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New York's Conservation Easement Statute: The Property Interest and Its Real Property and Federal Income Tax Consequences

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COMMENTS

NEW YORK'S CONSERVATION EASEMENT STATUTE: THE PROPERTY INTEREST AND ITS REAL PROPERTY AND FEDERAL INCOME TAX CONSEQUENCES

A conservation easement is a voluntary agreement between a private landowner and a public body or eligible not-for-profit corporation to restrict the use of real property. Conservation easements have been used throughout the nation to provide public access to trails and waterways, and to protect farmland, forests, historic buildings, natural habitats, and scenic views along highways or surrounding state or national parks.[1] The popularity of the conservation easement, as a device to protect the character of real property, is in part attributable to the favorable federal income and other tax consequences which may result from the donation of conservation easements.[2]

The term "conservation easement" inaptly describes the interest in real property under consideration. Conservation easements may be utilized both to "conserve" natural resources and to "preserve" man-

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[1] *See generally* R. BRENNEMAN, SHOULD 'EASEMENTS' BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS? (1975); T. COUGHLIN, EASEMENTS AND OTHER LEGAL TECHNIQUES TO PROTECT HISTORIC HOUSES IN PRIVATE OWNERSHIP (1981); Barnes, *An Alternative to Alternate Farm Valuation: The Conveyance of Conservation Easements to an Agricultural Land Trust*, 3 AGRIC. L.J. 308 (1981); Knight & Dye, *Attorneys' Guide to Montana Conservation Easements*, 42 MONT. L. REV. 21 (1981); Comment, *The Use of Easements to Preserve Oregon Open Space*, 12 WILLAMETTE L.J. 124 (1975); Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 353.

[2] *See* Kinnamon, *Tax Incentives for Sensible Land Use Through Gifts of Conservation Easements*, 15 REAL PROP. PROB. & TR. J. 1, 1 (1980) ("It is now generally conceded that tax incentives are an important stimulus for preservation of unique natural and historic sites and for prevention of undesirable development in agricultural or scenic areas. Among the favored devices are easements for conservation purposes."); Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVTL. AFF. L. REV. 513, 514 (1981) ("The increased use of conservation restrictions, especially in the private sector, has been spurred on, in part, by a federal tax system that encourages the donation of such property interests in return for a charitable deduction."); Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL EST. L.J. 304, 307 (1979) ("Naturally, the availability of a tax benefit increased the attractiveness of easements.").

made resources.[3] The easement recognized at common law, moreover, only partially resembles the statutory conservation easement.[4] The enforceability of the restrictions imposed by a conservation easement, which are typically granted in perpetuity, has no counterpart at common law.[5]

A conservation easement is a limited interest that the owner of real property may transfer to another. A "facade easement," for example, is a type of conservation easement that prohibits the owner of an historic building from altering the architectural features of the exterior of the building.[6] The facade easement does not affect the ownership of the historic building, nor does it prohibit the owner from making interior alterations or other productive uses of the property

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[3] Historic preservationists often conflict with conservationists in their efforts to shape "conservation easement" legislation. *See* Small, *supra* note 2, at 315-19. In general, preservationist organizations, such as the National Trust for Historic Preservation, seek to preserve historic buildings and other man-made resources, whereas conservationist organizations, such as the Nature Conservancy, seek to protect pristine natural lands. *See* E. WATSON, ESTABLISHING AN EASEMENT PROGRAM TO PROTECT HISTORIC, SCENIC, AND NATURAL RESOURCES 44 (Information Sheet, National Trust for Historic Preservation No. 25, 1982) ("The National Trust for Historic Preservation is . . . [a] nonprofit organization chartered by Congress with the responsibility for encouraging public participation in the preservation of sites, buildings and objects significant in American history and culture."); Small, *supra* note 2, at 315 n.30 ("The Nature Conservancy, in the words of the group's magazine *The Nature Conservancy News*, is a 'national conservation organization committed to the preservation of natural diversity by protecting lands containing the best examples of all components of our natural world.' "). To "preserve," then, is to maintain something which has been created by man, whereas to "conserve" is to protect from man something which has been created by nature. Some states differentiate between "preservation easements" and "conservation easements." *See* CONN. GEN. STAT. ANN. § 47-42a (West 1978); DEL. CODE ANN. tit. 7, § 6901 (Supp. 1984); MASS. ANN. LAWS ch. 184, § 31 (Michie/Law. Co-op. 1977 & Supp. 1984); N.H. REV. STAT. ANN. § 477:45 (1983).

[4] The conservation easement, if defined in relation to common law property interests, is a hybrid, falling somewhere between the common law easement or covenant, depending on the type of restrictions imposed. See *infra* notes 20-21 and accompanying text for a definition of easement and covenant. The National Conference of Commissioners on Uniform State Laws chose the term "easement" because of its familiarity:

> [L]awyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. . . . [N]on-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements."

UNIF. CONSERVATION EASEMENT ACT prefatory note, 12 U.L.A. 55, 56 (Supp. 1985).

