2004

Protecting Ecosystems Using Conservation Tax Incentives: How Much Bang do we get for our Buck?

Julia LeMense Huff

Follow this and additional works at: https://scholarship.law.missouri.edu/jesl

Part of the Environmental Law Commons

Recommended Citation
Available at: https://scholarship.law.missouri.edu/jesl/vol11/iss2/3

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
ARTICLE

PROTECTING ECOSYSTEMS USING CONSERVATION TAX INCENTIVES:
HOW MUCH BANG DO WE GET FOR OUR BUCK?

Julia LeMense Huff

I. INTRODUCTION

Arguably, much of the effort to protect ecosystems has been targeted at federally owned lands. However, nearly 60 percent of the land in the United States is privately owned. There are still surprisingly intact ecosystems existing almost exclusively on private lands. Most of the remaining wetlands in the lower 48 states are located on private lands and 25 percent of all ecosystem types are underrepresented on federal lands.

Given the scope of habitat found on private land, it is not surprising that about “one-half of all threatened and endangered species in the United States are found exclusively on private lands, and 20 percent of the remainder spends half of their time on private lands.”

One significant method to protect ecosystems and biodiversity involves protecting private lands from destructive activities. It is at this point that the goals of conservationists who oppose development out of a desire to maintain open space or curb sprawl intersect with the broader goals of those advocating for ecosystem protection. Proponents of open space preservation have developed a number of strategies to achieve their goal without running afoul of our often fiercely protected notions of private property ownership and private property rights.

There are a number of tools available to protect private land from development, whether the land is categorized as agricultural land, ranch land, forest land, wetlands, open space, wildlife habitat, riparian, or grassland. Municipalities and states can use zoning and land use laws to protect open space characteristics, encourage open space planning or protect ecologically significant land. Local, state and federal government agencies can acquire land to be protected as park, forest, reserve, refuge or sanctuary. Municipalities can create a transferable development rights system in conjunction with property restrictions to allow private landowners who protect sensitive lands to trade development rights for consideration. Private conservation organizations can acquire land in fee or an easement to protect certain characteristics of the land and restrict

* Assistant Professor of Law and Assistant Director of the Environmental and Natural Resources Law Clinic, Vermont Law School. B.A. Michigan State University; J.D. The University of Iowa College of Law; LL.M. Vermont Law School. Professor Huff thanks her husband Robert for his support and Professor Janet E. Milne for her encouragement, guidance and friendship.

2 See id. at 374.
3 See id.
4 See id.
5 See id.
7 See generally Morisette, supra n. 1 (discussing the role acquisitions play in land conservation efforts).
development or other uses. Municipalities encourage the continued traditional or low-impact use of property by providing property tax relief for landowners who enroll their property in an existing or current use assessment program. There are a myriad of agencies, organizations and individuals who advocate for one or several of these approaches to preserving land possessing certain noteworthy characteristics.

The author is strongly in favor of open space preservation. However, rather than exploring all of these approaches in detail, this article examines the possibility of using existing tax incentives to promote the goal of ecosystem protection, which differs to some extent from the goal of open space preservation. It is from this ecosystem perspective that the various tax incentives are analyzed, and the author makes no judgment about the value of the tax incentives for achieving other conservation goals.

This article begins by reviewing the tax incentives available under the federal tax system and discusses the requirements imposed on taxpayers desirous of taking advantage of those incentives. After laying the foundation at the federal level, this article explores a variety of tax incentives offered at the state and local level to illustrate how tax incentives can be used to accomplish a number of conservation goals. However, tax incentives necessarily lead to a reduction in the overall revenue generated when taxpayers take advantage of those incentives. Therefore, one of the important and overarching questions to be considered when analyzing the use of tax incentives to promote ecosystem protection is what are the foregone revenues buying? As part of the exploration of the plethora of state and local conservation tax incentives, this article analyzes the qualifying criteria landowners must meet before becoming eligible for tax incentives, any ongoing obligations to maintain eligibility and the stated goal of the incentive. This analysis is done in an effort to determine whether the criteria or burdens imposed on the landowners are sufficient to accomplish the goals of protecting and possibly restoring ecosystems, such that the expense borne by taxpayers is warranted. For purposes of illustration, this article reviews tax incentives available in the Commonwealth of Virginia and the State of Oregon because of the variety of types and requirements embodied in the incentives offered by these two states. In the final analysis, this article concludes that when viewed from the perspective of ecosystem protection, as opposed to the preservation of open space, the lands we “protect” through the use of tax incentives are not “worth” the cost unless the tax incentive is structured in such a way as to ensure that the land protected has been identified as ecologically significant and is part of an overall conservation scheme.

II. Conservation Tax Incentives

Not all tax incentives are created equally. To begin with, tax incentives may be offered at the federal, state or local level. Some tax incentives provide deductions from federal or state taxable income. Other tax incentives allow for credits against state or federal income tax liability. Certain tax incentives allow taxpayers to exclude amounts from estate taxes. Finally, there is a universe of property tax benefits that state and local governments may afford their taxpayers. This Part provides an overview of federal, state and local tax incentives designed, in whole or in part, to promote conservation of private lands.

---

9 See generally id.
10 See generally Daniel C. Stockford, Student Author, Property Tax Assessment of Conservation Easements, 17 B.C. Envtl. Aff. L. Rev. 823 (1990) (discussing the variety of tax incentives that can be used to promote conservation).
11 The value of ecological services protected through conservation efforts, which some argue greatly offset the foregone revenue, is beyond the scope of this article.
12 Also implicated in this discussion is the method by which land is selected for preservation, which is a fascinating topic that deserves more attention than can be devoted here. See generally Craig R. Groves, Drafting a Conservation Blueprint: A Practitioner’s Guide to Planning for Biodiversity (Island Press 2003) (detailing the conservation process, from development of goals and selection of land to filling information gaps and implementing the plan).
A. Section 170 of the Internal Revenue Code – Deductions for Charitable Contributions

The federal government permits a federal income tax deduction for charitable contributions of real property and interests in real property, subject to certain requirements. An individual taxpayer can contribute her entire interest in real property or a partial interest in real property to a qualifying charitable organization; however, the Internal Revenue Code ("I.R.C." or the "Code") has placed certain restrictions on deductions for contributions of less than fee simple title not transferred by trust.

In an effort to promote charitable contributions for conservation purposes, the I.R.C. contains an exception to the general disallowance of deductions for contributions of less than fee simple title when those contributions are "qualified conservation contributions." A "qualified conservation contribution" is a "contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes." The Secretary of the Treasury promulgated regulations providing specific, detailed guidance to taxpayers wishing to take advantage of an income tax deduction for qualified conservation contributions. The

---

13 A charitable contribution is defined as follows:

A contribution or gift to or for the use of—

1. A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States of the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

2. A corporation, trust, or community chest, fund, or foundation—

   A. created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

   B. organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes;

   C. no part of the net earnings or which inures to the benefit of any private shareholder or individual; and

   D. which is not disqualified for tax exemption under section 501(c)(3).


14 Id. § 170(a).

15 See id. § 170(b)(1)(A) for a list of charitable organizations.

16 Id. § 170(f)(3)(A).

17 Id. § 170(f)(3)(B)(iii).

18 Id. § 170(h)(1). A "qualified real property interest" is any of the following interests in real property: "the entire interest of the donor other than a qualified mineral interest, a remainder interest, and a restriction (granted in perpetuity) on the use which may be made of the real property." Id. § 170(h)(2). A "qualified organization" is a governmental unit referenced in I.R.C. § 170(c)(1)(A), an organization referenced in I.R.C. § 170(c)(1)(B), or a Section 501(c)(3) organization that meets the requirements of either Section 509(A)(2) or (a)(3). Id. § 170(h)(3).

