservation.

I. IMPORTANCE OF WETLANDS AS WILDERNESS AREAS

A. Wetlands Benefits

Wetlands are extremely valuable wilderness lands. They provide important benefits to aquatic and terrestrial ecosystems, including benefits for wildlife, water quality, flood control, recreation and open space, and as a source of valuable commercial products, including timber and agricultural resources, among others.¹

Wetlands provide “critical food sources, spawning grounds and nurseries for coastal fish and shellfish . . .”² and are crucial to the survival of freshwater species as well.³ “Wetlands also provide nesting, feeding, and resting sites for waterfowl and migratory birds”⁴ which is why “[m]any endangered or threatened species are heavily dependant on wetlands for continued survival.”⁵

¹ Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 3 (1993); Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 309 (1991); Woolf & Kundell, *supra* note 7, at 797; Stewart L. Hofer, Comment, *Federal Regulation of Agricultural Drainage Activity in the Prairie Potholes: The Effect of Section 404 of the Clean Water Act and the Swampbuster Provisions of the 1985 Farm Bill*, 33 S.D. L. REV. 511, 527 (1987); see also JANET LYONS & SANDRA JORDAN, WALKING THE WETLANDS 171 (1989). See also ERIK B. BLUEMEL ET AL., N.Y. COUNTY LAWYERS’ ASS’N, COMMENT ON A04231, at 7-8 (2003), <http://www.nycla.org/nyclanew.pdf>.

² Coastal Zone Management: Hearing Before the Nat’l Ocean Pol’y Study of the Comm’n on Commerce, Sci. and Transp. of the Senate, 100th Cong., 1st Sess. 1, 38 (1987) (statement of Dr. Donald F. Boesch, Executive Director, Louisiana University Marine Consortium); Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990s: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COL. L. REV. 711, 712 (1991); Mark A. Chertok, *Federal Regulation of Wetlands*, SG101 ALI-ABA 1049, 1051 (2002) (citing M. Holloway, *High and Dry: New Wetlands Policy Is a Political Quagmire*, SCI. AM., Dec. 1991, at 20).

³ Forrest Stearns, *Management Potential: Summary and Recommendations*, in FRESHWATER WETLANDS: ECOLOGICAL PROCESSES AND MANAGEMENT POTENTIAL 360 (Ralph E. Good et al. eds. 1978); William Odum, *Non-Tidal Freshwater Wetlands in Virginia*, 7 VA. J. NAT. RESOURCES L. 421, 431 (1988); Bhavani P. Nerikar, Comment, *This Wetland is Your Land, This Wetland Is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN L.J. 197, 203 (1990).

⁴ Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 20 LAND & WATER L. REV. 349, 356 (1995) (internal citations omitted).

⁵ Chertok, *supra* note 2, at 1051-52.

Wetlands also provide important functions for improving water quality. Wetlands “purify storm water by filtering out nutrients, sediments and pollutants, thereby protecting both surface and ground water.”⁶ Wetlands plants and soils absorb nutrients and contaminants in the water, thereby minimizing the amount of upland runoff that reaches underground aquifers and drinking water supplies.⁷

Wetlands protect lowlands from flooding, by storing waters in their varied channels.⁸ Wetlands also slow the velocity of storm waters, reducing damages caused by flood waters.⁹ Coastal wetlands also serve as an important buffer for coastal properties and development against storms.¹⁰

B. Gauging Wetlands Loss

Since the mid-1980s, New York has seen a net gain of nearly 15,500 acres of wetlands.¹¹ However, this gain is not what it seems. Ninety-nine percent of the net wetlands gains are due to reversions of properties to wetlands from agricultural lands that had been abandoned and from hydrology changes which have resulted in increased runoff; ninety-nine percent of the wetlands

⁶ *Id.* at 1051. See also D.D. HOOK, *THE ECOLOGY AND MANAGEMENT OF WETLANDS* 52-53 (1988).

⁷ ANNE D. MARBLE, *A GUIDE TO WETLAND FUNCTIONAL DESIGN* 31-66 (1992); S. Wesley Woolf & James E. Kundell, *Georgia Wetlands: Values, Trends, and Legal Status*, 41 *MERCER L. REV.* 791, 793 (1990); Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 *TUL. L. REV.* 3, 88-89 (1983); Odum, *supra* note 3, at 433; Wetlands Conservation: Hearings Before the Subcomm. on Fisheries and Wildlife Conserv. and the Env't of the House Comm. on Merch. Marine and Fisheries, 101st Cong., 1st Sess. 1, 236 (1989) (statement of Janice L. Goldman-Carter, Fisheries and Wildlife Div., Nat'l Wildlife Fed'n); Jeter M. Watson & Richard H. Sedgley, *Land Use Regulation by the Virginia Marine Resources Commission: The Virginia Wetlands Act and Coastal Primary Sand Dune Protection Act*, 7 *VA. J. NAT. RESOURCES L.* 381, 386 (1988); Kevin O'Hagan, Comment, *Pumping with Intent to Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining*, 40 *DEPAUL L. REV.* 1059, 1063-65 (1991).

⁸ O'Hagan, *supra* note 7, at 1064; Denis Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 *U. FLA. L. REV.* 1, 18-19 (1972); Houck, *supra* note 7, at 76; Mary K. McCurdy, *Application of the Public Trust: Public Trust Protection for Wetlands*, 19 *ENVTL. L.* 683, 697 (1989).

⁹ OFC. OF TECH. ASSESSMENT, *WETLANDS: THEIR USE AND REGULATION* 44 (1984) [hereinafter *WETLANDS USE AND REGULATION*].

¹⁰ D.F. WHIGHAM ET AL., *WETLAND ECOLOGY AND MANAGEMENT: CASE STUDIES* 64-65 (1990); *WETLANDS USE AND REGULATION*, *supra* note 9, at 46. See also James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 *N.Y.U. ENVTL. L.J.* 74, 105 (2003).

¹¹ N.Y. Dep't of Env'tl. Conserv., *Freshwater Wetlands Status and Trends*, available at <http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog3.htm> (last visited June 25, 2003).

losses came from increased urbanization and its associated impacts.¹² Furthermore, “[n]et gains posted for some states may be due to underestimates of original wetlands, or represent real gains through incidental or intentional wetland creation or restoration associated with water impoundments and other projects.”¹³ This explanation seems entirely plausible given the recent realization of the New York state Department of Environmental Conservation (DEC) that earlier wetlands estimates were understated.¹⁴ These gains in wetlands, then, do little “to substantiate a change in the long-term continuing decline” of wetlands.¹⁵

This general trend toward declining wetlands acreage is made evident by the fact that over 300,000 acres of wetlands are lost each year throughout the United States.¹⁶ Wetlands losses to development are considered irreversible.¹⁷ Yet between 1992 and 1997, over eleven

¹² *Id.* In the United States generally, agricultural conversion is the largest cause of inland wetland losses, while port development and other transportation hub-related dredging is the largest cause of estuarine wetland losses. See WETLANDS USE AND REGULATION, *supra* note 9, at 7, 170; THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. DEP’T OF INTERIOR, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES: MID-1970S TO MID-1980S 2 (1991); Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 4 (1991); James T.B. Tripp & Michael Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCES L. 221, 221 n.2 (1988).

¹³ MARGOT ANDERSON & RICHARD MAGLEBY, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS, 1996-1997, 310 (1997).

¹⁴ For a list of filing dates of DEC wetlands maps by region, see N.Y. Dep’t of Env’tl. Conserv., New York state Article 24 Freshwater Wetland Map Filing Dates by County, *available at* <http://www.dec.state.ny.us/website/dfwmr/habitat/CountyFilingDates.html> (last visited June 25, 2003).

¹⁵ See, e.g., Tex. Parks & Wildlife Dep’t, Texas Wetlands, *available at* http://www.tpwd.state.tx.us/wetlands/ecology/wetland_types.htm (last visited June 25, 2003).

¹⁶ Wetlands Conservation: Hearings Before the Subcomm. on Fisheries and Wildlife Conserv. and the Env’t of the House Comm. on Merch. Marine and Fisheries, 101st Cong., 1st Sess., 1, 9 (1991) (between 300,000 and 450,000 acres lost annually) (statement of Ralph Morgenwerk, Asst. Dir. of Fish and Wildlife Enhancement, U.S. Fish and Wildlife Serv.); U.S. FISH AND WILDLIFE SERV., WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 31 (1984) (400,000 acres lost annually); Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 698 (1989) (between 300,000 and 500,000 acres lost annually).

¹⁷ Robert H. Levin, Note, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 598-99 (2001) (“Irreversibility looms large in the background of every conservation and condemnation question. Once land is developed, it is nearly impossible, for economic and ecological reasons, for it to ever return to its natural state.”).

million acres were developed for the first time, far surpassing the development growth rate for any previous five year segment of time.¹⁸

C. Government Regulatory Failures and Wetlands Loss

As noted in the previous section, development pressures are the primary cause of the loss of New York's wetlands. However, if wetlands are so valuable, and recognized as such by DEC,¹⁹ why are they disappearing at an ever-increasing rate? Development pressures certainly change land values, making preservation of open space and ecological protection less valuable by comparison. However, the legal regime is designed to insulate environmental protection from such changes in land values. It appears that a breakdown in the legal system has occurred. This seems evident where Clean Water Act²⁰ § 404 permits for development activities in wetlands are routinely granted.²¹ Aside from the permitting requirements, § 404 exempts certain activities from requiring a permit at all, including historical silvicultural uses, which can be highly degrading to the environment.

Given the necessity to create a broad statutory framework to allow agency discretion in particular circumstances depending upon the wetlands functions and values and the impact of the particular activity upon those functions and values, the Clean Water Act has provided broad

¹⁸ NATURAL RES. CONSERV. SERV., U.S. DEP'T OF AGRIC., SUMMARY REPORT: 1997 NATIONAL RESOURCES INVENTORY 39 (2000), available at http://www.nrcs.usda.gov/technical/NRI/1997/summary_report/report.pdf.

¹⁹ N.Y. Dep't of Env'tl. Conserv., A Brief Description of the Freshwater Wetlands Act and What it Means to Wetlands Landowners, available at <http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm> (last visited April 7, 2003); see also N.Y. Dep't of Env'tl. Conserv., Wetlands Functions and Values, available at <http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog2.htm> (last visited June 25, 2003).

²⁰ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)).

²¹ ENV'T SVCS. SECTION, IN. DEP'T OF TRANSP., CONSTRUCTION ACTIVITY ENVIRONMENTAL MANUAL app. at 16 (2002) ("Army Corps Section 404/Section 10") (noting that three percent of nationwide permits are denied), <http://www.in.gov/dot/pubs/manuals/cae/index.html>; Susan Dudley, Dir., Regulatory Stud. Prog., George Mason Univ., Testimony on the Corps' Authority Under Section 404 of the Clean Water Act (Oct. 6, 2000) (noting that only one percent of wetlands permits are denied), <http://www.mercatus.org/article.php/43.html>. E.g., *Much Ado About Nothing: The Federal Wetlands Program in California* (Apr. 1995) (noting that, absent one large project that was denied, under three percent of wetlands permit applications were denied), <http://www.ewg.org/reports/calwetlands/calwet.html>.

discretion to the Army Corps of Engineers and the Environmental Protection Agency in supporting activities in wetlands.²² Some authors have argued that this discretion is too broad, and given agencies' "implementation" mandate,²³ agencies are often predisposed toward action. Development agencies, therefore, may favor development over preservation. While § 404 requires implementation of the least environmentally harmful alternative that fulfills the project's purpose, where implementation agencies act as the lead agencies in performing environmental impact studies and defining the project's purpose and need statement, there may be little room for analysis of less harmful alternatives.²⁴ This self-serving model of environmental governance has been criticized by many environmental advocates. These advocates have begun to recognize the difficult tension between allowing discretion in particular instances and providing too much discretion, the existence of which has allowed agency actions to the detriment of wetlands and other wilderness areas, and are now calling for the use of conservation easements to protect wetlands and wilderness lands.