[5] *See infra* notes 66-71 and accompanying text.

[6] See E. WATSON, *supra* note 3, at 3, where the author notes:

> *Exterior or facade easements* . . . protect the outside appearance of a building. These easements usually control alterations to the exterior and may require proper maintenance of the property. They also usually include aspects of the scenic easement, to control the development rights of the lot on which the building stands and the air rights, which are development rights for constructing additional stories above the building.

Id. (emphasis in original).

that are consistent with the terms of the easement.[7] If a facade easement is transferred by means of a charitable contribution, the donor may obtain significant federal income tax savings.[8] Moreover, to the extent that the market value of the restricted property is reduced, the donor's assessment for real property tax purposes may also be reduced.[9]

The subject of this Comment is the New York Conservation Easement Statute (CES),[10] signed into law on December 31, 1983 by Governor Mario M. Cuomo[11] after a protracted legislative history,[12] and

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[7] See T. COUGHLIN, *supra* note 1, at 8, where the author states:

> Preservation easements are remarkably flexible. Unlike government regulation, which tends to be applied to all properties, easements are prepared individually to meet the particular needs of a historic property . . . . The easement can be tailored to accommodate additions and alterations to non-historic fabric, provided they are accomplished in a way that does not detract from the property's historic integrity.

Id.

The use of conservation easements to protect the historic character of privately-owned buildings which are put to productive uses is consistent with current trends in the preservation movement. *See* Fowler, *Historic Preservation and the Law Today*, 12 URB. LAW. 3, 6-7 (1980). Commentator Fowler states that preservation requires "retention of . . . resources as viable and productive elements in today's society. Museums and shrines still have their place, but the thrust of the preservation movement goes to the broader questions of quality of life in contemporary America." *Id.*

[8] *See infra* notes 94-101 and accompanying text.

[9] *See infra* notes 158-94 and accompanying text.

[10] The acronym "CES" will be used throughout this Comment to refer to the original legislative package signed into law on December 31, 1983, *see* 1983 N.Y. Laws ch. 1020, and amended on June 26, 1984, *see* 1984 N.Y. Laws ch. 292 (McKinney). The CES has been codified under two separate books in McKinney's Consolidated Laws of New York. *See* N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1984 & Supp. 1984-1985); N.Y. REAL PROP. TAX LAW §§ 530(2), 533, 540, 542(5) (McKinney 1984 & Supp. 1984-1985). This Comment will cite to McKinney's Consolidated Laws of New York when referring to the CES.

In a recent decision involving a pre-CES agreement that the court referred to as a "conservation easement," the New York Court of Appeals implicitly held that the CES should not be retroactively applied to restrictive agreements executed before the effective date of the CES. *See* Friends of the Shawangunks, Inc. v. Knowlton, No. 110, slip op. at 6 (N.Y. Mar. 19, 1985) ("ECL art. 49 was not enacted until 1983 . . . . Thus the easement granted [to the intervenor] in 1977 was a common law easement appurtenant . . . .").

[11] *See supra* note 10.

[12] In 1970, the New York State Temporary Study Commission on the Future of the Adirondacks, a blue-ribbon committee appointed by Governor Nelson A. Rockefeller, recommended the use of conservation easements to protect the Adirondack Park. *See* Fairbanks, *State Aid Program for Easements*, in NEW YORK STATE TEMPORARY STUDY COMM. ON THE FUTURE OF THE ADIRONDACKS, TECHNICAL REPORT 6, at 6 (1970). Professor Fairbanks states:

> Certainly an easement acquisition program by the state can be an important tool for preserving the open space attributes of the Adirondack Park for all the people of the state.
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> . . . .
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> . . . Development pressures of major proportions have only recently come to bear on the Park. The longer the implementation of a scenic easement program is delayed, the

amended on June 26, 1984.[13] Although this legislation was much disputed,[14] the idea of conservation easements is far from radical.[15] The CES is similar to conservation easement statutes enacted in twenty-seven other states,[16] and draws heavily from the Uniform Conserva-

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more difficult it will be for such a program to be successful.
Id.

Bills designed to eliminate common law impediments to the use of conservation easements have been introduced in the New York State Legislature in various forms for more than a decade. *See* N.Y.S. 6753-D, N.Y.A. 7981-C, 205th Sess. (1982); N.Y.S. 6753-A, N.Y.A. 8031, 204th Sess. (1981); N.Y.A. 5645, 202d Sess. (1979); N.Y.S. 8991-A, N.Y.A. 11921-A, 201st Sess. (1978); N.Y.A. 7747, 200th Sess. (1977); N.Y.S. 5694-A, N.Y.A. 7655-C, 199th Sess. (1976); N.Y.S. 5694-A, N.Y.A. 7655-A, 198th Sess. (1975); N.Y.S. 9417, N.Y.A. 9658, 195th Sess. (1972); N.Y.S. 6783, N.Y.A. 7068, 194th Sess. (1971).

[13] *See supra* note 10.

