

# **A HIGHWAY RUNS THROUGH IT:**

*Conserving Scenic Corridors in Florida*

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<sup>1</sup> The University of Florida Conservation Clinic is an interdisciplinary legal clinic housed in the Center for Governmental Responsibility at the University of Florida Levin College of Law. Under the supervision of its Director, the Clinic provides value-added, applied educational opportunities to graduate and law students at the University of Florida by offering its services to governmental and non-governmental organizations and individuals pursuing conservation objectives.

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## I. Introduction

Scenic corridors may encompass not just roadway pavement, right-of-way areas and adjacent roadside, but also the many elements that make up scenic vistas. Features found within scenic corridors may include lakes, streams wetlands; forest and agricultural lands; desert or mountain views; urban and rural scenes; and cultural and historic resources. A scenic corridor may extend for miles and miles in horizon vistas depending on a corridor's terrain. Similarly, the width of a scenic corridor may include a closed canopy road or a narrow urban street.

Unfortunately, unplanned growth, uncontrolled signage, poorly designed development and incompatible land uses can easily compromise the aesthetic quality of scenic corridors. Federal, state and local scenic corridor protection programs have emerged to encourage creative roadway planning. Such planning can yield direct and indirect benefits for communities, landowners and roadway users. Direct benefits may include increases in tourism revenue due to identification on state, federal and auto club maps; increases in business, tax revenue, and jobs from tourist dollars; access to federal and state funding for planning and managing the corridor; increases in property values, improved maintenance and higher budgets for roads; and access to money and other assistance from state and national offices of economic development and tourism. Indirect benefit includes the official recognition that what the community has is special. This official acknowledgment carries with it a sense of community pride.

This paper addresses scenic corridor protection techniques, both regulatory and incentive-based. Section II discusses the roots of the scenic highway movement in the United States. Section III then provides an overview of Federal scenic byway programs. Next, Section IV describes state programs with an emphasis on Florida's scenic highway program. Finally, Section V of this paper discusses local government and community-based scenic corridor protection strategies including tools and techniques for implementing scenic corridor programs.

## II. Roots of the Scenic Highway Movement

The scenic highway movement can trace its roots back to the later half of the 19<sup>th</sup> century. Frederick Law Olmstead created and developed avenues and boulevards that meandered through urban parks.<sup>2</sup> Over time, these thoroughfares increased in numbers as automobile transportation became affordable for the American working class.

Some of the first scenic highways included suburban parkways built in Boston, Massachusetts and Westchester County, New York in the early decades of the 20<sup>th</sup> century.<sup>3</sup> For instance, the Bronx River Parkway, which began construction in 1913, was designed to provide

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<sup>2</sup> National Trust for Historic Preservation, *The Protection of America's Scenic Byways*, Information Series No. 68 (1992) (attached as [Appendix A](#)).

<sup>3</sup> *See id.*, at 1.

a pleasurable commuting experience by beautifying a blighted urban corridor.<sup>4</sup> This scenic corridor provides scenic vistas and a limited number of access points for simple, comfortable travel along the Bronx River.

### III. Federal Scenic Byway Programs

#### A. National Park Service

In the 1930's the National Park Service (NPS) began constructing parkways using the urban parkways around New York City as models. These parkways now constitute a special type of unit of the NPS.<sup>5</sup> They are defined as highways "for recreational passenger car traffic with a wide right-of-way that insulates the roadway from abutting private property, minimizes intersections and access points, and protects natural scenic values."<sup>6</sup> These early parkways included the Blue Ridge Parkway in Virginia and North Carolina and the Natchez Trace Parkway in Tennessee and Mississippi.<sup>7</sup> Today, the NPS manages nine parkways, four of which are found in or near Washington, D.C. Moreover, numerous national parks contain roads considered scenic corridors including Skyline Drive in Shenandoah National Park, Virginia, and Going-to-the-Sun Road in Glacier National Park, Montana.<sup>8</sup>

#### B. U.S. Forest Service and Bureau of Land Management

The U.S. Forest Service and the Bureau of Land Management also have scenic highway systems.<sup>9</sup> The U.S. Forest Service (USFS) began its program in 1988 by designating roads within national forest boundaries in 30 states.<sup>10</sup> USFS scenic highways are mostly protected by federal ownership of the their land and in a few situations by scenic easements.<sup>11</sup> However, many USFS scenic highways pass through both public and private land. Like the USFS, the Bureau of Land Management (BLM) has promoted a network of scenic roads called "Back Country Byways" in the western states. These scenic roads are intended to expose the beauty of the west that is not

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<sup>4</sup> *See id.*

<sup>5</sup> U.S. Department of Transportation—Federal Highway Administration, *Protection Techniques for Scenic Byways: Four Case Studies* (September 1990) (attached as [Appendix B](#)).

<sup>6</sup> *See id.*, at 16.

<sup>7</sup> *See id.*, at 16.

<sup>8</sup> *See National Trust for historic Preservation, The Protection of America's Scenic Byways*, *supra* note 2, at 2.

<sup>9</sup> *See id.*

<sup>10</sup> U.S. Department of Transportation—Federal Highway Administration, *Community Guide to Planning & Managing a Scenic Byway* (attached as [Appendix C](#)).

<sup>11</sup> *See National Trust for historic Preservation, The Protection of America's Scenic Byways*, *supra* note 2, at 2.

<sup>12</sup> *See U.S. Department of Transportation, Protection Techniques for Scenic Byways: Four Case Studies*, *supra* note 5, at 16.

easily accessible by major roads including prairies, deserts, canyons, historic towns, mountaintops and wildlife.<sup>12</sup> Back Country Byways are classified into four classifications, depending on the terrain and travel conditions.<sup>13</sup> Most require trucks or four-wheel drive vehicles for reasonable access. Thus, these byways may be impassable during certain times of the year.

### C. National Scenic Highways Program

The federal government has been particularly interested in scenic byways for several decades. Early interest was formalized in the 1960s with the creation of the Outdoor Recreation Resources Review Commission.<sup>14</sup> In 1965, the Highway Beautification Act was passed, regulating signage and junkyards along federally aided highways.<sup>15</sup> Several federal studies of scenic byways were also taken from the 1960s through the 1980s. However, legislation to create a national system of scenic highways was not drafted until 1988 with the help of the Coalition for Scenic beauty (now known as “Scenic America”).<sup>16</sup>

In 1989, the Scenic Byways Protection Act was introduced in the House of Representatives and the Senate, with support from engineering, environmental and economic interests.<sup>17</sup> Even though this particular bill was not approved, the 1990 appropriation legislation for the Department of Transportation contained provisions for implementing a study to recommend guidelines for conducting a national scenic byways program. The study assessed existing scenic byways, safety issues, economic impacts, tourism, and protection techniques of scenic byways. The study generated further support for scenic byways, and in 1991 several more bills were introduced in Congress.<sup>18</sup>

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*See National Trust for Historic Preservation, The Protection of America’s Scenic Byways, supra note 2, at 2.*

*See U.S. Department of Transportation, Protection Techniques for Scenic Byways: Four Case Studies, supra note 5, at 17.*

*See National Trust for Historic Preservation, The Protection of America’s Scenic Byways, supra note 2, at 5.*

*See id.* *See also infra* § V(G) Sign Control.

*See id.* *See also* [www.scenic.org](http://www.scenic.org)

<sup>17</sup> *See National Trust for Historic Preservation, The Protection of America’s Scenic Byways, supra note 2, at 5.*

<sup>18</sup> *See id.*

Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA) in 1991.<sup>19</sup> The Act provided funding, over six-years, for the construction and maintenance of highways, bridges and mass transportation facilities.<sup>20</sup> The Act contains strong provisions for state and local planning and a concern for assessing the impact of transportation projects on communities and integrating transportation and community goals.

The foundations of the national scenic byways program are established in Section 1047 of ISTEA.<sup>21</sup> First, the Act creates a 17-member Scenic Byways Advisory Committee with the purpose of assisting the Secretary of Transportation in developing a national scenic highway program.<sup>22</sup> The Committee is composed of six members from the federal government, three members representing travel and tourism, two members representing transportation officials, two members representing truck and auto users and four members representing the preservation and conservation communities.<sup>23</sup> This eclectic membership reflects the broad spectrum of interests groups that are concerned about the scenic byways program and influence scenic byway legislation.

ISTEA creates a two-tier system of scenic byways: a system of designated roads that meet national criteria and a system of five-star byways, the so-called all-American roads.<sup>24</sup> The “minimum criteria” for use in designating highways as scenic byways and all-American roads requires the committee to address scenic beauty and historic significance of highway corridors, operation and management standards, signage standards, safety standards, landscaping and traveler’s facilities, and procedures for designating scenic byways.<sup>25</sup>

The National Scenic Byways Program is envisioned as the next tier above state programs, with all-American roads as the very best of the national byways.<sup>26</sup> Participation by the states is voluntary. The designation criteria must consider user needs, protection of resources and strong public participation.<sup>27</sup> Furthermore, a corridor management plan is required as part of the

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**Intermodal Surface Transportation Efficiency Act, Public Law 102-240(1991), codified in chapters 23 and 49 of the United States Code. Authorization of the National Scenic Byways Program can be found at P.L. 102-240 § 1047, and codification can be found at 23 U.S.C. 101 (1996). The National Scenic Highways Program can also be found in the Congressional Statutes at large at 105 Stat. 1996.**

<sup>20</sup> *See id.*, at 23 U.S.C. 101.

