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Taxing and Untaxing Land: Open Space And Conservation Easements

by Joan M. Youngman

Joan M. Youngman is a senior fellow with the Lincoln Institute of Land Policy in Cambridge, Mass.

One of the most dramatic recent developments in the usually staid evolution of property law in this country has been the explosive growth of conservation easements over the past three decades. All but unknown before then, conservation easements today number in the tens of thousands and restrict millions of acres of land.[1] Perhaps their most innovative feature is their duration because they generally limit development in perpetuity. Their implications for land use planning, environmental management, and land markets are still not fully understood, and it is not surprising that many aspects of their property tax treatment remain unsettled as well.

A conservation easement restricts development on a parcel of land. An owner who conveys an easement to an exempt organization, such as a land trust or the Nature Conservancy, usually expects future property tax assessments to reflect that reduction in development potential. However, state law may be unclear on that point, and the drafters of the Uniform Conservation Easement Act deliberately avoided any legislative statement on local tax consequences.[2] Moreover, it is often difficult to estimate the effect of an easement on property value. The terms of each easement are unique, with wide variation in permitted uses, provisions for public access, if any, and authorized construction. An easement that prohibits any building on land that is under development pressure could deprive the property of the greater part of its market value. However, an easement that blocks subdivision of land whose highest and best use is as a single-family estate may not have a dramatic effect on its market price. Many highly publicized cases of abusive overvaluation for federal tax purposes have brought new attention to the speculative nature of some of those calculations and the need for greater clarity in the tax treatment of conservation easements, including the property tax assessment of land they restrict.

Traditional Easements and Conservation Easements. An easement is an interest in land that does not rise to the level of possession. Perhaps the most familiar example is a right of way that permits its holder to cross property belonging to another. That does not confer possession, ownership, or the ability to exclude others, but only the right to traverse the property. However, it may be extremely valuable if it allows passage to an otherwise inaccessible road or a body of water. That is an example

[1]Estimates of the amount of land in the United States subject to conservation easements have risen from 1.9 million acres in 1990 to 6.2 million acres in 2000 and over 9 million acres in 2006. Christopher West Davis, "Pushing the Sprawl Back: Landowners Turn to Trusts," *The New York Times*, Oct. 12, 2003, section 14WC, p. 1; Karl Kell, "Group Touts Benefits of Land Conservation," *New Orleans Times-Picayune*, June 29, 2006, p. 1. By comparison, 9 million acres is approximately the combined land area of Rhode Island, Delaware, Connecticut, and Hawaii. U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005*, 213. Many conservation programs now seek protection of 1 million acres of land, from New York (Lisa W. Foderaro, "State Acquires 2,500 Acres of Wilderness Near Preserve," *The New York Times*, Mar. 15, 2006, p. B5) to San Francisco (Chuck Squatriglia, "A Million Acres: Conservation Advocates Set Goal of Doubling Bay Area Open Space," *The San Francisco Chronicle*, July 16, 2006, p. A1) to the state of Washington (Christopher Schwarzen, "Plan Offered to Save State's Green Spaces," *The Seattle Times*, May 20, 2005, p. B1).

[2]The commentary to the act states, "The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system." National Conference of Commissioners on Uniform State Laws, *Uniform Conservation Easement Act*, Commissioners' Prefatory Note, p. 3 (1981).

of an affirmative easement, one that permits a specified use of property. Less commonly, negative easements convey the right to prohibit some use of the affected parcel. For example, an easement protecting a view or access to sunlight might block construction on neighboring property, or on a specific portion of it.

It is often difficult to estimate the effect of an easement on property value.

A right of way illustrates another important distinction among easements because it would generally be held by the owner of neighboring land. After a sale of the landlocked parcel, the right of way would normally pass to the new purchaser rather than follow the previous owner to a new location. Property law historically favored easements held by neighboring owners for the benefit of their land ("appurtenant" easements), over easements that did not accompany ownership of adjacent land (easements "in gross"). In part, that reflected the value placed on flexibility in responding to changing economic conditions. Adjoining landowners have a vested interest in appropriate neighborhood development, and less reason to block adjustments to new circumstances. They also may be more easily identified and located, particularly after the passage of time, than specific individuals or organizations.

The traditional easement had no special conservation function, but its terminology was pressed into service when environmental concerns required development of a new property right. The most familiar means of open space preservation — outright purchase of land by a governmental or conservation organization — is not always feasible or appropriate. Expense alone limits the amount of environmentally significant property that can be protected in that way. Ownership also entails maintenance, insurance, and many other responsibilities and liabilities that local land trusts, nonprofit organizations, and governmental agencies may be ill-equipped to assume. Most importantly, families with the greatest appreciation for the natural beauty and environmental value of their land often are the least disposed to relinquish title to it. Those owners might make a personal or contractual commitment to preserve their land, but there could be no assurance that future heirs or purchasers would be bound by that promise. All those considerations indicated the need for a new conservation tool to ensure long-term preservation of open space that remained in private ownership.[3]

This seemingly straightforward description actually presented a significant challenge. A classic appurtenant easement would meet this need only if held by owners of neighboring property. An easement in gross held by a conservation organization or land trust might not "run with the land" to constrain future owners. In fact, that conservation purpose required exactly the type of easement most disfavored by the common law: negative (to block future development rather than to permit action on the affected land); in gross (held by a conservation organization, land trust, or government agency, rather than by a neighboring landowner); and, most unconventionally of all, of indefinite or even perpetual duration, to preserve open space for the foreseeable future.

States across the country responded to that situation with legislation permitting this new device, usually called a conservation easement. The Uniform Conservation Easement Act was drawn up to assist in the process, and numerous states adopted it in whole or in part. Because the new instrument did not fit any traditional legal pattern, the term "easement" was itself somewhat arbitrary.[4] The drafters of the Uniform Act used easement nomenclature in part because they considered lawyers and judges to

[3]In 1959, the journalist and sociologist William H. Whyte championed use of easements for that purpose in a report for the Urban Land Institute, "Securing Open Space for Urban America: Conservation Easements," *U.L.I. Technical Bulletin* 36 (December 1959), and in 1965 the Federal Highway Beautification Act, Public Law 89-285, encouraged use of easements for highway landscaping. In *The Last Landscape* (1968), Whyte detailed even earlier uses of easements for scenic preservation in Massachusetts, California, and Washington, D.C. In the 1930s, the National Park Service pioneered the use of scenic easements along the Blue Ridge and Natchez Trace parkways, but as Whyte said, "This was a pioneering program without enough pioneers." *Id*. at 84. *See* Roger A. Cunningham, "Scenic Easements in the Highway Beautification Program," 45 *Denver Law Journal* 168 (1968).

[4]In Louisiana it is called a "conservation servitude," La. Rev. Stat. Ann. section 9:1271, and in Massachusetts a "conservation restriction," Mass. Gen. Laws, ch. 184, section 31.

be more familiar with easements than with alternatives such as equitable servitudes and restrictive covenants.[5]

Federal Tax Incentives. Any review of tax issues raised by conservation easements must begin with federal taxes, because the Internal Revenue Code has had a critical role in shaping the development of easements. Although an early IRS ruling indicated that a gift of a conservation restriction might qualify as a charitable donation,[6] the 1969 Tax Reform Act placed that conclusion in doubt. To curtail abusive deductions by taxpayers who retained beneficial control of assets they claimed to have donated to charity, that act generally required that deductible gifts convey all interests in property. In 1976 environmental groups achieved passage of an explicit exception to that rule for qualified conservation easements.[7] Initially, those easements were required to last at least 30 years; that was later changed to allow deductions only for easements in perpetuity.[8]

The requirement of perpetuity was perhaps the most dramatic example of the influence federal tax legislation exerted over the terms of conservation easements because it ensured that most would be perpetual. That itself was a startling development, for flexibility and responsiveness to changed conditions are still significant land policy considerations.[9] A private landowner who conveys a perpetual easement has legally restricted development forever, a step that arguably merits public participation.[10] Another controversial issue concerns public access to conservation land. Environmental advocates successfully argued against requiring access as a condition for federal deductibility. Where an easement protects animal habitat or fragile plant life, public access might undermine its conservation purpose. But often a lack of public access serves primarily to protect the privacy of landowners who have received a public subsidy for the easement on their property.