A "conservation purpose" means:

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public;

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;

(iii) the preservation of open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

Id. § 170(h)(4). A contribution will fail the "conservation purposes" element of the provision "unless the conservation purpose is protected in perpetuity." Id. § 170(h)(5)(A) (emphasis added).

amount of the deduction depends on the value of the contribution, which value is determined by an appraisal.\textsuperscript{20} A charitable deduction is also available for those taxpayers who convey land to a charitable organization at less than fair market value in a transaction known as a bargain sale.\textsuperscript{21} The difference between the appraised fair market value and the “bargain sale” price of the land can qualify as a charitable contribution, which can be claimed by the taxpayer as an income tax deduction so long as the taxpayer complies with the provisions of the Internal Revenue Code.\textsuperscript{22}

\textbf{B. Taxpayer Relief Act of 1997 – Estate Tax Exclusion}

In addition to income tax incentives for conservation and charitable donations, Congress enacted the Taxpayer Relief Act of 1997,\textsuperscript{23} which included an additional exclusion of up to $500,000 from the gross estate tax for land in the estate that is subject to a qualifying conservation easement.\textsuperscript{24} The purpose behind the exclusion is to provide an incentive to taxpayers to preserve open space and to “ease existing pressures to develop or sell open space in order to raise funds to pay estate taxes, and thereby help to preserve environmentally significant land.”\textsuperscript{25} As evidenced by the qualifying criteria established in the Code and discussed \textit{infra}, this provision is designed to provide relief to those paying estate taxes so the taxpayer does not resort to voluntary conversion of “sensitive” land to pay the tax.\textsuperscript{26} Because, arguably, the purpose for enacting I.R.C. § 2031(c) differs from the goals of section 170(h), the term “land subject to a qualified conservation easement” found in section 2031(c) differs slightly from the term “qualified conservation easement” set forth in section 170(h).\textsuperscript{27}

To qualify for the exclusion, the land must be located in the United States or in a United States possession.\textsuperscript{28} The land must have been owned by the decedent or her family member at all times during the three year period prior to the decedent’s death.\textsuperscript{29} Finally, the easement must have been granted by the decedent prior to death, or the heirs must have elected to grant the easement prior to the estate tax return filing deadline.\textsuperscript{30} Conservation easements granted for historic preservation purposes do not qualify for the section 2031(c) exclusion.\textsuperscript{31} In addition, if the qualified real property interest is a use restriction instead of an easement, the use

\textsuperscript{20} See \textit{Land Trust Alliance, Conservation Options: A Landowner’s Guide} 14 (2002). The amount of the deduction is also limited to a percentage of the taxpayer’s contribution base. I.R.C. § 170(b).

\textsuperscript{21} A bargain sale is a transfer of property that is part sale or exchange of the property and part charitable contribution. Typically, a bargain sale occurs when an owner of property sells the property to a charitable organization for less than the property’s fair market value. In the event of a bargain sale, the seller may be entitled to a charitable contribution deduction based on the difference between the purchase price and the fair market value. See 26 U.S.C. § 1011(b) (2000); 26 C.F.R. § 1.1011-2A (2003); and 26 C.F.R. § 1.170A-4(c)(2)(i).

\textsuperscript{22} See \textit{id}.


\textsuperscript{24} I.R.C. § 2031(c). The amount of the exclusion is the lesser of $500,000 (in 2002 and thereafter) or “the applicable percentage of the value of land subject to a qualified conservation easement, reduced by the amount of any deduction under section 205(f) with respect to such land.” \textit{Id.} § 2031(c)(1). The applicable percentage is calculated pursuant to a formula set forth in I.R.C. § 2031(c)(2). For a discussion of this tax provision, see \textit{generally} Karen M. White, Student Author, “Extra” Tax Benefits for Conservation Easements: A Response to Urban Sprawl, 18 Va. Envtl. L.J. 103 (1999).


\textsuperscript{26} \textit{See White, supra n. 24, at 119}.

\textsuperscript{27} I.R.C. § 2031(c)(8)(A) & (B).

\textsuperscript{28} \textit{Id.} § 2031(c)(8)(A)(i).

\textsuperscript{29} \textit{Id.} § 2031(c)(8)(A)(ii).

\textsuperscript{30} \textit{Id.} § 2031(c)(8)(A)(iii).

\textsuperscript{31} \textit{Id.} § 2031(c)(8)(B).
restriction must "include a prohibition of more than a de minimis use for a commercial recreational activity." Prior to 2001, Congress also required the land (on the date of the decedent's death) be located in or within 25 miles of a metropolitan area, in or within 25 miles of a national park or wilderness area, or in or within 10 miles of an Urban National Forest. However, Congress amended section 2031 in 2001 and removed this requirement from the Code, which allows a wider range of land subject to conservation easements to qualify for the exclusion.

C. Property Tax Incentives

Property tax incentives typically fall into one of three categories: preferential assessment, deferred taxation, and restrictive agreement programs. Preferential assessment programs assess lands on the basis of their current use (e.g. agriculture, open space, forest, grassland, etc.), provided the property is used for the qualifying purpose as determined by the taxing authority. The preferential assessment program benefits the landowner, who enjoys a reduced property tax rate so long as she continues to use the property for the qualifying purpose. The taxing authority and the other taxpayers arguably benefit from the continued use of the property for a qualifying use. However, once the landowner changes the use so that the property no longer qualifies for preferential tax treatment, the property tax benefit disappears, but the landowner pays no penalty. Under this type of scheme, the other taxpayers subsidize the tax-benefited landowner and are left with nothing of their "investment" once the use changes. A preferential assessment program may be just as successful at lowering the carrying costs for land speculators as it is at encouraging conservation or preservation of open space or other types of qualifying properties—arguably a perverse incentive to be avoided.

A deferred taxation program is similar to the preferential assessment program in that a landowner receives the benefit of a reduced tax rate so long as the landowner uses her property for a qualifying use. However, at such time as the landowner chooses to change the use she loses the tax benefit and must repay, as a penalty, some portion of the taxes she saved through the program. Depending upon the amount of the penalty, this system has a greater chance of encouraging landowners to maintain the qualifying use. Oregon and Virginia each offer deferred taxation incentive programs, which are discussed infra. A deferred taxation program also provides the ability for the municipality to recover some of the revenue lost during the time the landowner used her property for a qualifying use. While this type of program may prevent some of the speculation abuses warned of in the preceding paragraph, it still does not provide the taxing authority or the people in the community with a sense of security that a certain parcel of property will be preserved in perpetuity.

The third type of property tax program requires landowners to enter into agreements with the taxing authority to continue using property in a certain manner for a term of years in consideration for a preferential

---

32 Id.
33 Id. § 2031(c)(8)(A)(i)(I) (amended by Pub. L. No. 107-16 § 551(a) (2001)).
34 Id. § 2031(c)(8)(A)(i)(II) (amended by Pub. L. No. 107-16 § 551(a) (2001)).
36 See Stockford, supra n. 10, at 843.
37 See id. at 844.
38 See id.
39 See id.
40 See id.
41 See id.
42 See id.
43 See id.
44 See id.
tax rate. Restrictive agreement programs provide more stability for the taxing authority because the duration of the preferential treatment is known, as are the terms of the agreement. However, the restrictive agreement program still suffers from the same shortcomings as preferential taxation programs and deferred taxation programs, unless the property is protected in perpetuity.

III. COMMONWEALTH OF VIRGINIA

The Commonwealth of Virginia has enacted a number of laws to encourage land conservation through the use of income tax incentives, estate tax incentives and property tax incentives. Some of these provisions are comprehensive programs, while others are simply miscellaneous, piecemeal provisions authorizing special income and property tax treatment for lands devoted to certain uses. Before delving into the particular tax incentives, it is helpful to first present an overview of the status of conservation easements in Virginia.