[14] The CES was controversial throughout the course of its journey through the New York State Legislature. *See Fight Brews in Albany Over Rural Easement Tax Breaks*, Poughkeepsie J., Dec. 16, 1983, at 37, col. 1; *Controversial Scenic Easement Bill Moves Toward Law*, Lake Placid News, Sept. 15, 1983, at 1, col. 1; *Easement Proposal Raises Fears in Park*, Albany Times Union, Aug. 14, 1983, at B5, col. 3; *Uneasy New York Easements*, N.Y. Times, Aug. 6, 1983, at 20, col. 1; *Bill Would Conserve Land, But Cut Tax Rolls*, Poughkeepsie J., July 5, 1983, at 9, col. 2.

The original CES, N.Y.S. 1997-A, N.Y.A. 2323-B, 206th Sess. (1983), passed the Assembly on June 25, 1983, *see* 2 NEW YORK ASSEMBLY JOURNAL, 206th Sess. 1,680 (1983), but was defeated in the Senate by a single vote, *see* NEW YORK SENATE JOURNAL, 206th Sess. 360 (1983) (Senate Voting Record). On June 27, 1983, the vote was reconsidered, and the CES narrowly squeaked by the Senate. *See id.*; Flateau, *Stafford Barely Loses in Debate Over Easements*, Plattsburgh Press Republican, June 28, 1983, at 5, col. 1 ("[A]s the roll call of the affirmative and negative votes was being read, supporters were simultaneously rushing Sen. Howard E. Babbush into the session and, as the final list of absentees was being called, he cast the 31st and deciding affirmative vote."). After this hard-fought legislative victory, Governor Mario M. Cuomo delayed signing the bill until December 31, 1983. *See supra* note 10. Although Governor Cuomo signed the CES to satisfy its supporters, he instructed state agencies not to accept title to any conservation easements until the CES could be amended. *See* Governor's Memorandum on Approval of 1983 N.Y. Laws ch. 1020 (December 31, 1983), *reprinted in* [1983] N.Y. LEGIS. ANN. 424 ("I am instructing all State agencies to refrain from acquiring or accepting conservation easements until additional statutory language can be implemented . . . . [M]y intention [is] not to accept title to such easements at this time."). The Governor's program bill, amending the original CES, was signed into law on June 26, 1984. *See supra* note 10.

[15] The concept of the conservation easement was first advanced in a 1959 study by William H. Whyte for the Urban Land Institute. *See* W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Technical Bulletin No. 36, 1959).

[16] *See* ALA. CODE §§ 41-10-135 to -154 (1982); ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1983); CAL. GOV'T CODE §§ 51050-51065, 51070-51097 (Deering 1974 & Supp. 1985); COLO. REV. STAT. §§ 38-30.5-101 to .5-110 (1982); CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1978); DEL. CODE ANN. tit. 7, §§ 6901-6906 (Supp. 1984); FLA. STAT. ANN. § 704.06 (West Supp. 1984); IDAHO CODE §§ 67-4601 to -4619 (1980); ILL. ANN. STAT. ch. 24, § 11-48.2-1 to .2-7 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. §§ 32-5-2.6-1 to .6-7 (Burns Supp. 1984); IOWA CODE ANN. §§ 111D.1-.5 (West 1984); KY. REV. STAT. ANN. §§ 65.410-.480 (Bobbs-Merrill 1980); ME. REV. STAT. ANN. tit. 33, §§ 667-668 (1978 & Supp. 1984-1985); MD. REAL PROP. CODE ANN. § 2-118 (1981); MASS. ANN. LAWS ch. 184, §§ 31-33 (Michie/Law. Co-op. 1977 & Supp. 1984); MICH. STAT. ANN. §§ 26.1287(1)-(8) (Callaghan 1982 & Supp. 1984-1985); MONT. CODE ANN. §§ 76-6-201 to -211 (1983); N.H. REV. STAT. ANN. §§ 477:45 to :47 (1983); N.J. STAT. ANN. §§ 13:8-30 to -44 (West

tion Easement Act (UCEA).[17]

This Comment examines the statutory definition of "conservation easement," and the requirements to create, enforce, and extinguish a conservation easement under the CES and related law. This Comment further examines how the donation of a conservation easement fits into the broader context of the charitable contribution deduction available under section 170(h) of the Internal Revenue Code,[18] and the effect of a conservation easement donation on real property tax assessment.

I. Real Property Law

A. *Definition of Conservation Easement*

The statutory definition of "conservation easement" consists of three parts. First, the CES defines conservation easement as an interest in real property that encompasses the common law definition of easement and covenant. Second, the CES defines conservation easement as an interest that "limits or restricts" the use of real property, a definition which thus precludes the imposition of affirmative obligations in conservation easements. Third, the CES describes the public purposes for which a conservation easement may be created. Each component of this three-part definition will be separately discussed.