II. CURRENT CONSERVATION EASEMENT SYSTEM

Given the failures of the current system to protect wetlands adequately, some advocates have called for the use of conservation easements as a means by which to protect wilderness lands from development. Conservation easements, simply, are title-based restrictions upon the land that are designed to restrict the allowable uses of the land to those that promote conservation or preservation of ecologically important lands. Conservation easements typically allow some traditional uses, such as agricultural use, to continue, but may restrict other traditional uses, such as logging. Conservation easements also typically allow for the construction of a limited number

²² See generally Mark A. Chertok & Kate A. Sindig, *Federal Regulation of Wetlands*, in ENVIRONMENTAL LITIGATION (A.L.I.-A.B.A. Course of Study, June 23-27, 2003), WL SH093 ALI-ABA 849.

²³ Tripp & Alley, *supra* note 10, at 106.

²⁴ Sharon Buccino, *NEPA Under Assault: Congressional Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 59-64 (2003).

of minor structures. The terms of each conservation easement are unique and based upon the importance of the lands to the local ecosystem and what activities can proceed without impacting the lands' ecosystemic functions and values. This Part analyzes existing incentives to donate conservation easements, the mechanisms by which conservation easements are conveyed, and drawbacks to the current conservation easement system.

A. Incentives to Donate Easements

Conservation easements are promoted by the government through a variety of incentives, primarily tax-based. “[A] landowner may claim an income tax deduction based on the value of the rights foregone. The reduction in . . . value associated with a conservation easement can also lower estate and gift taxes, helping families pass their land intact to the next generation.”²⁵ Donations also avoid capital gains taxes, which can be significant where the land has appreciated in value.²⁶ This may occur in undeveloped wetlands where development pressures have increased land values and property taxes, diminishing net operating income and threatening the viability of such activities.²⁷ A few of the more important tax incentives, which have combined to result in the nationwide donation of over 300,000 easements, are discussed in the following sections.²⁸

1. *Income Tax Benefits*

²⁵ Am. Conserv. Real Estate (ACRE), An Introduction to Conservation Easements, at <http://www.conservationrealestate.com/conservations.htm> (last visited June 30, 2003); see also FLATHEAD LAND TRUST, PURSUING A CONSERVATION EASEMENT 2 (2002), <http://www.flatheadlandtrust.org/images/Easement%20Fact%20Sheet%20.pdf>.

²⁶ FLATHEAD LAND TRUST, *supra* note 25, at 8.

²⁷ LEELANAU CONSERVANCY, CONSERVATION EASEMENTS: A GUIDEBOOK FOR LANDOWNERS IN LEELANAU COUNTY 7-8 (2002), at <http://www.theconservancy.com/protection/guidebook.doc>; Stephen Longmire, *Push Incentives for Preservation*, E. HAMPTON STAR, Apr. 3, 2003, available at http://www.lta.org/newsroom/news_star_040303.htm (last visited June 30, 2003) (quoting Russell Shay, Public Policy Director, Land Trust Alliance). See also PATRICK G. HALPRIN, SUFFOLK COUNTY PLAN. COMM’N, FARMLAND PRESERVATION PROGRAM: HISTORY AND CURRENT PERSPECTIVE 1, 17 (1990) (noting that increasing land values are a primary reason why public agencies have been unable to meet targeted conservation goals).

²⁸ TUG HILL COMM’N, ISSUE PAPER SERIES: CONSERVATION EASEMENTS 5 (2000), at <http://www.tughill.org>.

The Internal Revenue Service provides tax benefits for conservation easements donated as charitable gifts.²⁹ These benefits include a thirty percent deduction from the donor's adjusted gross income along with appraisal and legal fees if such costs exceed two percent of the donor's adjusted gross income and can be carried over up to five additional years.³⁰

Only conservation easement properties having "significant" conservation values may qualify for an income tax benefit.³¹ Wetlands almost presumptively have such values, as do many other wilderness lands.³² To receive a tax benefit, the conservation easement must be granted in perpetuity³³ to a qualified 501(c)(3) organization (non-profit charitable organization) or public agency and must prohibit surface mining as part of its purpose. Such a purpose might include: preservation of lands for education of, or recreation by, the public; protection of relatively natural habitat for fish, wildlife, plants, or ecosystems, preservation of open space for scenic purposes, or pursuant to a clearly delineated government policy. Data regarding the conservation values must be collected prior to the donation.³⁴ Easements granted by a developer

²⁹ See IRC § 170 (2003); *see also* STEPHEN J. SMALL, LAND TRUST ALLIANCE, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS WITH SUPPLEMENT (1986). For a more detailed, though slightly outdated, discussion of the income tax implications of conservation easements, see John C. Partigan, *New York's Conservation Easement Statute: The Property Interest and its Real Property and Federal Income Tax Consequences*, 49 ALBANY L. REV. 430 (1985).

³⁰ IRC § 170(b)(1)(B) (2003); *see also* FLATHEAD LAND TRUST, *supra* note 25, at 5-6; LEELANAU CONSERVANCY, *supra* note 27, at 5.. This may change, as "Senate Bill 701 would increase the portion of adjusted gross income landowners could deduct from their federal taxes for donating conservation easements to land trusts or local governments from 30 to 50 percent." Longmire, *supra* note 27. Furthermore, "the deduction could taken for up to 16 years, instead of the current six, until the appraised value of the gift was exhausted." *Id.* In addition, "the CARE Act proposes a 25-percent cut in the capital gains tax now due when land or a conservation easement is sold, not given, to a land trust or government." *Id.*

³¹ IRC § 170(h)(4)(A) (2003); LEELANAU CONSERVANCY, *supra* note 27, at 3.

³² LEELANAU CONSERVANCY, *supra* note 27, at 3.

³³ An interesting question that is beyond the scope of this report is the applicability of the Rule Against Perpetuities in the sale of a conservation easement. *See* Carol W. LaGrasse, A Critical Look at Conservation Easements, speech to Tompkins County Farm Bureau (Oct. 26, 2000), *available at* <http://www.prfamerica.org/ConsEaseCriticalLook.html> (last visited June 30, 2003). "Of the fort-seven states that have conservation easement statutes, all allow, or even require, the easement to be perpetual." Levin, *supra* note 17, at 599 (internal citations omitted).

³⁴ IRC § 170(h); *see also* FLATHEAD LAND TRUST, *supra* note 25, at 3-4.

in exchange for development rights are not eligible for income tax benefits, as such easements are considered exactions.³⁵

Therefore, the income and capital gains deductions for the donation of conservation easements are significant and provide a good incentive to landowners to enter into conservation agreements under existing law. Such benefits are the primary reasons that landowners donate conservation easements.

2. *Estate Tax Benefits*

While income tax benefits are the primary reasons that landowners donate conservation easements, “[m]any ranch families are ‘land-rich’ but ‘cash-poor,’ and as a result benefit little from income tax deductions associated with the gift of a conservation easement.”³⁶ These cash-poor families may seek to donate conservation easements to obtain valuable estate tax deductions.

“State and federal taxes are based on the fair market value of the property at the time of . . . death, not the original purchase price or current use value.”³⁷ As property values rise as a result of general property value trends and development pressures, the estate tax levied upon death may reach the millions of dollars. Where heirs do not have the funds to pay such taxes, the property title will be lost.³⁸

The easement decreases the value of the property, and thus decreases the value of the estate for tax purposes. Some farm operations will be exempt from estate tax after the easement if it causes their estate value to be below the minimum required for the tax. Decreasing the amount of estate taxes that must be paid may allow the family to keep the farm rather than having to sell part of it off to pay the taxes.³⁹

³⁵ FLATHEAD LAND TRUST, *supra* note 25, at 5.

³⁶ Conservation Easements, *supra* note 25.

³⁷ FLATHEAD LAND TRUST, *supra* note 25, at 6. This is “usually the amount a developer or speculator would pay.” TUG HILL COMM’N, *supra* note 28, at 4. It is also termed the “highest and best use” of the property. Longmire, *supra* note 27.

³⁸ FLATHEAD LAND TRUST, *supra* note 25, at 6. “The resulting estate tax can be so high that the heirs must sell the property to pay the taxes.” TUG HILL COMM’N, *supra* note 28, at 4.

³⁹ Sean F. Nolon Cozata Solloway, Note, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 611 (1997) (internal citations omitted).

As a result, “[c]onservation easements can be a useful estate-planning tool to reduce estate tax liability and allow land to remain in the family.”⁴⁰

3. *Property Tax Benefits*

Property tax benefits also encourage landowners to donate conservation easements to land trusts or public agencies. Generally, if local property taxes are not paid by the state, the “conservation easement should reduce the assessed valuation of the burdened property.”⁴¹ This occurs because New York “[l]and under conservation easement is treated for tax purposes as if it were in an agricultural district, and should clearly receive a lower valuation. Some assessors are slow to reassess the property, however, and even a reassessment may not result in lower taxes, depending upon the situation.”⁴² This might occur where the parcel underlying the conservation easement increases in value as a result of an easement, as the tax deductions created by the easement may be offset by the tax increases on the non-easement parcel.⁴³ Despite this possibility, however, conservation easement/agricultural property tax assessments have reduced New York landowners’ overall tax burden by approximately \$47 million per year.⁴⁴ As discussed below, this can create significant issues for the provision of community services that depend upon the local property tax base.

⁴⁰ TUG HILL COMM’N, *supra* note 28, at 4. This is because “an individual can give up to \$1,000,000 (including land) during his/her lifetime and/or at death that is not subject to federal gift or estate tax.” *Id.* Conservation easements can therefore save hundreds of thousands of dollars in estate taxes, and allow the remaining property to be inherited by its rightful heirs. *Id.* at 6-7.

⁴¹ Philip Weinberg, Practice Commentaries to ECL § 49-0301 (2003 Elec. Update) (1997).

⁴² Solloway, *supra* note 39, at 612 (citing N.Y. Agric. & Mkts. Law § 306(1)) (internal citations omitted).

⁴³ *Id.* (internal citations omitted).

⁴⁴ ADVISORY COUNCIL ON AGRIC., N.Y. DEP’T OF AGRIC. & MKTS., FARM PROPERTY TAXES IN N.Y. STATE 47 (1996).

Properties taxed at development value will usually see the tax burden decrease once an easement is established, since easements generally reduce the allowable development.⁴⁵ This is the case in New York, which evaluates property tax rates based upon the development, or speculative, use of a property.⁴⁶ Therefore, the impact of an easement upon the market value of the underlying property must be calculated when assessing the tax rate of the property.⁴⁷ Vermont law conducts a similar property tax assessment, decreasing property tax assessments “only upon the value of those remaining rights or interests to which [the owner] retains title.”⁴⁸ In some cases, such as where regulation already limits the speculative uses of a property (e.g., wetlands regulation), the difference between the speculative value and the agricultural or recreational value may be minimal.⁴⁹

In some areas, such as the Adirondack and Catskill parks and the Tug Hill region, New York State must pay the property taxes on conservation easements acquired by the state.⁵⁰ This presents a difficult issue and serves to inhibit the creation of conservation easements in that ecologically sensitive area, at least with respect to easements held by public agencies.⁵¹ It does

⁴⁵ LEE LANAU CONSERVANCY, *supra* note 27, at 5.

⁴⁶ John R. Nolon, *The Stable Door is Open: New York's Statutes to Protect Farm Land*, in LAND USE L. REP., May 1994, at 4.