A. Virginia Conservation Easement Act

The Commonwealth statutorily permitted the creation and enforcement of conservation easements with the passage in 1988 of the Virginia Conservation Easement Act. A conservation easement is defined as:

a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired though gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.

Conservation easements are presumed to be perpetual unless the granting instrument expressly provides for a different duration. Notably, a conservation easement will not be valid and enforceable unless the easement “conforms in all respects to the comprehensive plan at the time the easement is granted for the area in which the real property is located.” This is a commendable attempt to ensure that other municipal planning devices are given consideration and that conservation easements are not granted in a vacuum. Of course, this provision could also prevent the granting of conservation easements by well-intentioned owners whose grants do not conform to the comprehensive plan yet still relate to conveyances of land worthy of protection. For this provision to effectively accomplish conservation goals, the comprehensive plans must be thoughtful and complete.

45 See id. at 845.
47 Id. § 10.1-1009. The definition of “holder” is found in the same section, which states that the holder must be a charitable corporation, charitable association or charitable trust under §501(c)(3) whose purposes include protecting and preserving open space, natural resources, etc. Id. The holder must also have had a principal office in the Commonwealth for at least five years or it may not hold the easement unless it co-holds the easement with another qualified holder. Id. § 10.1-1010(C). If the holder of a conservation easement ceases to exist, the easement automatically vests in the Virginia Outdoors Foundation, unless the instrument provides for other transfer provisions. Id. § 10.1-1015.
48 Id. § 10.1-1010(C).
49 Id. § 10.1-1010(E).
50 Local planning commissions must prepare a comprehensive plan and recommend the plan to the governing body of the municipality. Id. § 15.2-2223.
B. The Open Space Land Act

The Open-Space Land Act authorizes any public body to acquire title to or interest in open-space land so as to provide for the preservation or provision of the land. The duration of acquired rights or interests must be at least five years. The use of real property for open space subject to an open space easement must conform to the comprehensive plan for the area in which the property is located. Open space land acquired by a public body may be subject to a reservation of farming or timber rights. In fact, property acquired by a public body pursuant to the Open-Space Land Act will be made available for compatible agricultural and timbering uses when practicable in the judgment of the public body. The effectiveness of the Open-Space Land Act is questionable because of the five-year duration (although perpetual grants are allowed) and the ability for the public body to permit “compatible” uses. Non-perpetual grants would not be eligible for the federal income tax deduction allowed by Section 170(h), and the community would not have the same sense of certainty about the effectiveness of open space conservation or land use planning for short-term grants. This provision appears to be more of an effort to preserve agricultural and forest land, as opposed to a more pure conservation motive. If the public body acquiring the interest under the Open-Space Land Act is subject to political pressure from agricultural or forestry interests, the practicability judgment may be easily manipulated.

C. Income Tax Incentives

The Land Conservation Incentives Act of 1999 offers income tax credits for conveyances of land or interests in perpetuity of agricultural, forest, and open space lands, for watershed, biodiversity conservation and historic preservation. Under this Act, a taxpayer may be eligible for a tax credit in an amount up to 50 percent of the fair market value of land or the value of the easement donated in perpetuity for conservation or preservation purposes. The credit is available for donations in fee and donations of an interest less than fee, so long as the interest donated qualifies as a charitable deduction under section 170(h) of the Code. A taxpayer...
who is unable to use an otherwise allowable credit may transfer the unused credit for use by another taxpayer.\(^{58}\) Such a transfer will not trigger a gain or loss for the transferor or transferee.\(^{59}\) A taxpayer who elects to claim the land preservation tax credit may not claim a credit for costs the taxpayer incurred for instituting agricultural best management practices.\(^{60}\) In addition, a taxpayer claiming the land preservation tax credit must forego deductions of the gain on the sale of open space land or an open space easement for a period of three years following the year in which the land preservation credit is claimed.\(^{61}\) The Commonwealth also provides a capital gains tax exemption for the gain made on the sale of land or easements devoted to open space after the conveyance.\(^{62}\)

Virginia offers other income tax incentives, separate from the Land Conservation Incentives Act of 1999 and open space easement programs discussed above. For instance, prior to tax years beginning on or after January 1, 2004 the value of a qualified agricultural contribution could be deducted from Virginia taxable income.\(^{63}\) While the deduction for a qualified agricultural contribution does not specifically relate to land conservation, it may promote using land for agricultural purposes. This may or may not be desirable, depending upon the intensity of the agricultural use and the land management practices. The conservation value of this deduction becomes more dubious, because the deduction does not impose any best management practices on the taxpayer.

In contrast to the now-expired qualified agricultural contribution, Virginia makes a non-refundable tax credit of up to $17,500 available to taxpayers who work with their local soil and water conservation district to create a soil conservation plan and expend money for agricultural best management practices.\(^{64}\) The tax credit, coupled with the subtraction for charitable donations may provide a conservation incentive to taxpayers.

The gain from the sale or exchange of fee property or an easement that results in the property or the easement being devoted to open-space use for a minimum of 30 years can also be deducted from taxable income.\(^{65}\) Real estate devoted to open-space use means

real estate used as, or preserved for, (i) park or recreational purposes, (ii) conservation of land or other natural resources, (iii) floodways, (iv) wetlands as defined in § 58.1-3666, (v) riparian buffers as defined in § 58.1-3666, (vi) historic or scenic purposes, or (vii) assisting in the shaping of the character, direction, and timing of community development or for the public interest and consistent with the local land-use plan under uniform standards prescribed by the Director of the Department of Conservation and Recreation . . . and the local ordinance.\(^{66}\)

---

\(^{58}\) Id. § 58.1-513(C)-(E). The amount of the credit a taxpayer may claim increases from $50,000 in 2000 to $100,000 for the tax years 2002 and thereafter. Id. § 58.1-512(B). The amount of the tax credit cannot exceed the amount of tax owed by the taxpayer. Id. § 58.1-512(B).

\(^{59}\) Id. § 58.1-513(E).

\(^{60}\) Id. § 58.1-513(A).

\(^{61}\) Id. § 58.1-402.

\(^{62}\) Id. § 58.1-402(C)(13) (for corporations) and § 58.1-322(C)(14) (for individuals) (2003). A qualified agricultural contribution was defined at Section 58.1-322.2.

\(^{63}\) Id. § 58.1-339.3

\(^{64}\) Id. § 58.1-402(C)(16).

\(^{65}\) Id. § 58.1-3230. Wetlands means “an area that is inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, and that is subject to a perpetual easement permitting inundation by water.” Id. § 58.1-3666 (emphasis added). Riparian buffer means “an area of trees, shrubs or other vegetation, subject to a perpetual easement permitting inundation by water, that is (i) at least thirty-five feet in width, (ii) adjacent to a body of water, and (iii) managed to maintain the integrity of stream channels and shorelines and reduce the effects of upland sources of pollution by trapping, filtering, and converting sediments, nutrients, and other chemicals.” Id. (emphasis added).
This gain can be subtracted from Virginia taxable income only to the extent that the gain is included in federal taxable income.  

The riparian forest buffer tax credit is another tax credit that goes a long way toward achieving riparian land conservation goals because of its comprehensiveness. The credit against income tax is allowed for an individual taxpayer who owns land “abutting a waterway on which timber is harvested, and who forbears harvesting timber of certain portions of the land near the waterway.” The State Forester must develop the qualification guidelines for the credit, including determining the land eligible for the credit. The State Forester develops a Forest Stewardship Plan with which the taxpayer must comply. It is interesting to note that the burden is on the governmental agency to prepare the Plan, which arguably provides some consistency to the program. The buffer zone must be a minimum of 35 feet and no more than 300 feet and the buffer must exist for a minimum of 15 years. However, there must be a 15-year period between buffer zone qualifications, which could conceivably leave the buffer zone unprotected between enrollment periods. If the taxpayer (or any other person) harvests the timber in the buffer zone before the expiration of the duration of the buffer zone, then the taxpayer must repay the tax credit claimed.