1. The Relationship of Conservation Easements to Common Law Easements and Covenants

The CES in pertinent part provides that " '[c]onservation easement' means an easement, covenant, restriction or other interest in real property, created under and subject to the provisions of this title."[19] The definition of conservation easement encompasses the fa-

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1979); Or. Rev. Stat. §§ 271.710-.750 (1981); R.I. Gen. Laws §§ 34-39-1 to -5 (1984); S.C. Code Ann. §§ 27-9-10 to -30 (Law. Co-op. 1977 & Supp. 1983); Tex. Nat. Res. Code Ann. §§ 183.001-.005 (Vernon Supp. 1985); Utah Code Ann. §§ 63-18a-1 to -6 (1978); Va. Code §§ 10-151 to -158 (1978 & Supp. 1984); Wash. Rev. Code Ann. §§ 84.34.200-.220 (Supp. 1985); Wis. Stat. Ann. § 700.40 (West Supp. 1984-1985).

[17] Unif. Conservation Easement Act, 12 U.L.A. 55 (Supp. 1985). *See infra* note 42 and accompanying text.

[18] I.R.C. § 170(h) (1982).

[19] N.Y. Envtl. Conserv. Law § 49-0303(1) (McKinney Supp. 1984-1985).

miliar easement[20] and covenant[21] recognized at common law, the "restriction,"[22] a term of less precise meaning in common parlance, and whatever comparable interests might be included in the catchall "other interest in real property."

The significance of this definition is that all three common law concepts may be integrated into a single grant. For example, a pri-

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[20] An easement is a permanent interest in land in the possession of another which entitles the easement holder to limited use of the land subject to the easement. The land subject to the easement is called the "servient tenement." The easement holder's privilege of use may be protected against interference from third persons and is not dependent upon the consent of the owner of the servient tenement. In Antonopulos v. Postal Tel. Cable Co., 261 A.D. 564, 26 N.Y.S.2d 403 (1941), *aff'd without opinion*, 287 N.Y. 712, 39 N.E.2d 931 (1942), the court stated:

> An easement is a form of servitude. Its conventional or common-law meaning is that it is a right or privilege which one parcel of land yields up to another parcel of land as an easement appurtenant. . . . It is an incorporeal hereditament which issues from a corporeal estate for the benefit of another estate. It is a burden imposed on corporeal property and not upon the owner thereof.

Id. at 568, 26 N.Y.S.2d at 407-08. *See generally* RESTATEMENT OF PROPERTY § 450 (1944). A common example of an easement is the easement of way, or "right of way," which entitles the easement holder to enter upon the servient tenement to provide, for example, access to a road or lake. *See* Slater v. Ward, 92 A.D.2d 667, 460 N.Y.S.2d 150 (1983) (holding that easement of way for driveway purposes established by prescriptive use for statutory period); Marra v. Simidian, 79 A.D.2d 1046, 435 N.Y.S.2d 182 (1981) (holding that boating, swimming and sunbathing are reasonable incidents of easement granted to provide access to Lake George). The distinguishing characteristics of the four types of easements recognized at common law are discussed *infra* notes 27-32.

[21] A covenant is a contractual promise, typically found in a deed or lease, to perform certain specified acts, *see* Procopio v. Fisher, 83 A.D.2d 757, 443 N.Y.S.2d 492 (1981)(covenant to pay sum of money), or to refrain from performing certain specified acts, *see* Siverstein v. Shell Oil Co., 40 A.D.2d 34, 337 N.Y.S.2d 442 (1972) (covenant not to compete), *aff'd*, 33 N.Y.2d 950, 309 N.E.2d 131, 353 N.Y.S.2d 730 (1974), with regard to real property. The covenant is primarily a contractual obligation, not an interest in land. It is, however, a contract that has certain real characteristics, namely, the ability to "run with the land" of the parties to the covenant. *See* Reno, *Covenants, Rents and Public Rights*, in 2 AMERICAN LAW OF PROPERTY § 9.1, at 335 (J. Casner ed. 1952). The term "running with the land" is metaphorical. As stated by Judge Clark: "The covenants are always personal in the sense that they are enforced in personal actions for damages . . . [and] the question is merely how far the transfer of an interest in land will also transfer either the benefit or the burden of covenants concerning it." C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 93 n.3 (2d ed. 1947).

[22] It is difficult to discern the scope of the term "restriction" as used in the CES. The words "restriction" and "restrictive covenant" are often used interchangeably by the courts. *See* Goodfarb v. Freedman, 76 A.D.2d 565, 566-67, 431 N.Y.S.2d 573, 575 (1980) ("[T]he owners entered into a series of restrictive covenants . . . . Another restriction required front and side yard setbacks . . . ."). A restriction might simply be used to signify a restrictive covenant as distinguished from an affirmative covenant. The term "restriction," however, probably implies an interest of broader scope than the restrictive covenant. *See* N.Y. REAL PROP. ACTS. LAW § 1951(1) (McKinney 1979) (implicitly defining "restriction" to include a covenant, promise, negative easement, special limitation, or condition subsequent); *see also* CONN. GEN. STAT. ANN. § 47-42a (West 1978) (" 'Conservation restriction' means a limitation, whether or not stated in the form of a restriction, easement, covenant or condition . . . .").

vate landowner could grant a conservation easement to the New York State Department of Environmental Conservation, the terms of which prohibit: (1) the erection of billboards or other structures which would have the effect of obstructing the view from a nearby highway; (2) the subdivision of the property for commercial development purposes; and (3) the excavation of the property or the dumping of trash thereon.[23] Based on existing law, the first term of the agreement might be classified as a negative easement,[24] the second, a covenant,[25] and the third, a restriction.[26] The CES provides that regardless of how these individual restrictive terms might otherwise be classified, the agreement constitutes a "conservation easement" if it is created pursuant to the CES.