⁴⁷ *Adirondack Mountain Reserve v. Board of Assessors of Town of North Hudson*, 99 A.D.2d 600, 601, 471 N.Y.S.2d 703, 705 (3d Dep't 1984).

⁴⁸ 10 VT. STAT. ANN. tit. 10 § 6306 (1995).

⁴⁹ Solloway, *supra* note 39, at 637 (internal citations omitted).

⁵⁰ Philip Weinberg, Supp. Practice Commentaries to ECL § 49-0301 (2003 Elec. Update) (1999); N.Y. REAL PROP. TAX LAW § 533, as amended by Chapter 419 of the Laws of 1998 (July 22, 1998); TUG HILL COMM'N, *supra* note 28, at 1. Of note is that the group that in large part helped passed this bill, the East Branch of Fish Creek Working Group, concluded that “conservation easements are the best way to protect water quality in the watershed while still allowing for timber production, hunting, fishing, trapping, and snowmobiling.” TUG HILL COMM'N, *supra* note 28, at 1. Governor Pataki noted that Section 533 “is consistent with the recommendations of the state Open Space Plan, which calls for the use of ‘Working Forest’ conservation easements in the Tug Hill region, coupled with the payment by the state of its proportionate share of local taxes.” Governor Pataki, Memorandum Approving 1998 Amendments to Real Property Tax Law § 533, 1998 McKinney's Sess. Laws 1474. Real Property Tax Law § 533 requires the state to pay property taxes on conservation easements obtained in a number of areas. N.Y. REAL PROP. TAX LAW § 533 (2003). However, such designated areas do not include all possible areas, and therefore some areas leave the property tax question less well defined.

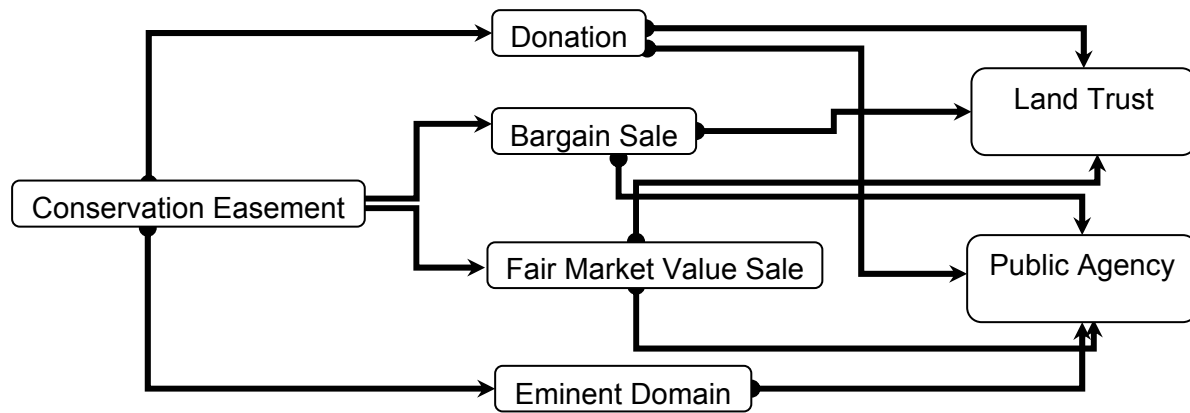
⁵¹ For instance, the New York Open Space Plan requires that the Department of Environmental Conservation and the Office of Parks, Recreation, and Historic Preservation evaluate the economic costs and benefits associated with

not, however, affect the ability of landowners to donate conservation easements to conservation organizations. Not all states have such requirements. Establishing conservation easements must be done in a way to “lessen a landowner’s tax burden while keeping conserved lands on local tax roles,”⁵² so that various communities can maintain their viability and self-sufficiency, meeting their needs through local taxes.

B. Existing Mechanisms

Donation of conservation easements for tax benefits can occur to both not-for-profit conservation organizations and to government agencies. The following sections discuss the major ways in which conservation easements are donated in New York, and to a certain extent, nationwide. Figure 1 illustrates graphically the different pathways which a conservation easement might be established:

Figure 1: Establishing a Conservation Easement



1. *Land Trusts*

ecologically important properties to determine whether acquisition of those properties would significantly burden the local tax base. NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 76.

⁵² NORTHERN FOREST ALLIANCE, CONSERVATION EASEMENTS IN THE NORTHERN FOREST [hereinafter NORTHERN FOREST EASEMENTS], at <http://www.northernforestalliance.org/newspubs/1easements/NFAeasements.htm> (last visited June 30, 2003).

Over 1,200 land conservation organizations, or land trusts, exist in the United States.⁵³ Most land trusts are located in the Northeast.⁵⁴ The number of land trusts is growing at a steadily increasing and rapid rate.⁵⁵ These land trusts have conserved 2.6 million acres through conservation easements.⁵⁶ For example, The Nature Conservancy holds conservation easements constituting nearly 1.2 million acres.⁵⁷ Conservation easements are not the only mechanism by which land trusts protect wilderness lands, but easement lands constitute a large percentage of total lands protected by land trusts.⁵⁸ Land trusts have led the conservation easement movement in recent years.⁵⁹ Now, “a tool that is increasingly used [to protect special resource areas] is the conservation easement.”⁶⁰ Conservation easements are being used with greater frequency by land trusts because they are seen as “stretch[ing] the per-dollar value of land conservation.”⁶¹ The use of easements by conservation organizations is also partly a result of arrangements with public agencies whereby conservation organizations purchase easements and then sell those

⁵³ Land Trust Alliance, 1990s Bring Surge in Land Conservation as Regional, Local Land Trusts Attract 1 Million Supporters [hereinafter Land Conservation Surge], at <http://www.lta.org/aboutlta/census.shtml> (last visited July 3, 2003) (“1,263 local and regional land trusts were in operation in 2000, a 42 percent increase over the number (887) that existed in 1990.”)

⁵⁴ Land Trust Alliance, National Land Trust Census: Charts and Graphs, at http://www.lta.org/newsroom/census_charts.htm (last visited July 3, 2003); Kevin Kasowski, *Growth Management and Green Spaces: Rural America at a Crossroads, Developments*, NAT’L GROWTH MGMT. LEADERSHIP PROJECT NEWSL., July, 1993, at 3.

⁵⁵ Land Conservation Surge, *supra* note 53.

⁵⁶ *Id.* This is a 475% increase in the use of conservation easements to protect lands since 1990, and an overall increase of 226% of lands conserved since 1990. *Id.*

⁵⁷ Carol W. LaGrasse, *Land Trusts Threaten Private Property: Conservation Easements: Easy Government Money—Future Problems*, (citing RON ARNOLD, *UNDUE INFLUENCE* 162 (Merril Press 1999), available at <http://www.prfamerica.org/LandTrustsThreatenPP.html> (last visited June 30, 2003).

⁵⁸ See Land Conservation Surge, *supra* note 53; Margaret Jordan, Press Release: Nature Conservancy Celebrates 50 years of Saving Last Great Places, Oct. 22, 2001, at <http://nature.org/wherewework/northamerica/states/northcarolina/press/press449.html> (last visited July 3, 2003). See also LINDA E. HOLLIS & WILLIAM FULTON, *OPEN SPACE PROTECTION: CONSERVATION MEETS GROWTH MANAGEMENT* app. tbl. 1, at 72-73 (Brookings Inst. 2002), <http://www.brook.edu/es/urban/publications/hollisfultonopenspace.pdf>.

⁵⁹ *E.g.*, Land Conservation Surge, *supra* note 53 (“California, New York and Montana led the nation in the amount of acreage protected by local and regional land trusts.”).

⁶⁰ TUG HILL COMM’N, *supra* note 28, at 1; Levin, *supra* note 17, at 598, 608.

⁶¹ NORTHERN FOREST EASEMENTS, *supra* note 52.

easements to the public agencies at prices “equal to that of unencumbered parcels, plus costs,” creating a cycle of conservation.⁶²

2. *Conservation Easement Acts and Environmental Conservation*

This section analyzes specific statutes which allow government agencies in New York to obtain conservation easements through donation, sale, or bargain sale. While the following analysis is specific to New York, many other states have similar open space and conservation easement laws authorizing the conveyance of properties to state agencies, and much of the following analysis is applicable to those statutes as well, given general similarities in judicial interpretations.⁶³ Many of these statutes are based upon the Uniform Conservation Easement Act.⁶⁴

⁶² STEVEN J. EAGLE, CTR. FOR PRIVATE CONSERVATION, CONSERVATION EASEMENTS AND PRIVATE LAND STEWARDSHIP 12-13 (n.d.), <http://www.privateconservation.org/pubs/mono/easements.pdf>.

⁶³ For instance, open space programs exist in nearly all states and many localities. See HOLLIS & FULTON, *supra* note 58, app. A, at 49-64, app. B, at 65-71. See also DANIEL HELLERSTEIN ET AL., FARMLAND PROTECTION: THE ROLE OF PUBLIC PREFERENCES FOR RURAL AMENITIES 22, 29, 49 (Ag. Econ. Rep. No. 815, 2002) (although defining open space programs as limited to preservation of public parks and playgrounds, the authors still find that thirty-one of the forty-eight contiguous states have open space programs that are generally comparable), <http://www.farmlandinfo.org/documents/29039/aer815.pdf>. These open space programs are generally similar in nature, with minor variations. See HOLLIS & FULTON, *supra* note 58.

Although the New York Conservation Easement Law is not directly based upon the Uniform Conservation Easement Law, UNIFORM CONSERVATION EASEMENT ACT (1981), <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.pdf>, it contains similar provisions and has been similarly interpreted. See LaGrasse, *supra* note 57, n.9; EAGLE, *supra* note 62, at 7 (noting the general similarity of and applicability of general analysis to conservation easement laws from differing origins). Every state currently has a substantively similar conservation easement law either based in statutory or common law. See JOSEPH R. HOLSTEAD, STATES AGRICULTURAL POLICIES, OLR Res. Rep. 2002-R-0568 (2002), <http://www.cga.state.ct.us/2002/olrdata/env/rpt/2002-R-0568.htm>; HELLERSTEIN ET AL., *supra*, at 20 n.20.

The Uniform Conservation Easement Act, adopted in whole by the District of Columbia and substantively by a number of states, encourages the creation of covenants or conservation easements for the purpose of retaining or protecting natural, scenic or open-space values of real property, ensuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

D.C. Code §§ 45-2601(1), 45-2604(a). See Comm. of 100 on the Fed. City v. Dist. of Columbia Dep’t of Consumer and Regulatory Aff., 571 A.2d 195 (D.C. 1990).

Other state enabling laws and financing provisions may also be necessary to give full effect to conservation easement legislation, however, most states have such laws and provisions. For a discussion of other relevant New York legislation, see BLUEMEL ET AL., *supra* note 1, at 29-30.

⁶⁴ The Uniform Conservation Easement Act has been adopted by twenty-one states and the District of Columbia and since its passage, twenty-seven states have enacted independent conservation easement laws. See Nat’l Conf. of Comm’rs on Uniform State Law, A Few Facts About the Uniform Conservation Easement Act, *at*

The New York Environmental Conservation Law (ECL) identifies wetlands conservation easements warranting acquisition and ensures the adequate compensation of landowners.