D. Estate Tax Incentives

With respect to estate tax benefits, the Commonwealth does not provide any additional benefits outside of those provided by I.R.C. § 2031(c). However, Va. Code Ann. § 64.1-57.3 statutorily recognizes that personal representative and trustees have the power to donate conservation easements under the Virginia Conservation Easement Act or the Open-Space Land Act to obtain the benefit of the federal estate tax exclusion for post-mortem grants.

E. Property Tax Incentives

The Commonwealth provides a wide variety of special property classifications that, if maintained, may entitle the landowner to property tax relief. Real property devoted to agricultural use, horticultural use, forest use or open-space use is eligible for special property tax treatment. In the case of real property devoted to forest use, the property is compared against standards prescribed by the State Forester to determine eligibility.

---

67 Id. § 58.1-402(C)(16).
68 See id. § 58.1-339.10. The amount of the tax credit is equal to 25 percent of the value of the timber in the buffer zone, with the value not to exceed the lesser of $17,500 or the total tax liability. Id. § 58.1-339.10(C). The burden is on the taxpayer to apply to the State Forester to determine the amount of the credit based on the assessed value of the timber in the buffer. Id. § 58.1-339.10(D).
69 Id. at § 58.1-339.10(A). A waterway is “any perennial or intermittent stream of water depicted on the then most current United States Geological Survey topographical map.” Id.
70 Id. § 58.1-339.10(B).
71 Id.
72 Id.
73 Id.
74 Id.
75 Id. § 58.1-339.10(B) & (D).
76 Id. § 64.1-57.3.
77 Id. § 58.1-3230.
78 Id. The standards are adopted to: “(1) Encourage the proper use of real estate in order to assure a readily available source of agricultural, horticultural, and forest products, and of open space within reach of concentrations of population.
Real property devoted to open space must be consistent with the local land use plan and standards prescribed by the Director of the Department of Conservation and Recreation and the local ordinance.\(^79\)

With respect to land devoted to open space use, the requirements of the Virginia Administrative Code must be met.\(^80\) The open space use must be consistent with the local land use plan.\(^81\) Land qualifying for this classification must be at least five acres, except in certain circumstances where only a minimum of two acres is required.\(^82\) To qualify for open space use assessment, real estate devoted to open space must be in an agricultural or forest district, be subject to a perpetual easement or a recorded open space use agreement between the landowner and the local governing body for at least four years and no more than ten years.\(^83\) The landowner must apply to the local assessing officer for taxation on the basis of a use assessment.\(^84\) The local officer must first determine that the property meets the criteria in section 58.1-3230 and the standards prescribed and that it meets the minimum acreage requirements and that all applicable provisions have been satisfied.\(^85\) If the local officer makes a favorable determination, the property will be assessed and taxed as open space.\(^86\) If the use changes so as to no longer qualify, then the taxpayer will be subject to roll back taxes.\(^87\) Roll back taxes are additional taxes assessed against that portion of the real estate that no longer qualifies for assessment and taxation on the basis of its use or zoning.\(^88\) Roll back taxes are not due upon transfer of title to the property, unless the new owner changes the use or the zoning.\(^89\) If the taxpayer fails to pay roll back taxes when due, then the local treasurer can impose a penalty and interest.\(^90\)

Finally, the Virginia Conservation Easement Act provides that perpetual easements held pursuant to the Act or the Open-Space Land Act are not subject to state or local tax.\(^91\) The Virginia Conservation Easement Act also provides that assessments of land subject to such perpetual conservation easements will reflect the reduction in value caused by the owner’s inability to put the property to its full range of uses.\(^92\) However, certain landowners whose land is subject to a perpetual conservation easement may qualify for an additional

---

(2) Conserve natural resources in forms that will prevent erosion. (3) Protect adequate and safe water supplies. (4) Preserve scenic natural beauties and open spaces. (5) Promote proper land-use planning and the orderly development of real estate for the accommodation of an expanding population. (6) Promote a balanced economy and ease/lessen the pressures which force the conversion of real estate to more intensive uses.” 4 Va. Admin. Code 10-20-20 (2003).


\(^81\) Id. at 5-20-10(A)(1). It must be consistent with land use zones depicted on a map or with stated uses, objective, goals or standards of the plan. Id. at 5-20-10(A)(2). Consistency with the plan is presumed for properties that are subject to a recorded perpetual conservation or open space easement held by a public body, as consistency with the plan is a prerequisite for those easements. Id. at 5-20-10(A)(3).

\(^82\) Id. at 5-20-10(B). Exceptions are made for land adjacent to scenic rivers and highways, byways or property listed in the Virginia Outdoors Plan, or densely populated areas. Id. at 5-20-10(B)(2).

\(^83\) Id. at 5-20-30(3). The form of agreement is set forth at 4 Va. Admin. Code 5-20-30, which states that the agreement is made for purposes of securing favorable real estate tax treatment by the landowner in exchange for maintaining the property in a certain condition. Id. The agreement allows for the local governmental body to enter the property at all reasonable times to ensure compliance with the agreement. Id.


\(^85\) Id. § 58.1-3233.

\(^86\) Id.

\(^87\) Id. § 58.1-3237(A).

\(^88\) Id.

\(^89\) Id. § 58.1-3237(D).

\(^90\) Id.

\(^91\) Id. § 10.1-1011(A).

\(^92\) Id. § 10.1-1011(B).
property tax benefit if (1) the land qualifies as being devoted to open space use as defined in section 58.1-3230, and (2) the locality in which the land is located has provided for land use assessment and taxation.\(^9\) In those cases, the land will be “assessed and taxed at the use value for open space.”\(^9\) Therefore, the Commonwealth provides for a certain level of incentive, which can be increased by municipalities at their discretion.

Throughout the Virginia conservation tax incentive provisions there is a theme of consistency between the comprehensive plans and the use for which preferential tax treatment is sought. This requirement places a great deal of confidence in the comprehensive planning process, but at least it attempts to involve the localities in the conservation planning process. Municipalities are further invested in the conservation process by having the ability to provide additional property tax incentives to certain qualifying lands. With respect to the property tax incentive discussed in the preceding paragraph, it is perhaps unfortunate that both perpetual and non-perpetual uses can qualify for favorable tax treatment—but it is clear that those willing to place perpetual restrictions on land have an additional incentive. In addition, the inclusion of a roll back tax provision gives participants in Virginia’s deferred taxation program some incentive to maintain the current use of qualifying properties.

### IV. STATE OF OREGON

Oregon has also enacted a number of statutes that provide income tax credits and property tax benefits to encourage conservation. Oregon does not provide a capital gains tax exclusion and does not specifically reference the federal estate tax exclusion. To facilitate conservation, Oregon, like Virginia, has statutorily recognized the validity of conservation easements and highway scenic preservation easements.\(^9\)

Oregon Rev. Stat. § 271.725 sets forth the authority for the state, counties and other designated agencies to acquire and hold easements. Highway scenic preservation easements are to be limited to land within 100 yards of public rights of way.\(^9\) Conservation and highway scenic easements are presumed to be perpetual unless the instrument provides a specific term.\(^9\)

#### A. Income Tax Incentives

The Underproductive Forestland Tax Credit Program allows an owner of at least five acres of brushland, grassland or poorly stocked forestland\(^9\) to claim a state income tax credit equal to 50 percent of approved

---

\(^{93}\) Id. § 10.1-1011(C).