Valuation for Federal Tax Purposes. In the absence of an established market for conservation easements, federal regulations permit their value to be estimated by comparing the market price of the restricted property before and after the easement is imposed.[11] That approach is logical but frequently problematic. The easement is a useful tool largely because it does not require a change in ownership, but that often means there will be no recent sales data for the property either before or after it is imposed. In that case, before and after value estimates may be hypothetical, and vary widely with appraisal assumptions.

In many transactions, review by two parties with opposing financial interests — a buyer and seller, a mortgage bank and a loan applicant, or an assessor and a taxpayer — provides some check on the natural tendency to adopt assumptions most favorable to a client. That can be absent if an appraisal is prepared for an easement donor whose deduction will be enhanced by assumptions that magnify the unencumbered value of the property and minimize its value after imposition of the easement. The conservation organization receiving the easement must acknowledge the tax value placed on it, but that does not signify assent to the valuation or any review of the assumptions behind it.[12] Less-than-scrupulous appraisers and donors may hypothesize a development potential unsupported by market evidence or even by the physical features of the

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[5]The first reason given by the drafters of the Uniform Act for using that term was that "lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest." National Conference of Commissioners on Uniform State Laws, *Uniform Conservation Easement Act*, Commissioners' Prefatory Note, p. 2 (1981).

[6]Rev. Rul. 64-205, 1964-2 C.B. 62.

[7]IRC section 170(f)(3)(B)(iii) (1976).

[8]On the history of the Internal Revenue Code provisions on this point, *see* Janet L. Madden, "Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements," 11 *Boston College Env. Affairs Law Rev.* 105, 125-137 (1983).

[9]Some implications of discarding traditional property-law restraints on "perpetuities" are considered in "Symposium: Trust Law in the 21st Century," 27 *Cardozo Law Rev.* 2465 (2006). One particular use of a perpetual trust was discussed in Antonio Regalado, "A Cold Calculus Leads Cryonauts to Put Assets on Ice," *The Wall Street Journal*, Jan. 21, 2006; p. A1 ("You can't take it with you. So Arizona resort operator David Pizer has a plan to come back and get it. Like some 1,000 other members of the 'cryonics' movement, Mr. Pizer has made arrangements to have his body frozen in liquid nitrogen. . . . And because Mr. Pizer doesn't wish to return a pauper, he's taken an additional step: He's left his money to himself. With the help of an estate planner, Mr. Pizer has created legal arrangements for a financial trust that will manage his roughly $10 million in land and stock holdings until he is re-animated. Mr. Pizer says that with his money earning interest while he is frozen, he could wake up in 100 years the 'richest man in the world.'").

[10]The drafters of the Uniform Act argued that "public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails." National Conference of Commissioners on Uniform State Laws, *Uniform Conservation Easement Act*, Commissioners' Prefatory Note, p. 2 (1981).

[11]Treas. Reg. section 1.170A-14(h)(3)(i).

[12]A charity receiving a gift with a value above $5,000 must sign an appraisal summary for the gift to be deductible, but "the signature of the donee on the appraisal summary does not represent concurrence in the appraised value of the contributed property." Treas. Reg. section 1.170A-13(c)(4)(iii). In fact, the donee may sign the appraisal summary before the appraiser supplies an estimate of fair market value. Treas. Reg. sections 1.170A-13(c)(4)(ii)(J) and 1.170A-13(c)(4)(iv)(D).

parcel. They may assume that the easement has deprived the property of nearly all value, even if it imposes minimal restrictions on the most valuable use. Unless the tax return claiming the deduction is audited and successfully challenged, unrealistic assumptions will maximize the easement's tax benefit.[13]

Federal regulations require a written appraisal for any easement valued at more than $5,000. Although there have been recommendations that they be made public to discourage abusive overvaluations,[14] those appraisals are private documents. An assessor asked to reduce the property tax valuation of land subject to a conservation easement could request a copy of any appraisal prepared for federal tax purposes — knowing that it may estimate a before value far above the pre-easement property tax valuation, and an after value far below it. The federal tax deduction is maximized by the greatest possible difference between the before and after values, whatever their amounts; the posteasement property tax is minimized by the lowest possible after value.

The incentives for non-arm's-length valuations were highlighted in a 2003 *Washington Post* multipart investigative report on the Nature Conservancy in 2003. Part of that series described transactions in which the Nature Conservancy purchased unrestricted property, imposed a conservation easement on it, and then resold it to a related party for a much lower amount. Although the reduced purchase price would seem evidence that the easement decreased the land value, the purchasers had agreed to make simultaneous donations to the Nature Conservancy in an amount sufficient to recover its initial investment. In effect, the ultimate purchasers were paying the full unrestricted price for the property and then placing an easement on it. By using the Nature Conservancy as an intermediary, they could claim a charitable deduction for the cash donation without documenting any reduction in property value. A typical purchaser received "substantial tax write-offs. . . . The easement restricting development also reduced the land's assessed value, slashing his property tax bill."[15]

One Conservancy trustee interviewed by the *Post* said, "This is a business. . . . We sort of wince and look away at some of the values buyers put on these transactions. We're not the IRS." That same trustee bought a Kentucky horse farm for his daughter through a two-part transaction with the Nature Conservancy because "the federal government is buying part of the land for you." His daughter explained that had she put an easement on the land herself, "the IRS could challenge an appraiser's estimate of the reduction in the land's value." In contrast, the check to the Nature Conservancy would raise no valuation issue. Nor did the easement affect her land use:

> The easement authorizes construction of two houses, outbuildings, garages, toolsheds, a barn, fences, driveways, paths, septic systems, underground pipes, overhead wires, swimming pools and tennis courts. It permits commercial farming, hay cutting and cattle grazing. The land may also be subdivided for sale to two buyers.
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> "There aren't big restrictions," she acknowledged. "I wouldn't have agreed to the easement if it would have changed my plans."
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> The easement continues to save her money: She said the county assessor values her 146 acres and the new six-bedroom house at $150,000. "It was so low I laughed," she said.

The *Post* described a $1.5 million parcel marketed by the Nature Conservancy that was subject to an easement that allowed home construction and prohibited public access. The listing stated, "Advance the work of the Conservancy and at the same time enhance your enlightened self-interest by owning this property for your personal, exclusive use." Later *Post* articles examined problematic easements held by other organizations, such as "golf course" easements for which developers receive millions of dollars in tax deductions by agreeing not to build on fairways.[16]

The *Post* series led to proposals for legislation, reform efforts, new IRS oversight, and a major

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[13]"Companies and individuals claiming huge write-offs face little risk of audit. In the past two fiscal years, an IRS program aimed at identifying inflated deductions taken for easements and other non-cash gifts to charities produced thousands of leads but, because of competing priorities at the agency, did not produce a single audit, according to the General Accounting Office." Joe Stephens and David B. Ottaway, "Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System," *The Washington Post*, Dec. 21, 2003, p. A1.

[14]"Even if nothing else were changed in the laws affecting easement appraisals, subjecting them to public scrutiny would have a significant effect in curtailing abuses, since appraisers would know that their work would be subject to public and peer review." Jeff Pidot, "Appraisal and Taxation," in *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* (Lincoln Institute of Land Policy, 2005), at 30-31.

[15]Joe Stephens and David B. Ottaway, "Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks With Few Curbs on Land Use," *The Washington Post*, May 6, 2003, p. A1.

[16]Joe Stephens and David B. Ottaway, "Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, But Critics Fear Abuse of System," *The Washington Post*, Dec. 21, 2003, p. A1. In this article, Stephen J. Small, a leading expert on conservation easements, expressed "scorn for developers who donate easements on golf

(Footnote continued on next page.)

review of procedures at the Nature Conservancy.[17] It also sparked a vigorous and largely successful effort by environmental organizations to maintain existing tax incentives for conservation easements. It brought new attention to the enormous amount of acreage and land value affected by these innovative instruments, and the lack of precise measures for the resulting loss in property value.

Property Taxation of Land Subject to Conservation Easements. Changes in state property law to permit perpetual conservation easements have rarely faced significant political opposition, in part because they usually avoid potentially controversial questions. As noted, the drafters of the Uniform Conservation Easement Act explicitly deemed local tax issues outside their mandate. Local assessors may therefore encounter this new encumbrance without definitive guidance as to its effect on tax valuations. For example, in 1997 the Louisiana attorney general was asked "whether Louisiana provides any particular income or property tax incentives or benefits to the grantor of a conservation easement." The answer was, "We are not aware of any special provisions relative to conservation easements."[18]

(1) Should the Assessment Take the Easement Into Account?

