Property Tax Assessment of Conservation Easements

by

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PROPERTY TAX ASSESSMENT OF CONSERVATION EASEMENTS

*Daniel C. Stockford**

Don't it always seem to go
That you don't know what you've got till it's gone?

Joni Mitchell, *Big Yellow Taxi*

I. INTRODUCTION

In the past decade, conservation easements have become increasingly important tools for the protection of scenic, historic, and ecologically significant property.[1] A conservation easement, or conservation restriction,[2] is a recorded agreement in which the owner of property restricts the type and amount of development that is allowed on the property.[3] In granting a conservation easement, a property owner conveys certain rights in the property to a governmental agency or charitable organization for the public benefit.[4] The rights conveyed vary according to the particular attributes of a property and the desires of a property owner.[5] A landowner wishing to preserve land as open space may grant a conservation easement giving up the right to develop the property, while the owner of a

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[1] LAND TRUST EXCHANGE, 1989 DIRECTORY OF CONSERVATION LAND TRUSTS v (1989) (acreage on which land trusts hold conservation easements has increased substantially). *See generally* J. DIEHL & T. BARRETT, THE CONSERVATION EASEMENT HANDBOOK 6 (1988).

[2] Conservation easement enabling legislation in some states use the term "conservation restriction" to describe conservation easements. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 184, § 31 (West Supp. 1989); S.C. CODE ANN. § 27-9-10 (Law. Co-op. 1977). This Comment uses the more common term "conservation easement."

[3] J. DIEHL & T. BARRETT, *supra* note 1, at 5.

[4] *Id.* at 5–6.

[5] *Id.* at 5–7.

historic building may grant a historic preservation easement that restricts the owner's ability to alter certain historic features of the structure.[6]

More than thirty states have passed legislation specifically sanctioning the granting of less-than-fee interests in property for conservation, scenic, or historic purposes.[7] In states that have not passed conservation easement legislation, the common law of easements permits the creation of similar restrictions.[8] Most conservation

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[6] Historic preservation easements that restrict the permissible alterations of historic structures raise some property assessment issues that are beyond the scope of this Comment. *See* D. LISTOKIN, LANDMARKS PRESERVATION AND THE PROPERTY TAX (1982); Roddewig & Shlaes, *Appraising the Best Tax Shelter in History*, 50 THE APPRAISAL J. 25, 30 (1982). This Comment will focus specifically on easements that restrict the permissible uses of land. For discussions of historic preservation easements, see J. DIEHL & T. BARRETT, *supra* note 1, at 209–39; D. LISTOKIN, *supra*; Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976); Reynolds, *Preservation Easements*, 44 THE APPRAISAL J. 355 (1976).

[7] ALASKA STAT. §§ 34.17.010–.060 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (Supp. 1988); ARK. STAT. ANN. §§ 15-20-401 to -410 (1987); CAL. CIV. CODE §§ 815–816 (West 1982 & Supp. 1989); COLO. REV. STAT. §§ 38-30.5-101 to -111 (1982 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1986); DEL. CODE ANN. tit. 7, §§ 6901–6906 (Supp. 1988); D.C. CODE ANN. §§ 45-2601 to -2605 (Supp. 1988); FLA. STAT. ANN. § 704.06 (West 1988); GA. CODE ANN. §§ 44-10-1 to -5 (1982 & Supp. 1989); HAW. REV. STAT. §§ 198-1 to -6 (1985); IDAHO CODE §§ 55-2101 to -2109 (1988); IND. CODE ANN. §§ 32-5-2.6-1 to -7 (Burns Supp. 1988); IOWA CODE ANN. §§ 111D.1–111D.8 (West 1984 & Supp. 1988); KAN. STAT. ANN. §§ 58-3803 to -3809 (Supp. 1987); KY. REV. STAT. ANN. §§ 382.800–.860 (Michie/Bobbs-Merrill Supp. 1988); ME. REV. STAT. ANN., tit. 33 §§ 476 to 479-B (1988); MD. REAL PROP. CODE ANN. § 2-118 (1988); MASS. GEN. LAWS ANN. ch. 184, §§ 31–33 (West 1977 & Supp. 1989); MICH. COMP. LAWS §§ 26.1287(1)–26.1287(19) (1982 & Supp. 1988); MINN. STAT. ANN. § 84C.01–84C.05 (West Supp. 1989); MISS. CODE ANN. §§ 89-19-1 to -15 (Supp. 1988); MO. ANN. STAT. § 67.870–.910 (Vernon Supp. 1989); MONT. CODE ANN. §§ 76-6-201 to -211 (1987); NEB. REV. STAT. §§ 76-2,111 to -2,118 (1986); NEV. REV. STAT. §§ 111.390–.440 (1986); N.H. REV. STAT. ANN. § 477:45–477:47 (1983); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West Supp. 1989); N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1984 & Supp. 1989); N.C. GEN. STAT. §§ 121-34 to -42 (1986); OHIO REV. CODE ANN. §§ 5301.63–.70 (Baldwin 1987); OR. REV. STAT. §§ 271.715–.795 (1987); PA. STAT. ANN. tit. 32, §§ 5001–5012 (Purdon Supp. 1988); R.I. GEN. LAWS §§ 34-39-1 to -5 (Supp. 1988); S.C. CODE ANN. §§ 27-9-10 to -30 (Law. Co-op. 1977 & Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 1-19B-56 to -60 (1985); TENN. CODE ANN. §§ 66-9-301 to -309 (1982 & Supp. 1988); TEX. NAT. RES. CODE ANN. §§ 183.001–183.005 (Vernon Supp. 1989); UTAH CODE ANN. §§ 57-18-1 to -7 (1990); VA. CODE ANN. §§ 10.1-1009 to -1016 (Supp. 1988); VT. STAT. ANN. tit. 10, §§ 821–823 (1984 & Supp. 1989); WIS. STAT. ANN. § 700.40 (West 1988); *see also* Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, in LAND-SAVING ACTION 85 (R. Brenneman & S. Bates ed. 1984).

[8] *See* Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109–11 (1986). Common-law conservation easements are generally considered easements in gross. As such, without the benefit of enabling legislation, they are subject to common-law rules and restrictions. Conservation easement legislation is designed to immunize the easements from common-law restrictions on the alienability and enforceability of such easements. UNIFORM CONSERVATION EASEMENT ACT, 12 U.L.A. 58, 64 (Supp. 1988).

easement statutes provide that landowners may grant conservation easements to governmental units or private nonprofit organizations such as land trusts.[9] The number of land trusts that are willing to accept grants of conservation easements has grown dramatically in recent years. A 1989 survey of conservation land trusts in the United States revealed that there are over 700 land trusts in the United States, Puerto Rico, and the Virgin Islands.[10] Seventy-two percent of the 549 land trusts that responded to the survey accepted easement donations.[11] As of 1989, these land trusts had protected over 290,000 acres of land with conservation easements.[12]

A property owner may save on income, estate, and property taxes by donating a conservation easement to an appropriate agency or organization. Under federal income tax law, the donation of a conservation easement is a tax-deductible charitable gift, provided that the easement is donated in perpetuity, exclusively for conservation purposes, to a qualified conservation organization or public agency.[13] Property owners also may be able to reduce estate taxes dramatically by donating easements during their lifetime, or in a will upon their death.[14]

It is more difficult to predict the effect that a conservation easement will have on a landowner's property taxes. The assessment of land for property tax purposes generally reflects the "highest and

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"One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends." *Id.*

[9] Land trusts are private, charitable organizations that acquire and hold full and partial interests in property for the purpose of preserving the property in perpetuity. Fenner, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039, 1042 (1980); *see also* J.E. MILNE, THE LANDOWNER'S OPTIONS 21 (3d ed. 1985); Stein, *Greening of the City*, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION 176 (1982).

[10] LAND TRUST EXCHANGE, 1989 NATIONAL DIRECTORY OF CONSERVATION LAND TRUSTS iv (1989). Forty-five percent of these land trusts are located in New England. *Id.* at v.

[11] *Id.* at v–vi.

[12] *Id.* at v. Between 1985 and 1989, the amount of land held by land trusts under conservation easements increased by about 80,000 acres. *Id.*

[13] I.R.C. § 170(h) (1986). Conservation purposes within the Code definition include outdoor recreation; education; natural habitat of fish, wildlife, plants, or similar ecosystems; scenic open space; conservation pursuant to governmental policy (including farmland and forest land); historic land; and historic structures. *Id.* § 170(h)(4)(A); *see also* J. DIEHL & T. BARRETT, *supra* note 1, at 12–21; S. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS (1986).