Although the CES builds its definition of conservation easement from ancient common law property interests, the conservation easement is a statutory creature, unbounded by traditional notions of

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[23] *See generally* E. WATSON, *supra* note 3, at 35-40 (sample deed of scenic, open space, and architectural facade easement).

[24] The negative easement of air or light, which prohibits the owner of the servient tenement from erecting buildings or other structures to obstruct the flow of air or light to the dominant tenement, is recognized in New York, *see* Elgar v. S.H. Kress & Co., 280 A.D. 621, 116 N.Y.S.2d 527 (1952), *rev'd on other grounds*, 308 N.Y. 533, 127 N.E. 325 (1955), but may be created only by express grant. *See* Cohan v. Fleuroma, Inc., 42 A.D.2d 741, 346 N.Y.S.2d 157 (1973) (holding that easements of air and light cannot be acquired by prescription); Pica v. Cross County Constr. Corp., 259 A.D. 128, 18 N.Y.S.2d 470 (1940) (holding that easement of air and light will not be implied). *See generally Easements* § 22 in 2 WARREN'S WEED N.Y. LAW OF REAL PROPERTY (4th ed. 1980) [hereinafter cited as *Easements*]. Language prohibiting the erection of billboards or other obstructions might also be construed as a restrictive covenant. *See* Regan v. Tobin, 89 A.D.2d 586, 452 N.Y.S.2d 249 (1982) (restrictive covenant prohibiting erection of stockade fences in subdivision); *see also* Reno, *supra* note 21, § 9.12, at 373 ("Whenever a covenant imposes purely negative duties upon the covenantor, it is possible for the court to construe the covenant as the grant of an easement, and thus avoid the necessity of privity of estate between the parties." (footnote omitted)).

[25] Language prohibiting subdivision of the property for commercial development purposes would probably be construed as a restrictive covenant. *See* Board of Educ. v. Doe, 88 A.D.2d 108, 452 N.Y.S.2d 964 (1982) (holding that restrictive covenant prohibiting commercial use was extinguished in action to quiet title); Goodfarb v. Freedman, 76 A.D.2d 565, 431 N.Y.S.2d 573 (1980) (holding that restrictive covenant limiting use to single private residence was breached by construction of photographic studio on premises); Poughkeepsie N.Y. Congregation of Jehovah's Witnesses v. Booth, 67 Misc. 2d 53, 323 N.Y.S.2d 181 (Sup. Ct. 1971) (holding that restrictive covenant limiting use to "residential and farm purposes only" prohibited church construction).

[26] Language prohibiting excavation of land or the dumping of trash thereon might be construed broadly as constituting a "restriction." *See supra* note 22. Such prohibitions also resemble traditional covenants against "noxious" uses of the burdened property. *See* Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877) (discussing covenant prohibiting erection of school, stable, engine-house, manufactory or any business); Kress v. West Side Tennis Club, 57 Misc. 2d 772, 293 N.Y.S.2d 666 (1968) (holding that covenant prohibiting "any noxious, dangerous or offensive thing, trade or business or use of the property" not breached by music festival).

easements and covenants. A comparison of the common law easement and covenant with the conservation easement illustrates the statutory refinements wrought by the CES.

At common law, an easement may be classified as either "appurtenant" or "in gross," based on its relationship to other property.[27] In New York, an appurtenant easement may be assigned to another, whereas an easement in gross is deemed "personal" to its holder and may not be assigned[28] unless the easement is "commercial in character."[29] The CES provides that a conservation easement held in gross

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[27] An appurtenant easement typically involves two contiguous parcels of land. *See generally* Rundell, *Easements and Licenses* in 2 AMERICAN LAW OF PROPERTY § 8.6, at 233 (J. Casner ed. 1952). *But see* Cady v. Springfield Waterworks Co., 134 N.Y. 118, 31 N.E. 245 (1892) (easement for flowage of water appurtenant although dominant and servient tenements separated by street). The parcel which is subject to the easement is called the "servient tenement." *See supra* note 20. An appurtenant easement limits in some way the possessory rights of the owner of the servient tenement, and at the same time adds to the possessory rights of the owner of other land, called the "dominant tenement." *See generally* Rundell, *supra*, § 8.6, at 233. The appurtenant easement exists for the use and enjoyment of the owner of the dominant tenement, and is an inseparable incident of the dominant tenement. *See id.* § 8.7, at 234 ("All who possess that land become . . . entitled to the benefit of the easement. [This is so] whether they acquire that possession by succession to prior possessors, or by entering into possession independently of any succession, as by adverse possession." (footnote omitted)). A common example of an appurtenant easement is an easement of way across adjoining land to provide the dominant tenement with access to a road or lake. *See* cases cited *supra* note 20.

