Conservation Easements, Conservation Purposes & Property Taxes:

Amending the Florida Constitution to Encourage the Conservation of Land by Private Interests in the State of Florida.*

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I. Introduction

For years, the traditional wisdom in conserving land was for the state or federal government to purchase or claim eminent domain over environmentally sensitive lands. However, as approximately 60% of the land in the United States is privately owned, the cost of this approach makes any significant environmental conservation difficult. Moreover, the revenues collected by both state and federal taxes have been diminishing for years, making land purchase less of a viable option. Many commentators have determined that alternatives such as economic incentives for private landowners to preserve their lands “may ultimately prove more valuable in resolving the complex environmental, water and land use issues of the next millennium.”

Today, private property owners are able to combine their environmental concerns and their desire to reduce taxes by donating or selling conservation easements on their property. Conservation easements use property law to create encumbrances designed to preserve and protect private lands. The terms of a conservation easement can be tailored to meet a landowner’s specific needs while still protecting that landowner’s property. Although conservation easements are not without potential disadvantages, many commentators feel that conservation easements are currently the “best, and perhaps only, tool for preserving open space and ecologically sensitive lands that are in private hands.” Although conservation easements are currently the most popular way private landowners can preserve their land for conservation purposes, states should encourage other methods of promoting the use of privately held land for conservation purposes.

With the accelerating increase in suburban sprawl, traffic jams, and the disappearance of open space, Floridians have an increasing interest in conserving environmentally sensitive lands. In recent history, the state of Florida has seen tremendous population growth, as each year thousands of people relocate to Florida. To accommodate the influx of people, many private landowners have been building on previously undeveloped land. In addition, Florida has an aging farmer population. Generational interests coupled with increased global competition through trade agreements have increased pressure to sell to developers. Moreover, as the fair market value of desirable undeveloped Florida property rises, so do the potential property taxes.

3 Eitel, supra, note 1, at 93 (quoting JoAnne L. Dunec, Economic Incentives: Alternatives for the Next Millenium, 12 J. NAT. RESOURCES & ENVTL. L. 292, 295 (1998)).
5 Id. at 36.
6 Eitel, supra, note 1, at 58 (quoting Peter M. Morrisette, Conservation Easements and the Public Good: Preserving the Environment on Private Lands, 41 NAT. RESOURCES J. 373, 375 (2001)).
on Florida lands.\textsuperscript{8} Properly implemented property tax incentive programs, which promote the use of private lands for conservation purposes, including the use of conservation easements, can be excellent tools for destination states such as Florida trying to control the environmental impact of an increasing overall population and decreasing farming population.\textsuperscript{9}

However, in Florida, current incentives for conservation easement use are inefficient and susceptible to both abuses and legal challenges. Moreover, as it currently exists, Florida’s property tax assessment framework for private lands does not offer sufficient incentives for landowners to place conservation easements on their land, as the current program does not provide adequate incentives to the private owners of a large portion of agriculturally used land in Florida to use conservation easements. Further, the effect the current property tax special assessment Florida grants to property owners with conservation easements on their property is unpredictable, as its impact varies from county to county.

This report will (1) discuss the rise in the popularity of conservation easement use throughout the United States and describe the current statutory framework Florida provides for conservation easements; (2) demonstrate how the advantages vastly outweigh the disadvantages of encouraging the use of conservation easements; and (3) encourage the state and local governments to go beyond promoting the use of conservation easements and develop other methods to promote the use of privately held land for conservation purposes; and (4) provide recommendations for what Florida can do to strengthen its property tax incentives for conservation purposes, beginning with an amendment to its state constitution.

II. The Rise in the Popularity of Conservation Easement Use

From 1970 to 1990, nearly 20 million acres of rural land were developed in the United States.\textsuperscript{10} In 2002, approximately 365 acres of farms and forests in the United States were developed every hour.\textsuperscript{11} As the rapid demise of farms, fields and forests become a cause for concern, many people are realizing that once the natural state of a parcel of land is developed, it cannot be easily restored.\textsuperscript{12} This awareness is just one of several reasons the use of conservation easements has soared in the United States.\textsuperscript{13} To understand this rise in the popularity of conservation easements, it is important to understand how conservation easements work.

A. What is a Conservation Easement?

Owning property consists of distinct rights, including agricultural, development, mineral, timber, water, etc. These property rights are often analogously referred to as the “bundle of

\begin{itemize}
  \item See Sigurani, \textit{supra}, note 4, at 39.
  \item See Id. at 35.
  \item See Lipman, \textit{supra}, note 7, at 471; \textit{see also} Vicki Elkin, \textit{Every Community has a Walden Pond}, \textit{CROSSCURRENTS}, Gathering Waters Conservancy, Madison, Wis., 2 (Winter 2002).
  \item See Sigurani, \textit{supra}, note 4, at 40.
\end{itemize}
sticks.” Any of these property rights can be transferred to another party separate from the others. One mechanism for transferring bona fide property rights is known as an easement. At common law, easements are legal contracts negotiated between usually adjoining landowners. Easements confer upon their holders the legal right to a “limited use or enjoyment” of the land on which an easement has been placed. The land on which an easement has been placed is commonly referred to as the servient estate.

A typical conservation easement is a recorded deed restriction, where a landowner agrees to transfer some or all of the development rights associated with the property to a qualified easement holder. The landowner maintains the rights to use, sell, and bequeath the property subject to the terms of the conservation easement. Usually in a statutory conservation easement, neither the landowner, nor easement holder, nor third party purchaser, nor heir can reacquire the development rights without forfeiting tax benefits and, in some cases, paying tax penalties. The easement holder is responsible for the current and subsequent landowners adhering to the conditions of the conservation easement. What constitutes a qualified easement holder varies from state to state, but typically a qualified easement holder has to be a governmental agency, charitable corporation, or trust whose purpose coincides with the aims of the conservation easement. This is the case in Florida. In receiving a conservation easement the holder of the easement typically assumes two responsibilities (1) monitoring the property and enforcing the easement restrictions and (2) funding the maintenance, monitoring, and enforcement of the easement restrictions.

A conservation easement is usually referred to as a “negative easement in gross.” That is, a conservation easement restricts the types of activities that can be performed on the servient estate (i.e. negative easement), and the restrictions are designed to benefit a specific individual or entity, rather than the owner of adjoining property (i.e. easement in gross).

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15 Sigurani, supra, note 4, at 36.
16 Tapick, supra, note 14, at 266.
17 Lipman, supra, note 7, at 492.
19 Tapick, supra, note 14, at 267.
22 See generally Stockford, supra, note 2, at 842-853.
23 Sigurani, supra, note 4, at 36.
26 Sigurani, supra, note 4, at 36.
28 See Tapick, supra, note 14, at 267.
However, without specific statutory authorization, some scholars and commentators have questioned the validity of conservation easements qualifying as easements, or any other type of common law servitude. This is because conservation easements do not conform to the traditional common law categories of negative easements (e.g., ensuring the support of structures, or the protection of the flow of air, light, or water). Moreover, at common law, easements in gross were usually not allowed to be perpetual in nature, whereas conservation easements usually are. However, this discussion has become largely academic, as today, all but two states have passed legislation commonly referred to as “conservation easement enabling statutes.” These statutes give credence to the validity of conservation easements as legally enforceable land restrictions on the use and enjoyment of land. Although these statutes vary from state to state, most of the conservation easement enabling statutes are modeled after the Uniform Conservation Easement Act (UCEA) of 1981.