The most basic question for the assessor is whether the easement should be taken into account at all in valuation. Some states have explicitly provided that it should — one state, Idaho, requires that it be ignored[19] — and some states have adopted arbitrary nonmarket values for the taxation of easement property.[20] In states that have not addressed the question, courts must determine whether existing tax law mandates that an assessment reflect the effect of a conservation easement, under general market-value principles, or ignore the easement, on the theory that assessments need not take divided legal interests into account.

On the one hand, landowners who have made a federally recognized charitable gift of development rights understandably find it plain that those rights now belong to an exempt organization and should not be taxed. That is a cogent argument, but the opposite conclusion also has support. Usually, when an owner voluntarily divides legal interests in real estate, property tax assessments are not affected. The taxing jurisdiction is not responsible for prorating a bill between a landlord and a tenant, and many states will not exempt a leasehold granted to a charity by a non-exempt owner.[21] An assessor need not allocate the tax between joint tenants, or between a life tenant and the holder of a remainder interest, or between a mortgagor and a bank extending a loan. In each of those cases, the parties must come to an agreement over how to pay the single property tax imposed on the undivided estate.

Interestingly, traditional appurtenant easements — those held by owners of neighboring land — have long been an exception to the general rule. The obscure historical development and circuitous legal reasoning behind this special treatment has led some commentators to question whether there is any rationale for this exception.[22] However, it clearly relates to the appurtenant easement's effect on two parcels of land. The owner of the benefited parcel now has new rights, such as a right of way over neighboring property. The owner of the burdened estate has reduced rights, in this case no longer being able to exclude all others, for the easement permits its holder access that in its absence might constitute trespass.

Although assessors might disregard the division of interests between a landlord and tenant or between a mortgagor and a bank, a transfer of rights between two distinct taxable parcels is not so easily

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courses, then seek tax breaks for preserving open space. All but a few such easements, he said, are on their face 'ridiculous.'"

[17]A partial list of articles in *The Washington Post* by Joe Stephens and David B. Ottaway includes "Nature Conservancy Suspends Land Sales; Board of Nonprofit to Review Practices," May 13, 2003, p. A3; "Charity Hiring Lawyers to Try to Prevent Hill Probe," May 16, 2003, p. A27; "Conservancy Abandons Disputed Practices; Land Deals, Loans Were Questioned," June 14, 2003, p. A1; "IRS to Audit Nature Conservancy From Inside," Jan. 17, 2004, p. A1; "Senators Question Conservancy's Practices: End to 'Insider' and 'Side' Deals by Nonprofit Organizations Is Urged," June 8, 2005, p. A3. Joe Stephens was the sole author of "Charities Fight for Easement Donors; Preservation Groups Target Legislators in Move to Save Tax Breaks," Feb. 26, 2005, p. A2; "Nature Conservancy Retools Board to 'Tighten' Oversight," Mar. 4, 2004, p. A21; and "IRS Starts Team on Easement Abuses," June 9, 2005, p. A6.

[18]La. Atty. Gen. Op. No. 1997-336 (Oct. 1, 1997).

[19]Idaho Code section 55-2109 provides, "The granting of a conservation easement across a piece of property shall not have an effect on the market value of property for ad valorem tax purposes and when the property is assessed for ad valorem tax purposes, the market value shall be computed as if the conservation easement did not exist."

[20]*See, e.g.*, "Maryland Tax Department Adopts Emergency Open Space Easement Valuation Rule," *State Tax Notes*, Sept. 30, 2002, p. 990, *2002 STT 185-16*, or *Doc 2002-20900*. (Maryland regulation setting the value of land subject to a perpetual or long-term easement at $1,000 per acre).

[21]*See, e.g.*, Maurice T. Brunner, "Property Tax: Exemption of Property Leased by and Used for Purposes of Otherwise Tax-Exempt Body," 55 A.L.R.3d 430 (1974). *Cf.* Edward L. Raymond, "Property Tax: Effect of Tax-Exempt Lessor's Reversionary Interest on Valuation of Nonexempt Lessee's Interest," 57 A.L.R.4th 950 (1987).

[22]"Why the easement should have received exceptional treatment we are unable to say." James Bonbright, *The Valuation of Property*, Vol. 1, p. 497 (1937).

ignored. If the property undergoing a loss in rights were assessed at full market value, as if no easement existed, consistency would require that the easement also be ignored in assessing the benefited estate, so that the property with expanded rights would be valued at less than its market price. Conversely, if the tax on land carrying a right of way, or a right to an unobstructed view, or a right to enter a private park, reflected its full market value including those benefits, the correspondingly encumbered land should not be taxed as if it were available for development. Note that this analysis deals only with appurtenant easements held by neighboring property owners, and not with easements in gross held by land trusts, environmental organizations, or government agencies. Nevertheless, the historical tax treatment of appurtenant easements provided the initial context for considering the new conservation instrument. Traditional doctrine thus provided two contradictory guides: a general disregard of divided legal interests in assessment and an exception to that rule for appurtenant easements.

Most jurisdictions have concluded that legislative authorization for conservation easements implies that they should be taken into account for property tax purposes.

If fine points of legal doctrine do not assist the assessor facing a novel claim for a reduced valuation by reason of a conservation easement, appeals to common sense and established practice can be equally unavailing. On the one hand, relinquishment of future development rights to promote conservation may seem the very model of a charitable gift; from that point of view, common sense would dictate that only the rights retained by the owner be subject to tax. The amendment of basic state property law to effectuate that, complete with statutory preambles and legislative statements on the benefits of open space, could also be considered evidence that the transfer serves a public purpose. Most jurisdictions have in fact concluded that legislative authorization for conservation easements implies that they should be taken into account for property tax purposes.[23]

On the other hand, appeals to common sense may take other forms. The owner of an estate with great scenic beauty or important conservation values may not be a sympathetic figure to a tax assessor, especially if a seemingly arcane and completely voluntary transaction with estate planning implications has provided the landowner with a federal tax deduction but produced no evident change in the property. The absence of any right of public access may suggest that the transaction is a private matter, with no more implications for property taxation than a lease or a family trust.

This skepticism is not limited to the unsophisticated or to those who lack environmental awareness. The Treasury regulations on conservation easements, for example, consider the owners' plans to actually develop the property when determining the amount of their charitable deduction.[24] That reflects a common-sense concern that taxpayers not be rewarded for refraining from something they would not have done anyway. It is efficient to limit tax incentives to situations in which they make a difference. But that is quite different from considering the likelihood that the donor would develop the property in establishing or valuing a gift of development rights. In contrast, the market for development is strongly relevant on that point. Building rights on rural land with little development potential may have a low value, and if so, the transfer of those rights should not support a significant deduction. But the assessor's perhaps well-founded suspicion that the owner of a scenic estate would never develop it, however great the profit, does not bear on whether its market value has been diminished by extinction of the development rights. A donor who transfers shares of stock to a charity may never have intended to sell them, and perhaps never would have sold them, but something of value has been relinquished nonetheless. Wealthy landowners who cherish their estates might never plan to sell or develop them, but shifting financial and family situations could lead them to change their minds, and in any event their heirs might have a different view. Even if the donors would never have taken this step, they have given up the right to do so.

(2) How Should the Effect of the Easement Be Calculated?

If easements are taken into account in the assessment process, assessors must calculate their effect both on the restricted property and on nearby parcels. The neighboring properties are in many respects more easily analyzed. Their legal rights are unchanged, and any scenic landscape they enjoy is a familiar amenity. Direct observation of prices in the surrounding area can provide a basis for estimating the easement's effect, if any, on neighboring property values. In most cases some increase would be expected, rising with proximity to the conservation

[23]For a list of 18 states that statutorily direct assessors to consider the effect of conservation easements in the valuation process, see Michael R. Eitel, "Comment: Wyoming's Trepidation Toward Conservation Easement Legislation," 4 *Wyoming Law Rev.* 57, 78 n.158 (2004).