\(^{94}\) Id.

\(^{95}\) Or. Rev. Stat. § 271.715-271.795 (2001). A conservation easement is defined as a “nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.” Id. § 271.715(1). A highway scenic preservation easement is defined as a “nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open space values of property.” Id. § 271.715(2). Oddly enough, while the definition of “holder” includes Indian tribes, it does not include the federal government. Id. § 271.715(3).

\(^{96}\) Id. § 271.725(3)

\(^{97}\) Id. § 271.725(5)

reforestation project costs actually paid or incurred by a landowner to reforest underproductive Oregon forestlands. The credit is not intended to benefit landowners who have decimated their forestlands by commercial logging practices and who are required by law to restore their forestlands. Although secondary benefits to wildlife and to other natural resources may result from the reforestation work subsidized by the program, the apparent goal of the program is to increase the state’s timber supply.

Oregon also makes a non-refundable tax credit available to taxpayers who voluntarily implement a fish habitat improvement project fully approved and certified by the Department of Fish and Wildlife as provided in Or. Rev. Stat. § 496.260. The amount of the credit is 25 percent of the amount certified by the Department of Fish and Wildlife. The State also provides a tax credit to taxpayers who install fish screening devices, bypass devices or fishways.

The Riparian Lands Tax Credit Program is an effort to control non-point source pollution and will be available to Oregon farmers beginning in 2004. Under this program, farmers can receive a state income tax credit equal to 75 percent of the market value of crops forgone when qualifying riparian land is voluntarily taken out of farm production. The program encourages landowners to voluntarily remove riparian land from farm production and undertake conservation practices to minimize water quality degradation, habitat degradation, and stream bank erosion. This credit is intended to benefit those actively engaged in farming and who are willing to employ conservation practices on the land that are consistent with State Department of Agriculture’s agricultural water quality management plan. The provision contains an incentive for farmers to keep riparian land out of production for consecutive years to allow habitat and water quality to improve by prohibiting farmers from claiming the credit for five tax years following the year the riparian land was put back into production after being voluntarily removed.

Id. § 315.104(3). The amount of credit claimed by the taxpayer, as set forth in the application for the preliminary certificate, is subject to limitation by the State Forester after determining the average annual amount of estimated costs. Id. § 315.108. The eligible project costs are listed in Or. Admin. R. 629-023-0430 (2003).

Or. Rev. Stat. § 315.104. The taxpayer must expend a minimum of $500.00. Id. § 315.104(4)(b). The statute divides the credit into two parts so that one-half of the credit is available upon receipt of a preliminary certificate from the State Forester certifying that the land qualifies as underproductive forestland and that the proposed project meets the statutory requirements. Id. § 315.104(1)(a). See also Or. Admin. R. 629-023-0450. The second half of the credit is available in the tax year in which the State Forester certifies that the new forest is established based on a physical inspection. Or. Rev. Stat. § 315.104(1)(b). No credit will be awarded if the new forest is not established by the end of the “second taxable year following the taxable year for which the preliminary certificate was issued” and the credit given upon issuance of the preliminary certificate must be repaid, unless the reason for the forest’s failure was beyond the control of the taxpayer. Id. § 315.104(9) & (10). See also Or. Admin. R. 629-023-0460. Projects started before 2001 may be eligible for 30% credit. The provision sunsets on December 31, 2011. Or. Rev. Stat. § 315.104 at Historical and Statutory Notes.

Or. Rev. Stat. § 315.104(3)(a). The standards used for determining that the reforestation project complies with the program are listed in Or. Admin. R. 629-023-0440.

Id. § 315.134. Id. § 315.134(1).

Id. § 315.138. Id. § 315.113. The amount of the credit is calculated by taking 75 percent of the product of the market value per acre of the foregone crop and the acreage of riparian land not in production. Id. § 315.113(4)(a).

Id. § 315.111. For purposes of this tax credit, the riparian land removed from production cannot exceed a width of 35 feet measured between the edge of land in production and the watercourse. Id. § 315.113(1)(b)(B). In order to be considered riparian land, the land must border a river, stream or other natural watercourse. Id. § 315.113(1)(b)(A).

Id. § 315.113(3)(d).

Id. § 315.113(10).
B. Property Tax Incentives

In addition to the credits against income tax discussed in the preceding paragraphs, Oregon has adopted a myriad of current use assessment property tax incentives. Oregon has recognized the need to prevent the forced conversion of open space to more intensive land uses by providing a property tax benefit for landowners who own land designated as or qualifying for open space classification. An owner of open space land must apply to the county assessor for open space use assessment. The county assessor must refer applications to the planning commission, if the applicable governing body has one, and to the granting authority for review and approval. The approving body must conduct a balancing analysis to determine if the benefits of open space use assessment for a particular parcel outweigh the costs and other burdens, but cannot deny the application solely on the grounds that open space use assessment would result in decreased local tax revenue, if balanced out by other preservation and conservation considerations. Depending upon if and when the owner gives notice of a change in use or withdrawal of the property from open space use classification, the owner may be subject to a range of repercussions anywhere from the assessment of back taxes to the assessment of back taxes and a 20 percent penalty.

The Riparian Lands Tax Incentive Program is administered by the local county assessors and the Oregon Department of Fish and Wildlife. A landowner who manages her riparian land pursuant to the terms of an approved riparian management plan designed to preserve, enhance or restore riparian land is eligible for a property tax exemption for the riparian land. This program is targeted primarily at lands (1) lying outside of adopted urban growth boundaries (2) that are planned and zoned as forest or agricultural lands and (3) that are also in compliance with statewide planning goals. However, the statute makes allowances for owners of land...

---

109 Id. § 308A.303. Open space land is “any land area so designated by an official comprehensive land use plan adopted by any city or county” or any land the preservation of which would “(A) conserve and enhance natural or scenic resources, (B) protect air or streams or water supply, (C) promote conservation or soils, wetlands, beaches or tidal marshes, (D) conserve landscaped areas . . . which reduce air pollution . . ., (E) enhance the value of other open space, (F) enhance recreational opportunities, (G) preserve historic sites, (H) promote orderly . . . development, or (I) retain in their natural state tracts of land . . .” Id. §§ 308A.300(1)(a) & (b).
110 Id. § 308A.306.
111 Id. § 308A.309.
112 Id.
113 Id. at §§ 308A.318-321 and § 308A.327.
114 Id. § 308A.356. The State Department of Fish and Wildlife sets standards and criteria for the designation of riparian lands. Id. § 308A.359(1). The landowner has the burden of developing the plan, which is subject to the review and approval of the Department. Id. § 308A.359(2).
115 Id. § 308A.353. The minimum plan requirements are set forth at Or. Admin R. 635-430-0360(4). The landowner must enter into both a riparian management plan and a program agreement. Or. Admin. R. 635-430-0360(6). No more than the first 100 feet landward of the line of nonaquatic vegetation may be designated as riparian land eligible for property tax exemption. Or. Rev. Stat. § 308A.350(3). This area cannot exceed 25 acres. Or. Admin. R. 635-430-0340. The factors to be considered in determining the width of the riparian land are set forth at Or. Admin. R. 635-430-0340(1)-(8).
116 Or. Rev. Stat. § 308A.359(2)(a)(A). The Oregon Legislature adopted the Oregon Planning Program in 1973, which went into effect on June 8, 1973. Ch. 127, 1973 Or. Laws 215. Pursuant to the Oregon Planning Program, on December 27, 1974, the Oregon Land Conservation and Development Commission adopted Goal 14: the statewide planning goal addressing urban growth. Each city in Oregon is required under Goal 14 to take into consideration seven factors (need factors and locational factors) and to work cooperatively with surrounding cities and counties to develop an urban growth boundary. An urban growth boundary is the boundary, drawn on planning and zoning maps, showing where a city expects to grow. Land inside the boundary is either already urban, or land that can be developed for urban uses. Land outside the boundary is expected to remain rural, and cities will not extend infrastructure to those areas. In addition, the zoning in areas outside of the boundary will prohibit urban and high-density residential development. In the case of well-
for which the zoning changed between July 1, 1997 and July 1, 1998. This program may also benefit owners of agricultural, forest and lands within urban growth boundaries, if individual cities choose to participate in this incentive program. Once designated, the land will remain exempt from property taxation so long as its use is consistent with the statute, unless the land is withdrawn. The landowner is not subject to any penalties or additional taxes upon the withdrawal of riparian property, unless the landowner fails to give the statutory withdrawal notice required by Or. Rev. Stat. §§ 308A.365(2) and 308A.368. If the landowner fails to give the required notice, or if the assessor discovers the riparian land is being put to a use inconsistent with the plan, then the assessor will impose additional taxes on the landowner. A change from other special current use assessments to riparian land use assessment does not trigger additional taxes or penalties. The Department of Fish and Wildlife conducts the first inspection within the first year after enrollment and then monitors for compliance after the first year in five-year intervals.