[14] J. DIEHL & T. BARRETT, *supra* note 1, at 55–56. Easements on property donated during an owner's lifetime can result in estate tax savings for the heirs. Conservation easements donated in a will at the owner's death will result in the deduction of the full value of the easement from the value of the estate, with a corresponding reduction in estate taxes. *Id.*; *see also* S. SMALL, *supra* note 13; S. SMALL, PRESERVING FAMILY LANDS (1988).

best use" of that land.[15] The highest and best use of property is the most profitable, likely, and legal use of that property.[16] Because conservation easements often restrict the permissible uses of a property, the restrictions are likely to alter the highest and best use and correspondingly diminish the value of the property.[17]

While commentators generally agree that conservation easements may diminish the fair market value of property,[18] property tax assessors have treated conservation easements with considerable variation.[19] In Massachusetts, for example, conservation restrictions have resulted in downward reassessments ranging from as little as thirteen percent to as much as ninety-five percent of a property's pre-restriction assessed value.[20] The widely varying effects that easements have had on property valuations have prompted those who advocate the donation of conservation easements to caution potential donors about what they should expect in the way of downward reassessment.[21] Although one may attribute the variation in valuation of easement-burdened land to differences in the terms of the easements and the specific characteristics of the properties, a number of other factors contribute to the uncertainty.

This Comment examines the factors that contribute to the uncertainty surrounding assessment of property burdened with conservation easements. Section II of this Comment examines the theories upon which property tax assessment is based, and discusses the effect that conservation easements can exert on the valuation of the properties that they burden. This section also examines how conservation easements have been treated for federal tax appraisal purposes. Section III discusses the wide variations in the valuation of easements and the reasons that a conservation easement grantor might find it difficult to obtain the downward property tax reassessment the grantor might desire and deserve. Section III also exam-

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[15] *See* Youngman, *Defining and Valuing the Base of the Property Tax*, 58 WASH. L. REV. 713, 764 (1983).

[16] Hoffman, *Appraising Deductible Restrictions*, in LAND-SAVING ACTION, *supra* note 7, at 202.

[17] *Id.*

[18] *See, e.g.*, Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENERGY L. & POL'Y 55, 80 (1985); Comment, *New York's Conservation Easement Statute: The Property Interest and Its Real Property and Federal Income Tax Consequences*, 49 ALB. L. REV. 430, 476 (1985).

[19] Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENVTL. AFF. 481, 497 (1975).

[20] *Id.*

[21] J. DIEHL & T. BARRETT, *supra* note 1, at 56–57.

ines state programs designed specifically to encourage the conservation of certain types of land by providing owners with property tax incentives. In Section IV, this Comment suggests steps that local governments and state legislatures should take to establish guidelines, incentives, and a degree of uniformity in this ambiguous area that would promote the preservation of both open space and a strong community tax base.

II. PROPERTY TAX ASSESSMENT AND FEDERAL TAX APPRAISAL OF LAND BURDENED WITH CONSERVATION EASEMENTS

A. Property Valuation Principles

Local property taxes in the United States are generally *ad valorem*, based on the value of taxable land and improvements.[22] Most states require, either constitutionally or statutorily, that property tax assessments be based on a specified percentage of the fair market value of the property in question.[23] Fair market value or fair cash value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts.[24] The fair market value of land may reflect more than the value of the land for its present use. Especially in a developing area, the fair market value of property will also reflect the value of the property for its most profitable, likely, and legal use, also known as its "highest and best use."[25] Calculation of fair market value is made on the basis of a property's highest and best use on the theory that a buyer is willing to pay a price reflecting the potential value of the property.[26]

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[22] D. LISTOKIN, *supra* note 6, at 18; Youngman, *supra* note 9, at 715.

[23] Youngman, *supra* note 15, at 715 n.1. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-227 (1980 & Supp. 1988) (setting "full cash value" as basis of assessment); ME. CONST. art. IX, § 8 (requiring "just value" as basis of assessment); MASS. GEN. LAWS ANN. ch. 59, § 38 (West 1978) (requiring "fair cash valuation" as basis of assessment); MICH. CONST. art. IX, § 3 (setting "true cash value" as basis of assessment); N.J. STAT. ANN. § 54:4-2.25 (West 1986 & Supp. 1988) (setting "true value" as basis of assessment).

[24] Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 566, 137 N.E.2d 462, 473 (1956) (fair cash value); State *ex rel.* Evansville Mercantile Ass'n v. City of Evansville, 1 Wis. 2d 40, 42, 82 N.W.2d 899, 900 (1957) (fair market value).

[25] *See* Hoffman, *Appraising Deductible Restrictions*, in LAND-SAVING ACTION, *supra* note 7, at 202; INTERNATIONAL ASS'N OF ASSESSING OFFICERS, ASSESSING AND THE APPRAISAL PROCESS 16–17 (1968) [hereinafter ASSESSING AND THE APPRAISAL PROCESS].

[26] D. FRANKLIN, T. JANKOWSKI, JR. & R. TORTO, MASSACHUSETTS PROPERTY REVALUATION 23–24 (1983) [hereinafter MASSACHUSETTS PROPERTY REVALUATION]. For example, a

To determine the fair market value of property, assessors and appraisers employ three traditional approaches to property tax valuation. These three techniques are the comparable sales, cost, and income approaches.

The comparable sales, or market data, approach involves determination of fair market value through comparison of similar properties recently sold in the same, or in a similar, market as the property being appraised.[27] This approach is based on the theory that the typical buyer will compare sales and asking prices in order to get the best possible purchase price, and that the seller also will try to get the best price.[28] The comparable sales approach is believed to be most reliable when there are active markets for the type of property being appraised.[29]

Even where active markets exist, however, sales data may be inadequate to establish a sufficient pattern to make valid comparisons in property value.[30] Nevertheless, this approach is often the most reliable standard for determining fair market value because it is based on "actual" values resulting from free market transactions.[31] Also, any limitations in the comparable sales approach can be overcome to a certain extent by adjusting the value of comparable properties to reflect differences between the comparable properties and the subject property.[32]

The cost approach estimates the current reproduction or replacement cost of improvements on the property, taking into account the depreciation of those improvements and adding the estimated value of the land to the depreciated replacement value of the improve-

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10-acre wooded parcel zoned for one-acre single family lots in a developing area will have a fair cash value that reflects its highest and best use: subdivision into 10 one-acre parcels for residential development.

[27] NATIONAL TRUST FOR HISTORIC PRESERVATION AND THE LAND TRUST EXCHANGE, APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF HISTORIC PRESERVATION AND LAND CONSERVATION EASEMENTS 24 (1984) [hereinafter APPRAISING EASEMENTS]. *See also* ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 31–49.

[28] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 23; ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 32.

[29] APPRAISING EASEMENTS, *supra* note 27, at 24.

[30] *Id.*

[31] *See* Baetjer v. United States, 143 F.2d 391, 397 (1st Cir. 1944) ("What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available.").

[32] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 25–27. For an illustration of how comparable sales are adjusted to arrive at fair market value, see Stotler v. Commissioner, 53 T.C.M. (CCH) 973 (1981).

ments.[33] This method alone does not usually result in a determination of a property's fair market value. Rather, the cost approach tends to set the upper limit of the property's value, because an informed buyer is not likely to pay more for the real estate than it would cost to reproduce it.[34] Assessors use the cost approach extensively, however, because it involves a more or less mechanical application of replacement costs based on construction industry information, and depreciation percentages based on the age of the improvements on the property.[35] Thus, the cost approach avoids some of the subjective elements associated with the comparable sales approach, including the inherently subjective task of finding similar properties and adjusting values to compensate for differences between those properties.

The income, or capitalization of income, approach involves the capitalization, or reduction to present value, of expected future benefits to be generated from the property during its economic life.[36] As with the comparable sales approach, the income approach requires a significant amount of reliable market data, such as rents, occupancy rates, and operating expenses.[37] It is most applicable to real estate that is normally bought and sold on the basis of its income-producing capabilities, such as retail, commercial, and agricultural properties.[38]

An assessor is likely to make use of all three approaches to arrive at the fair market value of a parcel of property.[39] Once an assessor has derived value indications from the comparable sales, cost, and income approaches, the assessor will correlate the values to arrive at a final market value estimate.[40] Because the values derived from the three approaches are not likely to be the same, the assessor must analyze each value, considering the reliability and amount of information collected under each approach, the strengths and weaknesses of each approach, and the relevance each approach bears to

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[33] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 20. *See generally* ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 24–30.