[24]Treas. Reg. section 1.170A-14(h)(3)(ii).

land. A legally protected scenic view generally commands a premium price, as evidenced by advertisements for homes "adjoining protected land" or "adjacent to conservation property." Moreover, in some areas, large amounts of conservation land may increase the price of developable parcels by decreasing their supply. Federal tax law anticipates a potential benefit to neighboring lots and requires that any resulting increase in the value of other land held by the easement donor or related parties reduce the charitable deduction for the gift.[25]

Although easements may enhance the value of surrounding property, they will not necessarily do so. Certainly they could have little or no effect. A building restriction on rural land may not even be noticed by neighbors or by the market. Similarly, restrictions on development in an area that has become largely industrial or commercial might have no effect on the value of nearby shops and factories. It is even theoretically possible for an easement to diminish the value of neighboring land. For example, for a potentially profitable large-scale development requiring assemblage of numerous component lots, building limitations on one parcel might negate that possibility for the others.[26] Public access can also have positive or negative effects on surrounding property. A nearby scenic recreational area might increase residential values, but proximity to an ill-maintained or poorly patrolled public park could reduce them. Those effects might be subtle, but they are not conceptually problematic; they illustrate standard market influences often seen in assessment practice.

The effect of an easement on the restricted property itself is more complex and open to dispute. The Treasury regulations take a neutral position on the matter, which is in fact quite controversial. They state that an easement may raise, lower, or have no effect on the value of the property it restricts.[27] Clearly, an easement may lower the value of the subject property. Land in the urban fringe could lose the greater part of its value under a building restriction. An easement could also have a minor effect, as in the case of remote land with no ready market potential. The first question is whether an easement can actually have no effect on value or whether a perpetual restriction must reduce value, even if slightly, below that of an identical parcel still available for development. That can seem a theoretical inquiry, because the difference between an "extremely minimal effect" and "no effect" will not often have important tax consequences. But it is characteristic of the surprising ways in which conservation easements have evolved that this seemingly abstruse point has created a huge controversy.

The debate opened with a 1985 U.S. Tax Court case in which a taxpayer claimed a charitable donation for a "facade" easement on a building in the French Quarter of New Orleans.[28] That prohibited changes in the exterior of the structure, just as a conservation easement restricts development of land. However, the already stringent historic preservation ordinances governing the French Quarter effectively restricted changes to the building exterior even before the easement was imposed.[29] The IRS took the position that only a $24,500 reduction in value was warranted, as against the taxpayers' figure of $108,400. The Tax Court permitted a deduction of $55,278, or 10 percent of the property value. The 10 percent reduction for an easement with limited practical application was widely noted. By the time a 1988 opinion allowed a similar 10 percent reduction ("for lack of evidence to the contrary") for a New Orleans facade easement, the Tax Court felt it necessary to state, "By this decision we

[25]Treas. Reg. section 1.170A-14(h)(3)(i).

[26]William Whyte described a method of blocking development in a larger area by purchasing small parcels of land: "The fish-and-game department of one New England state is especially adept at this kind of tic-tac-toe. In the absence of sufficient money to buy prime coastal wetland areas, it has bought time with a spoiling operation. Its negotiators, who vastly enjoy what they call their dirty-tricks project, have very skillfully picked up enough isolated tracts to effectively seal many thousands of acres against development that otherwise would be inevitable." William H. Whyte, *The Last Landscape* 70 (1968). A contemporary example of this practice is described in Leonora LaPeter, "A Final Preservation," *St. Petersburg Times*, Sept. 19, 2004, p. 1B: "Billy Campbell is the only medical doctor in Westminster, S.C., population 3,400, in the foothills of the Appalachian Mountains. An avid environmentalist, he came up with the idea to use burials to preserve land. For centuries, folks have wrapped up their dead and buried them in the back yard. . . . Campbell took the idea a step further. What if the natural burials on just a portion of land could preserve an undeveloped, larger chunk forever? In 1996, Campbell and his wife bought 33 acres along a creek and offered 'green burials.' . . . Only 18 people were buried there in six years. But seven were buried in just the last month, after Campbell's preserve was featured in an article in The American Association of Retired Persons Bulletin. Now Campbell has joined with Tyler Cassity, a consultant on HBO's *Six Feet Under* and owner of celebrity cemetery Hollywood Forever, where film director John Huston, Hollywood mobster Bugsy Siegel and Rudolph Valentino are buried. They want to bring Campbell's concept to areas from Florida to Texas, Colorado, Washington and Illinois. Their goal: preserve 1 million acres over the next 30 years."

[27]Treas. Reg. section 1.170A-14(h)(3)(ii) ("Further, there may be instances where the grant of a conservation restriction may have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of property. In such instances no deduction would be allowable.").

[28]*Hilborn v. Commissioner*, 85 T.C. 677 (1985).

[29]*Id.* at 679 ("The public interest is protected to a large degree because the buildings and their existing facades are already protected by law.").

do not mean to imply that a general '10-percent rule' has been established with respect to facade donations."[30]

After its 2003 series on the Nature Conservancy, *The Washington Post* undertook a similar set of reports on facade easements the following year. It found "hundreds of affluent Washingtonians who have taken part in the once obscure but rapidly growing program. . . . In almost every instance, easement donors in Washington write off about 11 percent of the value of their homes. That means owners of a $1.5 million mansion claim federal tax breaks of $165,000 or more."[31]

> Such tax deductions are increasingly common although the District already bars unapproved and historically inaccurate changes in the facades of homes in the city's many historic districts. As a result, easement donors largely are agreeing not to change something that they cannot change anyway.
>
> "It really is money from the taxpayer for nothing," said lawyer John D. Echeverria, director of the Georgetown Environmental Law and Policy Institute. "People are absolutely delighted — and astounded — that the federal government would send them $50,000 and more for doing nothing."
>
> . . .
>
> "They are giving up absolutely nothing," said former Treasury official Daniel Halperin, now a nonprofit tax specialist at Harvard Law School. J. Peter Byrne, a historic preservation specialist at Georgetown University Law Center, called the donations "bogus gifts" that have been supplying homeowners with "free money."
>
> The increase in easements has been driven by the emergence of for-profit "facilitators" — businesses that market the program and process the paperwork for homeowners, making the procedure quick and painless. In recent years, such companies and the nonprofit preservation groups that hold the easements have taken in millions of dollars for processing paperwork and monitoring the easements.
>
> . . .
>
> Homeowners typically claim tax deductions of 10 to 15 percent of their home's value, according to preservationists. Until earlier this year, an IRS guide suggested that easement valuations "should" fall in that range.
>
> In Washington, easement promoter Tim Maywalt said, "I have never seen an appraisal come in at anything but 11 percent — and I have seen 350 appraisals."[32]

The chief assessor of the District of Columbia said his office "searched in vain for evidence of lost value, to determine whether property taxes should be reduced for the donors. 'We don't see any difference in value here between the homes that have the facade easements and the ones that don't.'"

Needless to say, this series sparked widespread criticism, calls for legislative reform, and defense of legitimate and beneficial facade easements.[33] This controversy had its roots in the apparently arcane question of whether an easement taking away rights already blocked by local ordinance could have a significant effect on market value.

If an easement clearly can have a negative effect on market value, and may well have a nominal or unobservable effect, what of the third possibility contemplated by the Treasury regulations — can an easement *increase* the value of the property it restricts? The theoretical grounds for a negative response are clear: Buyers cannot be expected to bid more for a smaller set of rights. The market value of land without development potential cannot exceed the value of identical land that still carries development rights. If the New Orleans cases considered that even an extremely small diminution in property rights must reduce market value somewhat, there seem no grounds on which to argue that it could increase that value.

Powerful as that logic is, the Treasury regulations demonstrate that it is not the only possible conclusion. One interesting source of some assessors' skepticism is their observation that many wealthy buyers pay high prices for homes subject to restrictive conditions imposed by historic districts, neighborhood associations, gated communities, or cooperative apartments. That has led some to conclude that restrictions actually add value, and that owners who voluntarily place conservation easements on their land may also anticipate an increase in property value as a result. That hypothesis has been influential and deserves a response.

Property owners benefit from restrictive agreements that prevent their neighbors from indulging in various undesirable actions and inactions — such as loud parties, houses painted shocking colors, derelict cars on the lawn, and failure to remove holiday lights by the appointed time. There is clearly a value in knowing that one's investment is not at

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[30]*Nicoladis v. Commissioner*, 55 T.C.M. 624 (1988).