<sup>21</sup> *See P.L. 102-240, supra note 19, at § 1047.*

<sup>22</sup> *See id.*

<sup>23</sup>

*See id.*

<sup>24</sup> *See U.S. Department of Transportation, Community Guide to Planning & Managing a Scenic Byway, supra note 9, at 10.*

<sup>25</sup> *See National Trust for Historic Preservation, The Protection of America’s Scenic Byways, supra note 2, at 5.*

<sup>26</sup> *See Christopher J. Duerksen, Protecting Scenic Highways—A Legal Primer, Clarion Associates (1993).*

<sup>27</sup> *See id.*

designation process and the Federal Highway Administration has the responsibility to provide technical assistance capability.<sup>28</sup> Finally, for a route to be eligible for inclusion in the National Scenic Byways Program, it must include: one or more of six intrinsic qualities (scenic, natural, historic, cultural, archeological, and recreational), broad-based local community support for its designation, and continued management as laid out in a corridor management plan.<sup>29</sup>

#### **IV. State Scenic Byway Programs**

##### **A. Generally**

ISTEA's National Scenic Byways Committee decided that roads should first be recognized at the state level as scenic highways before they could be eligible to receive national byway status. This decision caused the rapid development and enhancement of state scenic byway programs across the country. As a consequence, most states have some type of scenic byways program and they designate roads that have scenic values and historical and cultural resources.<sup>30</sup> In a number of states, such as Florida, formal scenic byways programs are authorized by legislation and are designated in accordance to published standards and procedures.<sup>31</sup> Other states, such as Maryland and North Carolina, have programs with administrative authorization granted under a general or executive authority.<sup>32</sup> Lastly, many states, such as Missouri and Illinois, have no formal scenic highway program but have designated a road or roads as scenic, often as part of a special initiative.<sup>33</sup>

The procedures for scenic designation differ dramatically. In some states, designation of scenic corridors is initiated at the local level. In other states, a state-level planning board or committee nominates the roads. Formal scenic highway program designation criteria varies from state to state. For example, California and Oregon have very defined and high standards of designation that relate to aesthetics, natural beauty and historic resources.<sup>34</sup> Other state programs apply criteria that relate more to tourism and travel experience. Whatever criteria are used, most state scenic byways programs mark the roads with special signs. This special signage is designated to heighten awareness of the roads' special qualities.

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<sup>28</sup> *See id.*

<sup>29</sup>

*See U.S. Department of Transportation, Community Guide to Planning & Managing a Scenic Byway, supra note 9, at 8.*

<sup>30</sup> *See id.*

<sup>31</sup> *See infra* § IV(B) Florida.

<sup>32</sup> *See National Trust for Historic Preservation, The Protection of America's Scenic Byways, supra note 2, at 2-3*

<sup>33</sup> *See id.*

<sup>34</sup>

*See id.*, at 3.

State scenic byways are often promoted through maps and brochures as tourist attractions.<sup>35</sup> However, most state programs do not incorporate the protection and management of the road corridors into their scenic byways programs.<sup>36</sup> Scenic protection of a designated corridor is generally left up to local jurisdictions in which the road passes.

## **B. Florida**

Florida had no official scenic highways program prior to ISTEA.<sup>37</sup> The Florida Legislature had designated several routes as “scenic and/or historic,” but they were chosen on a case-by-case basis with no uniform designation criteria.<sup>38</sup> In 1993, State legislation was passed to allow the Florida Department of Transportation (FDOT) to establish an official program for scenic highways.<sup>39</sup> In 1994, FDOT received a Scenic Byways Grant from the Federal Highway Administration to create a Florida Scenic Highways Program.<sup>40</sup> The product of that grant was a proposed Florida Scenic Highways Program. Then, in February 1997, the Secretary of the Florida Department of Transportation approved and signed an FDOT procedure establishing the Florida Scenic Highways Program as official.<sup>41</sup> Finally, in April 1997, the Program received federal recognition.<sup>42</sup> Since that time, the Federal Highway administration has awarded FDOT with an “Environmental Excellence Award” for its creation of the Florida Scenic Highways Program.<sup>43</sup>

The Florida Scenic Highways Program is structured around the idea of building a grass roots effort to increase awareness of Florida’s history and intrinsic resources. The program’s mission statement reflects this purpose:

*“The Florida Scenic Highways Program will preserve, maintain, protect and enhance the intrinsic resources of scenic corridors through a sustainable balance of conservation and land use. Through community-based*

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<sup>35</sup> *See id.*

<sup>36</sup>

*See id.*

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*See Florida Department of Transportation, Florida Scenic Highways Program Manual (1996), at Chapter 1, §1.2.*

<sup>38</sup> *See id.* at Section 1.3. Scenic and historic highways legislatively mandated through the 1993 session include 19 highways from Escambia County to Dade County and of the 19 highways: 12 are historic, <sup>39</sup> 6 are scenic and 1 is historic and scenic (see [Appendix D](#) for a listing of the highways).

<sup>40</sup> *See FLA. STAT. § 335.093 (1993).*

*See Florida Department of Transportation, Florida Scenic Highways Program Manual, supra note 37, at Section 1.3.*

*See id.*

<sup>42</sup> *See id.*

<sup>43</sup>

*See id.*

*consensus and partnerships, the program will promote economic prosperity and broaden the traveler's overall recreation and educational experience.*"<sup>44</sup>

Implicit in the Florida Scenic Highways Program's mission statement is the acknowledgment that the program's ultimate goal is to preserve, maintain, protect and enhance Florida's unique intrinsic resources. To date two highways have been formally designated under the Florida Scenic Highways Program. The "Pensacola Scenic Bluffs Corridor," which includes portions of State Road 10A and U.S. 90, is approximately 11 miles in length and was officially designated as Florida's first State Scenic Highway on April 24, 1998.<sup>45</sup> The other designated State Scenic Highway is the "Tamiami Trail Scenic Highway" which includes portions of U.S. 41 and is approximately 49.5 miles in length and was designated on December 9, 1998.<sup>46</sup>

The Florida Scenic Highways Program consists of three separate phases: eligibility, designation, and implementation.<sup>47</sup> During the eligibility phase an applicant forms a Corridor Advocacy Group (CAG) to develop an Eligibility Application.<sup>48</sup> After eligibility is established, the CAG begins the designation phase by developing a Corridor Management Plan (CMP), which specifies the procedures, protection techniques, and standards and regulations by which the scenic highway will be managed.<sup>49</sup> If designation is granted, then the implementation phase is initiated and the actions, techniques, and procedures laid out in the CMP are carried out.<sup>50</sup>

## **V. Protection Strategies: Tools and Techniques for Implementing Scenic Corridor Programs**

### **A. Planning**

#### **1. Policy Statements**

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<sup>44</sup> See *id.*, at § 1.2.

<sup>45</sup> See [www.scenicfla.org](http://www.scenicfla.org) (This is the website of "Citizens for a Scenic Florida," a Florida Chapter of "Scenic America.>").

<sup>46</sup> Per phone conversation with Kristee Booth, Florida Department of Transportation, November 30, 1999.

<sup>47</sup> Florida Department of Transportation, *Florida Scenic Highways Program Manual*, supra note 37, at § 1.6.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

A governmental entity may issue a policy statement regarding land use or land development that provides a start for protection of scenic resources.<sup>51</sup> This policy may or may not be incorporated in a comprehensive plan or zoning ordinance. Recognition by a local government that a roadway is scenic may spark enough citizen support to protect it. Policy statements may also strengthen ordinances by influencing decision-making processes.

## 2. Comprehensive Planning

In Florida, local government comprehensive plans combine planning and regulatory functions.<sup>52</sup> They are legally enforceable documents used to plan for and regulate land use development in the local jurisdiction. All proposed development within a jurisdiction must demonstrate “consistency” with the comprehensive plan. In order for a particular use to have consistency with the comprehensive plan it must be “compatible with and further the objectives, policies, land uses . . . in the comprehensive plan.”<sup>53</sup> Furthermore, this consistency requirement ensures that the goals and objectives of the local comprehensive plan, such as scenic highway designation, will be implemented in land use decision-making. Moreover, Florida’s Growth Management Act addresses complications caused by multi-jurisdictional problems by requiring each local plan to address intergovernmental coordination.<sup>54</sup>

A Scenic Highway’s CMP must be either adopted into a local government’s comprehensive plan or it must be demonstrated that the comprehensive plan already contains provisions to protect the corridor.<sup>55</sup> Specifically, these elements include a map displaying the corridor, a corridor vision statement, and goals, objectives and strategies related to the specific local government.<sup>56</sup> This required coordination helps ensure scenic highways do not suffer from piecemeal local planning.

## 3. Pre-application Review of Development Proposals

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<sup>51</sup>

*See* U.S. Department of Transportation, *Protection Techniques for Scenic Byways: Four Case Studies*, *supra* note 5, at 12.

*See* Florida Department of Transportation, *Florida Scenic Highways Program Manual*, *supra* note 37, at <sup>53</sup>Chapter 7.

*See* FLA. STAT. § 163.3194(3)(a)(1995) (Chapter 163 of the Florida Statutes is referred to as Florida’s Growth Management Act).

<sup>54</sup> *See id.*, at § 163.07.

*See* Florida Department of Transportation, *Florida Scenic Highways Program Manual*, *supra* note 37, at <sup>56</sup>§ 3.15.1.

*See id.*

A local government environmental review process can be an important tool in protecting scenic resources.<sup>57</sup> Development-approval processes generally include an environmental review, which requires developers to do an environmental assessment of a potential building site. This review can, and usually does, include an inventory of scenic, historical, and conservation resources and assesses the impacts of the proposed development on those resources. An environmental review does not by itself avoid adverse environmental impacts, but it usually does recognize potential threats to the environment and may identify some mitigation of the impacts.

### **3. Site Plan Review and Design Guidelines**

A Site Plan Review may be installed by a local government to act as a modified special permit process.<sup>58</sup> This middle-ground approach allows local governments more comprehensive control over new development than is feasible through zoning alone, but at the same time reduces “unbridled discretion” exercised by boards of county commissioners utilizing inadequate bylaws which are vague or lack necessary detail. This type of review is most often used for non-residential uses.