The amount of land that can be enrolled in the Riparian Lands Tax Incentive Program in any given year is statutorily limited to 200 miles each year in each county. The program has had 113 participants since its establishment in 1981, with one new enrollee in 2002. There are currently 1,061 acres, and 77 miles of riparian stream covered. According to the current statistics and the results of a study reported by the Conservation Incentives Work Group ("Work Group"), this program has been relatively ineffective and under-subscribed because there is little incentive for landowners to enroll in the program and be bound by a riparian

established cities, the boundary may closely mirror the city's political boundary. In the case of growing cities, the boundary operates as a projection as to how much land will be necessary to accommodate growth. To the extent land included within a city's urban growth boundary is not within the city's limits, the city must continue to work cooperatively with the county through the use of urban growth management agreements. After cities, counties and other relevant special districts cooperate to establish the boundary, the Land Conservation and Development Commission reviews the boundary to ensure its consistency with Goal 14. See Oregon Department of Land Conservation and Development, What Is an Urban Growth Boundary? Facts about an Important Land-Use Planning Tool in Oregon's Statewide Planning Program <http://www.uoregon.edu/~pppm/landuse/UGB.html> (accessed Jan. 8, 2004). For a detailed discussion of Oregon's Planning Program in its entirety, see also Edward J. Sullivan, Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100, 77 Or. L. Rev. 813 (1998).


Id. § 308A.365(1). There are a number of activities that are generally deemed to be compatible with riparian lands, including limited livestock watering and crossing, irrigation, recreational facilities and tree harvest. Or. Admin. R. 635-430-0380. The uses that are generally deemed to be incompatible with the riparian land are listed in Or. Admin. R. 635-430-0390

Or. Rev. Stat. § 308A.368(2). The assessor can demand reports of owners to confirm the use of the property. If the owner does not provide the requested report, the assessor may withdraw the property, subject to certain notice requirements. Id. § 308A.374(1). In addition, the assessor may ask the Department of Fish and Wildlife to inspect the property to determine if the property still complies with the plan. Id. § 308A.374(2). If it no longer qualifies, the property will be withdrawn and additional taxes imposed. Id.

Id. §§ 308A.377(1) & (2). For instance, land that is already subject to favorable property tax treatment under special current use provisions relating to farm use, forest use or open space use will not lose its favorable tax treatment if a portion of the land is designated as riparian habitat and exempted under Section 308A.350 et seg. In addition, land that is already specially assessed or exempt from property taxation will not be subject to disqualification if the owner enters into an habitat conservation and management plan, a conservation easement or a conservation deed restriction. Id. § 308A.743.

Id. 635-430-0420(a) & (b).


management plan and agreement when their land is already the beneficiary of reduced property tax treatment under any one of the other special assessment provisions.\textsuperscript{125}

Through the Wildlife Habitat Conservation and Management Program, land subject to a wildlife habitat conservation and management plan (approved by the Oregon Department of Fish and Wildlife) is assessed for property tax purposes at the value that would apply if the land was being used for agricultural or commercial forestry purposes.\textsuperscript{126} One of the legislature’s stated purposes for enacting this legislation was to encourage the integration of habitat conservation and agricultural and forestry uses.\textsuperscript{127} Commercial activities may continue on the land as long as they are compatible with the wildlife objectives of the plan.\textsuperscript{128}

In order to qualify for preferential tax treatment under the Wildlife Habitat Conservation and Management Program, the landowner in a participating county must complete a wildlife habitat conservation and management plan that is approved by the Oregon Department of Fish and Wildlife.\textsuperscript{129} The plans are intended to improve water quality, protect and restore fish and wildlife habitat, recover threatened and endangered species, enhance stream flows and restore ecological health.\textsuperscript{130} A landowner may receive approval of a plan on land assessed as open space under Or. Rev. Stat. §§ 308A.301-308A.330, but approval is granted by the Department of Fish and Wildlife as opposed to the county assessor.\textsuperscript{131} The Department of Fish and Wildlife conducts periodic reviews of management plan lands to ensure compliance with the plan.\textsuperscript{132} Land encumbered by a conservation easement does not necessarily lose an existing current use assessment when it becomes subject to an approved management plan. However, there is no additional property tax benefit to landowners enrolled in the program who further subject their land to a conservation easement.

In 2001, the legislature amended the law to require that counties participate or formally opt out of the program by January 2003.\textsuperscript{133} Counties opting out have the option of later opting back in to the program.\textsuperscript{134} Undoubtedly due to the fear of what an additional property tax relief measure would do to local coffers and the inability to opt out at a later time, 22 counties (more than half of the total number of counties) opted out.\textsuperscript{135}

A landowner considering granting an easement to a public body may write to the county assessor for a report on the effect of the conveyance on the property taxes, but the landowner is responsible for providing an appraisal to the county for consideration.\textsuperscript{136} Before a public entity acquires a conservation or scenic highway


\textsuperscript{126} Or. Rev. Stat. § 215.808(3).

\textsuperscript{127} Id. § 215.800(3).

\textsuperscript{128} Id. § 215.806(1)(c).

\textsuperscript{129} Id. § 215.806. The contents of a plan are set forth in Or. Admin. R. 635-430-0040. The landowner must submit the plan both to the county planning department, which has a right to comment on the plan, and the Department of Fish and Wildlife, which has ultimate review and approval power. Or. Admin. R. 635-430-0050. The approval standards are contained in Or. Admin. R. 635-430-0060.

\textsuperscript{130} Or. Rev. Stat. § 215.806(1)(B).

\textsuperscript{131} Id. § 215.808.

\textsuperscript{132} Id. § 215.808(6). The Department of Fish and Wildlife monitors the plan at least once every two years to ensure compliance. Monitoring includes a physical inspection done with prior written notice to the landowner. If the landowner is not in compliance with the plan, the Department of Fish and Wildlife will notify the landowner of compliance measures that must be implemented within 6 months or else the property can be removed from the program and lose its special use tax assessment classification. Or. Admin. R. 635-430-0090.

\textsuperscript{133} Or. Rev. Stat. § 215.802(2).

\textsuperscript{134} Id. § 215.802(3).

\textsuperscript{135} See Work Group, supra n. 125, at The Wildlife Habitat Conservation & Mgmt. Prog.