B. The Rise in the Popularity of Conservation Easements

Since the 1930’s, government agencies have used easements for conservation purposes. In 1956, Massachusetts became the first state to adopt conservation easement legislation, and California followed, several years later. Today, at least 48 states and the District of Columbia have enacted enabling statutes, reflecting the appeal and appreciation for the conservation easement as a land conservation device. “Statutory enabling legislation typically ‘reflects the consensus reached by the citizens of those states about the importance of protecting particular

29 See generally Id. at 266-72.
30 Id. at 267.
31 Id. at 267-68.
33 Tapick, supra, note 14 at 265; The National Conference of Commissioners on Uniform State Laws published the UCEA in 1981 to encourage more states to pass such enabling legislation. Tapick, supra, note 14, at 272; The acceptable purposes of conservation easements under the UCEA include "retaining or protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property." National Conference of Commissioners on Uniform State Laws, Uniform Conservation Easement Act 1(1) (1981).
34 Id. at 272; The UCEA states that "a conservation easement is valid even though: 1) it is not appurtenant to an interest in real property; 2) it can be or has been assigned to another holder; 3) it is not of a character that has been recognized traditionally at common law; 4) it imposes a negative burden; 5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; 6) the benefit does not touch or concern real property; or 7) there is no privity of estate or contract." National Conference of Commissioners on Uniform State Laws, Uniform Conservation Easement Act 1(4) (1981).
35 Lipman, supra, note 7, at 491.
36 Tapick, supra, note 14, at 272; see also 1956 MASS. ACTS, ch. 631; see also The Scenic Easement Deed Act of 1959, CAL. GOVT CODE § 6950-6954 (1959).
lands and the desirability of using conservation easements to do so.’” 38 “The laws enacted
during the past 40 years to “facilitate and encourage the use of conservation easements are
among the most powerful and effective of environmental protection laws.”” 39

Conservation easements have also found their way into federal and state tax codes. 40 Maryland enacted the first statute providing for farmland property tax reduction in 1957. 41 In 1964, the Internal Revenue Service ruled that a contribution of a restrictive easement to scenic forestland qualified as a deductible charitable donation. 42 Since then, Congress has expanded and codified tax benefits to encourage the conservation efforts of private landowners. 43 In 1976, Congress created an income tax deduction for landowners who place conservation easements on their land. 44 Prior to the mid 1980’s, conservation easements were only used by environmentally conscious landowners; however, in the mid 1980’s, the IRS produced federal income tax regulations on conservation easement donations, which created tax incentives for conservation easement use. 45 In 1989, 290,000 acres across the United States were protected by conservation easements. 46 In recent years, more and more states are offering income tax credits and property tax breaks for landowners who place conservation easements on their land, creating even greater tax incentives. 47

As of December 31, 2000, local and regional land trust throughout the United States held approximately 2.6 million acres in conservation easements, roughly a 476% increase over the

39 Sigurani, supra, note 4, at 36 (quoting John L. Hollingshead, Conservation Easements: A Flexible Tool for Land Preservation, 3 ENVTL. L. 319, 324 (1997)).
40 See Stockford, supra, note 2, at 843.
41 Id.
42 Lipman, supra, note 4, at 492; see also REV. RUL. 64-205, 1964-2 C.B. 62 (allowing charitable deduction under Section 170 for scenic easement); see also Kingsbury Browne, Jr. & Walter G. Van Dorn, Charitable Gifts of Partial Interests in Real Property for Conservation Purposes, 29 TAX LAW. 69, 71; see also Jeffrey A. Blackie, Conservation Easements and the Doctrine of Changed Circumstances, 40 HASTINGS L.J. 1187, 1191 (1989).
45 Id; see generally 26 I.R.C. § 170(h) (2004).
47 McLaughlin, supra, note 13, at 458; see e.g., Philip Tabas, Making the Case for State Tax Incentives for Private Land Conservation, 19 EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 7 (1999) (describing the state conservation easement property tax benefits in Alabama, North Carolina, and Virginia). Illinois specifies that any depreciation in land caused by the burden of a conservation easement shall be deducted in the valuation of that property. Eitel, supra, note 1, at 80; see also ILL. COMP. STAT. 200/9-145(e) (2003). North Carolina, Minnesota, Colorado, Missouri, Oregon, New Hampshire, Maine, Georgia and several other states also have laws similar to that in Illinois. Stockford, supra, note 2, at 830-31; see also Landowner Incentives for Conservation, University of New Hampshire, at http://www.ceinfo.unh.edu/Common/Documents/gsc31601.htm; see also GA. CODE ANN. § 48-5-7.4. Further, several state court decisions agree that conservation restrictions lower fair market values. Stockford, supra, note 2, at 831; see e.g., Lane County Assessor v. Briggs, 2002 Ore. Tax LEXIS 152 (Aug. 29, 2002).
450,000 acres protected by conservation easements as of 1990. As of March 2002, the Nature Conservancy, a private nonprofit organization, alone held more than 1.4 million acres in conservation easements in the United States.

Today, at least 24 states have required that conservation easements be considered when determining the value of land for property taxes. Currently, there are about 1,260 nonprofit local land trust corporations devoted to conservation. Many commentators believe that conservation easements are now the most important tool for protecting privately held land in the United States.

C. Florida’s Current Property Tax Incentive System for Conservation Easements

As private landowners hold many of Florida’s most important natural resources and environmentally sensitive lands, it is important and advantageous to encourage conservation of these lands. In recent history, Florida has seen tremendous population growth, as each year thousands of people relocate to Florida. In addition, Florida has an aging farmer population, and many fear the next generation may not continue the agricultural use of family farms. As the fair market value of desirable undeveloped Florida property rises, so do the potential property taxes on Florida lands. As will be discussed below, Florida has enacted a conservation easement enabling statute as well as statutorily provided for conservation easement burdened land property to be assessed at its present use, rather than its fair market value to provide incentives for conserving privately held lands.

Florida’s conservation enabling statute is § 704.06. In this section, the definition of acceptable conservation purposes for a conservation easement is extensive including: “retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition . . . areas as suitable habitat for fish, plants, wildlife . . . properties of historical architectural, archaeological, or cultural significance,” etc. According to § 704.06 conservation easements are perpetual in nature. In Florida, conservation easements can be created in the form of a restriction, easement, covenant, deed condition, will, order of taking, any other

49 Sigurani, supra, note 4, at 39.
50 Eitel, supra, note 1, at 77; see also John L. Hollingshead, Conservation Easements: A Flexible Tool for Land Preservation, 3 ENVTL. L. 319, 359-60 (1997). Current use assessment comprises the largest category of property tax based incentive programs in the United State. Defenders of Wildlife, STATUS REPORT: CONSERVATION IN AMERICA STATE GOVERNMENT INCENTIVES FOR HABITAT CONSERVATION at 10 (2002). Seventeen states provide property tax relief for land subject to a conservation easement, comprising the second largest category. Id. Forty-two states provide tax benefits to landowners who maintain, restore or donate habitat for wildlife. Id. Thirty-six states offer property tax programs for the maintenance of property in conditions suitable for wildlife habitat. Id.
52 Lipman, supra, note 7, at 491, see also Tapick, supra, note 14, at 259.
53 See FLA. STAT. ch. 704.06 (2004); see also FLA. STAT. ch. 193.501 (2004).
54 See FLA. STAT. ch. 704.06 (2004).
55 See FLA. STAT. ch. 704.06(1) (2004).
56 FLA. STAT. ch. 704.06(2) (2004).
instrument executed on behalf of the property owner, or they can be created in the same manner as any other interests in property except by condemnation or power of eminent domain. Under § 704.06, conservation easements are recorded as any other instrument affecting title to real property, and this recording is considered notice to the county property appraiser and tax collector. Further, conservation easements in Florida run with the land regardless of a lack of privity of contract.

According to § 704.06, conservation easements can be acquired by any governmental body or by a charitable corporation or trust whose purpose can includes a wide variety of conservation purposes. In addition, § 704.06 states that conservation easements entitle the holder to enter the land in a reasonable manner and at a reasonable time to assure compliance. These interests are assignable to other qualifying holders. The holder’s interests do not subject them to liability for damages or injuries suffered by a person on the property resulting from the conditions of the conservation easement.

A conservation easement may be released by its holder to the holder of the fee, even if the holder of the fee is not a governmental body or charitable corporation or trust. Section 704.06 also states that conservation easements can provide for a third party right of enforcement, and an action affecting an easement can be brought by the landowner, easement holder, a person having a third-party right of enforcement. Moreover, an action affecting an easement can be brought by the landowner, easement holder, a person specified as having a third party right of enforcement, or a person authorized by another law.

When it comes to property tax assessment in the United States, the most common techniques legislatures have used to provide preferential treatment to certain uses of lands for property tax purposes are known as use-value assessment schemes. There are three kinds of use-value assessment schemes: preferential assessment programs, deferred taxation programs, and restrictive agreement programs. All three programs assess land at its current use value, rather than fair market value, while the latter two penalize the landowner if they use the property in a matter inconsistent with the restrictions that allowed them the special assessment treatment in the first place by having them pay recapture taxes. Florida’s present use assessment scheme, as described in § 193.501, is similar to the latter two use-value assessment schemes.