Design guidelines and design controls can be utilized under a design review process to effectuate what acceptable development in a community should look like.<sup>59</sup> Design guidelines may be published by citizen groups or governmental bodies and do not require enabling authority. Design controls, which are permitted by enabling legislation, require development to be in compliance with design guidelines. A design review board could administer these guidelines and controls. This approach, coupled with Site Plan Review, would provide a heightened level of scrutiny of development proposals along scenic corridors.

## **B. Acquisition of Interests**

### **1. Fee Simple Acquisition**

Ownership offers the surest way to protect scenic resources is to own them outright. Ownership of all or part of a scenic corridor assures maximum control of land use and design along a road. Title of land in “fee simple” is an absolute holding of real property without any limitation on ownership.<sup>60</sup> However acquiring property, whether by buying it or by donation, is usually the most expensive way to protect it. Further, costs are not limited to acquisition but also involve long-term management and maintenance. Moreover, scenic lands are often productive lands, and its

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<sup>57</sup> See U.S. Department of Transportation—Federal Highway Administration, *Scenic Resource Protection Techniques and Tools* (September 1990), at 28 (attached as [Appendix E](#)).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*, at 9.

productivity is part of that which makes it scenic. Removing such lands from their productive roles may interfere with scenic qualities.

## 2. Scenic or Conservation Easements

Scenic or conservation easements are the acquisition of certain limited rights to, or interests in, real property.<sup>61</sup> They are essentially an agreement between the owner of property and the holder of an easement that the land will be restricted for certain specified uses that might compromise the land's scenic or natural qualities. They are increasingly being used to protect the views from roads.

Conservation easements were authorized by statute in Florida in 1976.<sup>62</sup> Section 704.06 of the Florida Statutes details the procedure for creating conservation easements.<sup>63</sup> A conservation easement usually restricts the type and amount of development that may take place on the property.<sup>64</sup> For example, in the case of scenic highways, conservation easements can be used to prohibit or restrict the placement of buildings or billboards on a scenic corridor to ensure the preservation of scenic qualities. In Florida, easements are perpetual in nature, run with the land and may be in the form of an easement, restriction, condition or covenant. The easement "runs with the land," so that as ownership changes, the land remains subject to the easement.<sup>65</sup>

The easement's seller/donor (owner) may receive several benefits, including estate, property, and income tax deductions and retention of certain rights to develop if specified in the easement instrument. In addition, the easement is drafted to specifically address the particular property's needs and owner's goals. Its flexibility makes the conservation easement a useful instrument for attaining specific conservation goals.<sup>66</sup>

The easement's buyer/donee (holder) takes upon themselves the duty of monitoring and enforcing the restrictions of the easement. The holder of the easement should have the time and monetary resources to properly monitor the property and enforce restrictions. If these duties are not performed properly the easement may be vulnerable to an attack on its validity for lack of enforcement.

The Florida conservation easement law defines one type of a conservation easement as a right or interest in real property which is appropriate to fulfill the purpose of retaining land or water

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<sup>61</sup>

*See U.S. Department of Transportation, Protection Techniques for Scenic Byways: Four Case Studies, supra note 5, at 10.*

<sup>62</sup> The conservation easement statute was amended in 1986 and 1993.

<sup>63</sup> *See* FLA. STAT. § 704.06 (1997).

<sup>64</sup> *See* David Downes, *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209, 212 (Spring 1998).

<sup>65</sup> *See* FLA. STAT. § 704.06(4)(1997).

<sup>66</sup> *See* Cheryl A. Denton, *Conservation Easements in Florida: Do Unsubordinated Mortgages Pose a Threat?*, 70 FLA. BAR JOURNAL 50, 50 (1996).

areas predominately in their “*natural, scenic, open*, agricultural, or wooded condition.”<sup>67</sup> The purpose and restrictions in the easement should be drafted to reflect these objectives. The restrictions should be strict enough to protect the significant values of the property. Easements may be designed, however, that permit development that is consistent with the easement’s purpose.<sup>68</sup>

Any party that owns real property in fee simple may donate or sell interests in the property. If the property is subject to any mortgages or liens those lenders must agree to subordinate their rights in the property to the rights of the easement holder. Subordination is an IRS requirement to qualify for some tax deductions, as well as sound policy to preserve the easement.<sup>69</sup>

Under Florida law, the holder of the easement must be either:

- a governmental body or agency or
- a charitable corporation or trust
- whose purposes include:
  - (i) protecting natural, scenic, or open space values of real property,
  - (ii) assuring available land for agriculture, forestry, recreation, or open spaces use,
  - (iii) protecting of natural resources,
  - (iv) maintaining or enhancing air or water quality, or
  - (v) preserving sites or property of historical, architectural, archaeological, or cultural significance.<sup>70</sup>

It is also possible to have co-holders of the easement, allowing two qualified organizations to hold the easement. This arrangement brings together the strengths, abilities, and resources of the two stewardship organizations. The co-holders may share responsibility jointly or an individual organization can accept primary responsibility for enforcement of different restrictions.<sup>71</sup>

In order for the conservation easement to be enforceable, it must comply with all sections of Florida Statute ' 704.06. A conservation easement is defined in ' 704.06(2) as a A perpetual, undivided interest in property. Also, public access may be granted in a conservation easement, and is required for some income tax deductions.<sup>72</sup> Moreover, baseline data on the condition of the property at the time of transfer of the conservation easement must be recorded and incorporated by reference into the easement to provide evidence of conservation resource value and to satisfy

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<sup>67</sup> FLA. STAT. § 7 04.06(1) (1998) (emphasis added).

<sup>68</sup> See JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK, 5 (1988).

<sup>69</sup> See Treas. Reg. § 1.170 A-154(g)(2) (1998).

<sup>70</sup> See FLA. STAT. § 704.06(3) (1997).

<sup>71</sup> See DIEHL, *supra* note 68, at 77.

<sup>72</sup> See DIEHL, *supra* note 68, at 8.

certain IRS requirements.<sup>73</sup> It is best to compile the information for the baseline report prior to the transfer, so that it can be easily incorporated into the easement.

In drafting the easement the drafter should clearly state the purpose of the easement and identify all the boundaries of the property. The standards for the restrictions should be measurable standards. For a good example of a model easement and explanations of each provision see Janet Diehl and Thomas S. Barrett's *Conservation Easement Handbook* (see also Appendix B of Appendix E for an example of a scenic easement from Michigan).<sup>74</sup> The conservation easement is a flexible alternative to outright donations of land and offers the convenience to the property owner of another entity enforcing the conservation restrictions. The disadvantages include the monetary expense of monitoring the land, as well as decreased property value and decreased owner control.

## 9. Land Trusts

Another alternative for conveying or acquiring title to real property for conservation purposes, land trusts are often established to protect areas of unique scenic quality.<sup>75</sup> Land trusts hold land and other property rights for the benefit of the public and often include educational, recreational and scientific activities. Land trusts often have considerable flexibility in acquiring property and the ability to act quickly and take risks to buy land before it is sold for development. The downside, as with many of the acquisition techniques, is the cost of such a program.

The land trust arrangement was established by the Florida legislature in 1963.<sup>76</sup> Since that time, land trusts have become a popular vehicle for conservation. A land trust is an arrangement whereby the trustee retains both legal and equitable title to land for the benefit of another party, the beneficiary.<sup>77</sup> Major examples of land trusts include the Jackson Hole Trust of Wyoming and the Big Sur Land Trust in California.

When a deed or other recorded instrument naming the trustee as grantee sets forth the trustee's powers, a land trust is created.<sup>78</sup> Florida Statute § 689.071 sets out elements of a land trust that must be met in order to be entitled to the benefits of the statute. The following conditions must be satisfied:

- The instrument must convey an interest in real property;
- The grantee in the instrument must be designated as a "trustee";

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<sup>73</sup>

It also provides the information necessary for a summary report for the easement holder to utilize in monitoring the property.

<sup>74</sup> See DIEHL, *supra* note 68, at 15.

<sup>75</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, *supra* note 57, at 11.

<sup>76</sup> See FLA. STAT. § 689.071, which was enacted on August 17, 1963.

<sup>77</sup> See Mark Warda, *LAND TRUSTS IN FLORIDA 13* (Sphinx Publishing 4<sup>th</sup> ed. 1995) (1984).

<sup>78</sup> See *id.*; See also FLA. STAT. § 689.071.

- The recorded instrument must confer on the trustee "the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property@,
- The land trust agreement must be recorded.

If these conditions are satisfied, the trustee is vested with full ownership in the property, with full power and authority which was granted in the recorded instrument.

The distinctive features of a land trust include:

- Both the legal and equitable titles to the property are vested in the trustee, and the beneficiary has no interest in either.
- The trustee has no duties or powers other than to convey, mortgage, or deal with the real property as directed by the beneficiaries or to sell or liquidate the property at the trust's termination.
- The rights of possession, management, control, and operation of the property, as well as the right to rents, issues, profits, and proceeds of sale or mortgage financing are vested in the beneficiary.
- The rights, privileges, and obligations of the beneficiaries are not interests in real estate but by the trust instrument are expressly characterized as personal property.<sup>79</sup>

In land trusts, both legal and equitable titles to the trust property are vested in the trustee.<sup>80</sup> Therefore, a land trust differs from a conventional trust under which the trustee holds legal title and the beneficiary holds equitable title.<sup>81</sup> The trustee holds the title and may sign documents affecting title when directed by the beneficiary or the terms of the trust.<sup>82</sup> The beneficiary retains all other rights and duties regarding the property -- collects rents, pays taxes, obtains insurance, and manages the property.<sup>83</sup> Also, the terms usually contain the duty to convey the property to the beneficiary at the termination of the trust.<sup>84</sup>

As previously noted, a land trust beneficiary retains a personal property interest, not a real property interest.<sup>85</sup> The beneficiary, which can be a person, corporation, partnership, limited liability corporation, or a combination,<sup>86</sup> has the duty to manage the property.<sup>87</sup> Because the

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<sup>79</sup> See Bruce S. Goldstein, *FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS 9-B-1*, § 9.56 (The Florida Bar 1997). (Quoting: KENOE, *KENOE ON LAND TRUSTS I.C.[1.3]* (1978)).