[34] I.R.S. Publication 561 (Rev. Dec. 88) at 8.

[35] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 21–23.

[36] *See* MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 29–35. *See generally* ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 50–63.

[37] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 29.

[38] *Id.*

[39] *Id.* at 35; ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 64–65.

[40] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 35; ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 64.

the property being assessed.[41] Correlation is not an averaging process, but rather an attempt to determine which of the assessment techniques is most accurate and relevant and should receive the most weight in determining fair market value.[42]

B. Property Tax Valuation of Land Burdened with Easements

A conservation easement that restricts the permissible uses of a property is likely to alter the highest and best use of that property.[43] By altering the highest and best use of a property, the conservation easement often exerts a downward influence on the fair market value of the property.[44] For example, if a conservation easement requiring that property remain in its natural state were placed on vacant land with a highest and best use as a residential subdivision, the land's fair market value would no longer reflect its potential use as a residential subdivision. The fair market valuation of the property would be limited to the use of the property in its natural state.

The metaphor that landowners possess a "bundle" of property rights in their land also illustrates this principle.[45] A person who grants a conservation easement gives up one or more of the "sticks" in the bundle of rights associated with ownership of the burdened land, thus lowering the land's fair market value.[46] By giving up, for example, the "stick" that allows the owner to develop the land, the property owner diminishes the value of the property if the land is otherwise suitable for development.

Accordingly, more than half of the states that have passed conservation easement enabling legislation have provided by statute that imposition of conservation restrictions shall affect the property tax valuation of the burdened land.[47] In Minnesota, for example,

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[41] ASSESSING AND THE APPRAISAL PROCESS, *supra* note 25, at 64.

[42] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 35.

[43] *See* Suminsby, *Appraising Deductible Restrictions* in LAND-SAVING ACTION, *supra* note 7, at 198–99.

[44] *Id.*

[45] *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65–66 (1979) (setting forth metaphor that ownership of property consists of a "bundle" of "strands" of rights).

[46] *See* Suminsby, *supra* note 43, at 198.

[47] *See, e.g.*, ALASKA STAT. § 29.45.062 (Supp. 1989); CAL. REV. & TAX. CODE §§ 402.1, 423 (West 1987 & Supp. 1990); COLO. REV. STAT. § 38-30.5-109 (1982); CONN. GEN. STAT. ANN. § 7-131b (West 1972 & Supp. 1988); FLA. STAT. ANN. § 193.501 (West Supp. 1989); GA. CODE ANN. § 44-10-5 (1982); IND. CODE ANN. § 32-5-2.6-7 (Burns Supp. 1988); ME. REV. STAT. ANN. tit. 36, § 701-A (Supp. 1989); MD. TAX-PROP. CODE ANN. § 8-219 (1986); MASS. GEN. LAWS ANN. ch. 59, § 11 (West 1988); MICH. STAT. ANN. §§ 26.1287(6)–26.1287(7) (Callaghan

property burdened by a conservation easement is entitled to reduced property tax valuation if: the easement is for a conservation purpose; the easement is recorded in a registry of deeds; and the property is being used in accordance with the terms of the easement.[48] The laws of Colorado and Missouri require that assessing authorities give due regard to the limitations on future use of property resulting from the imposition of conservation restrictions.[49] Oregon requires that burdened property be assessed on the basis of the true cash value of the property, less any reduction in value caused by the conservation easement.[50] Maine mandates that assessors consider the effect upon value of any recorded contractual provisions limiting the use of lands.[51]

A number of state court decisions also reflect the theory that conservation restrictions lower the fair market valuation of the burdened land.[52] In *Village of Ridgewood v. Bolger Foundation*,[53] a landowner granted a perpetual conservation easement to the New Jersey Conservation Foundation, a private nonprofit organization, to keep the land in its natural state.[54] The New Jersey Supreme Court found that, by giving up in perpetuity the right to do anything with the property other than keep it in its natural state, the landowner seriously compromised the property's value as a marketable commodity.[55] The *Ridgewood* court held that the adverse impact of the easement on the market value of the land must be taken into account in assessing the land for property tax purposes.[56]

1982); MINN. STAT. ANN. § 273.117 (West Supp. 1989); MO. ANN. STAT. § 67.895 (Vernon Supp. 1989); MONT. CODE ANN. § 76-6-208 (1987); NEB. REV. STAT. § 76-2,116 (1986); N.H. REV. STAT. ANN. §§ 79-A:1 to 79-A:26 (Supp. 1988); N.J. STAT. ANN. § 13:8B-7 (West Supp. 1989); N.C. GEN. STAT. § 121-40 (1986); OHIO REV. CODE ANN. §§ 5713.01, 5713.04 (Baldwin 1987); OR. REV. STAT. § 271.785 (1987); PA. STAT. ANN. tit. 32, § 5009 (Purdon Supp. 1988); TENN. CODE ANN. § 66-9-308 (Supp. 1988); VA. CODE ANN. § 10.1-1011 (Supp. 1988); WIS. STAT. ANN. § 70.32(1g) (West 1989); *see also* Note, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383, 396 n.60 (1976).

[48] MINN. STAT. ANN. § 273.117 (West Supp. 1989).

[49] COLO. REV. STAT. § 38-30.5-109 (1982); MO. ANN. STAT. § 67.895 (Vernon Supp. 1989).

[50] OR. REV. STAT. § 271.785 (1987).

[51] ME. REV. STAT. ANN. tit. 36, § 701-A (Supp. 1989).

[52] *See* Village of Ridgewood v. Bolger Found., 6 N.J. Tax 391 (1984), *aff'd*, 202 N.J. Super. 474, 495 A.2d 452 (1985), *rev'd*, 104 N.J. 337, 517 A.2d 135 (1986); Parkinson v. Board of Assessors, Nos. 122909 to 122911, 130796 to 130798 (Mass. App. Tax Bd. May 23, 1984), *aff'd*, 395 Mass. 643, 481 N.E.2d 491 (1985), *rev'd on reh'g*, 398 Mass. 112, 495 N.E.2d 294 (1986).

[53] 104 N.J. 337, 517 A.2d 135 (1986).

[54] *Id.* at 339, 517 A.2d at 136.

[55] *Id.* at 342, 517 A.2d at 138.

[56] *Id.*

Similarly, in *Parkinson v. Board of Assessors*,[57] the Massachusetts Supreme Judicial Court found that a local assessing authority had erred in failing to take into account conservation restrictions in determining the fair cash value of the plaintiff's land.[58] The plaintiff had granted conservation restrictions on three parcels of land, totaling 82.17 acres, to The Trustees of Reservations, a private charitable corporation.[59] The restrictions prohibited development of the parcels, but allowed the taxpayer to maintain a single family residence with outbuildings on the property.[60]

The defendant municipality's policy was to assess land properly subject to a conservation easement or restriction at no more than twenty-five percent of full and fair cash value.[61] The town argued, however, that the plaintiff's easement was invalid.[62] The court disagreed, finding that the conservation easement on the plaintiff's land was valid under Massachusetts law,[63] and holding that the burdened property was therefore entitled to an assessment reflecting the impact of the restriction.[64]

C. Federal Tax Appraisal of Conservation Easements

Valuation of conservation easements in the federal tax appraisal area further illustrates that the imposition of a conservation ease-

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[57] 398 Mass. 112, 495 N.E.2d 294 (1986).

[58] *Id.* at 115, 495 N.E.2d at 296.

[59] *Id.* at 113, 495 N.E.2d at 295.

[60] *Id.* at 113–14, 495 N.E.2d at 295.

[61] 395 Mass. 643, 644, 481 N.E.2d 491, 492 (1985).

[62] *Id.* The Supreme Judicial Court of Massachusetts, in its first hearing of the case, upheld a finding of the Appellate Tax Board that the easement failed because the grantor failed to specifically identify a parcel of land separate from the buildings to which the easement applied. *Id.* at 645, 481 N.E.2d at 493. After the taxpayer and the Attorney General, on behalf of the Secretary of Environmental Affairs, petitioned for rehearing and explained, with the help of an amicus brief supported by 16 charitable corporations, the importance of the issue to environmental conservation, the court agreed to rehear the case. *Parkinson*, 398 Mass. 112, 113 n.1, 495 N.E.2d 294, 295 n.1 (1986). On rehearing, the court reversed the decision of the Appellate Tax Board and held that the conservation easement was valid because it met all of the requirements of a valid conservation restriction under Massachusetts law. *Id.* at 115, 495 N.E.2d at 296. The court held that although the statute required that real estate subject to a conservation restriction be assessed as a separate parcel, it was permissible, as Parkinson had done, to subject an entire parcel, including buildings, to such a restriction. *Id.* at 116, 495 N.E.2d at 296–97.