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57 Id.
62 Id.
67 Stockford, supra, note 2, at 843.
68 Id.
69 Id. at 844-45.
In Florida, the statute that allows for conservation easement burdened land to have special assessment for property taxes is § 193.501. According to § 193.501, lands subject to conservation easements as described in § 704.06(1), for a term over 10 years are able to receive special assessment treatment for property tax purposes. The conservation easement has to be held by a qualified holder as described in § 704.06(3), and promptly recorded with the appropriate office for recording instruments affecting title to real property. Section 193.501 of the Florida Statutes, as it is currently written, provides that if the conservation easement extends for at least 10 years “the property appraiser, in valuing such land for tax purposes, shall consider no factors other than those relative to its value for the present use, as restricted by any conveyance or covenant under this section.” If the conservation easement is for a term less than 10 years, then the land is assessed under § 193.011 (i.e. no preferential tax treatment).

Interestingly, according to § 193.501, a holder of an easement cannot release the landowner from the easement or reconvey the easement to the landowner or any other entity without proper notice and a public hearing. If the holder of the easement releases the landowner from the easement after the landowner has obtained preferential property tax assessment under § 193.011 then the landowner is going to have to pay the deferred tax liability. The deferred tax liability is defined as:

“any amount equal to the difference between the total amount of taxes that would have been due in March in each of the previous years in which the conveyance or covenant was in effect if the property had been assessed under the provisions of § 193.011 and the total amount of taxes actually paid in those years when the property was assessed under the provisions of this section, plus interest on that difference computed as provided in § 212.12(3).”

However, according to at least one property appraiser, the current statutory scheme in Florida “doesn’t provide for a predictable, reliable and meaningful property tax incentive for conservation easements.” Conservation easements can cost more in property taxes per year than the same land assessed as agricultural land. Thus, most agricultural properties remain under Florida’s Greenbelt Law, which requires that the agricultural use on the land be

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71 Id.
74 FLA. STAT. ch. 193.501(3)(a) (2004). As a side note, there appears to be a typo error in § 193.501(3)(a) where the reference to organizations as described in § 704.06(2), should be § 704.06(3).
76 FLA. STAT. ch. 193.501(5) (2004). However, this requirement is not mentioned in § 704.06. See FLA. STAT. ch. 704.06 (2004).
79 Presentation by Alachua County Property Appraiser Hon. Edward Crapo entitled: Conservation Easements and the Florida Property Tax Dilemma (on file with the University of Florida Conservation Clinic).
80 Presentation by Alachua County Property Appraiser Hon. Edward Crapo entitled: Conservation Easements and the Florida Property Tax Dilemma (on file with the University of Florida Conservation Clinic). Current Florida statutes provide that agricultural use values have none of the recapture provisions of conservation easements. Id; see also FLA. STAT. ch. 193.501(3) (2004); see generally FLA. STAT. ch. 193.461 (2004).
The sections below will point out the general benefits and shortcomings that should be taken into account for any proposed changes to Florida’s current legislative scheme for providing incentives for conservation easement use.

III. How the Advantages Outweigh the Disadvantages of Encouraging Conservation Easement Use

As private landowners hold many of the natural resources and environmentally sensitive lands in many states, including Florida it is important and advantageous to encourage conservation of these lands. However, while there are several advantages to conservation easements there are also disadvantages and uncertainties. Fortunately, with proper implementation of a conservation easement tax incentive program much of these disadvantages can be alleviated or mitigated.

A. Advantages of Encouraging Conservation Easements Use

There are many advantages to a state encouraging the use of conservation easements through financial incentives both for the public and the landowner. A conservation easement is the only land preservation device that is flexible enough to allow landowners to tailor their conservation easement agreements to meet their specific needs, continue enjoyment of their land, and obtain significant financial benefits. From the public perspective, conservation easements are also beneficial in that they can permanently protect property, and compared to other land preservation methods, conservation easements have a relatively low implementation cost because they comport to free market principles.

1. Benefits to Landowners

For landowners, the terms of a conservation easement can be extremely flexible, as each parcel of land is unique. Many options and combinations are available, as both parties are able to negotiate the terms to maximize benefits. Landowners are able to choose the property rights or interests they want to retain, while easement holders acquire the rights that best serve their conservation purposes and are not burdened by the responsibilities of owning land. For example, a landowner may prefer to retain hunting and fishing rights on the property while giving up many, if not all, of the development rights. Landowners also have the choice to place the conservation restrictions on all or just a portion of their land.

81 Id; see generally FLA. STAT. ch. 187.201(22)(b)(11) (2004) (Florida’s comprehensive plan); see generally FLA. STAT. ch. 193.461 (2004).
82 Sigurani, supra, note 4, at 36.
83 See Tapick, supra, note 14, at 258-59.
84 Sigurani, supra, note 4, at 36.
85 Id.
86 Id.; see also Tapick, supra, note 14, at 261-62.
87 Sigurani, supra, note 4, at 36
88 Id.
easement will limit or prohibit activities that are harmful to the conservation values of [the] property, but will permit the landowner to continue compatible activities.  

In addition, when using conservation easements, landowners can continue to enjoy the land. Landowners give up only the right to use the land in a way that will violate the terms of the easement, retaining all other property rights. Thus, it is possible for landowners to continue to live on the property, exclude others from their property, bequeath the property, or sell it.

As far as the landowner is concerned, there are significant financial benefits associated with using conservation easements. The amount a conservation easement decreases the assessed value of land depends on both the terms of the easement and the characteristic of individual properties. Hence, the more restrictive the easement is, the greater the reduction in value. In addition, both the federal government and many states “support the donation of conservation easements and subsidize them through significant tax reduction.” Conservation easements can alleviate or mitigate economic pressures on landowners who cannot withstand rising property taxes or the pressures imposed by developers. In fact, the total financial benefits a landowner could reap from a conservation easement can offset, and even exceed, a private landowner’s loss in property value. These financial benefits include a reduction of income tax, capital gains tax, estate tax, and property tax. Thus, conservation easements can give many Floridians a way to ward off economic pressures that otherwise would force them to sell or develop their lands.

After a landowner donates a qualifying conservation easement, the fair market value of the easement can be deducted from the donor’s federal and, in some cases, state income tax. Typically, fair market value is the price at which property “would change hands between a willing buyer and a willing seller . . . both assumed to have reasonable knowledge of relevant facts.” The fair market value of a conservation easement is equal to either the value of a comparable donated easement if there is a substantial record of sales, or it is equal to the fair market value of the property before the donation and the fair market value of the property after the donation. To qualify for a federal income tax deduction, a conservation easement does not have to encompass the entire property, nor eliminate all use or development property rights, nor allow public access. However, the federal income tax deduction for conservation easements

90 Sigurani, supra, note 4, at 36; see also Tapick, supra, note 14, at 261.
91 Sigurani, supra, note 4, at 36
92 Id.
93 See Id. at 37.
94 Eitel, supra, note 1, at 81.
95 Stockford, supra, note 2, at 837.
96 Sigurani, supra, note 4, at 37.
97 Lipman, supra, note 7, at 507.
98 Sigurani, supra, note 4, at 37.
99 Id. at 38. Florida does not have a state income tax. See generally Art. VII, Fla. Const.
100 Stockford, supra, note 2, at 827.
101 Sigurani, supra, note 4, at 38; see also TREAS. REG. § 1-170A-14(h)(3)(2000).
102 Sigurani, supra, note 4, at 37.
does require a conservation easement be donated for a qualified real property interest, to a qualified organization, exclusively for conservation purposes.\textsuperscript{103}

The Internal Revenue Code (IRC) describes a “qualified real property interest” as one that has to be a donated interest that must restrict the use of the property in perpetuity.\textsuperscript{104} A “qualified organization” must (1) be an IRS-recognized charitable organization or a public agency of the local, state, or federal government; (2) have a commitment to protect the donation’s conservation purposes; and (3) be financially able to enforce the conservation easement’s restrictions.\textsuperscript{105} Finally, the IRC has four acceptable conservation purposes: conservation of an open space, protection of a significant habitat or ecosystem, preservation of land for outdoor recreation or education of the general public, and preservation of historically important land area or structure.\textsuperscript{106}