<sup>80</sup> See Warda, *supra* note 77, at 16.

<sup>81</sup> See 76 *AMERICAN JURISPRUDENCE* § 12.

<sup>82</sup> See Warda, *supra* note 77, at 14.

<sup>83</sup> See *id.*, at 14.

<sup>84</sup> See *id.*, at 14.

<sup>85</sup> See *id.*, at 15.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*, at 17.

duties, rights, and responsibilities of ownership reside with the beneficiary, the beneficiary also assumes the responsibility and liability for mismanagement.<sup>88</sup>

A land trust may be created in two ways: A property owner can deed the property to a trustee, or a buyer can direct a seller to convey property to a trustee.<sup>89</sup> Two instruments typically are involved in the creation of land trusts. First, a land trust agreement states in detail the duties and responsibilities of the trustee. The agreement may also refer to the relationship among the beneficiaries when dealing with decision-making or profit-sharing. The second instrument, the deed, conveys title to the trustee. The deed will usually contain language that the trustee is granted full power and authority to protect, conserve, and sell, lease, encumber, or otherwise manage the property described in the deed.<sup>90</sup>

A land trust utilized as a vehicle for owning real property offers a number of benefits. Advantages of land trusts include:

- Because the interest of a beneficiary of a land trust is personal property rather than real property, a properly recorded judgment against a beneficiary does not constitute a lien against the real estate held by the land trust. It should be noted, however, that the filing of a RICO lien notice creates a lien in favor of Florida on the beneficial interest in land situated in the county in which the notice is filed.<sup>91</sup> A judgment creditor also could perfect a lien against the personal property interest of a beneficiary by following the necessary procedures for levying on personal property.
- The incompetency, death, bankruptcy, or divorce of one of several owners of a parcel of real estate can create problems in selling, mortgaging, or otherwise dealing with the property. If the property is held by a land trust, these circumstances affect only the beneficial interests of the persons involved and not the real estate. Thus, with appropriate authority granted by the land trust instrument, the trustee can effectively mortgage, convey title to, or otherwise deal with the property despite the existence of any of these circumstances.
- As noted [in '9.57], the personal liability of the trustee is limited under Florida Statutes '737.306(1)(a), which states that unless otherwise provided in the contract, a trustee is not personally liable on contracts, except contracts for attorneys' fees, properly entered into in the trustee's fiduciary capacity in the course of administration of the trust estate, unless the trustee fails to reveal his or her representative capacity and identify the trust estate in the contract.<sup>92</sup>

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<sup>88</sup> See *id.*; See also 76 AMERICAN JURISPRUDENCE § 12.

<sup>89</sup> See Warda, *supra* note 77, at 29.

<sup>90</sup> See *id.*, at 41.

<sup>91</sup> See FLA. STAT. § 895.07 (1998).

<sup>92</sup> See FLA. STAT. § 689.071(5).

- Because the land trust agreement is not recorded, the identity of the beneficial owners remains confidential.<sup>93</sup>

There are some down sides to setting up a land trust. First, there is a cost incurred when setting up a land trust and also with maintaining it.<sup>94</sup> Moreover, finding a trustee that can be trusted may prove to be difficult -- especially when considering that a trustee has full power to sell the property.<sup>95</sup> The sale cannot be taken back, but the act could constitute criminal fraud.<sup>96</sup>

#### 4. Revolving Funds

Revolving fund approaches allow a group to purchase threatened property and sell it with restrictions on alterations and use to a new owner.<sup>97</sup> This approach works well for non-profit groups willing to risk temporary ownership and to invest cash and extra effort in seeking permanent protection and responsible ownership for specific properties. The revolving fund approach differs from the land trust approach in that revolving fund groups are usually independent and may keep some of their property indefinitely.

There is a similar approach to the revolving concept referred to as “pre-acquisition” or “passthrough” program.<sup>98</sup> This approach involves a partnership between an organization and a government agency that will end up owning the property. The organization moves quickly to acquire the property when an agency might not be able to act. Then, the organization covers its costs by selling the property to the agency that permanently protects the property. The Nature Conservancy and the Trust for Public Lands have utilized this approach when working with park agencies, the U.S. Fish and Wildlife Service, and the U.S. Forest Service.<sup>99</sup>

#### 5. Other Types of Acquisition

##### a) Lease-Purchase Agreements

Another approach to acquiring property outright is lease-purchase agreements. Under this type of approach, rent paid under the terms of a lease is applied towards an already agreed upon sale

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<sup>93</sup> Goldstein, *supra* note 79, at § 9.62.

<sup>94</sup> One example would be attorney’s fees.

<sup>95</sup> See Warda, *supra* note 77, at 73-74.

<sup>96</sup> See Warda, *supra* note 77, at 74.

<sup>97</sup> National Trust for Historic Preservation, *Rural Conservation, Information Series No. 77* (1993) (attached as [Appendix F](#)).

<sup>98</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, *supra* note 57 at 12.

<sup>99</sup> See *id.*

price.<sup>100</sup> This allows a buyer to act quickly, when financing is not an option, and take on the responsibility for maintaining a property until the sale is completed.

### **b) Life Estates and Lease-backs**

Life estates allow a donor of property to retain full ownership and rights in the property until death, when it automatically becomes the property of another, without going through probate.<sup>101</sup> In a leaseback, a variation of the life estate, the donor actually gives the property to another, who then leases the property back to the donor.<sup>102</sup> This gives an entity some control over the management of the property during the donor's lifetime.

### **c) Land Exchanges**

Land exchanges allow a developer to trade one parcel of land for another.<sup>103</sup> Usually, the other land would be owned or acquired by a local government, who would also negotiate the exchange. Land exchanges or trades are similar to Transferable Development Rights (TDRs) which will be discussed later.

### **d) Bargain Sales**

The bargain sale is a hybrid acquisition technique that allows for the acquisition of property partly as a purchase and partly as a gift.<sup>104</sup> Under this "donative sale" technique, the owner sells the property for less than the appraised value and takes a tax deduction for the difference.<sup>105</sup> Provisions regulating this type of charitable donation can be found in the Internal Revenue Code.<sup>106</sup>

The Big Sur Land Trust in California used a bargain sale when a scenic 3,040-acre ranch came on the market. With a conservation-minded buyer providing the financing, the Trust purchased the land at a bargain—giving the owner, a developer a tax deduction—and immediately conveyed the property to the buyer.<sup>107</sup> Prior to the transfer, the trust added stringent restrictions on development to the deed, plus a right of first refusal and a provision of access to the land by the University of California for educational and scientific purposes.

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<sup>100</sup> See *id.*, at 9.

<sup>101</sup>

National Trust for Historic Preservation, *Rural Conservation*, *supra* note 99, at 14.

<sup>102</sup>

See *id.*, at 13

<sup>103</sup>

See Florida Department of Transportation, *Florida Scenic Highways Program Manual*, *supra* note 37.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup>

See *infra* § V(H) discussing the tax consequences of conservation conveyances.

<sup>107</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, *supra* note 57, at 10.

## e) Land Donations

Non-profit organizations and local governments sometimes receive gifts of property through a donation or bequest.<sup>108</sup> However, it is critical for donors to give adequate notice of their intention to donees, so the donees can solidify financial arrangements needed for the property's maintenance (see Appendix A of Appendix E for a list of representative guidelines for receiving property as a gift).

### C. Land Transfer Controls

#### 1. Purchase of Development Rights (PDR)

PDRs is the purchase of easements that extinguish the right to develop property, leaving the owner with all other rights of ownership.<sup>109</sup> The price of the rights is determined by the reduction in the market value of the property as a result of the removal of development rights. PDR programs are often financed by the sale of bonds. Reasonably successful TDR/PDR programs for preserving agricultural land have been implemented in Suffolk County, New York and in Montgomery County, Maryland.<sup>110</sup>

#### 2. Land Banking

Land Banking involves a local government obtaining fee simple to a parcel of land and then selling the land from its "land bank" with restrictions on allowable development of the land.<sup>111</sup> In effect, the government acts as a large-scale developer. Thus, it could acquire land along scenic corridors and re-sell for development in locations least disruptive to scenic values. This approach has been widely used in Europe, especially Sweden, Denmark and France.

#### 3. Transfer of Development Rights (TDR)

TDRs is a planning tool in which a developer may own the development rights to a property located in a designated no-growth zone and transfer those development rights to a receiving zone for credits.<sup>112</sup> Sellers of development rights receive cash for the land's potential without actually selling the land, developers are able to build to a higher density, and communities benefit by concentrating development where it is decided to be appropriate while at the same time protecting and preserving open space.

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<sup>108</sup>

*See id.*

<sup>109</sup> *See National Trust for Historic Preservation, Rural Conservation, supra note 99, at 13.*

<sup>110</sup> *See id.*

<sup>111</sup> *See U.S. Department of Transportation, Scenic Resource Protection Techniques and Tools, supra note 57, at 15.*

<sup>112</sup> *See National Trust for Historic Preservation, Rural Conservation, supra note 99, at 11.*

TDRs can be an effective tool for conservation, but they are complex and difficult to implement.<sup>113</sup> Unfortunately, there are few successful TDR programs in Florida or nationwide.<sup>114</sup> This tool might be best utilized in or near metropolitan areas where the jurisdiction covers a large area and a sophisticated planning process already in place.