\textsuperscript{136} Or. Rev. Stat. § 271.729.
easement, the entity must hold at least one public hearing and publish notice of the hearing.\textsuperscript{137} Property that is subject to a conservation easement or highway scenic easement will be assessed on the basis of the value of the property, less any reduction in the value caused by the easement.\textsuperscript{138} If a landowner enjoys a special use tax assessment, he will not lose that assessment simply by virtue of entering into a wildlife habitat conservation and management plan or conservation easement. However, if the landowner encumbers his land by a conservation easement, he is at risk of losing the special use assessment if he does not manage his land in accordance with the terms of the easement or does not continue to meet the requirements for the special use assessment.

Owners of western Oregon forestland may receive additional tax benefits for keeping their land in forest or woodland use.\textsuperscript{139} This provision is designed first and foremost to provide tax benefits to forestland owners to encourage timber growth and harvesting and to ensure a continuous supply of timber. The secondary goals of water quality and habitat protection may also be accomplished, but only if the landowner voluntarily engages in responsible timber management practices.\textsuperscript{140} This appears to be more of an economic stimulus measure than a conservation measure.

V. GETTING THE MOST “BANG” FOR THE “BUCK”

The use of tax incentives to achieve conservation goals is lauded by some and derided by others. Those in favor of the use of tax incentives point to the need to provide a financial incentive for individuals to protect land or use land in an ecologically sound manner.\textsuperscript{141} Tax incentives are perceived as a great tool to conserve land because the tax system is already in place.\textsuperscript{142} Unlike other conservation programs, like tradable development rights,\textsuperscript{143} the infrastructure is already in place and arguably functional.\textsuperscript{144} In addition, the various taxing authorities have expertise in valuation, collection and certain enforcement activities.\textsuperscript{145}

At the federal level, the availability of tax incentives is tied to specific conservation goals.\textsuperscript{146} Section 170(h)(4)(ii) and (iii) of the Code are designed to promote conservation of areas that have significant ecological value or provide a significant public benefit.\textsuperscript{147} The federal tax provisions require a public nexus, arguably because of the notion that the general public should not be affording tax breaks to specific taxpayers unless the end result benefits the public. In light of this overarching concern, the requirement that qualified conservation contributions be made in perpetuity makes sense—the ultimate goal is to provide a benefit to the public, not a benefit to the taxpayer.\textsuperscript{148}

The federal requirement that donations of open space be allowed when the donation is pursuant to a governmental conservation policy and provides a significant public benefit was intended “to protect the types of

\textsuperscript{137} Id. § 271.735(1) & (2).
\textsuperscript{138} Id. § 271.785.
\textsuperscript{139} Id. § 321.262.
\textsuperscript{140} Id. § 321.262(2).
\textsuperscript{141} See Protecting the Land: Conservation Easements Past, Present, and Future xxii (Julie Ann Gustanski & Roderick H. Squires, eds., Island Press 2000) [hereinafter Protecting the Land].
\textsuperscript{142} See Boyd et al., supra n. 8, at 216.
\textsuperscript{143} A transferable development right (TDR) plan allows landowners to sell unused development rights to owners of other sites as a means to compensate the transferor for restriction on development rights, without any cost to the municipality (other than perhaps TDR program costs). See Dennis J. McEleney, Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks, 8 Ill. B.J. 634, 635 (1995).
\textsuperscript{144} See Boyd et al., supra n. 8, at 216.
\textsuperscript{145} See id.
\textsuperscript{146} See supra Pts. II.A & B.
\textsuperscript{147} I.R.C. § 170(h)(4)(ii) & (iii).
\textsuperscript{148} Treas. Reg. § 1.170A-14(b)(2).
property identified by representatives of the general public as worthy of preservation or conservation.\textsuperscript{149} The treasury regulations make it clear that if a government program gives preferential tax or zoning treatment to “property deemed worthy of protection,” then such programs would satisfy the governmental conservation policy requirement.\textsuperscript{150} It is at this point where it is helpful to look at the goals of the incentive. The federal tax provisions assume that if property is given preferential zoning or tax treatment by a state or local government for conservation purposes, then the general public has deemed it to be worthy of conservation, and thus contributions of properties that receive preferential treatment are presumed to be for conservation purposes. This places a great deal of emphasis on the local zoning and assessment programs and assumes that the general public is aware and in support of these programs. Given the possible vulnerabilities of some local zoning and assessment programs: lack of ecological and scientific information, lack of planning expertise, lack of political will to protect significant land—this may be a dangerous assumption in some cases. These vulnerabilities do not pose a significant problem if the goal is simply to protect open space, but can be more problematic if the goal requires some scientific understanding of the ecosystem before it can be realized.

Some authors have also criticized the federal estate tax exclusion found in I.R.C. § 2031(c) because they claim it provides a “double benefit” to taxpayers, unduly elevates conservation activities and reduces federal revenue.\textsuperscript{151} While this is a matter of opinion and policy, it is perhaps myopic to measure the “wealth” of the country based on the amount of money in the coffers without looking at the health of our landscape. When Congress amended section 2031(c) to delete certain location-related eligibility requirements, this section provides a conservation incentive that is quite similar to that provided by section 170(h), albeit slightly narrower in scope.\textsuperscript{152}

Others criticize the use of tax incentives as “blunt and ineffective” because the incentive is typically available for qualifying taxpayers and cannot target specific properties.\textsuperscript{153} Because the configuration of lands conserved in response to tax incentives can be sporadic and unpredictable, some argue the overall value of the lands conserved, from an ecological standpoint, is diminished.\textsuperscript{154} Because taxpayers’ responses to incentives are also unpredictable, the amount and location of land conserved is difficult to gauge.\textsuperscript{155} Programs that require taxpayers to enroll their land in a program for a term of years or allow withdrawal at any time introduce additional uncertainty. State and local programs that do not require land to be conserved in perpetuity are particularly troubling because it can be argued that other taxpayers subsidize the carrying costs of land under the guise of conservation only to see their “investment” disappear when the market becomes favorable and the benefited taxpayer sells the land or changes the use.\textsuperscript{156} This argument to some extent dismisses the notion that landowners who conserve land and take steps to enroll properties in tax incentive programs sincerely care about the land and want to see it conserved.\textsuperscript{157}

While it is the case in many instances that certain landowners have pure motives, others do not. Especially in the context of property tax relief programs, neighboring landowners may be seen as getting left with the bill for conservation efforts that in the end may be defeated or counteracted in one fell swoop (e.g. the withdrawal of land from a particular use). Another argument against the use of tax incentives to promote conservation is that these incentive programs divert public resources from other programs that might be more

\textsuperscript{149} Treas. Reg. § 1.170A-14(d)(4)(iii)(A).
\textsuperscript{150} Id.
\textsuperscript{151} See White, supra n. 24, at 117-18.
\textsuperscript{152} See supra n. 35 and accompanying text.
\textsuperscript{153} See Boyd et al., supra n. 8, at 216.
\textsuperscript{154} See id. See also generally Groves supra n. 12.
\textsuperscript{155} See id.
\textsuperscript{156} See McEleney, supra n. 143, at 635.
\textsuperscript{157} See Protecting the Land, supra n. 141, at 458-64.
suited to encouraging comprehensive conservation. Again, while even temporary quelling of growth through open space preservation has its own merit, a temporary, non-strategic conservation measure may not be as valuable if the goal is protection or restoration of ecosystems.

The state law provisions discussed in Parts III and IV of this article provide illustrations of some of the criticisms of the use of tax incentives to achieve ecosystem protection goals. Oregon relies heavily on property tax benefits to encourage conservation efforts. This has the effect of forcing local governments to bear the financial burden of conservation efforts that arguably benefit the entire state. It also explains to some extent the confusing land classification systems in Oregon. First, the wide array of special use assessment categories is confusing and difficult to wade through because in many instances the designations are overlapping. The overlap makes it difficult for landowners to satisfy criteria and county assessors to make assessment determinations. The Work Group has recommended that this issue be addressed by clarifying that “wildlife habitat special assessment” is a category independent from all other special assessment programs and that, once a property is under wildlife habitat special assessment, no other special assessment criteria are relevant. It would also be helpful if the Department of Fish and Wildlife, which bears the burden for ensuring landowner compliance with habitat plans, could simply certify to the county assessor that the habitat plan criteria are being met, which would allow the assessor to simply confirm the assessment without requiring the local assessor to undertake additional analysis.