Other federal tax savings come in a reduction to capital gains and estate taxes.\textsuperscript{107} “When land burdened by a conservation easement is sold, the taxable appreciation is often reduced,” minimizing both the taxes on the sale of the property and the reported capital gains.\textsuperscript{108} Moreover, the land burdened by a conservation easement usually has a reduction in fair market value of the property equal to the value of the easement, thus lowering the value of an estate.\textsuperscript{109} This reduces the amount of estate taxes due as the land is handed down generation to generation.\textsuperscript{110}

At the state level, property tax savings can also be realized by the use of conservation easements.\textsuperscript{111} Property taxes are usually assessed on an \textit{ad valorem} basis, which means “according to value.”\textsuperscript{112} Local governments assess real property taxes based upon the fair market value of the property.\textsuperscript{113} Conservation easements restrict the “highest and best use” of land, resulting in lower fair market values.\textsuperscript{114} Since the fair market value of the land drops with the granting or selling of a conservation easement over it, the property taxes on that parcel should also drop.\textsuperscript{115} The value of the drop can vary from anywhere between 5 and 95%, depending on the terms of the conservation easement and the assessment by the local property

\textsuperscript{103}Id.; see also I.R.C. § 170(h)(1)(A)-(C).
\textsuperscript{104}Sigurani, supra, note 4, at 37; see also I.R.C. § 170(h)(2)(A)-(C).
\textsuperscript{105}Id. at 37-38; see also I.R.C. § 170(h)(3)(A)-(B); see also Treas. Reg. § 1-170A-1(c)(1)(2000).
\textsuperscript{106}Sigurani, supra, note 4, at 38; see generally I.R.C. § 170(h)(4)
\textsuperscript{107}Id.
\textsuperscript{108}Id.
\textsuperscript{109}Id.
\textsuperscript{110}Id. In 1997, the Tax Payer Relief Act was passed, which allows additional estate tax savings for landowners with conservation easements on their property, among other requirements. Id.; see also I.R.C. § 2031(c)(1)-(2) (2004).
\textsuperscript{111}Lipman, supra, note 7, at 506.
\textsuperscript{112}Eitel, supra, note 1, at 71.
\textsuperscript{113}Lipman, supra, note 7, at 506.
\textsuperscript{114}Id.
\textsuperscript{115}Id.
Because property taxes are usually assessed annually and given the perpetual nature or at lengthy terms of conservation easements, a landowner and her heirs can expect to save significant property tax savings over a multi-generational holding period. Various other forms of property tax breaks for conservation easements vary from state to state.

2. **Benefits to the Public**

   All states seem to recognize that conservation easements are created for a public benefit, not just for the benefit of two contracting parties. By preserving open space, protecting natural resources, and maintaining healthy air quality, the benefits of conservation easements are inherently public. “The public benefits of conservation easements are everlasting and far less expensive and intrusive than an outright purchase of a landowner’s property.” The encouraging of public benefits through the use of conservation easements runs counter to the land use philosophies of putting the land to its economically highest and best use, which has “shaped the common law for much of the past century.” Fortunately, lawmakers have started to recognize that land preservation provides as much, if not more, of a public benefit as unchecked land development.

   Conservation easements have the potential to provide a permanent means for landowners to preserve their property. Through conservation easements, landowners can restrict their development rights in perpetuity, thereby protecting their land for future generations to enjoy the same condition as its previous owners. Other conservation options available to landowners could be altered or repealed relatively easily and, therefore, are more unpredictable and ineffective for long-term preservation than properly implemented conservation easements.

   Unlike most methods of land preservation, conservation easements are beneficial in that they have relatively low implementation costs and they comport to free market principles. As the parties can freely negotiate the terms of a conservation easement and determine the price (if any) the easement holder will pay the landowner for the burden of the easement, advocates of private property rights are more receptive to these types of voluntary, free market transactions rather than less voluntary means of land preservation. In addition, conservation groups can

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117 Lipman, *supra*, note 7, at 507.

118 See *Id.* at 506.


121 Lipman, *supra*, note 4, at 507; see also Tapick, *supra*, note 14, at 259-60.


125 Sigurani, *supra*, note 5, at 36-37.

126 *Id.* at 37.


achieve their goals at a relatively low cost because they do not have to purchase full title to the parcel of land.\textsuperscript{129} Moreover, conservation easements can be drafted and implemented in a short period of time, as drafting an easement contract does not require involving government agencies or other outside parties.\textsuperscript{130} Because conservation easements are so user friendly and numerous laws encourage their use, conservation easements are often the best option to promoting conservation.\textsuperscript{131}

B. Disadvantages of Encouraging Conservation Easement Use

Even with the significant rise in the popularity of using conservation easements, their enforcement provisions and duration have remained relatively untested in a legal context.\textsuperscript{132} If they were challenged and found invalid, that would “significantly impair the continued viability and attractiveness of conservation easements as a land preservation tool.”\textsuperscript{133} Moreover, many local government legislators and property appraisers believe that the appraisal process is extremely difficult to implement in the context of conservation easement valuation.\textsuperscript{134} In addition, local officials criticize the granting of special property tax breaks for landowners whose land is burdened by a conservation easement because they feel it would diminish their tax base. Further, the potential for abuses of the system and the needs for safety nets and watchdogs have risen in recent times.

1. Legally Untested

With a rise in the popularity of conservation easements, should also come a rise in challenges of them in court.\textsuperscript{135} These challenges will likely come from landowners whose circumstances have changed and no longer wish to be burdened with a conservation easement, developers, groups with ideological qualms about perpetual servitudes, and local and state tax assessors.\textsuperscript{136}

However, not all challenges to conservation easements would be hostile to the environment.\textsuperscript{137} Sometimes the public interest would clearly be better served by a modification or dissolution of a conservation easement in certain cases.\textsuperscript{138} “‘Today’s vision of what is environmentally significant may change tomorrow.’”\textsuperscript{139} Still, by discouraging the use of conservation easements and allowing development, decreases conservation choices available to

\textsuperscript{129} See Tapick, supra, note 14, at 259-60.
\textsuperscript{130} Sigurani, supra, note 5, at 36.
\textsuperscript{131} Id.
\textsuperscript{132} Tapick, supra, note 14, at 260; see also Andrew Dana & Michael Ramsey, Conservation Easements and the Common Law, 8 STAN. ENVTL. L.J. 2, (1989).
\textsuperscript{133} Tapick, supra, note 14, at 260.
\textsuperscript{134} See Stockford, supra, note 2, at 839-842.
\textsuperscript{135} See Tapick, supra, note 14, at 277.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Baldwin, supra note 27, at 112 (quoting Gerald Korngold, Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements, 63 TEX. L. REV. 433, 461-62 (1984)).
future generations.\textsuperscript{140} Although usually perpetual in nature, conservation easements can be terminated by provisions in a state’s enabling statute,\textsuperscript{141} through eminent domain, foreclosure of a pre-existing lien on the property, marketable title acts, merger, or the equitable remedy of changed circumstances.\textsuperscript{142}

2. **Difficulty in the Appraisal Process**

Property appraisals must include objective assessment criteria such as considering the likelihood a parcel of land would be developed as well as any effect current zoning, conservation, or historic preservation laws already restrict that property’s highest and best use.\textsuperscript{143} Because land characteristics vary and conservation easement terms vary, so does their impact on valuation of land.\textsuperscript{144} According to studies done in Massachusetts and Maine, changes in the market value of land burdened by a conservation easement can range from a 5\% to 95\%.\textsuperscript{145} This valuation makes a property tax assessor’s job harder and does not let the landowner know what they can expect as a tax break.\textsuperscript{146} In the absence of legislative guidance, local assessors may be hostile toward downward reassessments trying to satisfy budget requirements.\textsuperscript{147}

Traditional assessment approaches include the comparable sales approach, the cost approach, and the income approach.\textsuperscript{148} An assessor usually makes use of all three approaches to estimate the fair market value of a parcel of land.\textsuperscript{149} However, when it comes to assessing land burdened by a conservation easement these approaches need tweaking, as absent legislation to the contrary, the land must reflect the land’s highest and best use.\textsuperscript{150}