#### 4. Deed Restrictions

Deed restrictions, also known as covenants, are self-imposed restrictions on subsequent owners of property when a property is transferred.<sup>115</sup> Deed restrictions operate similar to easements and are commonly used with limited development and revolving funds. These restrictions could impose development standards and limitations on property along and adjacent to a scenic corridors.

Generally, restrictions are instituted in order to control the free use of the owners property for the benefit of others. Restrictive covenants may be utilized to control the uses to which the land may be put.<sup>116</sup> Restrictive covenants can either be public or private. Public restrictions are legislative in nature and are established to protect the public welfare.<sup>117</sup> A zoning ordinance is an example of a public restriction.<sup>118</sup> Private restrictions, on the other hand, are used predominately in residential subdivisions to limit land use and to prevent nuisances.<sup>119</sup> Frequently, private restrictions are found in homeowner's association documents where many individuals live in ordered communities containing common areas.<sup>120</sup> Other examples are residential restrictions that call only for single-family residences and building line restrictions which prohibit the erection of a building nearer than a specified distance from the lot lines.<sup>121</sup>

#### D. Land Use Controls

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For a discussion of Transferable Development Rights as well as an easy-to-follow, illustrated explanation of the TDR concept see *An Analysis of the Development and Planning Alternatives to Protect the Character of Eastern Sarasota County While Minimizing Adverse Impacts on Sarasota County Taxpayers*, prepared by the Conservation Clinic at the University of Florida Levin College of Law, November 1999. See also Julian Conrad Juergensmeyer and Thomas E, Roberts, *Land Use Planning and Control Law* (1998), at § 9.9.

<sup>114</sup> See Florida Department of Transportation, *Florida Scenic Highways Program Manual*, supra note 37.

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See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 16.

<sup>116</sup> See Florida Bar Continuing Legal Education, *Florida Real Property Sales Transactions* 289 (1978).

<sup>117</sup> See Florida Bar Continuing Legal Education, *Florida Real Property Sales Transactions* § 9.15 (9-1).

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See Florida Bar Continuing Legal Ed., supra note 118, at 292.

## 1. Zoning Ordinances

A zoning ordinance is a set of rules used to guide land use and development.<sup>122</sup> They consist of two parts: a zoning map and the ordinance. The map divides a given governmental jurisdiction into land-use zones, each with certain development requirements and limitations. Most zoning ordinances have at least five unique zones: residential, industrial, institutional, commercial and open space.<sup>123</sup> Within each zone various construction and development restrictions are specified.

A zoning ordinance can be effective for minimizing the effects of urban sprawl. However, for this benefit to be realized, zoning must be strictly enforced and must ensure development occurs in conformity with the comprehensive plan. Unfortunately, there are also several drawbacks to traditional zoning.<sup>124</sup> First, they are often inflexible. Second, different uses are typically segregated. This segregation will not always protect a scenic corridor's environment or character.

## 2. Overlay Zoning & Scenic Highway Districts

Zoning ordinances may contain special zones called "overlay zones," also known as "critical area zones."<sup>125</sup> This type of special zoning may be applied to specific areas such as highway corridors to protect specific resources found throughout a community.<sup>126</sup> In these overlay zones, special restrictions apply to all land, regardless of how it is traditionally zoned. Overlay zoning does not affect the use or density regulations of existing zoning, but instead, it creates an additional set of requirements to be met when the unique resources protected by the overlay would be affected by a proposed land use.<sup>127</sup> Possibly, the most common overlay device for protecting a scenic road corridor is the highway corridor overlay district<sup>128</sup> (see Appendix C of Appendix E for an example of a scenic highway districts ordinance from Charleston County, South Carolina).<sup>129</sup> These scenic highway districts are used to conserve and enhance the natural beauty along scenic corridors. They work in conjunction with existing zoning classifications to ensure the preservation of scenic resources.

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<sup>122</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 18.

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup>

See National Trust for Historic Preservation, *Rural Conservation*, supra note 99, at 10.

<sup>127</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 19.

See Florida Department of Transportation, *Florida Scenic Highways Program Manual*, supra note 29.

<sup>129</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 19.

### 3. Development Agreements

Pursuant to Sections 163.3220 through 163.3243 of the Florida Statutes, local governments and developers may enter into development agreements that describe the way a development may proceed.<sup>130</sup> Any development agreement must be consistent with the local government's comprehensive plan and can only be adopted, amended or revoked after public notice and hearings.<sup>131</sup> Furthermore, these agreements may last up to ten years.<sup>132</sup> Consideration of scenic resources may be a part of the development agreement process. In the context of scenic corridors, development agreements could provide a level of certainty for a community regarding potential development along a scenic corridor. They would be aware of and may be more able to manage agreed upon development that takes place over a fixed duration of time.

#### E. Land Development Controls

##### 1. Subdivision Regulation

In contrast to zoning, which governs the use of property in a community, subdivision regulation controls the design of new development including what it will look like and how it will affect the community.<sup>133</sup> However, given their related objectives, subdivision controls are often coordinated with zoning ordinances. Thus, many communities combine the two concepts into single land development codes.<sup>134</sup>

Subdivision controls can be an important scenic conservation tool. They can apply to any parcel of land, not just traditional subdivisions, and can go a long way to lessen the negative scenic impacts of development. On the other hand, subdivision regulations may also inhibit flexible design standards that can enhance scenic resources. Two of the most important aspects of subdivision regulation are its design and engineering standards and performance guarantees.<sup>135</sup> First, design and engineering standards cover the division of property, including specifying the location of roads, open spaces and other improvements. Second, performance guarantees, such as escrow accounts, ensure that development will proceed only as approved.

##### 2. Flexible Design Standards

###### a) Cluster Development

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<sup>130</sup> See *id.*

<sup>131</sup> See FLA. STAT. § 163.3225 (1999).

<sup>132</sup>

See FLA. STAT. § 163.3229 (1999).

<sup>133</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 22.

<sup>134</sup>

Alachua County, Florida, for instance, has combined the two. See Part III, the Unified Land Development Code, of the Alachua County Code. Alachua, Florida (1997, as amended).

<sup>135</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 22.

Cluster development is the grouping of development on a small portion of land, and can be an effective way to limit development in scenic areas.<sup>136</sup> This type of land development control allows for open accessible to nearby property owners and the public. Moreover, clustering often appeals to developers because it allows flexibility in lot size and can be less expensive in terms of overall improvements. Cluster development in the context of scenic corridors could maintain viewsheds and protect unique natural and scenic resources. However, the success of programs that would *require* clustering depends on balancing the property rights and expectations of the landowner against the community's need to preserve its scenic land.<sup>137</sup>

### **b) Planned Unit Development**

This type of land development control treats large parcels of land as a single unit containing a mixture of uses.<sup>138</sup> They allow flexibility in zoning and often result in developments with greater open space than in traditional zoning. In residential areas PUDs could have an impact in the area of protection of scenic corridors through site planning and roadway location focusing on the natural resources along scenic corridors. They may also provide a way for local governments to incorporate site design specifications into development.

### **c) Performance Systems**

Rather than making the general assumptions embodied in traditional zoning, performance systems provide a way of analyzing the effects of proposed development.<sup>139</sup> Performance systems place the burden on developers to mitigate objectionable impacts before a building permit is issued. Generally, they operate with a point system and minimum point scores, or standards, can be set for the impact on scenic views and natural qualities.

Taking either the form of an overlay district or of an amendment to the underlying zoning provisions, the following zoning standards should reflect the scenic character of the district being regulated:

- a) Densities;
- b) Limitations on paved surfaces;
- c) Restrictions on underground services; and
- d) Restrictions on vegetational clearing.

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<sup>136</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, *supra* note 57, at 23.

<sup>137</sup> For a couple case studies and a brief discussion of clustering see *An Analysis of the Development and Planning Alternatives to Protect the Character of Eastern Sarasota County While Minimizing Adverse Impacts on Sarasota County Taxpayers*, prepared by the Conservation Clinic at the University of Florida Levin College of Law, November 1999.

<sup>138</sup> See Florida Department of Transportation, *Florida Scenic Highways Program Manual*, *supra* note 37.

<sup>139</sup> See National Trust for Historic Preservation, *Rural Conservation*, *supra* note 99, at 11.

In order to protect the scenic rural character of exurban areas, Calvert County, Maryland includes among its design standard requirements, a front roadway buffer for the purpose of maintaining and enhancing “a visually attractive rural landscape.”<sup>140</sup>

### **3. Development Moratoria**

An across the board restriction on development permits until a certain governmental action is complete, also known as a “development moratoria,” could be used to manage growth in a community.<sup>141</sup> Moratoria may be appropriate when a community is revising its comprehensive plan or trying to improve troublesome conditions such as heavy traffic congestion or limited sewer capacity.<sup>142</sup> However, a moratorium should not be used to postpone development indefinitely.<sup>143</sup> Otherwise, a community will open itself up to court challenges.

## **F. View Protection**

### **1. View Preservation**

In spite of preservation ordinances and design review regulations, many communities are recognizing the need to take a comprehensive approach to protecting special vistas and scenic roads. Communities are recognizing that vistas add to the local sense of place and image, which contribute to quality of life and attracting business. Therefore, many communities have enacted view protection ordinances utilizing a combination of tools, including height controls, use restrictions, sign controls and landscaping regulations.<sup>144</sup>

In some cities, such as Austin, Texas, view protection concerns have manifested in efforts to protect views of important buildings such as state capitols. In other cities, such as Denver, Colorado, mountain views have spurred special regulations to limit building heights. Furthermore, some cities, like New Orleans and Houston, have attempted to beautify their city’s entryways, which are the community’s welcome mat.<sup>145</sup>

### **2. Tree Protection**

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<sup>140</sup> See Calvert County, MD. Calvert County Code, at 5-103.D.5a. See also Stokes, *Saving America’s Countryside*, at 176-86.