Conservation types of easements have existed for many years and were established or granted under the general easement laws and rules. However, under those laws and rules several weaknesses existed. Under those general laws, it was necessary to have the easement ‘appurtenant’ to other land and this is not always possible, practical or desirable. . . .⁶⁵

Under the New York Conservation Easement Law, which ended the appurtenant requirement,⁶⁶ “[m]any public-spirited land owners are granting conservation easements in their lands, while others are being paid to do so. At the same time, under proper conditions, conservation easements can be obtained by the eminent domain laws.”⁶⁷ If the state is willing to pay the full market value for a conservation easement, then eminent domain need not be applied, except where an unwilling seller exists. Where eminent domain is applied, just compensation must be provided. If a willing seller exists, however, there is no such requirement. In this circumstance, the easement may be sold at a reduced price, known as a “bargain sale,” which provides both a direct payment for the easement and a reduced tax burden based upon the difference between the bargain sale price and the potential value of the easement. As a result of such existing conservation easement legislation, DEC now holds most of the conservation easements in Tug Hill.⁶⁸

3. *Open Space Plans*

http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Mar. 16, 2004); Farmland Info. Ctr., Am. Farmland Trust, Fact Sheet: Agricultural Conservation Easements, Jan. 2004, http://www.farmlandinfo.org/documents/27762/ACE_1-04.pdf. See also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.6 (2000); 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.01 (Michael Allan Wolf ed., 2001). Only two states rely on common law to support the establishment of conservation easements, Wyoming and Pennsylvania. Farmland Info Ctr., *supra*; Michael R. Eitel, Comment, *Wyoming’s Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature*, 4 WY. L. REV. 57 (2004) (discussing Wyoming); HOLSTEAD, *supra* note 63 (discussing Pennsylvania).

⁶⁵ Richard E. Hitchcock, *Conservation Easements: Recent Modifications to Traditional Law*, available at <http://prfamerica.org/ConsEaseHitchcock.html> (last visited June 30, 2003).

⁶⁶ Philip Weinberg, Practice Commentaries to ECL § 49-0301 (2003 Elec. Update) (1997); Solloway, *supra* note 39, at 599 (internal citations omitted).

⁶⁷ *Id.*

⁶⁸ TUG HILL COMM’N, *supra* note 28, at 1.

Conservation easements are also on the rise because taxpayers are becoming more willing to allocate bond money to open space conservation.⁶⁹ The New York State Open Space Conservation Plan authorizes the purchase of conservation easements for the protection of open space.⁷⁰ Under this authority, DEC has preserved “more than 400,000 acres in the past eight years.”⁷¹ New York Governor Pataki established the goal of conserving one million acres of open space—a goal shared by many states—making it likely that New York state agencies will continue to utilize their authority to obtain conservation easements.⁷²

The New York state Open Space Conservation Plan establishes a system to:

- identify specific places with exceptional natural resource or recreational values which may be threatened by land use change or which could serve critical recreational needs;
- determine the most appropriate strategy for conserving the resource values of those places including what action should be taken by DEC or [Office of Parks, Recreation, and Historic Preservation (OPRHP)];
- evaluate the costs and benefits of individual land conservation actions;
- establish priorities for land conservation actions given limited public resources;
- when state acquisition of land is the most appropriate strategy, ensure that land is worthy of public investment and clearly meets the goals of this Plan;
- provide for statutory and reasonable outside input into the project evaluation process.⁷³

The Open Space Plan ensures that “decisions on land conservation action by [DEC and OPRHP] are being made in a rational way which directs the expenditure of state funds to the most important and worthy land conservation projects.”⁷⁴ To do this, agencies, when considering

⁶⁹ In New York, of the thirteen open space conservation measures proposed in 2002, 92% passed, totaling over \$400 million in funds allocated to such conservation. LAND TRUST ALLIANCE, LAND VOTE 2002: AMERICANS INVEST IN PARKS & OPEN SPACE 11 (2003), *available at* <http://www.lta.org/publicpolicy/landvote2002.pdf>. Interestingly enough, in Saratoga Springs, a ballot measure passed with approximately a 75% approval rate authorizing \$5,000,000 in funds for conservation. *Id.* at 12.

⁷⁰ N.Y. ENVTL. CONSERV. LAW § 54-0301 (2003).

⁷¹ Erin M. Crotty, Comm’r, Dep’t of Env’tl. Conserv., *quoted in* Land Trust Alliance, 24 Land Trusts Receive Grants from Innovative NY Program [hereinafter Land Trust Grants], *at* http://www.lta.org/regionallta/ny_regrants03.html (last visited June 30, 2003).

⁷² *See* Land Trust Grants, *supra* note 71 (quoting Sen. Carl L. Marcellino).

⁷³ 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 69 (2002).

⁷⁴ *Id.*

acquiring a conservation easement, must evaluate “the cost of the project in relation to its resource value.”⁷⁵

This cost evaluation is partly based upon the cost of acquisition, which, under most Open Space plans, proceeds on multiple layers which ranks both the resource values of various parcels and the willingness of landowners to sell those parcels.⁷⁶ Under the Plan, the state must consider the possibility of an easement.⁷⁷ Easements obtainable from a voluntary seller are ranked higher than those requiring the use of eminent domain.⁷⁸ Additionally, the costs and benefits of acquisition are compared against other forms of protection.⁷⁹ Resources protectable by means less costly than a conservation easement are ranked higher than other similarly valued ecological resources.⁸⁰ In the end, Open Space plans typically preference conservation easements in the status quo and provide significant negotiating opportunities on issues other than price to both the landowner and state agencies.

C. Problems with Existing Schema

⁷⁵ *Id.* at 78.

⁷⁶ N.Y. ENVTL. CONSERV. LAW § 49-0203(3) (2003). Acquisition using funds from the Clean Water/Clean Air Bond Act requires a willing seller. The Environmental Protection Fund has a similar requirement, though it allows departure in extenuating circumstances. *Id.* at 78. Both of these funds would be available to wetlands easement acquisitions. The Open Space Plan, therefore, “recommends that any pursuit of acquisitions with unwilling sellers be as a last resort and resulting from unique circumstances.” *Id.* at 78. As a side note, “[t]he state Finance Law requires that individual open space conservation projects that are proposed for funding through the EPF be included as specific line appropriations in the capital project budget prepared each year.” *Id.* at 79.

⁷⁷ *Id.* at 74. This requirement comes from ECL § 49-0203(2). It states that

[t]he department and the office shall first consider in each acquisition whether acquisition of conservation easement or other less than full fee title interests would fulfill the purposes for which the particular acquisition is sought. If it is determined that a conservation easement or other interest would fulfill such purposes, the department or the office will use its best efforts to acquire such easement or interest, where practicable.

N.Y. ENVTL. CONSERV. LAW § 49-0203(2) (2003). Furthermore, the department and office must “pursue acquisitions through voluntary agreement to the maximum extent practicable to achieve the purposes of this article. Accordingly, the process of eminent domain shall only be used when reasonable efforts to obtain a voluntary agreement have been exhausted.” *Id.* § 49-0203(3).

⁷⁸ *See* N.Y. ENVTL. CONSERV. LAW § 49-0203(2) (2003).

⁷⁹ *Id.* at 73. Some of these strategies are discussed in the Open Space Plan. *See id.*, ch. 6, fig. 7.

⁸⁰ 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 74.

Despite the recent explosion in the use of conservation easements, their use has not come without criticism. Conservation easements have been criticized as freezing a land use type which may be undesirable in the future. On the other hand, conservation easements are criticized as being at heightened risk of expropriation. Conservation easements have also been criticized as costly to monitor and enforce. The following sections analyze these criticisms of the current conservation easement system, and acknowledge to some extent, the validity of these concerns, calling into question the desirability of conservation easements as a generally applicable policy tool.

1. *Perpetuity*

Conservation easements have been criticized by various scholars as unnecessarily stagnating land in perpetuity. The basic argument is that, as development patterns and wilderness areas change in complexion and intensity, conservation easements may become useless. For instance, land use and development patterns surrounding a conservation easement may thwart the success of a conservation easement.⁸¹ If a wetland area dries up and no longer has any of the ecological functions of a wetland, a conservation easement designed to protect wetlands will be rather fruitless. Instead, such an easement may become a burden upon the land, restricting development. Because “[c]onservation easements often result in fragmented, instead of contiguous, preservation of lands,”⁸² the danger that the success of conservation easements may be thwarted by surrounding development patterns poses a very real threat. While some statutes which direct state agency acquisitions of land counsel against such a fragmented approach,⁸³ conservation easements established by land trusts are not necessarily free from such

⁸¹ See 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 75 (2002).

⁸² Solloway, *supra* note 39, at 608 (internal citations omitted).

⁸³ *E.g.*, 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 75 (2002).

worries. Nevertheless, conservation easements established by land trusts have the same power to restrict development as easements held by state agencies.

In recognition of these concerns, some authors have suggested periodic renegotiation of conservation easements.⁸⁴ This idea, however, does not comport with the IRC perpetuity requirement, and therefore may make unavailable important income tax deductions. Such a renegotiation could create unwanted opportunities for game-playing by both landowners and state agencies, in attempts to gain windfalls.

A deeper analysis of current law reflects that the concerns expressed by these critics, however, illustrates that mechanisms are currently in place to protect such perpetual restrictions on development. Property tax assessments would, at least in theory, recognize changing land values and therefore value the conservation easement differently for tax purposes in relation to the underlying parcel. This valuation would reflect the increasing development potential of the lot and serve to offset some of the landowner's potential future losses through donation of an easement.

A more interesting critique in the author's view is that valuation of the easement is done purely in relation to the seller's reduced value, not to the purchaser's gain. This results in a sticky valuation of easement lands as the ecological value of those lands diminish. However, as the ecological value of those easement lands diminishes, the state has the option to extinguish or expropriate the easement,⁸⁵ or go to court obtaining a finding that changed circumstances require modification to, or termination of, the easement.⁸⁶

⁸⁴ See Carol W. LaGrasse, *Renegotiating the Conservation Easement*, available at <http://prfamerica.org/ConsEaseRenegotiation.html> (last visited June 30, 2003); Julia Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

⁸⁵ *Wechsler v. Dep't of Envtl. Conserv.*, 153 A.D.2d 300, 550 N.Y.S.2d 749 (3d Dep't 1990), *aff'd*, 76 N.Y.2d 923, 563 N.Y.S.2d 50; *Application of Residents of Summer Haven, Hamlin, NY*, 202 Misc. 682, 110 N.Y.S.2d 186 (N.Y. Sup. 1952); Richard J. Kohlman, *Condemnation of Easements*, 22 AM. JUR. *Trials* 743 § 5 (2003). Such a condemnation, if held by a private landowner, would require compensation. *Ossining Urban Renewal Agency v.*

Interestingly, “public property generally enjoys greater protection from condemnation than does private property.”⁸⁷ This would suggest that state purchase of easements would be the most secure method of wilderness protection through conservation easements, but raises another criticism of conservation easements: longevity. Of course, the ability of the government to purchase conservation easements is severely restricted by funding limitations and therefore the government has generally sought means other than purchase to obtain such easements.

Supposing that the ecological value of a conservation easement remains unchanged, but development pressures increase, expropriation or extinguishment of a conservation easement by a state agency is significantly easier than expropriating or extinguishing title to an entire property. Significantly fewer resources are involved, especially with respect to wetlands and existing state and federal regulation of wetlands development. Therefore, a disjuncture may exist between the valuation of the conservation easement, which may be minimal, basing its value upon the ability to develop given existing wetlands regulation, and the actual value of the ability to develop, since state agencies may desire development and be willing to apply discretionary authority to allow development under the wetlands regulation. Considering the

Lord, 39 N.Y.2d 628, 385 N.Y.S.2d 28 (1976). However, “[h]uge economic incentives are the major driving force behind the high number of Massachusetts conversions, as the towns need not pay to convert their open space land.” Levin, *supra* note 17, at 606 (internal citations omitted). An interesting question arises as to what might happen to the landowner’s tax benefits if the easement is extinguished prior to the landowner claiming her entire share of those benefits.