[31]Joe Stephens, "For Owners of Upscale Homes, Loophole Pays; Pledging to Retain the Facade Affords a Charitable Deduction," *The Washington Post*, Dec. 12, 2004, p. A1.

[32]*Id.*

[33]*See, e.g.*, Jennifer Anne Rikoski, "Comment: Reform but Preserve the Federal Tax Deduction for Charitable Contributions of Historic Facade Easements," 59 *Tax Lawyer* 563 (2006).

risk from wayward behavior, but that does not imply that similar restrictions on oneself carry a value as well.

An instructive thought experiment might consider a homeowners' association imposing these restrictions on property owners. Suppose a prospective purchaser were offered a specific house in that development under two alternate sets of terms: either the purchaser would be subject to the same restrictions as all other community residents, or the purchaser would be the only member of the community not subject to the restrictions. Is it reasonable to expect the prospective purchaser to offer *more* for restricted property than for the right to be the only unrestricted member of the association? If that is not plausible, the observed high sale prices may reflect the value of knowing that one's neighbors are subject to those restrictions, rather than any value that purchasers attach to being restricted themselves. In the context of conservation easements, in which only the easement donor's property is restricted, that reasoning suggests that an easement cannot raise the value of the very property it restricts.

That does not completely settle the question, however. Another, more limited argument for the possibility of easements increasing property value begins with the example of land not subject to development pressure — a parcel whose highest and best use is equally available before and after imposition of the easement. For example, a large scenic lot might have its highest price as an individual residence if its value as a single estate exceeds the sum of the values of smaller parcels under a hypothetical subdivision plan. In that case, loss of future development rights might have no observable effect on market value. If, in addition, the easement itself provides the owner with an amenity, whether through public recognition of the property's significance or simply social cachet, it is not inconceivable that some increase in property value might follow. In a standard real estate market, that chain of events might seem highly unlikely or even ludicrous. However, the past decade's explosive growth in demand for luxury properties and estates demonstrates that standard conditions do not always obtain. When *The New York Times* observes that among celebrities "membership in the Nature Conservancy is a social calling card, and the creation of a conservation easement on personal property is a status symbol,"[34] the possibility that a conservation easement might enhance market price cannot be dismissed out of hand. When houses in exclusive neighborhoods display plaques announcing that they are protected by easements, the parallel to security systems suggests that both measures might increase property values.

> ***The possibility that a conservation easement might enhance market price cannot be dismissed out of hand.***

This occasionally odd behavior in the most expensive portion of the real estate market has a disproportionate impact on the conservation easement debate. Land appropriate for conservation will often be of higher-than-average market value, and land deserving special protection is by definition not average. When easements are designed to protect against immediate development pressure, market values will reflect that demand. It is to be expected that in many easement cases, assessors will be asked to reduce taxes on estates held by affluent residents whose claims to having voluntarily reduced their property value may be met with initial skepticism.

The Massachusetts Example: Reasoning in the Absence of Legislative Guidance. The experience of Massachusetts illustrates the complexities and inconsistencies that can attend efforts to draw an answer to these questions from general principles of taxation. Although Massachusetts was one of the first states to amend its property law to permit conservation easements, and it established a unique system requiring both local governments and the state secretary of environmental affairs to approve easements,[35] its treatment of their property tax consequences was anything but clear. The only statutory guidance provided that "real estate under a conservation restriction in perpetuity . . . subject to a written agreement with a city or town shall be assessed as a separate parcel and the city or town acting through its assessor shall be bound by the terms of the written agreement until its expiration."[36] When the Appellate Tax Board faced a case involving the property taxation of easement land in 1984, it noted that "experienced and capable counsel for both parties made exhaustive searches of the law not only in this jurisdiction but in others and failed to turn up any cases in point. This is clearly a case of first impression."[37]

The board interpreted the legislative requirement that easement land be "assessed as a separate

[34]Anna Bahney, "Greetings From . . . Wyotana, 'Home of the Second Home,'" *The New York Times*, Jan. 17, 2003, p. F1.

[35]Mass. Gen. Laws, ch. 184, section 32.

[36]Mass. Gen. Laws, ch. 59, section 11.

[37]*Parkinson. v. Board of Assessors*, Mass. Appellate Tax Board Docket Nos. 122909-11, 130796-8 (1984), *aff'd*, 395 Mass. 643, 481 N.E.2d 491 (1985), *rev'd*, 398 Mass. 112, 495 N.E.2d 294 (1986).

parcel" to mean there could be no reduction in assessment if the undeveloped open space were not separate from the house lot. Because the land at issue included the taxpayer's house and other buildings, the board refused an abatement. One year later, the Massachusetts Supreme Judicial Court affirmed that result, finding the entire easement invalid because of the mixed residential and conservation use:

> The board's inability to assess the property in light of the conservation easement is symptomatic of the easement's fatal ambiguity. The use of a single family residence, along with the "usual" outbuildings and structures, was excepted from the restrictions set forth in the instrument. . . .
>
> There is nothing in the record which supports the apparently arbitrary determination that seven acres of land were required for the use of Parkinson's [i.e., the taxpayer's] house, and thus ought to be excepted from the restrictions set forth in the easement. One-half acre would probably be sufficient for some, while others would doubtless prefer substantially more. In short, the size of the servient [i.e., restricted] estate depends wholly on one's estimate of the amount of property required for the use of the house. Moreover, as the board recognized, the easement would allow the use of one single family residence anywhere on the property. Accordingly, the instrument creates a roving exception to the easement's development restrictions, which, if the current residence were destroyed, could be placed anywhere on Parkinson's land. Therefore, the easement fails because it inadequately describes not only the size, but also the location, of the land subject to its restrictions.[38]

One year later, the taxpayer and the state attorney general, acting on behalf of the secretary of environmental affairs, together with representatives of 16 conservation organizations, convinced the court to reverse its judgment and find the easement valid.[39] The opinion continued, "A majority of this court having found the easement effective, the remaining issue is to determine the market value of the property subject to it."[40] That suggested that a legally effective easement must be taken into account for tax purposes, the only question being the dollar amount of its value influence.

That was not the only possible conclusion, as the court's earlier opinion showed. Massachusetts precedent has long favored unitary taxation of all interests in property, even when those are held by separate parties. A dramatic example concerns landlords whose long-term leases have become unfavorable to them as market rents rise above the contractual amount. Although a purchaser would offer the landlord less than unencumbered market value for property burdened with that lease, this will not reduce the landlord's property tax assessment in Massachusetts. The assessment covers all interests in property, whether held by the landlord or by a tenant.[41] Therefore, the correct tax value is the market price that would be paid for the landlord's and tenant's interests together — that is, the value of the unencumbered fee. The converse is also true: A landlord who by luck or shrewd bargaining receives rents above market level does not pay more in property tax, because the value of the unencumbered fee has not risen. Massachusetts has consistently taken that position, even when tax values diverge from the sale prices of the owners' interests. That draws objections from owners when assessments do not reflect their low rental income, and from public officials when commercial buildings with above-market leases sell for more than their assessed amounts. In fact, one Massachusetts decision held that even though property could not legally be sold at all, this did not necessarily deprive it of market value for tax purposes.[42] Those cases might be read to support assessment on the full fee value, regardless of the effect of a conservation easement.

The implications of the Massachusetts court's reversal were themselves unclear. Five years later, the newsletter of the Massachusetts Association of Assessing Officers used the model of the long-term lease to analyze the taxation of easement property:

> Problem: A ten-acre parcel of unimproved land has a perpetual easement granted over it to the town for the general public to use it for walking and hiking. No trees may be cut, nor can the owner do anything to interfere with the public's use and enjoyment of the land. Similar unencumbered land sells for $5,000 per acre. How much should this property be assessed?
>
> Solution: $50,000 (10 Acres @ $5,000/Acre).

[38] *Parkinson v. Board of Assessors*, 395 Mass. 643, 646, 481 N.E.2d 491, 493 (1985).

[39] *Parkinson v. Board of Assessors*, 398 Mass. 112, 495 N.E.2d 294, 493 (1986).

[40] *Parkinson v. Board of Assessors*, 398 Mass. 112, 116; 495 N.E.2d 294, 296 (1986).