<sup>141</sup> See U.S. Department of Transportation, *Scenic Resource Protection Techniques and Tools*, supra note 57, at 24.

<sup>142</sup> See *id.*

<sup>143</sup>

See *id.*

<sup>144</sup> See *id.*, at 35.

<sup>145</sup> For a more detailed discussion of the Denver, Austin, and New Orleans’ view protection ordinances see Appendix E at § 3.8.1.

There is also an increasing interest in protecting existing trees across the nation. Americans have increasingly begun to realize and appreciate the benefits of trees. More specifically, people have recognized trees' abilities to "soften the edge of development," to contribute to a safer healthier environment and reduce the phenomena known as "urban heat islands" by moderating effects of sun, cold and wind.<sup>146</sup> Furthermore, trees serve as screens against noise, stabilize soils and provide a haven for wildlife.<sup>147</sup> In response to growing community interest, a number of local communities, such as Tallahassee, Florida, have adopted specific tree species as community hallmarks.<sup>148</sup> These designations and tree-related ordinances can help protect and conserve scenic vistas.

An emerging legal issue that has caused problems for tree protection in many areas is how to prevent an owner from clearing as site of trees before they apply for a building permit or site plan approval.<sup>149</sup> Communities have responded in several ways. They include following the Model Development Code approach and include tree removal under the definition of development that requires a permit. Alternatively, other approaches utilize separate regulations that place restrictions on land clearance, often as soil erosion and drainage control ordinances. Finally, some communities have tree ordinances that require a review process that consideration of trees in development proposals.

## G. Signage

Sign control is an essential tool of scenic resource protection. Sign control should include managing the location, appearance and existence of signage along scenic corridors.<sup>150</sup> An ideal system would convey information without creating clutter, blocking scenic views or contrasting with the natural or cultural character of an area.

In recent times, courts have recognized aesthetic concerns as being a valid justification for the use of the police power.<sup>151</sup> In many jurisdictions, aesthetics standing alone have been recognized as a valid exercise of these powers.<sup>152</sup> Moreover, regulations prohibiting signs near major highways and public places have been traditionally considered valid.<sup>153</sup> Although the justifications given for regulating signage through the police power have included the desire to protect travelers, most likely, grounds for sustaining these regulations have been based on either

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<sup>146</sup> *See id.*, at 38.

<sup>147</sup> *See id.*

<sup>148</sup>

*See id.*

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*, at 30.

<sup>151</sup> This has been the case since Berman v. Parker, 348 U.S. 26 (1954).

<sup>152</sup> *See id.*

<sup>153</sup>

*See, e.g., Illinois Highway Advertising Control Act of 1971, 225 Ill. Comp. Stat. 440/1 (1996) (discussed in Scadron v. City of Des Plaines), 989 F.2d 502 (7<sup>th</sup> Cir. 1993).*

aesthetics,<sup>154</sup> or the preservation of areas where signs would mar the historic or naturally scenic character of an area.<sup>155</sup>

The Federal Highway Beautification Act (FHBA) affects regulation of signage on the Interstate Highway System and the Federal-aid primary highway system.<sup>156</sup> One of the main purposes of FHBA is to “preserve natural beauty.”<sup>157</sup> Thus, FHBA’s principal mandate is for the “effective control” of signage by prohibiting signs within 660 feet of the right of way along interstate and primary highway systems, unless an area is zoned for commercial or industrial uses.<sup>158</sup> It is possible for new outdoor signs to be constructed on industrial or commercial land within controlled zones along Federal Interstate and Federal-aid primary system so long as they comply with the size, height, and spacing requirements set forth in a federal-state agreement to implement FHBA.<sup>159</sup> Compensation must usually be paid for the removal of signs predating the law.<sup>160</sup> Unfortunately, funding for compensation has lagged, and at its current level it is doubtful that targeted billboards will be removed in the near future. Overall, FHBA has provided the stimulus for many states to control signs along highways or risk loss of federal funds.

The state of Florida has complied with the mandates of the FHBA by enacting Chapter 479 of the Florida Statutes.<sup>161</sup> On most points Chapter 479 is more expansive and restrictive than the FHBA. For instance, Chapter 479 regulates signage along the State Highway System, in addition to signage along the Interstate and Federal-aid Primary Systems.<sup>162</sup> Further, Chapter 479 requires that every who engages in outdoor advertising person, with certain limited exceptions, must obtain a license for that business, and must obtain a sign permit for every outdoor sign erected within the controlled zone.<sup>163</sup>

The FHBA formerly provided that States with a scenic highway program may not allow the erection of any sign on any Interstate or Federal-aid primary highway designated scenic, subject to some exceptions. However, Congress has revised FHBA and inserted an exception to allow states to exclude from state or federal scenic byways designation any segment of a scenic road that

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<sup>154</sup>

*See Dukeminier, Zoning for Aesthetics Objectives: A Reappraisal*, 20 *Law & Contemp. Probs* 218 (1955).

<sup>155</sup> *See Julian Conrad Juergensmeyer and Thomas E. Roberts, Land Use Planning and Control Law* (1998), at § 12.3, at 565.

<sup>156</sup> *See* 23 U.S.C. § 131 (1999)(attached as Appendix G).

<sup>157</sup>

*See id.*, at § 131(a).

<sup>158</sup> *See id.*, at § 131(b).

<sup>159</sup>

*See id.*, at § 131(c)-(d).

<sup>160</sup>

*See id.*, at § 131(g).

<sup>161</sup>

*See* FLA. STAT. Chapter 479 (1998) (attached as Appendix H). Furthermore, the Florida Administrative Code Chapter 14-10 (1999) addresses Outdoor Advertising Sign Regulation and the Highway Beautification Program (attached as Appendix I).

<sup>162</sup> *See id.*, at § 479.105.

<sup>163</sup> *See id.*, at §§ 479.04-.105.

it determines to be inconsistent with the state's criteria for scenic designation.<sup>164</sup> Thus, Florida may determine that certain areas along designated scenic highways should be excluded from scenic designation and its outdoor sign prohibition.

Florida has provided that local governments may enact their own sign ordinances as long as the regulations are at least as stringent as those in Chapter 479.<sup>165</sup> Florida Courts have upheld carefully drafted, content-neutral local sign ordinances adopted pursuant to this authority.<sup>166</sup> Thus, any signage regulation used to protect scenic corridors should address size, location and lighting of signs using reasonable time, place and manner restrictions. Furthermore, any attempt at on-site sign regulation should utilize content-neutral and narrowly drawn ordinances to accomplish the legitimate end of protection of a scenic viewshed.

## H. Tax Benefits

The conservation of real property generates a number of opportunities to lower an individual's tax burden. Benefits may accrue through conservation conveyances in the areas of federal income taxes, estate taxes, gift taxes, capital gains taxes, and ad valorem taxes.<sup>167</sup>

### 1. Federal Income Taxes

The Internal Revenue Service recognizes a qualified conservation contribution (such as a conservation easement) as a charitable contribution under Section 170 of the Internal Revenue Code (Code).<sup>168</sup> Yet, it places restrictions on what may qualify as a conservation contribution.

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<sup>164</sup> See S. 440, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. § 314 (1995).

<sup>165</sup>

See *id.*, at FLA. STAT. § 479.155.

<sup>166</sup> See E.B. Elliot Advertising Company v. Metropolitan Dade County, 425 F.2d 1141 (5<sup>th</sup> Cir. 1970). See also Hav-a-Tampa Cigar Co. v. Johnson, 5 So.2d 433 (Fla. 1941). Importantly, "point-of-sale" or on-site signs, meaning those that were attached to property and advertised products or services available on that property were excluded from the restrictions considered. Because of this exclusion, the bounds of permissible regulation of point-of-sale signs was not ruled on by the Court in the above cases. Thus, a local government should distinguish between on-site and off-site signs in drafting any regulation. See also Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); City of Lake Wales v. Lamar Advertising Ass'n, 414 So.2d 1030, 1032 (Fla. 1982).

<sup>167</sup> For further reading about conservation and tax incentives, see Bowles, Downes, Clark, and Guerin-McManus, *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL L. AND POL'Y F. 209. See also SMALL, *supra* note 55 (additional explanations of the principles discussed below).

<sup>168</sup> See I.R.C. § 170 (1999). I.R.C. § 170(h) states:

#### 1.8 Qualified Conservation Contribution.--

### 1. In General. -- For purposes of subsection (f)(3)(B)(iii), the term "qualified conservation contribution" means a contribution-

- A. of a qualified real property interest,
- B. to a qualified organization,

The Code outlines a three-prong test to determine if a qualified conservation contribution exists.<sup>169</sup> Such a contribution must be (1) a qualifying real property interest, (2) to a qualified organization, (3) exclusively for conservation purposes.<sup>170</sup>

It is required that the contribution qualify as a real estate interest.<sup>171</sup> The Code defines a qualifying real property interest<sup>172</sup> as having any one of three characteristics. First, the owner may donate their entire interest in the property (other than mineral rights).<sup>173</sup> Second, the donor may give a remainder interest in their property.<sup>174</sup> This would be an interest in the property that would pass after the expiration of an intervening interest. For example, the owner may elect to

- 
- C. exclusively for conservation purposes.
  - 2. **Qualified Real Property Interest. For purposes of paragraph (1), the term “qualified real**
  - 3. **property interest” means any of the following interests in real property:**
    - A. the entire interest of the donor other than a qualified mineral interest,
    - B. a remainder interest, and
    - C. a restriction (granted in perpetuity) on the use which may be made of the real property.
  - 4. **Qualified Organization.-For purposes of paragraph (1), the term “qualified organization” means an organization which-**
    - A. is described in clause (v) or (vi) of subsection (b)(1)(A), or
    - B. is described in section 501(c)(3) and-
      - i. meets the requirements of section 509(a)(2), or
      - ii. meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (I) of this subparagraph.
  - 5. **Conservation Purpose Defined.--**
    - A. **In General.--** For purposes of this subsection, the term “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. . . .
    - 5. **Exclusively for Conservation Purposes. -** For purposes of this subsection -  
**A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity. . . . *Id***

<sup>169</sup> See I.R.C. § 170(h)(1) (1999).