Unlike an appurtenant easement, an easement in gross is not created with the intention of benefiting the owner of land as such, but exists without a dominant tenement. *See generally Easements*, *supra* note 24, at § 7.04. A common example of an easement in gross is the right of a power company to string wires through a neighborhood in which it does not own property. *See* Hoffman v. Capitol Cablevision Sys., 52 A.D.2d 313, 383 N.Y.S.2d 674, *motion for leave to appeal denied*, 40 N.Y.2d 806, 359 N.E.2d 438, 390 N.Y.S.2d 1025 (1976).

[28] In Loch Sheldrake Assocs. v. Evans, 306 N.Y. 297, 118 N.E.2d 444 (1954), the court of appeals, in dicta, described the easement in gross as follows:

> If we are to speak with strictest accuracy, there is no such thing as an "easement in gross" . . . since an easement presupposes two distinct tenements, one dominant, the other servient. Obviously, the reservation we are construing was not the sort of mere personal, nonassignable, noninheritable privilege or license sometimes loosely described as an "easement in gross."

Id. at 304, 118 N.E.2d at 447 (citation omitted). *See also* Gross v. Cizauskas, 53 A.D.2d 969, 970, 385 N.Y.S.2d 832, 834 (1976) ("This easement . . . must be in gross and, therefore, is neither assignable nor inheritable . . . ."). Although the benefit of an easement in gross may not be assigned to another, the holder of such an easement may enforce its terms against successors to the servient tenement. *See* Borough Bill Posting Co. v. Levy, 144 A.D. 784, 129 N.Y.S. 740 (1911) (granting injunction to enforce advertising privilege, held in gross, against subsequent purchaser of burdened property); *accord* C. CLARK, *supra* note 21, at 67-71.

[29] The distinction between commercial and non-commercial easements in gross was established by the Restatement of Property. *See* RESTATEMENT OF PROPERTY §§ 489-492 (1944). An easement in gross is "commercial in character," and therefore presumptively alienable, "when the use authorized by it results primarily in economic rather than personal satisfaction." *Id.* § 489 comment c. Judge Clark thoroughly criticized the Restatement's "highly cavalier treatment of existing law" in recognizing this exception to the general rule relating to the nonassignability

is freely assignable and may be enforced by its assignee against subsequent purchasers of the property subject to the easement.[30]

The common law easement may be further classified as either "affirmative" or "negative," based on the character of the privilege granted to the easement holder.[31] Prior to the enactment of the CES, the negative easement was of limited utility for conservation purposes because the common law recognized negative easements to protect only four categories of interest.[32] The CES provides that a conservation easement that imposes a negative burden is enforceable even though it does not fall within one of the traditionally recognized categories.[33] The CES thus abrogates the legally significant differences among the various types of common law easements. Unlike its cousin the common law easement, the conservation easement is monolithic.

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of easements in gross. *See* C. CLARK, *supra* note 21, at 79-83. New York has adopted the Restatement approach. *See* Banach v. Home Gas Co., 23 Misc. 2d 556, 199 N.Y.S.2d 858 (Sup. Ct. 1960), *aff'd*, 12 A.D.2d 373, 211 N.Y.S.2d 443, *motion for permission to appeal denied*, 14 A.D.2d 458, 218 N.Y.S.2d 586 (1961).

[30] The CES provides that a conservation easement is enforceable even though "[i]t is not appurtenant to an interest in real property" and even though "[i]t can be or has been assigned to another holder." *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(a), (b) (McKinney Supp. 1984-1985).

[31] An affirmative easement entitles the holder to do affirmative acts on the servient tenement. *See generally* RESTATEMENT OF PROPERTY § 451 (1944). An easement of way, for example, is an affirmative easement which gives its holder the privilege to enter upon the servient tenement in a manner which would otherwise constitute a trespass. *See* McCann v. Ryan, 92 A.D.2d 656, 460 N.Y.S.2d 169 (1983) (easement of way acquired by prescription). *See generally supra* note 20.

A negative easement entitles the holder to compel the person in possession of the servient tenement to refrain from doing certain specified acts. *See* Uihlein v. Matthews, 172 N.Y. 154, 158, 64 N.E. 792, 793 (1902) ("The right . . . to restrict the use of the . . . property is sometimes called a negative easement, which is the right in the owner of the dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property." (citations omitted)). *See generally supra* note 24. An example of a negative easement is an easement that prohibits the owner of the servient tenement from erecting a fence or otherwise obstructing the flow of air or light to the dominant tenement. *See* Rahabi v. Morrison, 81 A.D.2d 434, 440, 440 N.Y.S.2d 941, 946 (1981) ("To the extent that it prohibits . . . constructing any fence or structure . . . it is negative because plaintiff . . . has no natural right to light or air . . . in the absence of such a negative easement . . . .").