[41] *Donovan v. City of Haverhill*, 247 Mass. 69, 141 N.E. 564, 565 (1923) ("The tax whether assessed to the owner of the fee or to the person in possession is a tax upon the whole land and not merely on the interest of the person taxed.").

[42] *Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee*, 379 Mass. 420, 398 N.E.2d 724, 726 (1980) (fair cash value in those circumstances is to be ascertained "from the intrinsic value of the property").

> The bundle of rights in fee simple ownership includes all rights to do anything and everything with a property, subject only to taxation, eminent domain, escheat and police powers. The granting of an easement or a lease of a property to others does not negate the obligation of the feeholder from paying taxes on the full bundle of rights. The full bundle of rights still exist, they have just been apportioned among more parties.
>
> The consideration of the granting of the easement (or lease) took into account that the owner would have to continue paying taxes on the full bundle of rights. If the owner thought that he could reduce taxes by granting others the right to use his property, then he did not act wisely. And if so why should all other taxpayers pick up the additional tax burden?
>
> NOTE: If this property were to sell, the owner would only realize a small fraction of its full value as he can only sell a part of the bundle or rights. The town could sell its easement rights to the fee owners for a considerable amount of money, thereby proving the easements rights have an assessable value.[43]

That answer presents a fully developed approach to the taxation of conservation land, one consistent with the treatment of land subject to mortgages, leases, and other nonappurtenant encumbrances. It even considers the legitimate expectations of the parties to the agreement as to its effect on their tax liability. However, it is contrary to the position that the state's highest court had earlier found too clear even to require discussion — in a case that involved no public access at all. It demonstrates vividly the gulf that may divide an appellate opinion in an individual case from administrative practice in hundreds of assessing districts across a state.

Nor were Massachusetts local officials hesitant to step into the breach and supply the assessment guidelines the legislature had failed to provide. Many towns agreed to specific percentage reductions in the taxable value of property subject to conservation easements: one percentage for lands with public access, and another for those without.[44] Those policies provided certainty and encouraged easement donations, but ignored the effect of easements on market value. Even if all conservation easements had uniform provisions, their effect on land prices would vary greatly. Land ripe for development could experience a large reduction in value, while the price of land unsuited to development or far from the urban fringe might show little or no change. And easement provisions are far from uniform. In fact, there can be almost as many variations in easement terms as there are easements themselves.

Easements reflect the agreement of the parties, and need not follow any standard form. They may prohibit all development, or only development of a specific kind, or only development in a specific location. Future building locations may be specified, or they may be "floating" lots (or "roving" lots, as the Massachusetts court termed them), to be set down anywhere on the easement parcel. Landowners may relinquish or retain multiple rights of use. Public access may be prohibited; if permitted, it may be limited to specific times, places, and purposes. The series in *The Washington Post* detailed the enormous latitude granted to some easement donors, such as these rights under a conservation easement on land sold to a Nature Conservancy trustee:

> The covenant authorizes construction of a single-family house of unrestricted size, garages, a swimming pool, a tennis court, a home office, a guest cottage and a writer's cabin. It allows relocation of an access road, installation of septic facilities, construction of foot trails and related excavating, filling and bulldozing. It permits outside benches, tables, chairs, gazebos, birdbaths and screened tents.
>
> It allows cutting firewood for personal use and, on a particular portion of the property, it authorizes tree cutting, hillside terracing, gardening and lawn planting, all to provide the owners with "enjoyment of views." It approves construction of a dock on an ocean cove.
>
> What it does not require: public access.[45]

The purchaser "said the restrictions did not affect his plans for the property. 'We got exactly what we would have gotten anyway.'"[46]

There can be no general rule about the percentage by which a conservation easement reduces the market value of land, because there exists no general conservation easement, only specific documents with individual provisions, whose effects can be determined only for a given real estate market at a particular time.

In recent years the Massachusetts Appellate Tax Board has taken yet another approach, sometimes refusing to reduce the assessed value of easement

[43]E. Balboni, "Problem Corner," 22 *Massachusetts Association of Assessing Officers Newsletter*, No. 2, at 5, 9 (April 1991).

[44]*See, e.g.*, Mark H. Robinson, "Effect of Conservation Restrictions on Property Tax: Cape Cod Examples," Massachusetts Continuing Legal Education, *Preserving Family Lands*, Apr. 28, 1999, pp. 5-6.

[45]Joe Stephens and David B. Ottaway, "Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks With Few Curbs on Land Use," *The Washington Post*, May 6, 2003, p. A1.

[46]*Id.*

property if public access is not permitted.[47] Yet an easement prohibiting all building on land under intense development pressure could deprive that property of nearly all market value, whether or not it allowed public access.

The Massachusetts experience of conflicting judicial, executive, and administrative positions is neither unrepresentative nor unexpected. A new property instrument open to competing interpretations will naturally elicit inconsistent and uncoordinated initial responses in the absence of a clear legislative statement regarding its tax effects.

Public Costs and Benefits. It is entirely appropriate for a legislature addressing the tax consequences of easements to consider their public costs and benefits. The role of those policy considerations in judicial decisions is less clear, and in theory they should not enter the assessment process at all. However, subjective and imprecise interpretations of public benefit have influenced every level of the property tax process, as officials have struggled to clarify the effect of conservation easements.

Judicial opinions give evidence of shifting public attitudes toward the preservation of open space and the ways in which these cultural changes have influenced tax policy. For example, in 1961 *Englewood Cliffs v. Estate of Allison*[48] considered an early prototype of a conservation easement, one providing the maximum possible public benefit. In his will, William Allison bequeathed more than 7,000 acres of land overlooking the New Jersey Palisades as a park open to the public without charge. Because title to the property was held by a private trust responsible for maintenance and upkeep, the community enjoyed all the benefits of the park but did not bear its costs. For many years the park's property tax was based on a nominal $500 valuation. When this figure rose to over $20,000 in 1958 and $50,000 in 1959, the trustees brought this case in protest.

From today's vantage point, a magnificent public park plainly serves a charitable purpose, and it is disconcerting to learn that New Jersey did not consider open space an exempt use of property.[49] No argument was made that the land should be free of tax, but the court did note that both the state and local governments would certainly intervene to bar any sale of the park for private purposes — and that the taxing jurisdiction had made no effort to contribute to the park's maintenance. Drawing an analogy to an appurtenant easement, the court made an admittedly imprecise estimate that 90 percent of the land value had been transferred to the public, and so reduced the assessment to 10 percent of the unencumbered amount.[50]

Allison dealt with statutes that considered "empty" land not to merit a charitable exemption and found activity and construction the only use of real estate worthy of this support. Today, New Jersey is a state committed to environmental values, where "open space" carries a positive connotation and building restrictions are often considered a social good. New Jersey also supplemented its conservation easement statute with specific legislation requiring that assessments account for the effect of easements on value. Even before that provision, a change in judicial perspective was evident. In considering land subject to an easement that allowed no public access, the New Jersey Tax Court distinguished it from Allison Park on these grounds, and *raised* the property assessment by $12,500:

> The subject environmental easement is far different from the easement involved in the

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[47]*See, e.g., Wing's Neck Conservation Foundation, Inc. v. Board of Assessors*, Massachusetts Appellate Tax Board Nos. F262914-16, *Doc 2003-17181,* or *2003 STT 143-20* (unpublished) (2003), *aff'd*, 61 Mass. App. Ct. 1112; 810 N.E.2d 863 (unpublished) (2004).

[48]60 N.J. Super. 514, 174 A.2d 631 (App. Div. 1961).