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See I.R.C. § 170(h)(2) (1999).

<sup>173</sup> See I.R.C. § 170(h)(2)(A) (1999).

<sup>174</sup> See I.R.C. § 170(h)(2)(B) (1999).

donate the property upon death to a conservation trust. One method of achieving this result would be to place the property in a life estate for the duration of the life of the owner and grant the remainder interest to the conservation trust. Upon death, the remainder would pass to the trust. The creation of such a remainder interest would qualify as a real estate interest under the three prong test above. Third and finally, a restriction placed on the use of the real property will serve as a qualified real property interest (i.e. a conservation easement), provided the restriction is placed in perpetuity.<sup>175</sup> This option would allow the owner to retain ownership benefits of the property subject to the easement restrictions. The restrictions would serve to preserve and protect the land from any future development because such a restriction must be granted in perpetuity.<sup>176</sup>

In addition to qualifying as a real estate interest, the interest must be donated to a qualified organization.<sup>177</sup> Such an organization may be a governmental unit such as the state or federal government, or any of their respective agencies.<sup>178</sup> Alternatively, an organization formed under the Internal Revenue Code ' 501(c)(3) as a tax-exempt charitable organization may also qualify.<sup>179</sup>

Finally, the gift must be made exclusively for a conservation purpose.<sup>180</sup> The Code lists four criteria that may qualify as a conservation purpose.<sup>181</sup> First, the preservation of land for outdoor recreation by, or the education of, the general public qualifies as a conservation purpose.<sup>182</sup> Second, a conservation purpose may be found if the interest was given for the protection of a relatively natural<sup>183</sup> habitat of fish, wildlife, or plants.<sup>184</sup> Third, the preservation of open space may qualify as a conservation purpose.<sup>185</sup> To qualify however, the open space must

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<sup>175</sup> See I.R.C. § 170(h)(2)(B) (1999).

<sup>176</sup> The federal government places restrictions on donations before they allow tax deductions. See Reg. Sec. 1.170A-14(g)(2). The “first in time, first in right” principle threatens easements when a superior right to the property exists such as a mortgage. For a discussion of conservation easements and the subordination of mortgages and foreclosures, see Cheryl Denton, *Conservation Easements in Florida: Do Unsubordinated Mortgages Pose a Threat?*, 70 FLA. B. J. 50 (April 1996). In general, “[A]ny interest in the property retained by the donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.” Reg. Sec. 1.170A-14(g)(1).

<sup>177</sup> See I.R.C. § 170(h)(1) (1999).

<sup>178</sup> See I.R.C. § 170(h)(3)(A) (1999).

<sup>179</sup> See I.R.C. § 170(h)(3)(B)(1999).

<sup>180</sup> See I.R.C. § 170(h)(3)(A) (1999).

<sup>181</sup> See I.R.C. § 170(h)(4) (1999).

<sup>182</sup> See I.R.C. § 170(h)(4)(A)(I) (1999).

<sup>183</sup> Attempting to explain a “relatively natural” state with regard to a Michigan statute (the Recreational Land Use Act), the Court states: “The focus is on the use of the land and whether it remains in a relatively natural state or has been developed and changed in a manner incompatible with the intention of the act. . . . The central issue in this case is the *character* of the land.” *Wilson v. McNamara, Inc.*, 173 N.W. 2d 851, 854 (Mich. Ct. App. 1988)(emphasis added).

<sup>184</sup> See I.R.C. § 170(h)(4)(A)(ii) (1999).

<sup>185</sup> See I.R.C. § 170(h)(4)(A)(iii) (1999).

be for the scenic enjoyment of the general public (or, pursuant to another delineated governmental conservation policy) that will yield a significant public benefit.<sup>186</sup> Such open space may include farmland and forest land.<sup>187</sup> Finally, the preservation of a historically important land or structure may qualify as a conservation purpose.<sup>188</sup> The exclusivity requirement of this prong mandates that these conservation purposes be protected in perpetuity.<sup>189</sup>

Once it has been determined that a qualifying conservation contribution has been made, the taxpayer must determine the value of the donation.<sup>190</sup> In the event that the property owner donates property, this is simply the fair market value of the property. However, the value of any easement donation would be more difficult to ascertain. An appraiser must determine both the fair market value of the property *with* and *without* the easement.<sup>191</sup> The difference between these figures would yield the value of the easement.<sup>192</sup> Such values must be determined through a qualified appraisal with appropriate documentation to verify the amount of the deductions.<sup>193</sup>

After the value of the easement has been ascertained, the taxpayer may determine the extent of any deductions. According to the Code, the taxpayer may be eligible to deduct an amount equal to thirty percent (30%) of the taxpayer's adjusted gross income, up to the value of the easement.<sup>194</sup> The donor may take this deduction no more than six years and the deduction must cease once the value of the easement has been deducted.<sup>195</sup>

The following example may help one develop a better understanding of the Code regulations. Assume that a property has an appraised fair market value of \$100,000. The landowner donates a conservation easement to a qualifying organization such as a land trust. The easement restrictions reduce the value of the property to \$64,000. Thus, the value of the easement (and the landowner's gift) would be \$36,000. Assuming that the landowner has an adjusted gross income of \$60,000, they may deduct \$18,000 ( $\$60,000 \times 30\% = \$18,000$ ). This deduction may be taken the following year as well (assuming the adjusted gross income is constant) until the value

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<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> See I.R.C. § 170(h)(4)(A)(iv) (1999).

<sup>189</sup> See I.R.C. § 170(h)(5)(A) (1999). See Reg. Sec. 1.170A-14(g) (discussing the requirements of the donor to protect the property in perpetuity).

<sup>190</sup> See STEPHEN SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS, 17-1 (1990).

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See THE LAND TRUST ALLIANCE, APPRAISING EASEMENTS, 5 (1990).

<sup>194</sup> See I.R.C. § (b)(1)(C) (1999). Alternatively, the Code offers an election that may offer greater tax savings. In many situations however, it will offer no greater benefit. With the election, "a taxpayer who makes a charitable gift of appreciated property can choose to reduce the amount of the deduction to the cost or bases of the property, and one important new rule will follow: the value of the gift (a reduced to basis) will be deductible up to 50% of the taxpayer's income, compared to the 30% ceiling without the election. The decision to use the new rule is made by making an 'election' to reduce the value of the gift to basis, and to increase the deduction to 50% of income." STEPHEN SMALL, PRESERVING FAMILY LANDS: ESSENTIAL TAX STRATEGIES FOR THE LANDOWNER, at 93. See I.R.C. section (b).

<sup>195</sup> See *id.*

of the easement donation has been deducted (up to a maximum of six years). In this example, the landowner may take two years of the full deduction before the amount of the donation has been reached.<sup>196</sup>

## 2. Estate Taxes

Estate taxes are imposed on the right to transfer property by death.<sup>197</sup> The highest effective federal estate tax rate is fifty five percent (55%). Such rates underscore the importance of sound estate planning.<sup>198</sup> A conservation conveyance may be used to dramatically reduce estate taxes.<sup>199</sup>

The highest and best use of a property dictates the value of the property for purposes of estate taxes.<sup>200</sup> This amount is typically not what the existing use of the property may be, but the development potential of the parcel.<sup>201</sup> Thus for example, a desirable piece of farmland would be valued at the price developers would be willing to pay for it (for subdivision of the property) rather than the value of the parcel as farmland. The heirs of the property would be required to satisfy the estate taxes due on the fair market value of the property at its highest and best use, in addition to any other assets that the heirs may have inherited.<sup>202</sup> With the estate taxes due within nine months, heirs are often forced to sell the inherited land just to meet the estate taxes due.<sup>203</sup>

The use of a conservation easement or other conveyance may reduce the estate taxes.<sup>204</sup> By donating a conservation easement, the property owner is reducing the tax base of the property.<sup>205</sup> Such a restriction on the property would serve to lower the highest and best use.<sup>206</sup> Thus, the development potential of the property would be significantly diminished. Such a reduction would be reflected in the amount of estate taxes paid by the heirs of the estate.<sup>207</sup>

Such a conservation easement may be made during the life of the owner or upon death.<sup>208</sup> If the easement is made during the lifetime of the owner, the conveyance would immediately

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<sup>196</sup> See Florida Land Trust Association, *Preservation For Floridians*, 26-27 (1991). See generally Small, *The Federal Tax Law of Conservation Easements*, at 20.

<sup>197</sup> See HENRY CAMPBELL BLACK, *BLACK'S LAW DICTIONARY*, (5<sup>th</sup> ed. 1990). The tax is levied on the decedent's estate and not on the heir receiving the property. See *id.* A tax levied on the heir receiving the property would be an inheritance tax. *Id.*

<sup>198</sup> See JANET DIEHL & THOMAS BARRETT, *THE CONSERVATION EASEMENT HANDBOOK*, 55-56 (1988).

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*, at 55.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*

<sup>205</sup> See *id.*, at 56.

<sup>206</sup> See *id.*, at 56.