The comparable sales approach determines fair market value through comparison of similar properties recently sold in similar markets.\textsuperscript{151} This approach is usually the most reliable because it is based on values from actual free market transactions.\textsuperscript{152} However, sales of property burdened with similar easements are unlikely to be available for comparison because

\begin{itemize}
\item \textsuperscript{140} Id. at 113; see generally David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* 19 HARV. ENVTL. L. REV. 303 (1995).
\item \textsuperscript{141} Tapick, *supra*, note 14, at 283-84 (“[T]wenty-six state enabling statutes and the UCEA explicitly include a provision for wiping out the conservation easement . . . twenty-nine states allow an easement holder to release a conservation easement . . . because they want to preserve an easement holder’s decision-making capacity in regard to the easement.”). *Id.*
\item \textsuperscript{142} See Baldwin, *supra*, note 27, at 118-120
\item \textsuperscript{143} Lipman, *supra*, note 7, at 499.
\item \textsuperscript{144} Stockford, *supra*, note 2, at 836.
\item \textsuperscript{146} See Eitel, *supra*, note 1, at 81;
\item \textsuperscript{147} Id. at 81-83; see also Stockford, *supra*, note 2, at 839.
\item \textsuperscript{148} Stockford, *supra*, note 2, at 828.
\item \textsuperscript{149} Id. at 829.
\item \textsuperscript{150} Lipman, *supra*, note 7, at 499.
\item \textsuperscript{151} Stockford, *supra*, note 2, at 828.
\item \textsuperscript{152} Id.
\end{itemize}
conservation easements are usually donated to qualify for income tax benefits; hence few sales will be available for any basis of comparison.\textsuperscript{153}

The cost approach determines fair market value by estimating the reproduction or replacement cost of improvements on the property, while also taking depreciation into account.\textsuperscript{154} The cost approach usually sets the upper limit of the property’s value.\textsuperscript{155} However, under the cost approach, the effect of a conservation easement on land is not likely to have any relation to replacement cost of any improvements on the property.\textsuperscript{156} The cost approach also fails to consider the uniqueness of a particular property.\textsuperscript{157}

The income approach estimates fair market value by determining the present value of the expected future benefits to be generated throughout the economic life of the property.\textsuperscript{158} However, the income approach, is inapplicable to land burdened by conservation easements because those lands are usually undeveloped and unproductive.\textsuperscript{159}

These problems with applying traditional appraisal methods to lands burdened by conservation easements also create uncertainty for property owners trying to evaluate the full financial incentives in placing a conservation easement on their land.\textsuperscript{160} Usually, the fair market value of property can increase due to market forces extrinsic to the property causing property taxes to rise.\textsuperscript{161} Facing these rising property taxes, the landowner may be forced to develop the land or be forced to sell the land to developers.\textsuperscript{162} As a result, the property tax assessment system can cause assessors to act as \textit{de facto} planners because assessments based on the potential use of open space become self-fulfilling prophecies.\textsuperscript{163} In addition, landowners who want conservation easements placed on their land may not want to have their property reassessed because if assessment in the area has not occurred recently, any savings by the conservation easement program may be diminished by the triggering of a new assessment.\textsuperscript{164}

Some potential solutions to these assessment problems include making the property tax incentive either a standard credit, a percentage break of the fair market value for tax purposes, or a decrease in the rate of tax.\textsuperscript{165} In addition, local governments may want the land trust and conservation easement terms to have to meet general state law qualifications for the downward tax assessment treatment of property taxes.\textsuperscript{166} Further, providing county assessors with uniform

\textsuperscript{153} Id. at 838.
\textsuperscript{154} Id. at 828.
\textsuperscript{155} Id. at 829.
\textsuperscript{156} Stockford, supra, note 2, at 839.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 829.
\textsuperscript{159} Id. at 839.
\textsuperscript{160} Id. at 845-46.
\textsuperscript{161} Stockford, supra, note 2, at 842.
\textsuperscript{162} Id. at 842-43.
\textsuperscript{163} Id. at 843; see also Note, \textit{The California Land Conservation Act of 1965 and the Fight to Save California's Prime Agricultural Lands}, 30 HASTINGS L.J. 1859, 1864 (1979).
\textsuperscript{164} Stockford, supra, note 2, at 840; see also J. Diehl & T. Barrett, \textit{THE CONSERVATION EASEMENT HANDBOOK} 6, 57 (1988).
\textsuperscript{165} See Stockford, supra, note 2, at 848-852.
\textsuperscript{166} See \textit{Id.} at 849.
guidelines can alleviate pressure on them and would provide more certainty on the amount of revenue lost or gained from changes in property taxes. As will be discussed in later sections, in Florida, these approaches likely would require constitutional reform.

3. Concerns of a Diminishing Tax Base

Sales taxes, income taxes, property taxes and corporate taxes provide the bulk of revenue in most states. With the rise in the popularity of conservation easement use, local officials may fear diminishing funds from property taxes. However, with proper statutory implementation, conservation easements should not significantly impact property tax revenues for a number of reasons.

First, many parcels of the undeveloped land in states already qualify for some form of preferential property tax assessment and the additional placement of a conservation easement on the land will not significantly affect a municipalities property tax revenues. Second, undeveloped conservation burdened land is likely to require fewer services than developed land, such as roads, sewers, schools, and other maintenance and support services. According to one survey, nationally residential land typically costs counties an average of $1.15 in community services for every $1.00 in revenue; in contrast, farm and forest uses cost only $0.036 for every dollar in revenue. Not only can the costs in community services go down for counties, but with the appropriate use of conservation easements, local governments may not need to provide all of the amenities that provide significant benefits to the community such as open space, hunting and fishing access, hiking trails, scenic views, cultural heritage, etc. By encouraging conservation easement use, local governments can obtain these community benefits without taking lands entirely off the tax rolls and without purchasing land.

Third, according to what is known as the “betterment theory,” permanently burdened land is likely to increase the fair market value of neighboring property because areas with restricted development space are usually the most desirable and expensive in which to live. In essence, the value given up by the burdened landowner isn’t destroyed it just transferred to the neighboring properties. In support of this theory, the Vermont Land Trust conducted a study that found that land and housing values of property that surrounded the land to be burdened by a

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167 Id. at 848; see also Eitel, supra, note 1, at 94.
169 Eitel, supra, note 1, at 81; see also Stockford, supra, note 2, at 839.
170 See Eitel, supra, note 1, at 83-87.
171 Id. at 83-84.
172 Eitel, supra, note 1, at 85; see also Stockford, supra, note 2, at 846.
173 Eitel, supra, note 1, at 85; see also Roger Coupal et al., William D. Ruckelshaus Institute of Environment and Natural Resources, The Cost of Community Services for Rural Residential Development in Wyoming, in Wyoming Open Spaces (2002).
174 Eitel, supra, note 1, at 87.
175 Id.
176 Eitel, supra, note 1, at 86; see also Stockford, supra, note 2, at 847.
177 See Eitel, supra, note 1, at 86; see also Stockford, supra, note 2, at 847.
conservation easement increased significantly after the easement was placed on the neighboring land.\footnote{178}

Finally, some scholars argue that even the value of the burdened land will increase over time.\footnote{179} A market for conservation easements can develop as a desirable tool for developers to use in their developing on property adjacent to environmentally sensitive lands.\footnote{180} For example, landowners in sought after locales like northern Virginia and parts of California where wealthy people are buying property-limiting 50 or 100 acres to one house site actually causes property value to soar.\footnote{181} Therefore, because both the lands adjacent to the conservation easement will go up in value as well as the burdened land, over time a municipality’s property tax revenues would stabilize or even increase.\footnote{182} Still, because some counties revenues might be affected by the use of conservation easements more than other counties, the state legislature must keep this in mind when structuring a tax incentive program for conservation easements.\footnote{183}

4. Potential Abuses of Conservation Easement Incentive Programs

The rise in financial incentive programs to encourage conservation easement use has lead to the potential for fraud and other abuses.\footnote{184} Currently there is little risk of “audits” and enforcement of the landowner’s use of the burdened land.\footnote{185} In addition, deductions generated by conservation easements are getting the attention of wealthy families seeking tax shelters.\footnote{186}

While conservation easements have made great strides for land conservation and a vast majority of them are legitimate, a few easement holders with questionable credentials, known as “rogue land trusts,” are increasingly a cause for concern.\footnote{187} In 2003, the Senate Finance Committee opened a wide-ranging inquiry into the Nature Conservancy, the world’s largest environmental group.\footnote{188} The inquiry is to determine if any fraudulent conservation easements

\footnote{178} See Eitel, supra, note 1, at 86; see also Sean F. Nolon Cozata Solloway, Comment, Preserving our Heritage: Tools to Cultivate Agricultural Preservation in New York State, 17 PACE L. REV. 591, 612 n.164; see also Deb Brighton & Judy Cooper, Vermont Land Trust, The Effect of Land Conservation on Property Tax Bills in Six Vermont Towns (1994).