⁸⁶ For example, ECL § 3-0305(15) allows for the extinguishment of a temporary easement when “the purposes for which such easement right was acquired have been accomplished and that the exercise of such easement is no longer necessary.” N.Y. ENVTL. CONSERV. LAW § 3-0305(15) (2003). Temporary easements, however, are treated quite differently than permanent easements, as the taking of a temporary easement is compensated by the value of the lost rental income caused thereby. *Matter of County of Nassau*, 148 A.D.2d 533, 538 N.Y.S.2d 865 (2d Dep’t 1989); *Kauffman v. state*, 43 A.D.2d 1004, 353 N.Y.S.2d 61 (3d Dep’t 1974), *aff’d*, 36 N.Y.2d 745, 368 N.Y.S.2d 164. New York allows for the termination of a conservation easement under two situations: (1) when the easement agreement itself provides for destruction, or (2) when the easement is of “no actual and substantial benefit” because of changed conditions. N.Y. ENVTL. CONSERV. LAW § 49-0307(1) (2003); *see Bd. of Educ., E. Irondequoit Cent. Schl. Dist. v. Doe*, 88 A.D.2d 108, 113, 452 N.Y.S.2d 964, 967 (4th Dep’t 1982). *See also Eagle, supra* note 62, at 10; Mahoney, *supra* note 84, at 772-79.

⁸⁷ Solloway, *supra* note 39, at 610-12 (but noting that “governmental acquisition programs are not created to protect property from imminent condemnation”).

general weakness of lobbying power and influence of conservation organizations at the local level as compared to industry pressure groups, conservation easements suddenly seem a less secure method of protecting the wilderness habitat than other forms of protection.⁸⁸ This is a concern which has caused some scholars to note that “it means little to call a conservation easement ‘perpetual’ if it can be readily extinguished through condemnation.”⁸⁹

2. *Enforcement*

While the perpetuity critique seems to counsel for state acquisition of conservation easements, the enforcement critique suggests that land trusts should acquire conservation easements. This is because when state agencies acquire easements, they value those easements generally based on the fair market value. The fair market value fails to provide funds to monitor or enforce the terms of the easement. Therefore, if a landowner violates the terms of the easement, the state agency must expend its finite resources to enforce the agreement, taking away from other activities the agency may have otherwise undertaken. The state likely will not be able to guarantee financing to monitor easement lands into perpetuity. It was exactly these concerns that caused the Forest Service to reject the possibility of an easement to mitigate damages, concluding that “it was too expensive and impractical to monitor [the easement

⁸⁸ See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). Other, more secure methods of protection might include regulation for which is difficult to reverse directions. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Indeed, some regulation may establish that regulation less protective than current standards can never be implemented. See e.g., *Energy Policy and Conservation Act*, 42 U.S.C. § 6295(o)(1); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

⁸⁹ Levin, *supra* note 17, at 600. This is of particular concern since “[p]rotected conservation land will almost always be a less expensive condemnation option than an already developed site. The disparity is even more glaring if the government already owns the protected property, for it need not go through condemnation proceedings or acquire right-of-way access.” *Id.* at 600, 626-37 (arguing that greater procedural roadblocks to conversion or condemnation of conservation easements are necessary to ensure that they are not unduly taken). A telling example of the ease with which such conservation easements can be extinguished is the case of Massachusetts, which, although requiring that such condemnations be approved by a 2/3 vote by both the municipality and the state legislature, over 85% of the proposed condemnations were passed by both and undertaken. See *id.* at 605-06 (citing OPEN SPACE SUBCOMM’N OF THE JOINT COMM’N ON LOCAL AFFAIRS, GEN. CT. OF MASS., NEW SCHOOL CONSTRUCTION AND THE LOSS OF ARTICLE 97 LAND 13 (2000)).

holder's] land practices" even though the easement would be only twenty-five miles of a trail.⁹⁰ Therefore, private management of the lands or less-than-fair market compensation should be provided as a means to compensate the state purchaser for the costs of enforcing the easement. Since compensation schemes are generally pro-seller, it seems unlikely that less-than-fair market compensation will be established, counseling in favor of land trust-managed conservation easements.

In a private situation, such as with land trusts, enforcement funds are generally contracted into the easement agreement because "[e]asement holders typically ask landowners for a financial contribution to a stewardship fund to ensure the ability to monitor and enforce the easement in perpetuity."⁹¹ "Proper stewardship of easements requires that the easement holder have the technical and financial capacity to ensure that easement terms are being honored in perpetuity."⁹²

III. PROPOSED REFORMS

Numerous states have enacted legislation designed to address the shortcomings of conservation easements as described in the previous section. Unfortunately, there exist inherent difficulties in legislating the establishment of conservation easements, and attempts to increase the use of conservation easements and ensure their strength have typically created skewed incentives and interacted poorly with pre-existing legislation. This Part analyzes some of the major reform conservation easement initiatives underway, taking a particularly close look at a recent reform initiative proposed in New York which provides an example of the nationwide reform efforts.

⁹⁰ See *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 808 (9th Cir. 1999).

⁹¹ *FLATHEAD LAND TRUST*, *supra* note 25, at 3; *TUG HILL COMM'N*, *supra* note 28, at 3; *see, e.g., LEELANAU CONSERVANCY*, *supra* note 27, at 3 (noting that "the Conservancy asks all easement donors to make a financial contribution to the Conservancy's Endowment Fund" to help it annually monitor its easements for violations).

⁹² *NORTHERN FOREST EASEMENTS*, *supra* note 52.

Wetlands are recognized as possessing important social and the preservation of ecological functions at existing levels is generally an explicit goal of state laws. Any amendments to existing state environmental legislation should comport with that purpose. Unfortunately, some of the proposed reforms to the incentive structure and operation of conservation easements fail to do just that.

Reforms of conservation easements have generally taken the form of attempts to provide full market compensation to landowners seeking to sell conservation easements for particular conservation purposes.⁹³ However, these reforms have not justified the need to amend the existing conservation easement structure. That is, landowners are currently donating and selling easements. It is not clear that any additional incentives are necessary to encourage landowner sale of conservation easements, nor is it clear that full market compensation will actually encourage the protection of important wilderness areas. Additionally, such compensation schemes may affect or circumvent current judicial interpretations of takings law. Nevertheless, these reform efforts are underway.

These reform efforts generally apply to particularly valuable ecological resources, such as wetlands, as states attempt to encourage voluntary protection of these highly critical resources.⁹⁴ While it may generally be objectionable to mandate full market value compensation for

⁹³ *E.g.*, A.B. 4231, 226th Annual Legis. Sess. (N.Y. 2003) (generally); H.B. 2566, 46th Legis. (Ariz. 2004) (relating to determinations of tax credits); H.B. 6681, 2003 Gen. Assem. (Conn. 2003) (shifting purchase price of mandatory easements transferred upon abandonment of properties held by water companies from bargain sale values to fair market value values); S.B. 2754, 105th Reg. Sess. (Fla. 2003) (relating to rails-to-trails acquisitions, though noting that less-than-fair market value acquisitions are desirable in other circumstances); S.B. 3051, 22nd State Legis. (Haw. 2003) (setting maximum ceiling of purchase price of easements as difference in fair market value before and after the easement, but requiring that the landowner, should she wish to repurchase the easement, to pay the full fair market value—the likely result of which will be the purchase of easements at fair market value to the landowners); A.B. 3936, 210th Legis. (N.J. 2003) (relating to transferable development rights acquisition). While not all proposed reforms mandate just compensation at fair market value, most reform efforts do require appraisals to be based on fair market value, which may determine the purchase price. *See, e.g.*, 2003 A.B. 1701, 2003-2004 Reg. Sess. (Ca. 2004); A.B. 2480, 211th Legis. (N.J. 2004).

⁹⁴ *E.g.*, A.B. 4231, 226th Annual Legis. Sess. (N.Y. 2003) (promoting easements for wetlands preservation); S.B. 3051, 22nd State Legis. (Haw. 2003) (promoting purchase of easements for preservation of agricultural lands).

conservation easements, the application of conservation easement compensation legislation to particular resources also presents troubling concerns. Specifically, timing of designation of wilderness lands as covered resources creates opportunities for game-playing and potential windfalls. These issues are discussed in the following sections.

A. *Modified Compensation Standard*

1. *Generally*

The language used in proposed conservation easement compensation reforms relating to state acquisition of conservation easements, such as that in New York Assembly Bill 4231,⁹⁵ is generally unnecessary and counter-productive. Such language indicates that a state agency “shall justly compensate landowners for wetlands designations of such land at fair market value” Compensation requirements are not necessary in eminent domain proceedings, as most states already require the provision of just compensation to landowners.⁹⁶ The same is true with respect to less-than-full-fee acquisitions as well.⁹⁷

Doctrines invoking “just compensation” generally provide that such compensation should be done at “fair market value.”⁹⁸ This would seem to make such language superfluous. However, just compensation can be met by standards other than the fair market value.⁹⁹ As a result, just compensation is not as clear as it might be as a compensation standard. In fact, just compensation has taken many different forms, as have determinations of fair market value.

⁹⁵ A.B. 4231, 226th Annual Legis. Sess. (N.Y. 2003).

⁹⁶ *E.g.*, N.Y. CONST., art. I, § 7(1)(a) (“Private property shall not be taken for public use without just compensation.”); N.Y. EM. DOM. PROC. LAW § 101 (2003).

⁹⁷ *E.g.*, *id.* § 303.

⁹⁸ See Christopher A. Bauer, Note, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 B.Y.U. L. REV. 265, 273 (2003); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 169 (2002); see also *Keator v. state*, 23 N.Y.2d 337, 296 N.Y.S.2d 767 (1968).

⁹⁹ Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 117-18 (2002) (citing Roger P. Smith, *Real Property Valuation for Foreign-Wealth Deprivations*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 141 (Richard B. Lillich ed., 1972)).

Just compensation, in the takings context, means that the landowner should be restored to the position she would be in had the taking not occurred.¹⁰⁰ The term just compensation, while claimed by some to be superfluous in and of itself,¹⁰¹ has generally been taken to mean that the compensation should be fair to both parties.¹⁰² Therefore, “compensation should be just to the public as well as to the condemnee.”¹⁰³

Fair market value is “what a willing buyer would pay in cash to a willing seller.”¹⁰⁴ It includes not only the value that the taker is willing to pay for its desired use of the property, but also includes the speculative value of all those uses for which other users might wish the property.¹⁰⁵ As a result, the fair market value means that “[u]nder established rules for determining just compensation . . . compensation is based on the highest and best use of the property other than the use contemplated by the taker.”¹⁰⁶

However, fair market value can be established using multiple means. For instance, either a benefit to the taker/buyer or a loss to the owner standard could be selected as a compensation standard. Both standards can result in different levels of compensation.¹⁰⁷ Just compensation

¹⁰⁰ See, e.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

¹⁰¹ See, e.g., J.D. EATON, *REAL ESTATE VALUATION IN LITIGATION* 13 (2d ed. 1995).

¹⁰² See, e.g., Sidney Z. Searles, *The Law of Eminent Domain*, SB48 ALI-ABA 1, 8 (Am. L. Inst. 1997)

¹⁰³ *Searl v. Schl. Dist.*, 133 U.S. 553 (1890).

¹⁰⁴ *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). The Court noted that this standard of compensation does not fully indemnify the owner for particularized sentimental or specialized value placed on the property, but that the “need for a clear, easily administrable rule governing the measure of ‘just compensation’” outweighed such occasional inequities. *Id.* at 10 n.15 (internal citations omitted).