[63] *Id.*

[64] 398 Mass. at 115, 495 N.E.2d at 296. Based on the testimony of a real estate appraiser who claimed that the property could not be put to its highest and best use because of the restrictions, the court found that the fair cash value of the property with the easement was $212,500. Previously, the defendant had assessed the property without the easement at a value of $317,300 and $346,700, for two consecutive years. *Id.* at 116, 495 N.E.2d at 297.

ment is likely to reduce the fair market value of the burdened property. Property valuation for federal tax purposes utilizes techniques similar to those used for purposes of local property tax valuation. Like local property tax assessors, federal tax appraisers base their appraisals on the highest and best use, utilizing the cost, income, and comparable sales approaches to arrive at fair market value.[65]

Federal tax law allows donors of conservation easements to deduct the fair market value of a donated easement from their taxable income.[66] The goal of federal tax appraisal of easements is to determine the fair market value of the actual conservation easement in order to formulate the amount the landowner may deduct to account for the easement contribution.[67] This process contrasts with property tax assessment, which seeks to determine the fair market value of an entire parcel after it is burdened with a conservation easement.

The Internal Revenue Service (IRS), recognizing that conservation easements diminish the value of burdened property, applies a "before-and-after" approach in appraising the value of conservation easements.[68] To determine the fair market value of the easement donated, the before-and-after approach calculates the difference between the fair market value of the entire property before the grant of the easement, and the fair market value of the property after the grant.[69] The IRS considers this method necessary to determine the value of conservation restrictions because there is usually no substantial record of marketplace sales of easements to use as a meaningful guide in determining easement value.[70] There are few sales of easements in the market place because conservation easements in perpetuity are ordinarily granted by deed of gift, rather than by sale on the open market.[71] Thus, in order to determine the value of the easement itself it is necessary to determine the difference in the value of the property before and after the easement burdens the land.

In *Thayer v. Commissioner*,[72] the United States Tax Court used the before-and-after approach to determine the value of a conser-

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[65] Suminsby, *supra* note 43, at 198.

[66] *See* I.R.C. § 170 (1986).

[67] *See, e.g.*, Thayer v. Commissioner, 36 T.C.M. (CCH) 1504 (1977).

[68] Akers v. Commissioner, 48 T.C.M. (CCH) 1113, 1118 (1984); *see also Thayer*, 36 T.C.M. at 1504; Rev. Rul. 76-376, 1976-2 C.B. 53; Rev. Rul. 73-339, 1973-2 C.B. 68.

[69] Rev. Rul. 76-376, 1976-2 C.B. at 54.

[70] *Id.*

[71] *Id.*

[72] 36 T.C.M. (CCH) 1504 (1977).

vation easement granted to the Virginia Outdoors Foundation, a private charitable organization.[73] The taxpayer and IRS disagreed over the value of a conservation easement that the taxpayer had granted prohibiting further development on Overlook Farm, a sixty-acre parcel on the Potomac River in Fairfax County, Virginia.[74] The court found that the major disagreement between the parties' appraisal experts was over what the highest and best use of the farm was before the easement was granted.[75] The taxpayer's expert concluded that the property's highest and best use before the easement was subdivision into five to eight luxury homesites and that the highest and best use after the easement was as a country estate.[76] The IRS expert, on the other hand, contended that the topography of the land and unavailability of water and sewage facilities made the property unsuitable for development, and thus the highest and best use both before and after the easement was as a country estate.[77]

The court, considering local opposition to development and existing zoning restrictions, found that subdivision into two to four luxury homesites was the highest and best use of the property in the absence of the easement.[78] Using the before-and-after approach, the court deducted the fair market value of the property as a country estate from the fair market value of the parcel as a luxury subdivision to determine the fair market value of the easement. The taxpayer was entitled to a deduction in that amount.[79]

Tax court decisions have recognized conservation easement donations as having significant impact on the fair cash value of property, despite the remote possibility that such easements will be abandoned or the subject property condemned. In *Stotler v. Commissioner*,[80] the IRS argued that a conservation easement did not satisfy the Internal Revenue Code requirement that an easement be granted in perpetuity in order to qualify as a charitable deduction. The IRS said that the easement was not granted in perpetuity because the property owners had a statutory right to petition the easement holder to abandon it, and there was a possibility that the property would be condemned and the easement would terminate.

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[73] *Id.* at 1510.
[74] *Id.* at 1505.
[75] *Id.* at 1508.
[76] *Id.*
[77] *Id.* at 1508–09.
[78] *Id.* at 1509.
[79] *Id.* at 1510.
[80] 53 T.C.M. (CCH) 973 (1981).

Because the requirements for abandonment were so extensive, the court rejected the IRS's argument, reasoning that the possibility the easement would be abandoned was so remote as to be negligible.[81] The court also rejected the IRS argument that the easement violated the perpetuity requirement because language in the deed provided that the easement would terminate in the event the property were condemned for public use.[82] The court reasoned that even though there was a possibility that part of the land would be condemned for the construction of a dam, the possibility was remote and even if implemented would affect only a tiny fraction of the burdened land.[83] Utilizing the before-and-after approach, the tax court found that the conservation easement reduced the property's fair cash value by ninety percent.[84]

III. Obstacles to Obtaining a Downward Reassessment of Conservation Easement-Burdened Property

A. Disparity in Valuations

Despite almost universal recognition, in state statutes and decisions, and federal tax laws, regulations, and decisions, that conservation easements should and do exert a downward effect on property values, a property owner may have difficulty obtaining a property tax assessment that accurately reflects the impact of the restriction. Statistics show that property tax assessments and federal tax appraisals of easement-burdened lands vary considerably in the weight given to easements in determining the value of the property. For example, a Massachusetts study showed that conservation restrictions caused assessors to lower assessments by as little as thirteen percent and as much as ninety-five percent of the properties' pre-restriction value.[85] A statistical analysis conducted by the Maine

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[81] *Id.* at 980. The California statute allows a landowner to petition the governing body of the county or city where the property is located for approval of abandonment of an easement by the county, city, or nonprofit organization that holds the easement. Cal. Gov't Code § 51093 (West 1983). The governing body may only approve the abandonment, however, if it finds that no public purpose will be served by keeping the land as open space, the abandonment is consistent with the purposes of the statute and the local general plan, and the abandonment is necessary to avoid substantial financial hardship to the landowner due to involuntary factors unique to the landowner. *Id.*

[82] *Stotler*, 53 T.C.M. at 979. The provision terminating the easement in the event of a taking was designed to ensure that the landowner would recover the full value of the land without the easement. *See id.* at 975.

[83] *Id.* at 979.

[84] *Id.* at 983.

[85] Note, *supra* note 19, at 497.

Coast Heritage Trust of thirty-six federal tax appraisals of conservation easements revealed that easements resulted in reductions in fair market value of between five percent and ninety percent.[86]

Federal tax cases dealing with appraisal of conservation easements have demonstrated that often there is substantial disagreement among appraisers about the extent to which easements affect the value of property. In *Thayer*, for example, the taxpayer's appraiser argued that the easement diminished the value of the property by almost $150,000, while the IRS appraiser argued that the negative impact of the easement on fair market value was $60,000.[87] Even more dramatically, in *Stanley Works and Subsidiaries v. Commissioner*,[88] the taxpayer originally claimed a $12,000,000 impact on market value, while the IRS claimed that the conservation easement only diminished the fair market value of the burdened property by $619,700.[89] Although both parties eventually revised their appraisals, their closest valuations differed by over $2,000,000.[90]

Federal tax cases also demonstrate that easements can have a significant, but widely varying, impact on the fair market value of burdened property. For example, in *Stanley Works*, the tax court found that a conservation easement had diminished the fair market value of the subject property by 75 percent.[91] Similarly, the *Stotler* court held that an easement decreased the market value of the burdened property by over 90 percent.[92] In *Symington v. Commissioner*[93] and *Thayer*, on the other hand, the courts held that conservation easements had diminished the fair market value of the burdened properties by only about one-third.[94]

Much of the wide variation in the degree to which easements diminish assessed value can be attributed to differences in the terms of the easements and the characteristics of individual properties. The Maine Coast Heritage Trust study, for example, classified each easement into one of three categories according to the extent to which the easement limited development on the subject property.[95]

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[86] Maine Coast Heritage Trust, Technical Bulletin No. 104: Conservation Easements and Property Taxes 3–4 (Oct. 1989) [hereinafter Maine Coast Heritage Trust Bulletin].