\footnote{179} See Eitel, supra, note 1, at 86; see also John Casey Mills, Conservation Easements in Oregon, Abuses and Solutions, 14 ENVTL. L. 555, 570 (1984).

\footnote{180} See Paul C. Judge, A Tax Break the Deer Will Love, BUSINESS WEEK, January 19, 1998, available at http://www.businessweek.com/1998/03/b3561109.htm (last visited April 25, 2004); see also McLaughlin, supra, note 13, at 460-61 (saying that conservation easement use can be well-suited for providing buffer zones around core, environmentally sensitive lands with great biodiversity).

\footnote{181} Id.

\footnote{182} See Eitel, supra, note 1, at 86-87.

\footnote{183} Id. at 83.

\footnote{184} Ottaway & Stephens, supra, note 51.

\footnote{185} Id. A 1984 IRS study discovered that 40 out of 42 examined conservation easement income tax deductions resulted in overvaluations totaling close to $32 million. Id. For example, one developer has placed a conservation easement for maintaining open space on a golf course reaping $4.8 million in total tax savings for a golf course that cost $2.4 million to build. Id. In North Carolina, luxury homebuilders paid $10 million for land in the mountains, developed a third of the land and claimed a $20 million deduction. Id.

\footnote{186} Id.; Some of the best known conservation easements have been linked to major corporations and affluent individuals such as the Rockefellers, DuPonts, Ted Turner, Michael Jackson, etc. Id.

\footnote{187} Ottaway & Stephens, supra, note 51.

\footnote{188} Id.
are being set up, if any conflicts of interest exist, and other ethical concerns about holding conservation easements. 189

Easements are difficult to track and police. 190 Still, land trusts are often responsible for policing restrictions on property owned by their own officers, directors and donors, and most land trusts meet their ethical duties and responsibilities. 191 Moreover, land trusts are expected to turn away easements that allow too much development or are designed solely to benefit the wealthy. 192 While most of the abuses are concentrated on the federal tax benefits, it is important for states to make sure their tax incentive programs provide safeguards against abuse and fraud. 193 Local governments generally do not like enforcing easements, as it is a tough political issue. 194 Some communities rely on residents to report suspected violations. 195 Some commentators suggest that a state should hold by law that a holder should be liable for monitoring compliance with the easements, so the assessors can assume by law that the landowner is in compliance. 196

Some critics have said that the tax incentives for conservation easements are “upside down,” meaning that upper income donators receive disproportionately greater tax savings than middle and lower income donors. 197 By creating property tax incentives to conservation easement use, a state can provide sufficient incentives to lower income donors who, because they are “land rich, but cash poor,” cannot reap the benefits of federal income tax deductions. 198

Further, to help assessors and landowners better determine which lands can qualify for a property tax break, some states follow the guidelines set forth in Section 170(h) of the Internal Revenue Code for preferential income tax treatment. 199 Some states, like Georgia, require a donating landowner gain approval from a government agency to declare the landowner’s land acceptable for preferential tax treatment. 200 States like Georgia, Tennessee, and Alabama also limit the size of aggregate lands burdened by conservation easements a landowner can enroll in that municipalities current use-value property tax assessment system. 201

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189 Id.
190 See Ottaway & Stephens, supra, note 51. A 1999 study showed that “almost half of the protected tracts of land in the San Francisco area were not regularly monitored to make sure the restrictions were being followed.” Id.
191 Id.
192 Id.
193 Id.
194 Id.
195 Ottaway & Stephens, supra, note 51.
197 Id.
198 McLaughlin, supra, note 13, at 457.
200 GA. CODE ANN. § 48-5-7.4 (To qualify for conservation use preferential assessment property as environmentally sensitive lands, the property must be certified by the Georgia Department of Natural Resources.).
201 See Dylan Fuge, Environmental Defense Memorandum: Overview of Use-Value Program in the Southeast and Other Select States (Aug. 8, 2003). For example, Tennessee requires at least 15 acres for agricultural land and 3 acres for open space lands. Id. While Louisiana simply says all eligible land uses must be on at least 3 acres. Id. “Georgia and Alabama limit aggregate holding to a total of 2000 acres.” Id. “Tennessee limits individual holdings
Although there are a small, yet significant, number of abuses and legal uncertainties, most donors give out of a desire to protect the land they care about, and many actually lose money. Abuses to state property tax incentive programs are most likely to occur with second-generation landowners. For this reason, the real estate community needs to be educated about conservation easements, so they can educate potential land purchasers about the effects of conservation easements.

IV. Strengthening Florida’s Property Tax Incentive System for Conservation Easements and the Need for A Constitutional Amendment

The current property tax incentives for conservation in the state of Florida, although well intentioned, are currently ineffective for several reasons. One, with increased real estate demand in Florida and a lack of safeguards in the current incentive program, the potential for abuse of the current system is high. Two, the property tax incentives do not provide enough financial incentives to private owners of a large portion of agriculturally used land in Florida, as agricultural exemptions provide at least the same or better property tax breaks.

Third, Florida should not only encourage the use of conservation easements, but the state and local governments should also be able to promote other methods of encouraging using private lands for conservation purposes. Finally, the current system is susceptible to constitutional challenges. For all these reasons, the Florida Constitution should be amended to promote the use of conservation easements as well as enable the state and local governments to promote other methods of encouraging the use of private lands for conservation purposes. The sections below will discuss ways to strengthen both the incentives for conservation easement use in the state of Florida and the system that allows for those incentives.

A. Safeguarding the Current System to Prevent Abuses

While Florida’s enabling statute has a broad scope of eligible easement holders and allows for a broad transferability of easements, it should go further to explicitly permit unnamed third party enforcement; and allow for modification or termination in limited circumstance under judicial supervision.

Explicitly permitting unnamed third parties to bring suit for the enforcement of a conservation easement would create more watchdogs for potential abuses and makes fraud and other abuses more difficult to commit. It also would allow conservation organizations (other than the easement holder) to be more diligent in monitoring burdened property and enforcing conservation easement restrictions (even through enforcement litigation actions).

to 1500 acres per county” Id. Still, Louisiana, Maryland, Tennessee, and Texas have minimum thresholds in the size of a parcel of land for enrollment in a current use-value property tax assessment system to encourage conservation easement use. Id.

Ottaway & Stephens, supra, note 51.

See Baldwin, supra, note 27, at 114.

Id.

Tapick, supra, note 14, at 293.

Id. at 294.
In addition, most states do not require even minimal procedural or substantive safeguards to statutory release provisions.\(^{207}\) In fact, only two states mandate that a public hearing must be held prior to a holder’s release of a conservation easement.\(^{208}\) This could allow opponents of conservation easements a relatively easy way to extinguish an easement through financial inducements if a holder is a private organization, or political pressure if the holder is a government entity.\(^{209}\)

Any statutory language allowing for modification or termination of conservation easements in limited circumstances under judicial supervision, should be “accompanied by the omission of current provisions that allow an easement to be terminated or modified ‘under the principles of law and equity.’”\(^{210}\) These limited circumstances for modification or termination should be confined to when an easement no longer serves its intended conservation purpose or where the easement’s removal would provide a greater public benefit than the easement’s continued existence.\(^{211}\) This would protect conservation easements from ill-conceived attacks while maintaining the possibility of modifying or removing easements when it would benefit the public.\(^{212}\) The determination would be made in judicial proceeding similar to an action to quiet title or special probate hearing.\(^{213}\)

Other options Florida should consider to curb abuses to the tax incentive system include strengthening the penalties for noncompliance to the statutory scheme.\(^{214}\) Another option is to have a selective approach to property tax breaks for using conservation easements such as, specifying certain locations, requiring public access or other public benefits.\(^{215}\) Some states, like Georgia, require that the land attempting to have preferential assessment for being burdened by a conservation easement would have to get approved by a government entity.\(^{216}\) This will provide more certainty for whether or not a conservation easement qualifies for a tax benefit.\(^{217}\)

\(^{207}\) Id. at 285.