¹⁰⁵ 4 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* §12.02[1], at 12-60 to 12-67 (rev. 3d ed. 2001)

¹⁰⁶ *In re Lido Blvd.*, *Town of Hempstead, Lido Beach, Nassau County*, 43 A.D.2d 45, 349 N.Y.S.2d 422 (2d Dep’t 1973), *aff’d*, 39 N.Y.2d 958, 386 N.Y.S.2d 886; Thomas W. Merrill, *supra* note 99, at 118 (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)). This means that awards are not limited to compensating landowners for the value of the current uses, but based upon the most advantageous use to which the land could be developed. *Matter of Town of Esopus*, 162 A.D.2d 829, 557 N.Y.S.2d 732 (3d Dep’t 1990), *lv. denied*, 77 N.Y.2d 801, 566 N.Y.S.2d 586; *Dillenbeck v. state*, 193 Misc. 542, 83 N.Y.S.2d 308 (N.Y. Ct. Cl. 1948), *aff’d*, 275 A.D. 871, 88 N.Y.S.2d 389 (3d Dep’t 1949).

¹⁰⁷ A benefit to the taker standard of compensation, or a restitution/unjust enrichment theory of compensation, would result in higher awards because “condemnations of land typically increase the value of the property taken.” *Id.* at 118. A loss to owner standard of compensation, or indemnification standard, would also result in higher awards by providing compensation for the subjective value of the property to the individual owner as well as consequential damages such as lost profits, locational benefits, moving expenses, etc., otherwise lacking in a “fair market value”

relates to general damages—that is, the fair market value of the property—ignoring other consequential damages, such as an increase in value realized by the taker/buyer or the moving costs of the seller that might be recoverable under theories of restitution or indemnification.¹⁰⁸ Therefore, just compensation typically does not necessarily mean fair market value, where the market would otherwise capture such losses and gains. Three reasons have been put forth which justify a standard of incomplete compensation for certain takings: loss spreading, maintaining efficient incentives, and subsidizing public goods, the latter two of which will be discussed here.¹⁰⁹

The efficiency reason suggests that incomplete compensation encourages the government to regulate socially undesirable activity.¹¹⁰ If these proposed reforms increase both the number and cost of conservation easements in wilderness areas, the government may be less inclined to designate such properties as wilderness areas even if such designation results in heightened protection under the easement agreement. However, a state agency is never compelled to enter into a conservation agreement, and therefore, under a complete compensation such as the ones proposed in various reform packages, a state agency will likely leave the acquisition of conservation easements to the land trusts.¹¹¹

The subsidization argument for a less-than-complete compensation is also appropriate in the context of conserving wilderness areas. In the case of wetlands, where lands are condemned because they provide significant ecological benefit to the public, such “public use” of the

standard. *Id.* at 118-19. While it is possible for an indemnification standard to result in a lower award, that would only occur “in those relatively rare cases where an owner obtains some offsetting benefit from the taking.” *Id.* at 119. Merrill views the “fair market value” standard as providing incomplete compensation. *Id.* at 111.

¹⁰⁸ *See id.*

¹⁰⁹ *See* DANA & MERRILL, *supra* note 98, at 169-90.

¹¹⁰ *Id.* at 132.

¹¹¹ Levin, *supra* note 17, at 602.

property should be subsidized.¹¹² If designation of wilderness areas is done for the public benefit, and positive externalities result from that designation, then designation and acquisition of those lands should be encouraged to the point where the externality enjoyed by society is reduced from the cost of procuring the designation (i.e., the amount of required compensation).

Takings jurisprudence does not value land in such a manner because American society places an inherent value in ownership of real property without unnecessary government interference.¹¹³ As a result, higher costs are seen as important protections against unnecessary takings.¹¹⁴ While such concerns are important, government agencies rarely directly consider takings concerns when establishing regulation or taking action.¹¹⁵ It may be possible that agencies indirectly consider takings concerns, in which case it is also important to properly encourage public benefit-related government takings—forcing the government to pay the full cost of the loss to the owner of the taking is an improper method of valuing a conservation easement taken for the public benefit. A better method under this theory would be compensating the landowner based upon the public benefit received, which does not calculate all possible speculative uses.

This should be the preferred valuation method where a willing seller sells the easement to a willing state buyer. Mandatory compensation schemes under these voluntary circumstances undermine a large part of the value of conservation easements—low-cost conservation. While such easements are still only a portion of the total parcel, and therefore more cost-effective than

¹¹² *See id.*

¹¹³ For a discussion of the inherent value of property in defining personhood, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

¹¹⁴ Levin, *supra* note 17, at 626 (proposing a “comprehensive set of procedural and substantive restrictions that reflect the complexities of conversion and condemnation,” thereby “raising the cost and time it takes to convert or condemn conservation property” in order to prevent “rash and unnecessary conversions and condemnations”).

¹¹⁵ GOV'T ACCTG. OFFICE, REGULATORY TAKINGS: IMPLEMENTATION OF EXECUTIVE ORDER ON GOVERNMENT ACTIONS AFFECTING PRIVATE PROPERTY USE, Report to the Chairman, Subcomm. on the Const., Comm. on the Judiciary, House of Rep., GAO-03-1015, at 16-19 (2003).

obtaining the entire parcel, as the price of those easements goes up, the cost-effectiveness of conservation through easements decreases, especially as concerns regarding the comparative effectiveness of easements remain. Where landowners enter into conservation easement agreements voluntarily, they can always reject low bids and seek land trusts willing to pay more. Landowners are not forced into selling conservation easements under any existing conservation easement law, except through eminent domain. As a result, there is no need to legislate a compensation arrangement under such circumstances, since the negotiation process will value an easement at a price that is just to both parties.¹¹⁶ Instead, mandating full compensation under both voluntary and mandatory acquisitions creates incentives for landowners to sell, rather than donate their easements, causing easements to be ranked lower under most open space plans, and therefore less likely to be conserved.¹¹⁷

2. *Conservation Easements*

The ability to condemn lands in the interest of environmental protection is broad and without limitation.¹¹⁸ The previous section discussed compensation standards related to total takings. Partial takings operate under different compensation standards. Conservation easements do not impact a landowner's ability to utilize her property in manners not inconsistent with the easement, are best considered partial takings, and therefore the standard of compensation of partial takings should be applied to conservation easements.

¹¹⁶ See *supra* notes 102-103 and accompanying text.

¹¹⁷ Bargain sales do rank sites higher than sites whose landowners are unwilling to sell the easement at anything lower than the full market value based on speculation. See *id.* at 76. However, such ranking occurs at the qualitative review stage, and after the numerical ranking has already occurred. *Id.* at 74-76.

¹¹⁸ See, e.g., *Bath & Hammondsport R. Co. v. Dep't of Env'tl. Conserv.*, 73 N.Y.2d 434, 541 N.Y.S.2d 732 (1989); *In re Fowler*, 53 N.Y. 60 (1873).

The compensation standard generally used in partial takings cases is the fair market value of the taking plus the loss suffered through diminished value in the remaining property.¹¹⁹ Therefore, “[i]n the partial takings case, not only is the part taken valued, but an award is also usually made for damages to the property that is left after the taking.”¹²⁰

The usual rule is for a court to fix damages by including the value of the part taken . . . and adding to this severance damages, i.e., the damages to the property that is left The part taken is assessed by measuring its value as part of the whole property as it was before the ‘taking’¹²¹

Severance damages include either the “[l]oss or impairment of use to the remainder by reason of the partial taking,” or “[d]amages to the residue caused by construction of a project.”¹²² This method of valuing partial takings, though not the only method, is the method used by the United States Internal Revenue Service (IRS), and so shall be used in this Article.¹²³ It is called the “before and after” rule, which “evaluates the entire property before the taking and then values the remainder in the after taking situation. The difference is the loss of value for which compensation is payable.”¹²⁴

This fair market value-based standard of appraisal works well when a functioning market exists. However, there exists no such market for conservation easements.¹²⁵ Even where acquisition of conservation easements occurs voluntarily, such exchanges occur in

¹¹⁹ See *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *Donalio v. state*, 99 A.D.2d 335, 472 N.Y.S.2d 946 (3d Dep’t 1984), *aff’d*, 64 N.Y.2d 811, 485 N.Y.S.2d 924; 4A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §14A.01[2], at 14A-4 (rev. 3d ed. 2001). It may also be important, though for different reasons, to compute the fair market value of the real property interest of the holder of the easement. See INTERAGENCY COMM. FOR OUTDOOR RECREATION, GUIDELINES FOR USE OF CONSERVATION EASEMENTS: RIPARIAN HABITAT GRANT PROGRAM 17 (1999), for an example of how to compute such a value.

¹²⁰ Searles, *supra* note 102, at 13.

¹²¹ *Id.*

¹²² *Id.* at 13-14.

¹²³ Internal Revenue Code requires that any conservation easement donation over \$5,000 be valued by a qualified appraiser, See TUG HILL COMM’N, *supra* note 28, at 4, who “estimates the value of the property before and after the easement restrictions are applied. The difference between the two values is the amount of the charitable gift for tax purposes.” FLATHEAD LAND TRUST, PURSUING A CONSERVATION EASEMENT 5 (2002), at <http://www.flatheadlandtrust.org/images/Easement%20Fact%20Sheet%20.pdf>.

¹²⁴ Searles, *supra* note 102, at 13.

¹²⁵ See NORTHERN FOREST EASEMENTS, *supra* note 52 (“[Conservation easements] are particularly valuable for protecting values that are not adequately conserved by market forces.”).

extraordinarily thin markets with a monopoly seller of an easement competing for the highest bidder between the government and generally non-competitive (and perhaps collusive) land trusts. Purchasers of wilderness areas in the private market are either developers who believe they can develop the property consistent with statutory environmental requirements or are conservation organizations that desire the easement to protect the land from development. The latter have fewer resources, do not necessarily intend to exploit the resource for economic gain and therefore may not value the easement as highly as may a profit-minded developer who values the property based on its speculative value.

A developer's willingness and ability to pursue the development, therefore, is not equivalent to the conservation movement's willingness and ability to pay to prevent the development from occurring. Therefore, although there is some limited competition for the property and easement, the competition is really occurring at different levels and by individuals of very different abilities to pay. As a result, the market for conservation easements is not a smooth-functioning market. Since conservation easements under typical conservation easement laws can only be held by public bodies and not-for-profit conservation organizations,¹²⁶ the normally thin easement market is made even more anemic. As a result, the market for conservation easements is limited as it consists entirely of non-profit bodies.

In practice, however, government condemnations occur almost exclusively in thin markets, where there is only one seller who has a monopoly over some resource needed for a public project. Takings are forced exchanges of unique property rights, typically rights in land, that occur in circumstances where voluntary exchange has failed and there are no good substitutes for the land in question insofar as the condemning authority is concerned.¹²⁷

The previous discussion illustrates that no true market for conservation easements exists. As a result, compensation standards based on the purely theoretical construct based on opinions

¹²⁶ *E.g.*, N.Y. ENVTL. CONSERV. LAW § 49-0305(3)(a) (2003).

¹²⁷ Merrill, *supra* note 99, at 116.

as to what a negotiated price would have been in a full market on the day of the taking.¹²⁸ While a conservation easement may be voluntarily sold by the landowner, valuing the easement when the easement was not offered on a public market is still extremely difficult.