[87] Thayer v. Commissioner, 36 T.C.M. (CCH) 1504, 1508 (1977).

[88] 87 T.C. 389 (1986).

[89] *Id.* at 397–98.

[90] *Id.* at 413.

[91] *Id.* at 412–13.

[92] Stotler v. Commissioner, 53 T.C.M. (CCH) 973, 983 (1981).

[93] 87 T.C. 892 (1986).

[94] *Id.* at 903–04; *Thayer*, 36 T.C.M. (CCH) at 1510.

[95] Maine Coast Heritage Trust Bulletin, *supra* note 86, at 2.

"Forever wild" easements preserve properties in their natural state, and are thus the most restrictive.[96] "Resource protection" easements emphasize the protection and controlled use of natural resources, and may sharply curtail or prohibit development altogether.[97] "Limited development" easements generally restrict the amount or kind of development allowable on a property to a greater extent than state and local zoning.[98]

The Maine study revealed that the most restrictive easements, those classified as forever wild, resulted in an average reduction in fair market value of seventy-seven percent.[99] Resource protection easements resulted in average reductions in value of fifty-three percent, while limited development easements led to an average reduction of twenty-two percent in fair market value.[100]

The Maine Coast Heritage Trust study reveals that a certain degree of consistency does exist in the appraisal of conservation easements for federal tax purposes. The most restrictive easements, for example, resulted in greater average reductions in value than the less restrictive easements. At the same time, however, the Maine study demonstrates that significant variations can exist in the appraisal of even similarly restrictive conservation easements. For example, resource protection easements resulted in reductions in value of as little as twenty-one percent and as much as eighty-five percent.[101] The range of reductions in value for forever wild easements was between sixty-four and ninety percent, while limited development easements led to reductions in value of between five percent and thirty-nine percent.[102]

B. Problems in Applying Traditional Valuation Approaches to Land Burdened with Conservation Easements

The wide variation in valuations of even similarly restrictive easements demonstrates that there is considerable uncertainty facing owners of easement-burdened land about what they can expect in the way of downward reassessment. That there have been a number of reported cases resolving disputes over the proper federal tax

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 3.
[100] *Id.* at 4.
[101] *Id.*
[102] *Id.* at 3–4.

appraisal of conservation easements, despite the fact that there is a clearly established rule for easement appraisals in the before-and-after approach, demonstrates the subjective nature of the easement appraisal and assessment process and the potential for disagreement over how an easement-burdened property should be assessed. Disagreement and disparity about the proper valuation of land can be attributed in part to the difficulties of applying the traditional comparable sales, cost, and income approaches to land burdened with conservation easements.

Traditional property appraisal methods are often unsuitable for determining the fair market value of property burdened with conservation easements. The difficulty in using the comparable sales approach to assess the value of property burdened with conservation easements is a function of the nature of such easements. Conservation easements are still relatively new and uncommon. Differences in the terms of easements, and differences in the effect various terms will have on a specific property, are likely to be great. Therefore, sales of property burdened with similar easements are unlikely to be available as a source of comparison. Additionally, transfers of conservation easements are usually accomplished by deed of gift rather than by sale on the open market. Thus, there are few sales of conservation easements with which to form a basis of comparison.[103]

Assessors who utilize the comparable sales approach to assess land burdened with conservation easements often must make adjustments by attempting to analogize to natural or governmental restrictions on other properties.[104] For example, an assessor searching for comparable sales to a property burdened with a conservation easement prohibiting development may be able to analogize to property with natural features, such as lowlands or hilly areas, that make development impossible. The assessor may also be able to analogize to properties zoned in a way that prohibits uses similar to those prohibited by the easement. The usefulness of such analogies may be limited, however. Property with natural restrictions may be so different from the burdened land that comparison is inappropriate. The ease with which zoning legislation is often amended may make the impact of zoning restrictions on market value negligible, and thus comparisons worthless.

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[103] APPRAISING EASEMENTS, *supra* note 27, at 24.

[104] *Id.* at 24–25.

Because the cost approach focuses on the valuation of buildings and other improvements on property, it also is not often useful in the assessment of conservation easement properties.[105] Although some restrictions, such as historic preservation easements, may apply specifically to maintaining buildings in a preserved state, conservation easements usually impose restrictions on the use of land, with the objective of preserving it as open, unimproved space. The effect of the easement on the land is not likely to have any relation to the replacement value of any improvements on the property. The cost approach also fails to take into account the uniqueness and surrounding circumstances of a particular property. For example, a property with special natural, scenic, or historic attributes may have an especially high market value that will not be reflected in raw replacement or reconstruction costs.[106]

Because the income approach applies to income-producing properties, it too is often inapplicable to evaluating property burdened by conservation easements, which usually is undeveloped and unproductive. Additionally, the imposition of a conservation easement may produce uncertainty as to the future income-producing ability of a property, so that the effect of a conservation easement on income from the property is likely to be highly conjectural.[107]

C. Obstacles to Downward Reassessment Arising from the Nature of the Assessment Process

In addition to problems with applying traditional valuation approaches to easement-burdened land, other obstacles exist for owners of such land who seek to obtain abatement of their property taxes. In the property tax assessment field, the potential for disagreement over the assessment of easement-burdened property can be magnified by the very nature of the assessment process. Assessors may be reluctant to give full recognition to the impact of easements on fair market value because of concerns about a diminishing tax base, and because in reality property often is not assessed at full fair market value anyway.

For a number of reasons, property in a community is rarely assessed at full fair market value for any length of time. All states mandate that municipalities assess property uniformly for taxation

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[105] *See id.* at 26–27.

[106] *Id.*

[107] *Id.* at 27.

purposes.[108] Most states require that property be assessed uniformly at full market value.[109] Other states statutorily provide for uniform fractional assessment of real property for taxation purposes.[110] For example, Alabama law provides that taxable property shall be assessed at sixty percent of its fair cash value.[111]

In reality, the requirement of uniform valuation, whether at 100% of value or at a fraction of full value, rarely is achieved. Because of constantly rising real estate costs in many areas, property is likely to be assessed at full value for only a very brief time. Localities may be reluctant to assess at full value, even if required to do so by law, because of the political backlash that may result from a sudden increase in assessments.[112] Thus, a landowner who demands a reassessment because of a newly granted conservation easement may fear a higher overall valuation not corresponding to surrounding properties because a general reassessment in the area has not recently occurred.[113] Property owners may be hesitant or unwilling to approach their local taxing authority with a request for downward reassessment, out of fear that their request will trigger a complete reassessment of property that might result in a higher overall assessment.[114]

In an era of diminishing funds for local governments, local officials may be hostile to downwardly reassessing burdened land because they fear losing revenue.[115] Nationwide, local property taxes provide

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[108] Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923).

[109] *See* Annotation, *Requirement of Full-Value Real Property Taxation Assessments*, 42 A.L.R. 4TH 676, §§ 3–4 (1987).

[110] *Id.* § 6.

[111] *See* State v. Birmingham S.R. Co., 182 Ala. 475, 62 So. 77 (1913).

[112] For an example of the unwillingness of assessors in Massachusetts to assess at full market value, see MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 2–3. *See also Property Tax Assessments Average 37 Percent of Sales Price, Census Bureau Says*, 23 TAX NOTES 686–87 (1984) (assessors don't want to "go out on a limb" by assessing property at full market value because of inflation and uncertainties in market).

[113] *See* E. WATSON, ESTABLISHING AN EASEMENT PROGRAM TO PROTECT HISTORIC, SCENIC, AND NATURAL RESOURCES 7 (Information Sheet, National Trust for Historic Preservation No. 25, 1982). "[A]sking the assessor to consider the effect of an easement may cause the property to be reassessed in its entirety. This may in fact raise the property's assessment even after the easement is taken into consideration." Comment, *supra* note 18, at 476 n.194; *see also* J. DIEHL & T. BARRETT, *supra* note 1, at 57.

[114] J. DIEHL & T. BARRETT, *supra* note 1, at 57; *see also* Comment, *supra* note 18, at 476.