\(^{208}\) Id.; New Jersey and Massachusetts require a public hearing before an easement can be released. Mayo, supra note 58, Todd D. Mayo, A Holistic Examination of the Law of Conservation Easements, in Protecting the Land: Conservation Easements Past, Present, and Future 26 at Table 2.5 (Julie Ann Gustanski & Roderick H. Squires, eds., 2000).

\(^{209}\) Tapick, supra, note 14, at 285-86.

\(^{210}\) Id. at 294-295.

\(^{211}\) Id. at 295.

\(^{212}\) Id.

\(^{213}\) Tapick, supra, note 14, at 295.

\(^{214}\) Stockford, supra, note 2, at 851. An effective conservation easement program would allow for penalties such as rollback taxes for lands that violate the terms of the conservation easement. Id.

\(^{215}\) Eitel, supra, note 1, at 92.

\(^{216}\) GA. CODE ANN. § 48-5-7.4 (in Georgia, the approval entity is the Department of Natural Resources); see also Eitel, supra, note 1, at 80 (Maryland law states that property burdened by a conservation easement donated to the Maryland Environmental Trust shall receive a property tax credit against “100 percent of all property tax that otherwise would be due.”).

\(^{217}\) Id. at 93.
B. Creating Greater Incentives for Conservation Easement Use

Because Florida has a high number of farmers who already qualify for agricultural assessment on their property taxes, the conservation easement present use assessment, described in § 193.501, currently only preserves their current reduced tax assessment status. Although this allows them to not have to keep their land working as an agricultural use, and still avoid being hit with a large increase in property taxes, it does not provide incentive to not sell or develop their land. Moreover, landowners who currently enjoy an agriculture or forest use special assessment on their land will be unlikely to place a conservation easement on their land, if doing so they would face the possibility of higher taxes or even deferred tax penalties. As a result, only environmentally conscious farmers will take advantage of conservation easement programs.

At the very least, lands currently qualifying for use-value property tax assessment by means other than a conservation easement, should be statutorily assured that placing a conservation easement on their property will not sacrifice the preferential tax assessment or trigger deferred tax penalties, thereby, ensuring that the land would roll into the conservation easement special assessment without deferred taxes coming due. In Utah, land already receiving preferential assessment for property taxes will not be subject to recapture tax penalties if the land becomes subject to a conservation easement.

Florida’s statutory scheme should also consider going further by adding financial incentives by way of a property tax credit, or a reduction in the percentage of the use value taxed, or some other form of financial benefit to landowners who qualify for a current preferential assessment scheme such as agriculture or forestland. For example, Georgia provides that land devoted to an agricultural purpose shall be assessed at 30% of fair market value rather than the standard 40%.

The best solution would allow local governments to decide what kind of property tax incentives would work best for each county’s distinct environmental concerns. However, as will be discussed in the section below, in Florida most, if not all, of these options would require a constitutional amendment.

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219 Conservations Incentive Work Group, Report to the Seventy-Second Legislative Assembly at 22, (February 2003) available at, http://www.biodiversitypartners.org/pubs/ci_workgroup/05.shtml. Fortunately, in Florida, there is no penalty for the withdrawal of agricultural land, while a change from any other uses that qualify for special assessment results in a penalty equal to the total deferred tax liability. See Dylan Fuge, Environmental Defense Memorandum: Overview of Use-Value Program in the Southeast and Other Select States (Aug. 8, 2003) at 8.
221 Eitel, supra, note 1, at 80-81.
222 Stockford, supra, note 2, at 850. To provide tax incentives for private citizens to use conservation easements, a state statute could do several things such as (1) allow for downward readjustments of the assessed value of the land, (2) cut the tax rate applied to the assessed value of easement-burdened land or (3) allow the assessment of conservation easement burdened land be at a lower percentage of fair market value. Id.
224 See Stockford, supra, note 2, at 850.
225 See Id. at 850-51.
C. Encouraging Land Stewardship for Conservation Purposes Beyond Conservation Easement Use

Although conservation easements are currently the most popular way private landowners can preserve their land for conservation purposes, Florida should encourage other methods of promoting the use of privately held land for conservation purposes at both the state and local government levels. Encouraging the use of private lands for conservation purposes by means other than conservation easements can include traditional approaches to land use planning such as: zoning for conservation purposes, amending the comprehensive plan to encourage conservation uses, provide impact fee reductions for environmentally sensitive development proposals, amending zoning ordinances to allow special use permits for conservation purposes, or allowing various exceptions or variances for preserving private lands, etc. Other ways of encouraging the use of private lands for conservation purposes can include: private landowners enrolling in land management programs, or gaining approval by government environmental or preservation agencies, and various other creative approaches to providing property tax breaks and other financial incentives for private landowners that conserve their lands.

Several states and local governments have found ways to use tax and financial incentives to promote the use of private lands for conservation purposes without having to place perpetual servitudes, like conservation easements, on private lands. For example, Texas has expanded its definition of open space land (which is somewhat equivalent to Florida’s special assessment for agricultural uses) to include wildlife management, which allows for preferential property tax assessment treatment for lands held for that conservation purpose even absent a conservation easement. Moreover, in Virginia, which has a very flexible system for encouraging the conservation of private lands, the Virginia Constitution allows for local governments to provide property tax incentives to private landowners for using their land for conservation purposes, regardless of the placement of a conservation easement on the land.

Like Virginia, any amendment to the finance and taxation schemes outlined in the Florida Constitution should go beyond simply providing property tax incentives for conservation easements and encourage various other methods both the state and local government can use to promote the conservation of private lands. With property tax breaks and other financial incentives available for local governments to promote the conservation of private lands, many more creative methods of encouraging private land conservation can be developed in Florida.

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226 See generally OR. REV. STAT. § 308A.743.
227 See generally GA. CODE ANN. § 48-5-7.4 (in Georgia, the approval entity is the Department of Natural Resources); see also Eitel, supra, note 1, at 80 (Maryland law states that property burdened by a conservation easement donated to the Maryland Environmental Trust shall receive a property tax credit against “100 percent of all property tax that otherwise would be due.”).
228 See, e.g., OR. REV. STAT. § 308A.740 (2004), et al.
229 See TX. CONST. art. 8 sect. 1-d-1 (; Other areas Texas constitutionally provides for property tax incentives are described in the following: TX. CONST. art. 8 sect. 1-m; see also TX. CONST. art. 8 sect. 1-l; see also TX. CONST. art. 8 sect 1-f.
230 See VA. CONST. art. X, § 2 (2004) (“The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses.”).
than simply using conservation easements. Moreover, these methods could be specifically tailored by local governments to serve that locality’s environmental and public needs. In some cases, these incentives could even translate into market incentives for private landowners to use their lands for conservation purposes.

Still, new conservation tools will likely be susceptible to several of the disadvantages associated with conservation easements. Therefore, any alternative method for promoting private land conservation should consider some of the potential ways to avoid the potential abuses to programs that provide tax incentives to promote conservation, as discussed in the above sections of this report. Moreover, to allow the state or local governments to legally develop their own creative methods of encouraging the use of privately held lands for conservation purposes through tax incentives or other financial benefits, amending the Florida Constitution will likely be necessary.

In the section below, amendments to the Florida Constitution are proposed to enable the state and local governments to be able to promote the use of private lands for conservation purposes. By not limiting the amendments to providing property tax breaks to conservation easements, the Florida Constitution will be more robust in providing guidance for any new effective land preservation and conservation devices that become popular and, thus, potentially avoid the need for future constitutional amendments.

**D. Amending the Florida Constitution**

Article VII Section 4 of the current Florida Constitution states that “regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation.” However, the Florida Constitution lists acceptable exemptions to ad valorem taxation and also mandates that certain classes of properties will be assessed at something other than just value (e.g. agricultural lands can be assessed at current use). Without this specific authorization in the Florida Constitution, it is likely that any additional tax exemptions or any additional ad valorem tax assessment that diverge from the just value are unconstitutional. Therefore, because the Florida Constitution makes no exception or special assessment for lands subject to conservation easements, those lands must be assessed at their just value.