[49]"The statute which confers tax benefits upon non-profit organizations applies by its terms to buildings used for schools, churches, hospitals, and the like, and only exempts land as an incident of the exemption of the buildings upon it. N.J.S.A. 54:4-3.6. There is no provision in that section for parks, playgrounds and the like where the land itself is of primary importance and any buildings are of minor importance. Allison Park is used by a great many people because of the land itself. The caretaker's house, tool sheds and comfort stations in the park are not buildings which would have any claim to exemption under the statute nor does their existence give the park acreage any claim to exemption." *Id.* at 174 A.2d 633. In a 1998 case dealing with a parking lot, the New Jersey Tax Court took a similar position: "N.J.S.A. 54:4-3.6 directly confers an exemption on buildings and only derivatively, to the extent 'necessary for the fair enjoyment thereof,' on land. Where there is no building, land is not exempt." *Hillcrest Health Service System Inc. v. Hackensack City*, 18 N.J. Tax 38, 48 (1998). For other cases considering the tax status of conservation land, see, e.g., *Santa Catalina Island Conservancy v. County of Los Angeles*, 126 Cal. App. 3d 221, 237, 178 Cal. Rptr. 708 (1981) (environmental preservation held to be an exempt purpose; "It is beyond question that the public policy of this state promotes the preservation of ecological communities, native flora or fauna, important geological features, outstanding scenic values, and open-space recreational opportunities."); *Nature Conservancy of the Pine Tree State Inc. v. Town of Bristol*, 385 A.2d 39 (Maine 1978) (donors' retained rights of access prevented exemption because property was not used solely for charitable purposes); *Holbrook Island Sanctuary v. Inhabitants of Brooksville*, 161 Me. 476, 484, 214 A.2d 660 (1965) (wildlife sanctuary not entitled to exemption; "The purpose is plainly to benefit wild animals. We find no benefit to the community or to the public in the proposed sanctuary."); *Nature Conservancy of New Hampshire v. Nelson*, 107 N.H. 316, 221 A.2d 776 (1966) (no property tax exemption because of insufficient "use and occupancy" of land).

(Footnote continued in next column.)

[50]The arbitrary 10 percent figure is an interesting parallel to the Tax Court's allowance of a 10 percent deduction for the facade easements in New Orleans' French Quarter.

> *Allison* case. Here, [the] Foundation has the exclusive use of the property except that it has conveyed developmental rights and has agreed to maintain the property in its natural state. While these restrictions on the Foundation's use of the property could have meaning if it attempted to sell its remaining interests in the property, the restrictions have no meaning within the basic principles of local property taxation.[51]

On review, the appeals court found the Tax Court to be correct, but the state supreme court took a completely different approach. It emphasized the public benefit offered by preservation of open space and declared that an easement blocking development deprived the property of nearly all its market value:

> By giving up in perpetuity the right to do anything with the property other than keep it in its natural state, defendant has, as the County Tax Board found, seriously compromised its value as a marketable commodity. *Allison* leaves no doubt that the adverse impact of such an encumbrance on market value must be taken into account in arriving at an assessed valuation.[52]

The New Jersey Supreme Court approved an assessment of less than 5 percent of unencumbered value. That was a defensible but not a logically necessary result: The two lower court decisions to the contrary show that reasonable jurists could differ on the issue, and the example of single-family estates demonstrates that not every building restriction impedes highest and best use. Those cases, more than 20 years apart, reflect contemporary attitudes toward conservation as much as they do technical interpretations of property tax law.

It is problematic to ask assessors to judge public benefit. That measure can take many forms, some of them contradictory, and any judgment as to net benefit will necessarily be somewhat subjective.

Property tax determinations in other states have been equally or even more influenced by social attitudes. For example, one commentator recommended, "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."[53] Those are issues better considered by legislators setting the legal basis of the property tax than by local officials administering it. But statutes themselves may leave assessors with that policy determination. In Maine, for example, open space classification requires the assessor's finding of public benefit, considering factors such as size, uniqueness, scenic values, recreational use, and wildlife habitat.[54]

It is problematic to ask assessors to judge public benefit. That measure can take many forms, some of them contradictory, and any judgment as to net benefit will necessarily be somewhat subjective. Building restrictions may preserve scenic beauty, encourage tourism, protect wildlife, and promote agriculture. They may also encourage "leapfrog" sprawl, drive up land prices, block construction of affordable housing, and prevent flexible land-use responses to changed conditions. One of the most powerful conservation incentives is preservation of family lands through reduction in the taxable value of real estate. Where one party might see that as an unmitigated good, allowing cherished property to remain in the hands of those who have cared for it for generations, others could see it as a benefit for one specific family and a problem for others seeking to acquire land of their own. Moreover, the public benefit afforded by development restrictions may have no relation to the consequent loss in market value of the affected property, which is the issue within the assessor's expertise. A public park on land unsuited to development may provide enormous benefits without a correspondingly large reduction in value, while a "backyard" easement may block valuable development but provide no significant public benefit.[55] Assessors, already suffering from public perception that they are responsible for

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[51]*Village of Ridgewood v. The Bolger Foundation*, 6 N.J. Tax 391, 400 (1984), *aff'd in part, rev'd in part on other grounds*, 202 N.J. Super. 474; 495 A.2d 452 (1985), *rev'd*, 104 N.J. 337, 517 A.2d 135 (1986).

[52]104 N.J. 337, 342; 517 A.2d 135, 138.

[53]Daniel C. Stockford, "Comment: Property Tax Assessment of Conservation Easements," 17 *Boston College Env. Affairs Law Rev.* 823, 846 (1990).

[54]36 Maine Rev. Stat. sections 1102 (6) and 1109 (3).

[55]"In a wealthy suburban area, a landowner donated a conservation easement covering two acres of his backyard. While the property had considerable development value if sold separately from the existing residence, it had no other significant conservation values and was not visible to the public. This state also has no system of conservation easement review or determination of public benefit. The land trust accepted the easement, and the donor took a tax deduction." Jeff Pidot, "Backyard Easements," in *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* (Lincoln Institute of Land Policy, 2005), p. 31.

tax bills, are eager to dispel the notion that they set tax policy, or even tax rates.[56] But frontline officials are sometimes left to make policy choices by default, simply because they cannot avoid a decision for which no guidance has been issued.

Fiscal Impact Analysis. An influential and sometimes controversial measure of public benefit analyzes the fiscal impact of open space conservation, estimating its effect on local revenues and expenditures. That approach has been successful in increasing support for land conservation — even among voters whose primary concern is to avoid future tax increases. Open space will almost always produce less tax revenue than residential or commercial property, but fiscal impact analysis takes that computation further and considers the increased spending needs that accompany growth, particularly the costs of public education. Schools are often the largest element in local budgets, and these calculations can show that new construction, particularly of modestly priced housing or multifamily dwellings, will fail to "pay its way," and will require additional taxes from existing properties.

From one perspective, that is an entirely reasonable contribution to public debate. Conservation proponents see fiscal impact analysis as correcting a one-sided emphasis on forgone taxes by calling attention to larger budgetary choices involving both revenue and expenditure. However, that approach is controversial for two reasons. The first is technical, questioning specific assumptions — for example, the characteristics of anticipated residents and buildings — and therefore the accuracy of the analysis.[57] The second is political and philosophical. Is it in society's interest for jurisdictions to discourage growth of their school-age population? How should regions and states respond when individual communities attempt to limit development? Those issues are by no means confined to conservation. Fiscal considerations have led many communities to block construction of housing for families with children, whether by encouraging age-restricted residences or by limiting the number of bedrooms permitted in multifamily dwellings.[58]

That raises difficult issues as to whether and how communities should take into account the larger social impacts of local decisions. To what extent should a town be responsible for a "fair share" of the affordable housing required throughout the state? Should a locality with no needy residents be permitted to disclaim that allocation? Those questions arise when any community rejects growth, whether through zoning, regulation, or conservation restrictions on available building lots.

How should regions and states respond when individual communities attempt to limit development?

Residents of a given town may certainly benefit from restricting development, by whatever means. Land values may increase as a result of the open

[56]That image of assessors is evident in statements such as these from Daniel C. Stockford, "Comment: Property Tax Assessment of Conservation Easements," 17 *Boston College Env. Affairs Law Rev.* 823 (1990): "Assessors are paid to make assessments that will generate enough revenue to meet local budgetary needs." (p. 841); "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." (p. 845).

[57]*See, e.g.*, Anthony Flint, "Report Assails Growth/Cost Formula Need to Gauge Project Impact," *The Boston Globe*, Mar. 11, 2003, p. B3.