[115] *See* Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENERGY L. & POL'Y 55, 80–81 (1985) (assessors have been reluctant to reassess value as the result of an easement); *Getting Paid Not to Scratch the Surface*, N.Y. Times, Dec. 29, 1985, § 4, at 4, col. 3 (local governments sometimes have worked against conservation easements, fearing that lower values will lead to lower tax bases).

municipalities with an average of twenty-eight percent of total revenue.[116] In some states, such as Massachusetts, property taxes have accounted for fifty percent, or more, of local revenue.[117] Property tax reform referenda, such as Proposition 13 in California[118] and Proposition 2 1/2 in Massachusetts,[119] have put strains on municipal budgets by imposing ceilings on property tax rates.[120] In addition, cuts in federal and state aid to local governments have intensified local revenue problems.[121] In this context, any attempt to obtain a reduction in property taxes is likely to be met with opposition by local tax officials.[122]

Assessors are paid to make assessments that will generate enough revenue to meet local budgetary needs.[123] Even when state legislation mandates that conservation easements be reflected in the assessment of burdened property, much depends on the attitudes of local assessors toward such easements.[124] Proponents of conservation easements stress that organizations and agencies with easement programs should promote the cooperation of local officials and assessors.[125] The procedures for appealing a property tax assessment often are complicated and require the devotion of significant resources and effort, which grantors may be unwilling or unable to expend.[126] An easement grantor may not have the motivation or

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[116] MASSACHUSETTS PROPERTY REVALUATION, *supra* note 26, at 4.

[117] *Id.*

[118] CAL. CONST. art. XIIIA; *see also* T.S. BARRETT & P. LIVERMORE, THE CONSERVATION EASEMENT IN CALIFORNIA 77–78 (1983).

[119] MASS. GEN. LAWS ANN. ch. 59, § 21C (West 1988 & Supp. 1989).

[120] CAL. CONST. art. XIIIA, § 1 ("The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property."); MASS. GEN. LAWS ANN. ch. 59, § 21C(b) (West 1988) ("The total taxes assessed within any city or town under this chapter shall not exceed two and one-half per cent of the full and fair cash valuation in said city or town in any fiscal year.").

[121] *See, e.g., Fiscal Crisis Forces Communities to Take Up Prop. 2 1/2 Overrides*, Boston Globe, Feb. 4, 1990, West Weekly, at 1 (towns considering override of property-tax cap because of cuts in state aid); *Legislators Struggling to Find Budget Cuts*, N.Y. Times, Dec. 10, 1989, § 12WC, at 1, col. 5 (county might have to raise property taxes because of cutbacks in state and federal aid).

[122] T.S. BARRETT & P. LIVERMORE, *supra* note 118, at 76; J. DIEHL & T. BARRETT, *supra* note 1, at 56. In one instance in Connecticut, a town refused to reassess property burdened by both historic and conservation easements. Brooks, *Rules on Donating Easements*, N.Y. Times, Dec. 11, 1983, § 8, at 1, col. 1. Town officials told the owners that they were unwilling to create a tax-saving precedent that could be copied by others in the area and diminish the tax base of the town. *Id.*

[123] *Id.*

[124] *See* Cohen, *Progress and Problems in Preserving Ohio's Natural Heritage Through the Use of Conservation Easements*, 10 CAP. U.L. REV. 731, 741 (1981).

[125] J. DIEHL & T. BARRETT, *supra* note 1, at 56.

[126] *See generally* Baldinger, *Property Tax Assessment: A Reassessment*, 45 ALB. L. REV.

financial resources to challenge a hostile or intransigent local taxing body successfully.[127] Thus it is to the advantage of taxpayers as well as groups that accept grants of conservation easements to cultivate the cooperation of local assessors and taxing authorities in order to avoid the need to litigate assessment disputes.

D. Property Tax Incentive Programs

The difficulties facing property owners who seek to obtain downward reassessment based on conservation easements are especially significant in light of the recognition by many states that the economic burden of property taxes can serve to compel owners to develop their land in order to pay high property taxes. Indeed, many states have devised property tax incentive programs to encourage the conservation of certain types of property. Although very few of these programs apply specifically to conservation easement-burdened land, the programs represent efforts on the part of states to encourage the conservation of lands with property tax incentives and introduce some degree of uniformity into the assessment process.

The traditional property tax system in the United States based on highest and best use promotes the development of open land in developing areas. Valuation of property on the basis of its potential likely use, rather than on its present use, provides the economic incentive, and sometimes the economic necessity, to convert property to its highest and best use, as determined by the assessor.[128]

The fair market value of a parcel of land can increase dramatically in response to market forces extrinsic to the parcel itself.[129] For example, a fifty-acre undeveloped parcel on a previously isolated mountain road will likely escalate in value if a ski resort is built nearby. The traditional assessment system may assess the parcel based on its potential for use as a retail, residential, or commercial development to service the ski industry, or whatever is determined to be its highest and best use. The owner of the parcel will have an incentive to develop it, or sell it for development, to help pay the higher property taxes levied on the property. The property owner

958 (1981); Gustafson, *Challenging Unequal Property Tax Assessments in Minnesota*, 13 WM. MITCHELL L. REV. 461 (1987).

[127] *See* Cohen, *supra* note 83, at 741.

[128] Note, *The California Land Conservation Act of 1965 and the Fight to Save California's Prime Agricultural Lands*, 30 HASTINGS L.J. 1859, 1864 (1979).

[129] *Id.*; Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 638.

may even be forced to develop the property, if the owner is land-rich and cash-poor, to pay for the higher tax burden. These issues have prompted one commentator to assert that the traditional assessment system can cause assessors to act as de facto planners, and assessments based on the *potential* use of open space to become self-fulfilling prophecies.[130]

Legislatures have addressed the development-inducing implications of the assessment system with creative legislation designed to ease the property tax burden on certain undeveloped properties.[131] Since 1957, when Maryland enacted the first statute providing for farmland property tax reduction, all but two states have adopted statutes granting property tax relief for some types of agricultural or other undeveloped land.[132] While the majority of these statutes do not apply specifically to properties burdened with conservation easements, they illustrate techniques by which legislatures have promoted the preservation of open space with property tax incentives.[133] Also, property burdened with conservation easements may qualify for some of these programs because of the uses to which the property is put.[134]

The most common techniques legislatures have used are varieties of use-value assessment, or differential taxation, schemes.[135] These programs provide for the assessment of certain property based on its present use, rather than its highest and best use.[136] Although the individual provisions of each statute vary, differential taxation programs can be divided into three general categories: preferential assessment, deferred taxation, and restrictive agreement programs.[137]

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[130] Note, *supra* note 128, at 1864.

[131] *See, e.g.*, N.J. STAT. ANN. §§ 54:4-23.1 to -23.24 (West 1986 & Supp. 1988); MICH. COMP. LAWS ANN. § 554.710 (Supp. 1988).

[132] Massey & Silver, *Property Tax Incentives for Implementing Soil Conservation Programs Under Constitutional Taxing Limitations*, 59 DEN. L.J. 485, 493–94 (1982) (stating that Georgia and Mississippi were the only two states without differential taxation legislation).

[133] These statutes are expressly designed to lessen development pressures on land that is used for agricultural or open space purposes. The Maine statute, for example, is designed "to prevent the forced conversion of farmland and open space land to more intensive uses as the result of economic pressures caused by the assessment thereof for purposes of property taxation at values incompatible with their preservation as such farmland and open space land." ME. REV. STAT. ANN. tit. 36, § 1101 (1978).

[134] *See* Maine Coast Heritage Trust Bulletin, *supra* note 86, at 5.

[135] *See generally* Barlowe, Ahl & Bachman, *Use-Value Assessment Legislation in the United States*, 49 LAND ECON. 206 (1973); Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821 (1978).

[136] Currier, *supra* note 135, at 821.

[137] *Id.* at 827.

Preferential assessment programs assess qualified lands on the basis of their present agricultural or open space uses, as long as the property is used for those qualifying purposes.[138] Owners do not suffer penalties when they cease to use property for its qualifying use.[139] This type of program benefits the landowner, who can enjoy lower property taxes while the property remains in its qualifying use, but can develop the property at any time without being penalized.[140] Pure preferential assessment programs are likely to diminish local revenues, however, without any chance of the community retroactively recouping those revenues should landowners decide to develop.[141] Other taxpayers in a community may end up subsidizing land speculators who reap the benefits of lower taxes while waiting until market conditions become most favorable to development.[142]

Deferred taxation programs also provide for preferential assessment of qualifying properties based on use value rather than highest and best use. If a property owner terminates the qualifying use, however, the owner is required to pay back at least some of the taxes saved through the program.[143] At least theoretically, deferred taxation, or "rollback tax," programs give landowners a greater incentive to keep property in its qualifying use than do pure preferential assessment programs, because an owner is penalized with deferred taxes if the owner converts the use of the property.[144] At the same time, a community can recapture some of the benefits it previously conferred on a property owner should the owner choose to convert the property to a nonqualifying use.[145]

Finally, restrictive agreement programs require owners to contract with governmental units to keep a parcel in its qualifying use for a term of years.[146] Restrictive agreement programs are similar to, and in some cases part of, a state's conservation easement program.[147] Under these programs, property is assessed at its use value

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[138] Massey & Silver, *supra* note 132, at 495.