<sup>207</sup> See *id.*

<sup>208</sup> See *id.*

depreciate the value of the property.<sup>209</sup> Such a depreciation would be reflected in the estate taxes at the death of the property owner.<sup>210</sup> In addition, the owner would be able to capitalize on the benefits of an income tax deduction discussed above.<sup>211</sup>

An owner may choose not to limit their rights in the property during the owner's lifetime.<sup>212</sup> Should the owner choose, they may elect to donate a conservation easement upon their death. Such a devise would similarly reduce the taxable value of the estate as the conveyance during the lifetime of the owner.<sup>213</sup> However, the conveyance of the easement would not occur until death of the owner. At that time, the easement would pass and the heirs would realize the tax consequences of the estate with the easement.<sup>214</sup> Of course, the income tax benefits would not be realized by the property owner if the easement passed at death.

### 3. Gift Taxes

Gift taxes are imposed on a donor (the person making the donation) for the transfer of property.<sup>215</sup> This tax is based on the fair market value of the property at the time of the gift.<sup>216</sup> Similar to estate taxes, such a grant would serve to reduce gift taxes on gifts of property made during the lifetime of the owner.<sup>217</sup> By donating the easement before the gift is made, the property owner reduces the value of the property that would be subject to gift taxes.<sup>218</sup> By reducing the value of the property, the owner reduces the level of taxes that he or she will face due to the transfer.<sup>219</sup> If for example, the gift is made to the owner's children (spouses benefit from an exemption), the donor would benefit from the reduced gift taxes owed on the transfer.<sup>220</sup>

### 4. Capital Gains Taxes

When one donates an interest in the land, such a donation will ultimately serve to reduce any capital gains taxes on the property should the owner decide to sell their interest. As applied to real property, capital gains are basically the increase in value of the property while in the owner's possession. Capital gains realized when one transfers property are treated as income for purposes of taxation. The granting of an easement would reduce the amount of the property's appreciation

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<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> *See* JANET DIEHL & THOMAS BARRETT, *THE CONSERVATION EASEMENT HANDBOOK*, at 56.

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See* HENRY CAMPBELL BLACK, *BLACK'S LAW DICTIONARY*, (6<sup>th</sup> ed. 1990).

<sup>216</sup> *See id.*

<sup>217</sup> *See* JANET DIEHL & THOMAS BARRETT, *THE CONSERVATION EASEMENT HANDBOOK*, at 57.

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

from the time of acquisition.<sup>221</sup> Thus, the gain of the property would be proportionately reduced by the value of the easement.<sup>222</sup>

## 5. Ad Valorem Taxes

In Florida, ad valorem taxes are proportional to the assessed value of the property.<sup>223</sup> Donating a conservation easement should reduce the assessed value of the interest retained in the property.<sup>224</sup> Thus, the limitations of development on the property will reduce the appraised value, decreasing the amount of ad valorem taxes owed by the taxpayer.<sup>225</sup> Since the charitable contribution of the Code requires that a qualified appraisal<sup>226</sup> of the property be produced,<sup>227</sup> the property owner may use this as evidence of the reduced value of the property to the County Property Appraiser. Therefore, the owner would realize a reduced tax burden of their annual ad valorem taxes.<sup>228</sup>

An alternative method of reducing the owner's ad valorem taxes would be to downgrade the zoning of the property.<sup>229</sup> For example, an owner could seek to re-zone the property to open space. Since a change in zoning would not be permanent, the owner could later petition to re-upgrade the zoning classification.<sup>230</sup> Though this probably would not reduce taxes as much as a conservation easement, it may provide some tax relief for the taxpayer.<sup>231</sup>

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<sup>221</sup> See Stephen Small, *The Federal Tax Law of Conservation Easements*, 17-14.

<sup>222</sup> See generally *id.*, at 17-14 to 15.

<sup>223</sup> FLA. CONST. art. VII (1997).

<sup>224</sup> See JANET DIEHL & THOMAS BARRETT, *THE CONSERVATION EASEMENT HANDBOOK*, at 56.

Note however, in instances where the donor maintains an unencumbered interest in surrounding property, the assessed values in surrounding property may increase due to the added amenity of a conservation easement. See STEPHEN SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS*, at 18.

<sup>225</sup> See *id.*

<sup>226</sup> The Code requires that a qualified appraisal "include, among other things, a description of the property, the method of valuation used to determine the fair market value of the property, certain information about the appraiser and his or her qualifications, and a description of the fee arrangements between the donor and the appraiser." STEPHEN SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS*, at 19-3. The appraisal must be performed by a qualified appraiser which is "one qualified to make appraisals of the type of property being valued and cannot be a person whose relationship to the taxpayer or the donee organization would cause a reasonable person to question the independence of such appraiser." See *id.* at 19-2 to 3.

<sup>227</sup> See *The Land Trust Alliance, Appraising Easements*, 5.

<sup>228</sup> See JANET DIEHL & THOMAS BARRETT, *THE CONSERVATION EASEMENT HANDBOOK*, at 56.

<sup>229</sup> Telephone Interview with Robin Tardiff, Property Appraiser (Land Section) for the Manatee County Property Appraiser (Feb. 10, 1999).

<sup>230</sup> See *id.*

<sup>231</sup> Assessed property should reflect the just value of the property. FLA. CONST. art. VII s.4(c)(2)(1997). A downgrade in zoning may have a negative effect on the just value of the property. Florida Statutes state that the county property appraiser shall consider "[T]he highest and best use to which the property can be expected to be put in the immediate future and the present use of the property, taking into consideration . . . local and state land use regulation . . ." FLA. STAT. § 193.011(2)(1997).

Applying for greenbelt status may also reduce the tax burden.<sup>232</sup> Greenbelts give the owner an agricultural exemption on the ad valorem taxes of the property.<sup>233</sup> To qualify however for greenbelt status, the property must be used for a bonafide commercial agricultural use.<sup>234</sup>

## **6. Conclusion**

The land donations can provide several tax benefits to the donor of the interest. Such a gift enables the donor to take a deduction as a charitable gift on their federal income taxes. Upon death of the owner, the conveyance reduces the tax burden upon the estate before the property passes to heirs. The owner of the property may donate more property that has been encumbered with a conservation easement before subjecting themselves to gift taxes. Should the owner decide to sell the property, they will realize proportionately reduced capital gains after granting a conservation easement. Finally, the owner receives an immediate benefit with a reduction in their annual ad valorem taxes. Such benefits may amount to substantial savings to the taxpayer who donates the real property or a conservation easement.

### **I. Voluntary Approaches**

#### **1. Inter-jurisdictional Approaches**

Inter-jurisdictional agreements are a particularly important scenic conservation tool in corridors that cross two or more jurisdictions. They are contracts executed by local governments in order to most efficiently use services and facilities among adjoining jurisdictions.<sup>235</sup> They allow local governments to exercise together all power and authority that the governments share in common and could exercise independently. In Florida, local governments are allowed to enter into such agreements pursuant to Section 163.01 of the Florida Statutes.<sup>236</sup>

Interlocal agreements may create new entities that implement the agreement. This entity could perform the operational functions of a scenic highway program such as management and administration. Furthermore, an interlocal agreement could establish an independent special district to implement a scenic byway corridor.

#### **2. Special Districts**

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<sup>232</sup> Telephone Interview with Robin Tardiff, Property Appraiser (Land Section) for the Manatee County Property Appraiser (Feb. 10, 1999).

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *See Florida Department of Transportation, Florida Scenic Highways Program Manual, supra note 37.*

<sup>236</sup> *See FLA. STAT. § 163 (1999).*

Special districts, governed by Chapter 189 of the Florida Statutes, are local units within certain limited boundaries that have specific governmental purposes.<sup>237</sup> They may be either dependent or independent. Dependent special districts are created by an ordinance of a local government having jurisdiction over the area. Independent special districts, on the other hand, can only be created by the Florida Legislature, the Florida Governor and Cabinet, and in certain circumstances, local governments.

As stated earlier, local governments can create special districts by interlocal agreement.<sup>238</sup> A special district, created in this manner, could be useful for a scenic byways program. Under this type of scenario, a multi-jurisdictional independent special district with the necessary funding could focus on the protection of a scenic corridor by utilizing its “own governmental powers” to most effectively implement the other various tools to enhance and conserve scenic byways.

Finally, a variation of the special district is the community development district (CDD) authorized in Chapter 163 of the Florida Statutes which allows large scale developments, often developments of regional impact (DRIs), to utilize tax free bonds to construct and maintain improvements, including roadways.<sup>239</sup> A scenic corridor could be maintained and protected over the life of a CDD program.

## **VI. Conclusion**

With the creation of a National Scenic Byways Program, the opportunity to develop new scenic byways and to strengthen the protection of existing byways has increased dramatically. Some states, with the help of federal funding, have established new scenic byway programs in recent years, while other states have enhanced their byway programs. However, designation under scenic highway programs has provided only the trigger for protecting scenic corridors.

The real protection of scenic corridors rests in the hands of local communities requires a strong commitment to implementation of scenic corridor management plans that utilize corridor protection strategies. Thus, communities must explore the many tools and techniques capable of being utilized as corridor protection strategies. These protection techniques cover a wide spectrum from fee-simple ownership to ordinances that prohibit certain types of land use to self-directed grass roots efforts to protect and enhance scenic beauty.

In the long run, the success of corridor protection will rest on the ability of local interest groups to work together to balance the goals of fostering economic prosperity with protecting

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<sup>237</sup> See FLA. STAT. § 189 (1999).

<sup>238</sup> See *supra* this paper section § V(I)(1).

<sup>239</sup>

See FLA. STAT. §§ 163.360 - 163.385 (Community Redevelopment, in general Chapter 163 Part III).

the values of a scenic corridor. Thus, the protection of scenic corridors will necessitate local cooperation, commitment, and attention. However, “where there is a will, there is a byway.”<sup>240</sup>

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<sup>240</sup> See National Trust for Historic Preservation, *The Protection of America’s Scenic Byways*, supra note 2, at 17.