[32] *See* Reno, *supra* note 21, § 9.24, at 402 ("The doctrine of negative easements has never been extended beyond the four types recognized by the early English cases: easements for light, for air, for support of a building laterally or subjacently, and for the flow of an artificial stream." (footnote omitted)); *see also* UNIF. CONSERVATION EASEMENT ACT § 4 commissioner's comment, 12 U.L.A. 55, 61 (Supp. 1985) ("Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a 'novel' negative burden.").

[33] *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(d) (McKinney Supp. 1984-1985).

The conservation easement is also significantly different from its other cousin, the common law covenant.[34] In contrast with the treatment of appurtenant easements, which pass with a sale of the fee simple estate as an inseparable incident thereto,[35] the common law developed arcane rules to limit the ability of covenants to "run with the land."[36] The CES either abrogates or renders insignificant these rules regarding the enforceability of common law covenants.[37]

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[34] For a brief definition of the common law covenant, see *supra* note 21.

[35] *See supra* note 27.

[36] A covenant "running with the land" allows a promisee to impose an obligation, by virtue of succession to the promisor's estate, upon one who has not promised. The traditional requirements for the promisee to enforce a real covenant against a successor to the burdened property were summarized by the court of appeals in Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938) as follows:

> (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant.

Id. at 255, 15 N.E.2d at 795 (citation omitted).

[37] The three traditional requirements set forth in Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938), *see supra* note 36, must be applied separately to determine whether the benefit of a covenant may be enforced by a successor to the benefited property, and whether the burden of a covenant may be enforced against a successor to the burdened property. *See* C. CLARK, *supra* note 21, at 3 ("[T]he failure to distinguish between the benefit and burden of a covenant and to realize that they must pass separately or be held in gross is one of the most prolific sources of confusion in the subject." (footnote omitted)). As will be shown, these traditional requirements have limited applicability to conservation easements.

The intent-to-run requirement may be satisfied based on language used in the instrument creating the covenant, *see* Orange & Rockland Utils. v. Philwold Estates, Inc., 52 N.Y.2d 253, 418 N.E.2d 1310, 437 N.Y.S.2d 291 (1981) (holding that covenant binding "heirs, executors, and assigns" satisfied intent-to-run requirement), or, if necessary, by an examination of the surrounding circumstances. *See* Silverstein v. Shell Oil Co., 40 A.D.2d 34, 37, 337 N.Y.S.2d 442, 446 (1972) (stating it would be unrealistic to assume that a covenant for a 50-year term was intended to be "personal" to the grantor, when at the time of the conveyance such grantor was in his middle 50's), *aff'd*, 33 N.Y.2d 950, 309 N.E.2d 131, 353 N.Y.S.2d 730 (1974). In the case of conservation easements, the intent-to-run requirement is satisfied by the statutory presumption that conservation easements are of perpetual duration. *See infra* note 54 and accompanying text.

Privity of estate in New York traditionally required the transfer of an interest in land between the original parties to the promise (horizontal privity) and succession to some part of the estate of the promisee or promisor (vertical privity). *See* Lawrence v. Whitney, 115 N.Y. 410, 416, 22 N.E. 174, 176 (1889) ("There was thus no grant or transfer of anything from one to another, and, as a necessary consequence, the covenants for use did not run with the land, and remained personal."); *see also* RESTATEMENT OF PROPERTY §§ 534, 535 (1944). Compare C. CLARK, *supra* note 21, at 117, where the author states:

> The requirement of privity is designed to furnish a connecting link between the parties. That is already supplied between covenantor and covenantee by the promise itself . . . . The practical effect of requiring such a [horizontal] privity is that there should be a conveyance between covenantor and covenantee at the time of making the covenant. This amounts to a barren formality . . . .

In summary, then, the legal effect of the statutory refinements discussed above is to eliminate the need to differentiate among conservation easements based on their common law ancestry. In other words, whether the terms of a conservation easement are classified as an easement or covenant ultimately should not affect the enforceability of the resulting conservation easement.

2. The Failure of the CES to Authorize the Imposition of Affirmative Obligations in Conservation Easements

The second element in the definition of conservation easement provides that a conservation easement is an "interest in real property . . . which *limits or restricts* development, management or use of such real property."[38] The apparent meaning of the quoted language is that a conservation easement purporting to impose affirmative obligations[39] falls outside the statute.[40] The above interpretation of the

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Id. The New York Court of Appeals has recently stated in dicta that horizontal privity is no longer required. *See* Orange & Rockland Utils. v. Philwold Estates, Inc., 52 N.Y.2d at 263, 418 N.E.2d at 1314, 437 N.Y.S.2d at 295 ("[T]he concept of privity of estate took on a different meaning and now the party . . . enforc[ing] the covenant need show only that he held property descendant from the promisee which benefited from the covenant and that the owner of the servient parcel acquired it with notice of the covenant." (citation omitted)); *see also Recent Development — Privity of Estate Between Covenanting Parties Not Necessary for Affirmative Covenant to Run with the Land in New York*, 60 COLUM. L. REV. 1052 (1960). The CES provides that the doctrine of privity of estate has no application to conservation easements. *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(g) (McKinney Supp. 1984-1985).