[139] *Id.*

[140] Currier, *supra* note 135, at 827.

[141] *Id.*

[142] *See* Massey & Silver, *supra* note 132, at 496 n.66.

[143] Currier, *supra* note 135, at 828. Deferred taxation programs are also called "rollback tax" programs, as taxpayers must pay back some portion of taxes saved through the program when the qualifying use is terminated. *See* Barlowe, Ahl & Bachman, *supra* note 135.

[144] Currier, *supra* note 135, at 828. Some commentators argue that the success of deferred taxation in discouraging development is not significantly greater than under pure preferential assessment programs. *Id.* at 828 n.40.

[145] *Id.* at 828.

[146] Massey & Silver, *supra* note 132, at 498.

[147] *See, e.g.*, CAL. REV. & TAX. CODE §§ 421–430.5 (West 1987 & Supp. 1989).

in exchange for the owner's promise to keep the property at its qualifying use for a certain number of years.[148] Under most restrictive agreement programs, owners must give several years' notice if they intend to convert the use of the property.[149] If an owner fails to give adequate notice, changes the use of the property, or sells the property before the term expires, the owner must pay penalties or rollback taxes.[150]

The types of land uses eligible under various state differential taxation programs vary considerably. All of the states with such programs include land used for agricultural purposes within the categories of property eligible for differential taxation.[151] Forests, open space, and property of scenic, historical, or ecological significance are also eligible to differing degrees under certain state programs.[152] Only a few states, however, have differential taxation provisions that apply specifically to properties burdened with conservation easements.[153]

The differential taxation programs of many states apply only to agreements between property owners and certain governmental units, and not to agreements between owners and private groups such as land trusts. Thus, the applicability of the programs to conservation easements is further limited by the fact that the programs may not cover conservation easements granted to private land trusts, even if the specific type of property would fall within the program.

IV. Ensuring Fair and Accurate Assessments of Property Burdened with Conservation Easements

For several reasons, owners of land burdened with conservation easements may have difficulty obtaining an assessment of the property that accurately reflects the impact of the easement on the property value. The problems associated with using traditional appraisal methods to value land burdened by conservation easements creates uncertainty for property owners who have donated, or who wish to donate, conservation easements to a land trust or govern-

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[148] *Id.* Ten years is a common minimum term for restrictive agreement programs. *See, e.g.*, FLA. STAT. ANN. § 193.501 (West Supp. 1989).

[149] Massey & Silver, *supra* note 132, at 498.

[150] Currier, *supra* note 135, at 828–29.

[151] Massey & Silver, *supra* note 132, at 499.

[152] *Id.* at 499–500 nn.96–100.

[153] *See* CAL. REV. & TAX. CODE §§ 421–430.5 (West 1987 & Supp. 1989); FLA. STAT. ANN. § 193.501 (West Supp. 1989); N.H. REV. STAT. ANN. §§ 79-A:1 to 79-A:26 (Supp. 1988).

mental agency.[154] Adding to the uncertainty is possible difference of opinion over what the highest and best use of a property is, as demonstrated in the *Thayer* case.[155] Further compounding the problem is the nature of the assessment process itself, which puts taxpayers at the whim of local assessors who may be hostile to downwardly reassessing easement-burdened property because of a feared negative effect on local revenues.[156] Because the financial burden of property taxes can play a role in a property owner's decision whether to develop or preserve land,[157] measures should be instituted on both the local and the state levels to ensure that those who own land burdened with conservation easements receive fair property tax treatment.

A. Local Assessors Should Recognize the Impact of Conservation Easements on the Fair Market Value of Property

In assessing property burdened with conservation easements, assessors and local taxing authorities should take into account both the substantial community benefits of conservation easements and the minimal effect that granting lower assessments is likely to have on the tax base. Downward reassessment of property burdened with conservation easements ultimately will have a minimal effect on total municipal revenues. Undeveloped burdened land is likely to require fewer municipal services than developed land.[158] In contrast, developed land requires the support of numerous costly municipal services. For example, a residential subdivision requires roads, sewers, and schools to accommodate the needs of the residents. At least part of the costs of furnishing those services is provided by local property taxes.[159] Seemingly, land that does not and, by necessary implication of the terms of the easement, will never require expensive municipal services should bear a lower tax burden than land that is subject to development that will create the need for those services.[160]

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[154] *See supra* notes 103–07 and accompanying text.

[155] *See supra* notes 72–79 and accompanying text.

[156] *See supra* notes 122–27 and accompanying text.

[157] *See supra* notes 128–30 and accompanying text.

[158] Whyte, *Securing Open Space for Urban America: Conservation Easements*, URBAN LAND INST. TECH. BULL. No. 36, 43 (1959).

[159] Hagman, *supra* note 129, at 640. *See also Conservationists Ease Impact of Development with Easements*, Christian Science Monitor, Aug. 23, 1985, at 23 (haphazard development likely to cost local governments more than they will get back in property taxes).

[160] *Id.*

Lower assessments of easement-burdened land will also have a minimal effect on the tax base of a community because permanently burdened land is likely to increase the market value of neighboring property under a "betterment" theory.[161] Areas with restricted development and extensive open space are generally the most desirable and expensive in which to live. A significant marketing point for property adjacent to easement-burdened land is its proximity to property that will never be saddled with unsightly development, and its market value should increase accordingly. This principle has been referred to as the "betterment theory,"[162] and it has also been recognized in the federal tax appraisal context.[163] The extent to which the assessment of adjacent properties should be increased because of its proximity to easement-burdened land depends on the specific circumstances and the terms of the easement.[164]

Conservation easements can provide significant benefits to a community that further justify lower assessment and lessen the negative impact on local revenues. If a local community were to purchase property in order to protect it from development, there would be a substantial initial outlay of money and the property would be removed from the tax rolls completely. Easements are a mechanism by which communities can obtain the benefits of open space without expending substantial purchase money and without losing tax revenues from the property altogether.

In order to ensure that conservation easements will indeed benefit the community, administrators of a well-planned easement program should be selective about the properties on which they accept restrictions.[165] Land trusts and governmental agencies should accept restrictions only on property that will serve a public interest, whether it be environmental, historical, or scenic.[166] An easement program that is selective about the restrictions it accepts is likely to be most successful at obtaining lower property assessments for land burdened by easements. If the easements burden only environmentally or scenically significant property, the amount of land re-

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[161] *See* Whyte, *supra* note 158, at 43; *Conservationists Ease Impact*, *supra* note 159, at 23 (developers realize that property values are highest where scenic open space has been protected).

[162] *See* Note, *supra* note 19, at 499.

[163] *See* Symington v. Commissioner, 87 T.C. 892, 901 (1986) (citing S. REP. No. 1007, 96th Cong., 2d Sess. (1980), 1980-2 C.B. 599, 606).

[164] *See* Note, *supra* note 19, at 499.

[165] Whyte, *supra* note 158, at 42–43.

[166] *See* J. DIEHL & T. BARRETT, *supra* note 1, at 11–24 (stressing the importance of developing criteria for the acquisition of easements).

stricted will be relatively small and the community's tax base will not be significantly diminished.[167] Also, an easement program that accepts only significant parcels is likely to gain the support of local officials who can see the benefits of such easements and will be more willing to reassess the value of the restricted properties downwardly.[168]

B. State Legislatures Should Implement Property Tax Incentive Programs Expressly Designed for Conservation Easements

The burgeoning land trust movement and the widespread use of conservation easements has created a need for comprehensive statutory guidelines with differential taxation provisions for the assessment of property burdened with these restrictions. Introducing uniformity and incentives into the conservation easement assessment process would promote a number of objectives. Landowners who have donated or who are considering the donation of restrictions on their property would be certain of the tax benefits they could obtain from an easement grant, and would thus be more inclined to grant restrictions on their property. Uniform guidelines would give assessors and assessment authorities a comprehensive system to employ in the valuation of such restrictions. Finally, uniform assessment guidelines incorporating differential taxation provisions for easement-burdened property would help protect a community's tax base while encouraging landowners to restrict development on their property.

Most states have provided only generally that land burdened with conservation easements must be assessed with due regard to the impact of the restriction on the value of the property.[169] Although many states employ property tax incentive programs to protect agricultural and open space lands,[170] few such programs are designed specifically for property burdened with conservation easements.[171] It is ironic that many states have elaborate programs specifically granting property tax breaks to owners who informally and tempo-

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[167] Whyte, *supra* note 158, at 42–43.