A mandated fair market value compensation standard is particularly objectionable in a voluntary context because that standard determines the value of the easement solely in reference to the landowner,¹²⁹ and does not establish a compensation amount that is fair to both parties. Under current conservation easement systems, land trusts purchase conservation easements from willing sellers at very low prices. Inflating the value of the easement to the fair market value solely in reference to the landowner distorts what little market there is for conservation easements (it is assumed that the government can purchase easements for approximately the same cost as land trusts), and may well inhibit the cost effectiveness of utilizing conservation easements for state agencies.¹³⁰ The private market for conservation easements exists because landowners suffering from economic downturn or low farm incomes, and unable to exploit the “normal exemptions” of environmental statutes at a reasonable rate of return, sell or donate the easements to earn some income and a tax deduction from land that would otherwise be near valueless or burdensome because developers would likely be unable to pursue further development.

¹²⁸ See *id.* at 116-17.

¹²⁹ Even where assessing the value to the landowner, it does so objectively, without referencing the subjective value attached to the land by the owner, “ranging from psychological attachment to the property, to features of the property that have been customized to the owner’s tastes, to nontransferable benefits associated with the location, to a desire to avoid the hassles of moving” despite the fact that “if an owner has not sold the property, it is likely that the owner has a subjective value higher than the market value.” *Id.* at 119.

¹³⁰ See Alvin Sokolow & Anita Zurbrugg, Am. Farmland Trust, A National View of Agricultural Easement Programs: Profiles and Maps—Report 1 (2003) (noting that the average price of conservation easements approximates \$2,000 per acre, which while it typically represents the difference between farm values and conservation values, it does not represent other speculative development values—those values are considered donations for tax purposes), http://www.farmlandinfo.org/documents/29120/National_Assessment_Report_1.pdf.

When a market value for a property cannot be established, property value is determined by the “reproduction-cost method.” This method of appraisal, also known as the “sound-value method,”¹³¹ combines the value of the property and improvements made to the property, less depreciation.¹³² This alternate form is used because the courts have “refused to make a fetish even of market value, since it may not be the best measure of value in some cases.”¹³³ This alternative compensation standard might, along with a benefit to the buyer standard, be more appropriate in the context of conservation easements.

In the end, fair market value compensation standards do not work when no full and free market exists. In such situations, different methods of valuation are needed. The compensation standard ultimately chosen must be just for both the seller of the conservation easement and the public that purchases it. Overvaluing the conservation easement in the takings context might make some sense as a means to protect the sanctity and inviolability of private property, if such overvaluation did anything to effect state behavior. As noted above, however, it has not. Instead, a compensation standard which partially subsidizes takings of conservation easements for the public good seems appropriate as a means to encourage such protections and overcome agency inertia. This could easily take the form of a benefit-to-the-buyer compensation standard, which would avoid valuations referencing speculative development profits.

In the voluntary context of the sale of a conservation easement, a requirement that the easement be sold at fair market value, which references foregone speculative development opportunities, is especially inappropriate and unjust. Appropriate consideration must be given to the voluntary nature of the transaction and an appropriate level of subsidization to enhance the public welfare is appropriate, including the costs of monitoring and enforcing the easement,

¹³¹ Searles, *supra* note 102, at 9-10 (citing *In re Simmons*, 127 N.Y.S. 940 (1910)).

¹³² *Id.* at 9.

¹³³ *United States v. Cors*, 337 U.S. 325, 332 (1949).

counseling in favor of incomplete compensation for voluntarily-established conservation easements.

Under any standard used, the value of the easement must consider existing development and use restrictions.¹³⁴ As a result, most easements should be near valueless since “[e]ven the most restrictive easements typically permit landowners to continue traditional uses of the land.”¹³⁵ In wilderness condemnations, DEC must determine whether or not a development permit would have been granted and what that development would have entailed.¹³⁶ If the “highest and best use” of the property is the same before and after the establishment of the easement, then no damages are justified.¹³⁷ If the “highest and best use” has been affected by the establishment of an easement, however, then the easement clearly has compensable value.¹³⁸

Even the most restrictive environmental statutes governing actions in wilderness areas, such as wetlands regulations, typically allow traditional uses through exemption clauses and other regulatory allowances.¹³⁹ These traditional uses are generally allowed under conservation easements,¹⁴⁰ illustrating that little difference often exists between wilderness preservation regulation and conservation easements located in such areas. Conservation easements in these

¹³⁴ TUG HILL COMM’N, *supra* note 28, at 4; *Berwick v. state*, 159 A.D.2d 544, 552, N.Y.S.2d 409 (2d Dep’t 1990), *lv. denied*, 76 N.Y.2d 884, 561 N.Y.S.2d 544 (appropriation of wetlands for conservation easement required downward adjustment of valuation given development limitations imposed by wetlands regulations).

¹³⁵ TUG HILL COMM’N, *supra* note 28, at 3.

¹³⁶ *Chase Manhattan Bank, N.A. v. state*, 103 A.D.2d 211, 479 N.Y.S.2d 983 (2d Dep’t 1984).

¹³⁷ *Sun Oil Co. of Pa. v. state*, 50 A.D.2d 983, 377 N.Y.S.2d 252 (3d Dep’t 1975). Otherwise, such consequential damages are warranted. *See, e.g., Yochmowitz v. state*, 25 A.D.2d 930, 270 N.Y.S.2d 333 (3d Dep’t 1966), *lv. denied*, 18 N.Y.2d 579, 274 N.Y.S.2d 1027; *see also Bd. of Supervisors of Monroe County v. Frisbee*, 18 N.Y.S.2d 668 (1940) (where private character had been lost, the granting of an access easement entitled the landowner only to nominal damages); *Cooper v. state*, 48 N.Y.S.2d 212 (1944) (same). These damages are determined based on the difference between the market value of the remainder before and after the easement was taken. *Bohm v. Metropolitan El. Ry. Co.*, 129 N.Y. 576 (1892); *S.J. & J. Serv. Station, Inc. v. state*, 74 A.D.2d 707, 426 N.Y.S.2d 112 (3d Dep’t 1980), *appeal dismissed*, 50 N.Y.2d 927, 431 N.Y.S.2d 1033.

¹³⁸ *3775 Genesee St., Inc. v. state*, 99 Misc.2d 59, 415 N.Y.S.2d 575 (N.Y. Ct. Cl. 1979).

¹³⁹ TUG HILL COMM’N, *supra* note 28, at 3 (“Even the most restrictive easements typically permit landowners to continue traditional uses of the land.”).

¹⁴⁰ *See e.g., H.B. 1425 § 3(11)(b)*, 106th Reg. Sess. (Fla. 2004) (codifying existing practices regarding enforceability of conservation easement clauses against traditional agricultural practices).

areas are often obtained as an additional layer of protection against government retraction of regulation. As a result, there may be a difference in the fair market value of the easement which is based on the speculative belief that environmental regulation prohibiting development will be eased in the future.¹⁴¹ This speculative value should not be borne by the public in acquiring conservation easements for the public benefit.

Wilderness areas differ in functional importance, and therefore conservation easements in different locations will be valued differently.¹⁴² Since wetlands are grouped into different classes based upon ecological value,¹⁴³ valuing conservation easements of each class equally undermines the importance of such classifications. The danger in these reform proposals which seek to fix compensation standards based purely upon the loss to the landowner, therefore, is that they improperly apply a one-size-fits-all approach to conservation easement valuation.¹⁴⁴ Some existing statutes already recognize the differential value of easements by creating categories of

¹⁴¹ If such a regulatory change does occur in the future, it would likely constitute a “changed circumstance” which would warrant modification or termination of the easement. See Mahoney, *supra* note 84, at 777-79.

¹⁴² E.g., N.Y. Dep’t of Env’tl. Conserv., A Brief Description of the Freshwater Wetlands Act and What it Means to Wetlands Landowners (noting that “[d]ifferent wetlands provide different functions and benefits to different degrees” and that “not all wetlands are equal”), available at <http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm> (last visited April 7, 2003).

¹⁴³ *Id.* This authority is provided by N.Y. COMP. CODES R. & REGS. tit. 6, § 664 (2003). A supplemental classification process is currently being undertaken as part of DEC’s Natural Heritage Program. See N.Y. Dep’t of Env’tl. Conserv., Other Wetlands Conservation Programs, available at <http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog7.htm> (last visited June 25, 2003); N.Y. Dep’t of Env’tl. Conserv., Tidal Wetlands Categories, available at <http://www.dec.state.ny.us/website/dfwmr/marine/twcat.htm> (last visited June 25, 2003); N.Y. Dep’t of Env’tl. Conserv., Tidal Wetlands Permit Program: Standards for Issuance, available at <http://www.dec.state.ny.us/website/dcs/tidalwet/tidalwet05.html> (last visited June 25, 2003).

¹⁴⁴ This one-size-fits-all approach has been soundly criticized. For instance,

[t]wo overarching concepts must be considered with these, or any, principles regarding conservation easements. First, easements will differ based on the values and objectives of the landowner, the easement holder, the funders, and the public at large. Public interests are particularly important where public funds are involved or where a public agency will be the easement holder. Second, every easement will be tailored to the unique characteristics of the land it covers—its size, biophysical character, and geographical context—and must be based on a comprehensive resources analysis of the property. There is no such thing as an ideal “one-size-fits-all” easement.

NORTHERN FOREST EASEMENTS, *supra* note 52.

easements.¹⁴⁵ Undermining this differential valuation scheme would go even further to advantage the seller's position over the buyer's in the voluntary exchanges of conservation easements.

“The expenditure of public funds should be commensurate with the public benefit derived from the easement.”¹⁴⁶ An “assessment of the overall public benefit versus the expenditure of public funds, considering both the project itself and alternative uses of the funds” is necessary to ensure that public funds are not being improperly spent.¹⁴⁷ Appraisals based on a functional utility adjustment of easements have been approved by the New York courts, opening the door to public-value based pricing of easement acquisitions.¹⁴⁸ This benefit-to-the-buyer compensation standard is a valuable mechanism by which to encourage the acquisition and enforcement of conservation easements, and should be encouraged and further developed by the courts.

B. *Remedy Reduction*

In addition to donating conservation easements under existing law and selling such easements at fair market value, landowners can sell the easement for what is termed a “bargain sale.” A bargain sale occurs when a landowner sells land or easements in land at a price below its fair market value.¹⁴⁹ This possibility exists because “[I]and trust and government agencies are

¹⁴⁵ Other conservation easement laws, however, create categories of easements based upon levels of protections afforded, thus starting the process of valuing easements by function. *See, e.g.*, Forest Conservation Law, Montgomery County Council, Md. (July 1, 1992) (creating categories of conservation easements, with different activities restricted and allowed for each category of easements). While “[e]very easement is unique and tailored to the particular property and the interests of the landowner, the easement holder, and the programs or organizations providing funding for the easement’s purchase,” NORTHERN FOREST EASEMENTS, *supra* note 52, the proposed law does not do enough to assist the Board in valuing easements based upon the value of the easement to the public, but rather requires the valuation to be based upon the value lost to the landowner, despite the voluntary nature of the transaction.

¹⁴⁶ NORTHERN FOREST EASEMENTS, *supra* note 52.

¹⁴⁷ *See id.*

¹⁴⁸ *See, e.g., In re Acquisition of Easements by Albany County Airport Auth.*, 265 A.D.2d 720, 696 N.Y.S.2d 305 (3d Dep’t 1999), *lv. denied*, 94 N.Y.2d 758, 705 N.Y.S.2d 5 (2000).