All of the property tax incentive programs appear to suffer from a similar malady: there is no way to ensure that the property being “protected” by the special use assessment programs is in fact worthy of protection. If the goal is to protect environmentally or ecologically significant land, as opposed to simply preserving open space or preventing sprawl, then first those significant properties must be identified. Once those properties have been identified, then the question becomes: Is it enough to protect land for the short term or an undefined term? Perhaps a municipality would prefer to remove land from conservation programs for revenue reasons, but a municipality has no ability under this type of incentive program to target lands for specific conservation planning to achieve ecosystem protection goals.

Virginia’s comprehensive plan consistency requirements attempt to ensure that the “right” lands are protected. However, this approach is only as good as the comprehensive plan. There appears to be an assumption that if the consistency requirement is met, then conservation goals are being met. However, very few of Virginia’s tax incentives contain monitoring requirements, as compared to incentives offered by Oregon. Virginia in large measure relies on easement holders to monitor compliance. Certainly with conservation easements, the easement holder can monitor and enforce pursuant to the terms of the easement—and the quality of the monitoring and even the language of the easement will vary depending on the level of sophistication and expertise of the organization drafting the easement. The tax credit for agricultural lands managed in accordance with state best management practices and the riparian buffer tax credits both require compliance with a plan administered by a public agency, which goes a long way to ensuring that these fragile agricultural lands are properly managed. In contrast, the Oregon tax credits (underproductive forest lands, fish habitat and riparian lands) all have planning and monitoring components.

In recognition of the limited resources available to states to encourage conservation through incentive programs, the importance of producing tangible conservation benefits, and the fact that opportunities for conservation are not uniform across the landscape, the Oregon Work Group stressed the importance of the state strategically linking incentive program eligibility to locations that are designated as priority conservation areas.

---

158 See McEleny, supra n. 143, at 635.
159 See Work Group, supra n. 125, at The Wildlife Habitat Conservation & Mgmt. Prog.
160 These separate goals are not necessarily mutually exclusive, as obviously preventing sprawl and preserving open space will in many instances protect ecosystems. For an excellent discussion of conservation planning goals and methods, see generally Groves supra n. 12.
Members of the Work Group anticipate that this strategy will help ensure that government resources are used most efficiently and effectively. This strategy should also legitimize the need to forego local and state revenue in the name of conservation. Although Oregon is often cited for its commitment to land use planning, local comprehensive plans have not typically addressed habitat and water quality issues. Ideally, a statewide conservation plan would involve multiple resource agencies, as well as the private and non-profit sectors, and would address the full range of habitats, species, and other important natural resources across all land uses.

This statewide approach is being encouraged by Congress, which passed the Pittman-Robertson Wildlife Restoration Act. The Act establishes a cooperative relationship between the Department of the Interior and state departments of fish and wildlife to foster and fund wildlife restoration programs. In 2000, Congress passed the Fish and Wildlife Programs Improvement and National Wildlife Refuge System Centennial Act of 2000 to further these conservation goals. This collaborative system between the federal government and the state governments includes the “selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife, including acquisition by purchase, condemnation, lease, or gift of such areas or estates or interests therein.”

Prior to receiving grants under the State Wildlife Grants Program, states have to first develop or commit to develop by October 1, 2005, a comprehensive wildlife conservation plan “[t]hat considers the broad range of [each state’s] wildlife and associated habitats, with appropriate priority placed on those species with the greatest conservation need . . .” On February 20, 2003, President Bush signed into law the Department of the Interior and Related Agencies Appropriations Act, 2003. The bill included $60 million for the State Wildlife Grants Program.
Program—$1,039,321 of which was made available to Oregon and $1,171,378 to Virginia. All states have made a commitment to the federal government to complete a comprehensive plan by October 2005. Virginia's Senator Warner strongly advocated for additional state wildlife funding, and it would be surprising if Virginia let this funding source slip away. This funding source will support a truly strategic approach to statewide wildlife conservation efforts. Arguably, an effort to preserve and protect wildlife habitat will have a positive effect on ecosystem protection measures.

As several authors have pointed out, the key to enforcing a conservation easement, and by extension, any conservation measure, is monitoring. Only if we monitor protected areas do we know if the conservation goals are being met—this is true of both open space goals and ecosystem protection goals. Especially as certain states and organizations move toward a more comprehensive conservation system targeting specific lands because of their value in the overall scheme of ecosystem protection, monitoring becomes even more important. Monitoring becomes an essential part of battle to protect ecologically significant areas, as opposed to simply a means to ensure that a landowner is entitled to a property tax deduction. There is more at stake when the lands protected have been determined to be necessary to protect ecosystems.

Monitoring and enforcement activities are time-consuming and expensive. Some governmental agencies and non-governmental organizations have significant resources dedicated to monitoring and enforcement, but most do not. One study found that 75 percent of conservation easements held by land trusts were monitored, but only 30 percent of easements held by governmental agencies were monitored. As we have seen, conservation easements are only one of many tools used to preserve private lands. In the case of property tax current use assessments, tax credits and other tax incentives, it is possible that easements, restrictions or other agreements entered into with governmental bodies in programs conducted by those agencies are monitored at the same rate, or even more infrequently.

VI. CONCLUSION

Regardless of whether conservation programs are undertaken in a comprehensive manner to protect ecologically sensitive or significant private lands, or whether conservation is done in a less strategic manner, protected lands must be monitored. When conservation is encouraged through the use of tax incentives, the taxpayers carry the burden. If the agencies responsible for monitoring are unable to meet this obligation, then the taxpayers who are subsidizing the conservation efforts are being short-changed. In addition, in those instances discussed above where a landowner is not obligated to enroll her property in a program in perpetuity, but can withdrawal the land at any time, subject to certain rules and variations, the taxpayers and the taxing authority are not achieving any long-term conservation goals.

Arguably, to further the goal of ecosystem protection, it may be more beneficial if fewer lands were carefully selected for conservation because of the conservation values of the land, and those lands fully

---

174 See Morrisette, supra n. 1, at 391.
175 See id.
evaluated, inventoried, monitored and thereby protected. This approach would possibly decrease overall monitoring costs and increase the value to taxpayers. Based upon the developments in ecosystem planning;\(^\text{176}\) watershed planning\(^\text{177}\) and state comprehensive planning;\(^\text{178}\) it appears that these more selective methods of conservation are gaining popularity. While this evolution may be directly in response to the realization that we are still losing ecologically sensitive lands and biodiversity despite our past conservation efforts, this trend will also reduce the burden on local taxpayers who in essence fund sometimes fruitless conservation efforts.

The more information we have to use in the process of planning and conservation decision-making, the less we will need to rely on the scattered, opportunistic approaches reflected in many of the tax incentives discussed in this article. These approaches may cause states to move away from property tax incentives, like the current use assessment methods mentioned in Parts III and IV of this article and move to a more selective use of tax credits or tax exemptions. If a more selective approach is taken, then incentives can be given to taxpayers whose lands are determined to be ecologically significant and necessary to achieve the conservation goals set forth in the planning process and who are willing to take affirmative management steps, as opposed to simply awarding property tax benefits to landowners whose land happens to be situated in a particular zone. The limited resources we have should be wisely spent on protecting carefully selected land in furtherance of long-term, comprehensive conservation goals.