[58]*See, e.g.*, Laura Mansnerus, "Great Haven for Families, but Don't Bring Children," *The New York Times*, Aug. 13, 2003, p. A1 ("The federal Fair Housing Act prohibits discrimination against people with children. But restrictions that have that effect but are meant to accomplish something else are usually lawful."); Jonathan Saltzman, "Seniors-Only Trend Grows as School Enrollments Climb, Towns Encourage Age-Restricted Housing," *The Boston Globe*, June 30, 2002, West Regional Section, p. 1 ("More and more suburbs west of Boston are putting age restrictions on residential development. But noise isn't the main concern, it's money — specifically, the amount it costs taxpayers to educate public school students."); Lynn Walters, "N.H. Beckons as Shangri-La for Retirees," *The Boston Globe*, June 9, 2005, North Regional Section, p. 1 ("Adding to the allure is a boom in housing for those 55 years and older. Many builders find it easier to obtain approval for these age-restricted developments than for traditional housing, due to communities' concerns about the expense posed for towns by new housing that attracts families with school-age children."); Peter Whoriskey, "No Kids? That's No Problem; Falls Church's Deal With Builder Highlights Area School Crowding," *The Washington Post*, May 25, 2003, p. A1 ("Of all the people moving into the new 80-unit Broadway condominium in Falls Church, only one is expected to be a school-age child. This is not entirely a coincidence. Under an agreement that reflects the growing alarm over school costs in Washington's suburbs, the city gave the developer a significant incentive not to attract families with kids: If the building has more than eight schoolchildren as residents, the developer must pay $15,000 a year for each child above the cap. A census will be conducted annually for five years to determine whether the limit has been breached, and the developer is liable for as much as $225,000 during that period.").

space amenity, and the forgone taxes on conservation land could well be less than school costs for the children who might have lived there had it been developed. Financial and conservation considerations alike have contributed to the enormous popularity of ballot questions for open space acquisition, a dramatic exception to the general reluctance of voters to approve new taxes and bond issues.[59] When the Massachusetts Community Preservation Act allowed cities and towns to impose additional property taxes for open space preservation and affordable housing, the former proved far more popular than the latter:

> Many suburbs are spending lavishly to protect open space using funds raised under the Community Preservation Act, an analysis shows, despite the urgent need in many of those communities for what the measure is also supposed to provide — affordable housing.
>
> . . .
>
> The efforts to buy open space are also occurring in precisely those communities with the lowest level of affordable housing, as defined by the state.
>
> In many cases, furthering one goal of the act — preserving open space — is working directly against the affordable-housing goal. When the amount of developable land is reduced, the remaining land becomes even more precious, and land and home prices go up even more.[60]

Boston magazine, like most regional publications, issues annual comparisons on "The Best Places to Live." Its 2006 "Big Three" criteria are distance from the city center, educational performance, and percentage of land area protected as open space.[61] As these examples show, many affluent suburbs have substantial amounts of protected open space, potentially enough to influence land markets there:[62]

Town	Median home price	Percentage of protected open space
Cohasset	$751,250	25.49%
Concord	$712,000	31.08
Dover	$1,057,500	25.41
Hingham	$655,000	28.94
Lincoln	$1,141,500	35.49
Needham	$649,000	26.65
Sudbury	$681,000	26.05
Wayland	$590,000	36.94

At the same time, many economists identify restrictions on land use as the most important factor in the Boston area's lack of affordable housing, "forcing families out of the area just as wage-earners are entering their most productive years."[63]

Conservation easements have become popular in part because they can allow private parties to enact land-use controls without governmental intervention. However, perpetual development restrictions affect social and economic issues on which a public voice is appropriate.

Individual communities cannot be asked to solve collective problems on their own. If existing legal and fiscal structures provide a disincentive to

[59]*See, e.g.*, Spencer Banzhaf, Wallace Oates, James N. Sanchirico, David Simpson, and Randall Walsh, "Voting for Conservation: What Is the American Electorate Revealing?" *Resources*, Winter 2006, 7-12. One commentator questioned the meaning of a New Jersey conservation vote: "One impact of dedicating land use to green space in perpetuity is to increase the price of nearby land that is not restricted. In densely populated states such as New Jersey, removing substantial amounts of land from potential development is a massive wealth transfer from future residents to existing owners of unrestricted land. Given New Jersey's well-documented history of using land use regulation to 'zone out' the poor from well-to-do communities, which led to the landmark decision of the state supreme court in *Southern Burlington County NAACP v. Township of Mt. Laurel*, a bit of skepticism about New Jersey voters embracing a means of increasing land prices might be justified." Andrew P. Morriss, "Private Conservation Literature: A Survey," 44 *Natural Resources Journal* 621, 647-648 (2004) (citations omitted). Note that *Mt. Laurel* found a one-acre minimum lot size not to be substantially related to public welfare. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975).

[60]Anthony Flint, "Open Space, Not Housing, Is Priority," *The Boston Globe*, Feb. 16, 2003, B1.

[61]Michael Blanding, "Buyer's Market," *Boston*, May 2006, 123, 128.

[62]"The Best Towns: Where to Live Now," *Boston*, May 2006, insert.

[63]"Where's the Housing?" *The Boston Globe*, May 24, 2006, p. A10 (citing work by Alice Sasser of the Federal Reserve Bank of Boston New England Public Policy Center). *See also* Scott S. Greenberger, "Housing Slowdown Blamed on Local Rules; Study Says Regulations Raising Home Prices," *The Boston Globe*, Jan. 1, 2006, p. A1 ("Edward L. Glaeser, a Harvard University economics professor and the lead author of the study, said the oft-stated belief that housing in the Boston area is expensive because land is scarce is not accurate. Instead, Glaeser said, 'the housing affordability crisis in Boston is manmade, created fundamentally by regulation.'").

growth, it is not realistic to expect towns to embrace development and higher school taxes as an expression of regional solidarity. But neither should regional approaches to planning, development, and housing be hostage to localities' understandable wish to insulate themselves from these larger problems. Conservation easements have become popular in part because they can allow private parties to enact land-use controls without governmental intervention. However, perpetual development restrictions affect social and economic issues on which a public voice is appropriate.

Conclusion. The development of a new property instrument is an unusual and noteworthy phenomenon whose full ramifications can only be appreciated over time. In the case of conservation easements, even their property tax treatment has created a surprisingly wide range of questions involving both practice and principles. Nearly three decades of experience suggest some initial conclusions on those points.

Early efforts to determine the effect of a conservation easement on property tax assessment have sometimes relied on theories that have not stood the test of time. Absent an explicit statutory statement to the contrary, attempts to ignore their effect altogether have generally not been found to comport with legislative intent. It is reasonable, in the face of statutory silence, to assume that these newly created devices are to be taken into account in the assessment process. However, assumptions that easements necessarily deprive the burdened property of most of its market value will frequently be erroneous. The great variety of easements, and the lack of any standardization in the restrictions they impose, make generalization about their effects on market value treacherous. It is impossible to specify the percentage reduction in value that will follow imposition of an easement without knowing details of its legal provisions, the local real estate market, and the development potential of the property. Restricted estates may retain most of their value if their highest and best use does not require rights that have been relinquished, while land under intense development pressure could lose nearly all its value if construction is prohibited and there is no market for protected open space.

Those controversies touch on fundamental distinctions between legislative and administrative competencies. Local officials cannot exempt property from tax simply because they deem it worthy of support, or because it constitutes a minor portion of the tax base, or because the costs imposed by alternative uses might outweigh the revenue lost through the exemption. Appeals to public interest as the basis for a tax reduction are properly directed to lawmakers, and exceptions to general statutory standards for valuation, abatement, or exemption should require legislative justification. Many easements make enormous scenic, environmental, or recreational contributions to public welfare, but the examples of backyard easements and golf course easements show that this is not uniformly the case. Even easements with significant public benefits will also often impose costs, whether through higher land prices, patchwork development patterns, or loss of land-use flexibility when future conditions change. Policy choices between competing values of these types are difficult and politically costly, but subsidized land-planning measures that cover enormous amounts of property in perpetuity merit an explicit decision as to the appropriate public role in their imposition, taxation, and oversight.

Many of the challenges posed by conservation easements are actually a sign of their spectacular success. When William Whyte recommended using easements for that purpose almost a half century ago, no one could have anticipated that they would eventually cover millions of acres and constitute a substantial component of many local land markets. The scale of this development requires policymakers to consider how public action should supplement the "private magic"[64] of this new device. Because important but contentious choices of this type will often be delayed as long as possible, the very practical and local real property tax has been a vehicle for beginning to address them. Although property tax controversies form only a small part of the policy issues raised by conservation easements, their widespread, recurrent, and highly visible nature has allowed them to make a significant contribution to clarifying this debate. ☆

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[64]*See* Frederico Cheever, "Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future," 73 *Denver Univ. Law Rev.* 1077 (1996).