[168] *See* Brenneman, *Criteria for Acquisition and Management*, in LAND-SAVING ACTION, *supra* note 7, at 35–38. Massachusetts law, for example, ensures that there will be local support for all conservation restrictions by requiring approval by the local government, as well as the state Secretary of Environmental Affairs, before a restriction is officially recognized. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1973).

[169] *See supra* notes 47–64 and accompanying text.

[170] *See supra* note 132 and accompanying text.

[171] *See supra* note 153 and accompanying text.

rarily leave their property undeveloped, while relatively few states have legislation specifically providing property tax incentives to those who permanently restrict the development of their property with conservation easements.

To remedy this anomaly, state governments and local authorities should adopt programs to provide property tax incentives to owners who have burdened their property with conservation restrictions. One possible component of a successful program would be a requirement that a landowner receive approval for the easement from the local governing body, as is required in Massachusetts,[172] in order to qualify for a differential taxation program. The approval requirement would serve to ensure that the property values protected by the easement are sufficiently important to the community to warrant special tax treatment.[173] Local assessment authorities would be more likely to be receptive to downwardly reassessing easement-burdened property if the easement had been approved by the local government. Also, a community could regulate the impact of conservation restrictions on its tax base with its power to accept easements into the program.

A differential taxation program for land burdened with perpetual conservation easements would be analogous to restrictive agreement programs already existing in some states.[174] In exchange for granting a restriction on the uses of a property to a governmental body or land trust, a landowner would be eligible for special property tax treatment of the property. At the very least, the property owner would be entitled to an assessment of the property based on the value of its maximum use allowable under the restriction. While most states have statutes providing that assessment of easement-burdened land should be made with due regard to the restrictions on the land,[175] the reality is that, for a number of reasons, including the nature of the assessment process and traditional valuation methods discussed previously, such assessment does not always happen.[176]

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[172] MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1989).

[173] The drafters of the Uniform Conservation Easement Act, now adopted by at least eight states, explicitly did not subject conservation easements to a "public ordering system" like that in Massachusetts. In the prefatory note to the Act, the drafters expressed concern that the requirement that conservation easements be subject to governmental approval would discourage donors from granting easements and would discourage states from enacting the enabling legislation because of unwillingness to undertake the administrative responsibility. 12 U.L.A. 59 (Supp. 1988).

[174] *See supra* notes 146–50 and accompanying text.

[175] *See supra* note 47.

[176] *See supra* notes 115–27 and accompanying text.

Ideally, a differential taxation program would go beyond assessments of property at its present or permitted use, and allow for downward readjustments of the assessed valuation of land or of the tax rate applied to the assessed value of easement-burdened land. A statute could provide that any land burdened with an approved easement must be taxed at a lower rate than unburdened land. Alternatively, a statute could allow for the assessment of burdened land at a lower percentage of fair market value than other properties.[177] Finally, a statute could allow local governments to award credits against property taxes imposed on burdened property.[178]

By applying a lower tax rate or a lower percentage of market value assessment to conservation easement-burdened lands, a state or locality would provide additional incentives to landowners to grant such easements. A property owner would be guaranteed a lower tax burden regardless of an assessor's subjective appraisal of the effect of the easement on fair market value. For example, if property in a locality is normally assessed at fifty percent of fair market value, a statute providing that property burdened with conservation easements be assessed at forty percent of fair market value would give an automatic tax break to the owner. Similarly, a statute allowing easement-burdened property to be taxed at two and a half percent of assessed value in a locality where the normal tax rate is four percent would provide easement donors with tangible, automatic benefits not subject to an assessor's discretion.

A state's ability to apply a lower tax rate to easement-burdened property or to assess such property at a lower percentage of fair market value may depend on whether the state's constitutional uniformity requirement allows subclassification of property for taxation purposes. The Wisconsin Constitution, for example, specifically provides that taxation of agricultural and undeveloped properties need be uniform neither with respect to each other nor with the taxation of other real property.[179] Colorado allows for differential taxation of classes of property so long as the discrimination is justified by the nature and use of the property, and the classification is reasonable and bears some reasonable relationship to a legitimate state inter-

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[177] *See, e.g.*, COLO. REV. STAT. § 39-1-104(1) (1982 & Supp. 1988) (certain property assessed at lower percentage of actual value than other property).

[178] *See, e.g.*, MD. TAX-PROP. CODE ANN. § 9-206 (1986) (local government may grant credits of up to 75% of property taxes imposed on property if owner has conveyed permanent easement to preserve character of property).

[179] *See* WIS. CONST. art. VIII, § 1.

est.[180] In states where subclassification of property is constitutionally or statutorily prohibited, a constitutional amendment or enabling statute could make these types of incentives possible.[181]

A program that provides property tax breaks to owners of conservation easement-burdened property should have provisions that ensure that local treasuries are not significantly depleted by the loss of property tax revenues. An effective easement taxation program will provide for penalties or rollback taxes in the event that a perpetual restriction is violated or the term of a temporary easement expires.[182] Rollback tax provisions should guarantee that, if an easement does terminate, a taxing jurisdiction that has abated taxes on the property may recoup some of the benefits it had conferred on the property owner in the belief that the restriction was valid and permanent.

An easement taxation program should also require that easements be sufficiently in the public interest to merit special tax treatment for the burdened property. For example, a conservation easement that by its terms allows the maximum development possible on a parcel should not be eligible for special tax treatment. A government-approval requirement is one way to ensure that easements are sufficiently in the public interest to justify the assessment or taxation of the burdened property at a lower rate.[183] A state or locality should establish guidelines for the acceptance of easements into a program. Factors to be considered would include the natural, scenic, or historic significance of the property, and the degree to which the easement protects the property's character.

Selective acceptance of easements into a reduced taxation program would also serve to increase the market values of surrounding property and increase tax revenues from the nearby property accordingly. The betterment theory reasons that property that is adjacent to land burdened by an easement that ensures that the land will remain open has a higher market value than if the adjacent land were not so restricted.[184] Buyers are generally willing to pay more based on the character of neighboring property. Because increased

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[180] *See* Massey & Silver, *supra* note 132, at 508–09.

[181] *Id.* at 490.

[182] Even easements that are granted in perpetuity may be released under certain circumstances. *See* J. DIEHL & T. BARRETT, *supra* note 1, at 129–34 (eminent domain, foreclosure, marketable title acts, changed conditions, release, inaction, or merger may terminate a conservation easement).

[183] *See supra* notes 172–73 and accompanying text.

[184] *See supra* notes 161–64 and accompanying text.

market value of nearby property will result in higher assessments, decreased tax contributions from the easement-burdened property should be offset to a certain degree by increased tax revenues from the neighboring property.

Some commentators argue that property tax considerations have little influence on a property owner's decision whether or not to develop.[185] They believe that other factors, including the retirement or death of owners, are the leading reasons that farmland and open space are converted to other uses.[186] Thus, they argue that differential taxation programs do little to promote the preservation of open space.[187]

While property taxes alone may not be the deciding factor in a landowner's decision to develop or not develop the property, a guaranteed property tax reduction may provide the extra, dispositive incentive to a property owner who is considering placing a restriction on land. Certainly owners determined to subdivide and develop their property will not be deterred by potential property tax reductions they can obtain by donating an easement on their property. The tax savings are likely to be far exceeded by the revenues realizable through development. But for those landowners who have a desire to see their property preserved in its natural state, the tax benefits might persuade them to place an easement on their property. Property tax incentive programs might be particularly effective in encouraging owners who are land-rich and cash-poor to restrict a portion of their property and reduce their tax burden.

V. Conclusion

Economic pressures caused by high property taxes may have the effect of forcing landowners who otherwise would choose not to develop to subdivide and sell their property. Property tax abatements from the granting of conservation easements could be a significant incentive to landowners to keep their property undeveloped. Unfortunately, many landowners cannot count on receiving a favorable property tax assessment when they grant a conservation easement on their land. Even where statutes mandate that restrictions on property shall be reflected in the assessment of property, such

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[185] Currier, *supra* note 135, at 837–38.

[186] *Id.*

[187] *Id.*

assessments are neither always fair nor guaranteed. Local taxing authorities should recognize the value of conservation easements to the community and ensure that easement-burdened land is assessed fairly. Similarly, state legislatures should institute tax incentive measures that will guarantee property tax abatements to those who restrict development on their property with conservation easements.