However, § 193.501 of the Florida Statutes, provides lands with qualifying conservation easements on them shall be assessed at “present value.” The statute defines present value as “the manner in which the land is utilized on January 1 of the year in which the assessment is made.” However, absent specific authorization in the Florida Constitution, taxation of property must be based on “just value,” which means the land must be assessed at its “highest

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231 See Art. VII, Sec. 4, Fla. Const.
232 Id.
233 See Joe Dowling, Memorandum: Assessment of Conservation Easement Lands (Sept. 19, 2003) (on file with the University of Florida Conservation Clinic);
and best use.”\(^{236}\) A common rule in property appraising is that the highest and best use cannot be identical to the land’s current use because present valuation does not consider the potential highest and best use, it only considers the value of the land as it currently is being used.\(^{237}\) Therefore, § 193.501 may be unconstitutional, due to the present use valuation possibly not being a land’s “just value,” as the Florida Constitution does not currently grant specific preferential assessment treatment to conservation purposes.

Still, it is arguable that Section 193.501’s use of present valuation simply mandates that property appraisers must consider the value of the property rights given up by the landowner by a qualifying conservation easement, as that easement has changed the fair market value of that parcel of land by nullifying some, if not all, of that parcel of land’s development potential.\(^{238}\) In other words, the land’s highest and best use of that parcel of land is now capped by the imposition of the conservation easement restrictions. Thus, the present use of the land is now the highest and best use of the land and therefore, a just valuation, which passes constitutional muster. Still, a constitutional amendment allowing for special assessment treatment for conservation purposes would eliminate the argument over Section 193.501’s constitutional validity all together.

One option for Florida is to employ a local option for tax exemption. Virginia’s program is an excellent example of a flexible plan to provide financial incentives through property tax breaks.\(^{239}\) It is arguably the most adaptable state program for property tax incentives in the Southeast and maybe the entire United States.\(^{240}\) Virginia’s program allows localities to adopt local use-value ordinances with their own requirements.\(^{241}\) The Virginia legislature’s only guidance to the counties and municipalities is which categories of land use are eligible and what level of withdrawal penalties should be imposed.\(^{242}\) This “local option” would allow Florida counties to manage their own needs for conservation.

The conservation easement property tax incentive programs need to have limited economic impact while being as straightforward as possible. Without the ability to structure the tax benefits specifically for each county, one county may become saturated with conservation easements harming the community tax base, while another county with few or no conservation easements may find a minimal or no effect on its tax base.\(^{243}\)

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\(^{236}\) See Joe Dowling, Memorandum: Assessment of Conservation Easement Lands (Sept. 19, 2003) (on file with the University of Florida Conservation Clinic); see also Turner v. Tokai Fin. Servs., Inc., 767 So.2d 494 (Fla. 2d DCA 2000) (finding that “just value” and “market value” are synonymous).

\(^{237}\) Baldwin, supra, note 27, at 116.

\(^{238}\) See Joe Dowling, Memorandum: Assessment of Conservation Easement Lands (Sept. 19, 2003) (on file with the University of Florida Conservation Clinic); see generally, Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1970) (reaffirming the general rule that the levy of property tax assessed value must represent all the interests in the land).

\(^{239}\) See Dylan Fuge, Environmental Defense Memorandum: Overview of Use-Value Program in the Southeast and Other Select States at 10 (Aug. 8, 2003).

\(^{240}\) Id.


\(^{242}\) See VA. CODE ANN. § 15.2-5158 (2004).

\(^{243}\) Eitel, supra, note 1, at 92.
In 1998, the Florida Constitution Revision Commission reviewed the Florida Constitution for possible amendments. One of the proposed amendments to Article VII authorized counties and cities to grant property tax exemptions for land used for conservation. The proposed amendment was well received in committees and by the Revision Commission itself. The limited debate that was had over the amendment was over possible adverse effects to a narrowing tax base and the likely effect. However, the overwhelming consensus of the Commission was that this approach would (1) give private landowners an incentive to preserve and conserve their property; (2) be better than forcing the government to buy land in order to conserve it; (3) allow counties to grant exemptions where the cost of collecting taxes would exceed the actual amount collected; and (4) ease the disparity of tax treatment among different government entities. The Commission also determined that absent constitutional authorization, these tax exemptions could not be granted.

When the proposed constitutional amendment went to the ballot, it was lumped with other county tax reduction provisions. With the exception of the amendment for a local option tax exemption for property used for conservation purposes, watchdog groups such as Florida TaxWatch, heavily criticized the other proposed tax reduction provisions. The other provisions included amendments to the constitution supporting tax exemptions for governmental uses of municipal property; optional exemptions for municipal property used for airports, seaports, or public purposes; local option tangible personal property tax exemption for attachments to mobile homes and certain residential rental furnishings; and remove limitations on citizens’ ability to communicate with local officials about matters which are the subject of public hearings.

With all of these provisions lumped together for a single vote on the ballot, Florida TaxWatch also criticized the Commission’s “daisy chain” approach to including a “multiplicity of subjects covered and combined for a single vote.” With all of the criticism, the unpopularity of most of the provisions could not be overcome by the support for the local option tax exemption for property used for conservation purposes; thus, the Florida voters rejected the amendments, as they were all part of the same referendum.

245 Id.
246 Id.
247 Id.
248 Id.
249 Id.
253 Id.
With a constitutional amendment that allows for local governments in Florida to establish their own comprehensive approach to property tax incentives through ordinances in the form of exemptions, preferential assessment programs, or various other means, then each area of Florida can be specially tailored to promote Florida’s ecological needs, while avoiding overly burdening a county’s tax base or development potential. Two proposed constitutional amendments (and their ballot language) that would be a good start to achieving these goals are located in the Appendix of this report.

VI. Conclusion

As private landowners hold many of Florida’s most important natural resources and environmentally sensitive lands, it is important to encourage conservation of these lands. Unlike any other land preservation device, a conservation easement is a cost-effective means for preserving land, which benefits both the public and the landowner. Though not without its potential problems as a relatively new land use doctrine, many commentators feel that conservation easements are the best tool for preserving privately held open spaces and ecologically sensitive lands.255

Overall, in the state of Florida, the conservation easement is a highly beneficial legal device. However, as it currently exists, Florida’s property tax assessment incentive framework for placing conservation easements on private lands is unpredictable, does not provide adequate incentives to the private owners of a large portion of agriculturally used land in Florida, has the potential for abuses, and can have a variety of effects on the different counties of the state. Still, with some adjustments to its legal structure, as well as amending the Florida Constitution, conservation easements and other methods of encouraging the conservation of privately held lands, can continue to play an important and effective role in land preservation in the state of Florida for generations to come.

VII. Appendix

The section 3 amendment, described below, is a revival of an amendment proposed by the 1998 Constitution Revision Commission. The section 4 amendment, also described below, provides a means of bolstering the current treatment of conservation easement assessments in the State of Florida, by giving constitutional credence to § 193.501. Moreover, the section 4 amendment provides a statewide baseline for conservation easement treatment while the section 3 amendment, would allow local municipalities to offer additional tax exemptions and benefits.

**Ballot Language:**

LOCAL AND MUNICIPAL PROPERTY TAX EXEMPTIONS

Permits local option tax exemptions for property used for conservation purposes; permits local option preferential assessment treatment for property used for conservation purposes.

255 Eitel, *supra*, note 1, at 58; *see also* Tapick, *supra*, note 14, at 259.
To be inserted in ARTICLE VII FINANCE AND TAXATION SECTION 3. Taxes; exemptions.—

(f) A county or municipality may be authorized by general law to grant ad valorem tax exemptions for real property used for conservation purposes as defined by general law. 256

To be inserted in ARTICLE VII FINANCE AND TAXATION SECTION 4. Taxes; assessments.—

(f) The legislature may, by general law, for assessment purposes and subject to the provisions of this subsection, allow counties and municipalities to authorize by ordinance that real property used for conservation purposes may be assessed solely on the basis of character or use. Such character or use assessment shall apply only to the jurisdiction adopting the ordinance. The requirements for eligible properties must be specified by general law.