¹⁴⁹ *Id.*

sometimes willing, though often not able, to buy conservation land.”¹⁵⁰ For landowners in need of immediate income, yet desiring to conserve the property, a bargain sale may be a good option. “The difference between the land’s appraised fair market value and its sale price is considered a charitable donation and may be able to be claimed as an income tax deduction.”¹⁵¹ Therefore, “[i]f an easement donor wishes to claim tax benefits for the gift, he or she must donate or sell it for less than fair market value to a public agency or to a conservation or historic preservation organization that qualifies as a public charity under Internal Revenue Code Section 501(c)(3).”¹⁵²

Lancaster County, Pennsylvania has a program that provides landowners with numerous options in the release of a conservation easement including “a bargain sale with tax benefits, the holding of proceeds in a tax escrow account with deferred payments over a five year period, and a payment method of either a lump sum or installment payments.”¹⁵³ Despite the fact that the county pays a mere \$2,000 per acre of conservation easement land, there are still more than 150 properties on the waiting list to enter into take bargain sales.¹⁵⁴ Compensation standards which require the state to pay the full fair market value of the easement as determined by the value lost to the landowner would increase the price of the easements significantly, thereby reducing the number of conservation easements which the state can acquire.

These proposed compensation standards fail to recognize that landowners have differing values and goals with respect to the conveyance of conservation easements. Some landowners are more cash-poor than others. For some landowners, it is more advantageous to donate the conservation easement, not pay capital gains tax on the sale of the property, and receive income and estate tax deductions than it is to sell the property at full value and bear the full brunt of the

¹⁵⁰ FLATHEAD LAND TRUST, *supra* note 25, at 9.

¹⁵¹ *Id.*

¹⁵² TUG HILL COMM’N, *supra* note 28, at 3.

¹⁵³ Solloway, *supra* note 39, at 605 (internal citations omitted).

¹⁵⁴ *Id.* at 605, 607-08.

tax system. Most landowners probably fall somewhere between these two extremes—tangible cash is important to improve the farm operation and increase the equity capitalization,¹⁵⁵ but capital gains and other taxes prove to be too burdensome to sell the property at full value. For these landowners, a bargain sale may be the ideal option. Eliminating the option of a bargain sale through mandatory compensation standards would reduce the incentives for certain landowners to create conservation easements and would reduce the ability of the government to enter into conservation easements due to budgetary constraints. Instead, these landowners may opt to lease their development rights in order to obtain tax abatements in return for a temporary conservation easement.¹⁵⁶ However, lease development rights are significantly less desirable as conservation tools because such temporary protections provide no long-term guarantee that the land will be conserved, nor do they provide the landowners with income tax benefits.

C. Expanding Takings Jurisprudence

Designating property as wilderness lands which restrict development is not sufficient to trigger a takings claim.¹⁵⁷ Furthermore, the requirement that property owners obtain permits prior to developing wilderness areas does not constitute a taking.¹⁵⁸ Therefore, before a takings claim becomes ripe for review, a development permit must first be sought.¹⁵⁹ These reform

¹⁵⁵ Solloway, *supra* note 39, at 608-09 (“The proceeds can be invested for future equity, used to purchase more land, or otherwise invested in the farm. Plus, if the farmer has neighboring land that is not under easement, the value of that land will increase, providing equity.”) (internal citations omitted).

¹⁵⁶ HENRY H. STEBBINS, SCENIC HUDSON, INC., PRESERVING WORKING FARM LANDSCAPES IN THE HUDSON VALLEY: A FEASIBILITY STUDY 11 (1995). Lease development rights are authorized under N.Y. GEN. MUN. LAW § 247 (2003).

¹⁵⁷ Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) (wetlands).

¹⁵⁸ United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) (“[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . Only when a permit is denied and the effect of the denial is to prevent economically-viable use of the land in question can it be said that a taking has occurred.”).

¹⁵⁹ United States v. Byrd, 609 F.2d 1204, 1211 (7th Cir. 1979).

efforts attempt to either change or circumvent long-standing takings law through the mandated compensation standards requirements they seek to establish.¹⁶⁰

Although many of the reform efforts specifically mandate compensation standards only in the context of voluntary easement acquisition (easements acquired through eminent domain are compensated according to standards established in takings jurisprudence), they nevertheless predicate compensation on the mere fact that lands to be governed by an easement are protected wilderness areas. These reforms do not require that the landowner actually seek to develop the property in order to establish potential profit margins for a particular activity. Instead, the reform bills seek to compensate all landowners, regardless of whether they intend to let the land lay fallow for conservation purposes, who sell conservation easements on wilderness lands to public agencies. This concept rejects long-standing principles of takings jurisprudence, which, although not governing over voluntary sales is nevertheless informative, refuse to compensate landowners solely on the basis of the status of their land, absent a showing of preclusion of intended development by the application and denial of a permit or an illustration of how the designation of the property as wilderness lands somehow thwarted the landowner's reasonable investment-backed expectations.

These reform efforts also raise some very serious concerns about the role of notice in compensation. If a property owner purchases a property knowing that a permit is required to develop the property, such knowledge generally precludes the owner from arguing that her reasonable investment-backed expectations have been frustrated.¹⁶¹ These reforms may obviate

¹⁶⁰ For a more in-depth discussion of this issue with respect to New York Assembly Bill 4231, see BLUEMEL ET AL., *supra* note 1, at 38-40.

¹⁶¹ *Ciampetti v. United States*, 18 Cl. Ct. 548 (1989). *See, e.g., Anello v. Zoning Bd. of Appeals*, 89 N.Y.2d 535, 656 N.Y.S.2d 184 (1997); *Basile v. Town of Southampton*, 89 N.Y.2d 974, 655 N.Y.S.2d 877 (1997); *Gazza v. Dep't of Env'tl. Conserv.*, 89 N.Y.2d 603, 657 N.Y.S.2d 555 (1997); *Kim v. City of New York*, 90 N.Y.2d 1, 659 N.Y.S.2d 145 (1997); *see also* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002).

the notice limitations imposed under takings jurisprudence by allowing individuals, fully aware of the status of a property as a protected wilderness area, to purchase that property, enter into a conservation easement agreement, and receive the fair market value of that easement, even if the landowner paid a price for the land that was below fair market value.

This can happen because property values are based on a shorter time horizon than perpetuity. As a result, property values do not fully incorporate the separate, speculative value of the easement in perpetuity, which inevitably will be valued more highly than existing use values given the higher level of uncertainty in the long-term. Recognizing this uncertainty value, the fair market value of a perpetual easement will be higher than the fair market value of the same easement for a limited period of time. Although this skewed incentive advantages landowners with notice contrary to takings jurisprudence, it does provide an incentive to land speculators to establish conservation easements. However, under the proposed reforms, those easements would come at the price of a significant cost borne by the public.

D. Landowner Windfall

A further concern of the mandatory compensation standard endorsed by the reforms is the potential for double compensation. Although income tax benefits are generally unavailable for properties and rights for which compensation is received,¹⁶² other tax benefits may nevertheless be available. Furthermore, it is possible, albeit unlikely, that a court would require compensation both for the conservation easement and for a taking. This might occur where a property is designated as a wilderness area where development is heavily regulated. The landowner attempts to develop the property but is denied the necessary permits. The landowner raises a regulatory takings claim and is awarded compensation. The landowner, however, still retains title to the property and perhaps still pays some property taxes. The landowner then seeks to

¹⁶² See IRC § 701 (2003).

relieve itself of all tax liability and executes a conservation easement agreement with the state, whereby the landowner is compensated not only by a reduced tax burden but is also compensated the fair market value of the easement, which awards the landowner the speculative value of the property based on predictions that the property may be redesignated as non-wetlands sometime in the distant future.

Since the compensation requirement is mandatory and automatic under the proposed reforms and because the state valuation entities may not have knowledge of the landowner's suit in court for compensation under the Takings Clause, such double compensation is a possibility. Because the state valuation entities and the courts operate on two distinct levels and do not have precedential authority over each other and because the compensation schemes could theoretically operate at two different levels (one for the designation of the property as a wetland and the other for the conservation easement), such double compensation is a very real possibility.¹⁶³ Mandated compensation schemes for conservation easements, therefore, risk acting as a price support, compensating landowners for conservation easements by “paying the farmer twice.”¹⁶⁴

Courts may be reluctant to allow game-playing by landowners and may therefore reject claims for compensation under the Due Process Clause as unripe until a landowner seeks compensation from the state valuation entity. This may have the result of increasing transaction costs and reducing the amount of the total award provided landowners—courts may be reluctant to provide a second round of compensation given the claim to provide just compensation at fair market value for the designation of wetlands. Additionally, courts attempt to avoid duplicative awards of damages and therefore will limit one award based on compensation received in prior

¹⁶³ The extent to which the takings claim and the conservation easement regulate different behavior and are of different values may be significant in determining whether or not a state might be able to obtain the overpaid monies through an unjust enrichment action.

¹⁶⁴ Solloway, *supra* note 39, at 609.

proceedings.¹⁶⁵ However, the opportunities for game-playing and landowner windfalls abound in the proposed reforms.

CONCLUSION

In the end, the proposed reforms to the conservation easement system create more problems than they resolve. Current efforts to protect ecologically important wilderness areas from development and inimical state policies have illustrated that significant incentives exist in the status quo. While no analysis has been conducted to determine the optimal level of conservation and whether or not the existing incentives are properly aligned to achieve such conservation levels,¹⁶⁶ this Article posits that existing incentives are sufficient to achieve the necessary levels of conservation, though perhaps not on the desired timeline. A larger question that remains unanswered is what portion and types of lands should be conserved through the use of conservation easements as opposed to other preservation strategies. This is a question that will require time to answer, as some of the theoretical critiques of conservation easements have yet to play out. The validity of the perpetuity critique, especially, is difficult to evaluate. However, existing regulation typically allows for the modification and extinguishing of conservation easements when they are no longer supported by ecological need, and concerns that such easements might be ineffectual due to expropriation or extinguishment concerns seem no less compelling than changes in regulation or other modes of protection.

Nevertheless, before additional incentives are created in any conservation easement regime, careful analysis of the existing incentives and means to avoid the effectiveness critiques discussed in this Article are necessary to formulate an appropriate strategy. Concerns regarding the perpetual nature of conservation easements and the funding of their enforcement remain and

¹⁶⁵ See *Tarbell Road Realty, Inc. v. state*, 28 A.D.2d 819, 281 N.Y.S.2d 852 (4th Dep't 1967).

¹⁶⁶ This analysis, however, has begun. See Sokolow & Zurbrugg, *supra* note 130, at 5.

have not been resolved by the existing reform efforts. As a result, a fourth way may be necessary to resolve such concerns.

This Article suggests that adjusted compensation standards can go a long way toward remedying the monitoring and enforcement critiques. A benefit-to-the-buyer standard of compensation for eminent domain-acquired conservation easements would minimize the amount of agency resources needed to acquire the property so that more resources could be dedicated to enforcing the easement. While such a standard may not incorporate all the enforcement-related costs, it would consider alternative modes of action that a state agency might take to protect such lands, including regulation, and therefore would effectively reduce the overall state budgetary burden caused by acquisition of conservation easements. It would also be normatively supported, as the landowner did not choose to enter into the easement, and, as such, should not be saddled with the costs of enforcing such an easement.

In voluntarily-ceded conservation easement arrangements, this Article posits that no mandatory compensation requirement be established, but that legitimacy and support be provided to incomplete compensation standards which serves to subsidize the public benefit achieved through the easement and which covers the cost of monitoring and enforcing the agreement. Under such voluntary circumstances, “incomplete” compensation to the landowner is not particularly detrimental, since the differential value between the ultimate sale price and the potential sale price can be used to obtain various tax benefits.

Conservation easements are a very powerful tool to protect wilderness areas from development and state policies detrimental to wilderness areas and values. However, prior to using such easement arrangements, careful analysis should be taken to determine that an easement arrangement is the most effective means to protect the wilderness area under the

particular circumstances. Generally, conservation easements provide the opportunity to protect vast amounts of ecologically important lands at low per unit costs. However, without assurances that such easements will be honored and not be made ineffective through surrounding development, those are wasted costs.