A covenant "touches or concerns" the land when it directly affects the uses to which the land may be put and substantially affects its value. Orange & Rockland Utils. v. Philwold Estates, Inc., 52 N.Y.2d at 263, 418 N.E.2d at 1314, 437 N.Y.S.2d at 295; *see also* C. CLARK, *supra* note 21, at 99 ("Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in similar capacity, the requirement should be held fulfilled."). The CES provides that a conservation easement is enforceable even though the benefit does not "touch or concern" real property. *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(f) (McKinney Supp. 1984-1985). The CES, however, does not address the "touch or concern" requirement in relation to the running of the burden. A conservation easement drafted in the form of a common law covenant, therefore, would not be enforceable against a successor to the burdened land unless the covenant "touches or concerns" such land. This vestige of common law which survives the CES is probably without practical significance, however, because most restrictions on land use should pass the "touch or concern" test without difficulty, and because the CES does not authorize the imposition of affirmative obligations in conservation easements. *See infra* notes 38-48 and accompanying text.

[38] N.Y. ENVTL. CONSERV. LAW § 49-0303(1) (McKinney Supp. 1984-1985) (emphasis added).

[39] The essence of an affirmative obligation or "burden" is that the owner of the burdened property is required to perform certain specified acts. *See* Arroyo v. Rosenbluth, 115 Misc. 2d 655, 657, 454 N.Y.S.2d 610, 612 (Sup. Ct. 1982) ("Affirmative covenants are those in which the

phrase "limits or restricts" would be free from doubt but for a subse-

party binds himself either to continue the *status quo* as represented or to perform some acts in the future." (emphasis in original)). A common example of an agreement imposing an affirmative obligation would be a covenant to build or maintain property, or to pay a sum of money. *See* Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938) (covenant to pay money for maintenance of common grounds); Lincolnshire Civic Ass'n, Inc. v. Beach, 46 A.D.2d 596, 364 N.Y.S.2d 248 (1975) (covenant to pay money for operation and maintenance of recreational area); Moxley v. New Jersey & N.Y.R.R., 21 N.Y.S. 347 (1892) (covenant to build fences along boundary lines), *aff'd without opinion*, 143 N.Y. 649, 37 N.E. 824 (1894).

In contrast to an affirmative obligation, a negative obligation requires the owner of the burdened property to refrain from doing something. A common example of a negative obligation would be an agreement not to build, or not to compete. *See* Silverstein v. Shell Oil Co., 40 A.D.2d 34, 337 N.Y.S.2d 442 (1972) (covenant not to compete), *aff'd*, 33 N.Y.2d 950, 309 N.E.2d 131, 353 N.Y.S.2d 730 (1974); Romano v. Greenwald, 254 A.D. 782, 4 N.Y.S.2d 770 (1938) (covenant prohibiting erection of cow stable, pig pen, or other nuisance).

[40] The phrase "limits or restricts" denotes a burden which is negative in character. Other states have adopted similar language in conservation easement legislation to limit the scope of conservation easements to prohibitions on land use. *See* CONN. GEN. STAT. ANN. § 47-42-a(a) (West 1978) (" 'Conservation restriction' means a limitation, whether or not stated in the form of a restriction, easement, covenant or condition . . . ."); DEL. CODE ANN. tit. 7, § 6901(a) (Supp. 1984) (" 'Conservation easement' means a limitation stated in the form of a restriction, easement, covenant or condition . . . . Such easement may restrict, but not be limited to, the following [specified uses] . . . ."); MASS. ANN. LAWS ch. 184, § 31 (Michie/Law. Co-op. Supp. 1984) ("A conservation restriction means a right, either in perpetuity or for a specified number of years . . . to forbid or limit any or all [of the following specified uses] . . . ."); *see also* Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231, 241-47 (1976); Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 562-63 (1979).

Some states have adopted language expressly authorizing the imposition of both affirmative and negative obligations in conservation easements. *See* COLO. REV. STAT. § 38-30.5-102 (1982) (" 'Conservation easement in gross' . . . means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area . . . ."); IND. CODE ANN. § 32-5-2.6-1 (Burns Supp. 1984) (" 'Conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations . . . ."); N.H. REV. STAT. ANN. § 477:45(I) (1983) ("A conservation restriction shall mean a right to prohibit or require, a limitation upon, or an obligation to perform . . . ."); UTAH CODE ANN. § 63-18a-4 (1953) ("Any preservation easement may, with respect to the burdened land, entitle its owner to take certain action, to require certain action to be taken by the owner of the burdened land, or require that certain action not be taken by the owner of the burdened land . . . ."). *See generally* Note, *Affirmative Obligations in Historic Preservation Agreements*, 51 GEO. WASH. L. REV. 746 (1983).

An affirmative obligation, which requires the owner of the burdened property to perform certain specified acts, must be distinguished from an "affirmative easement," which entitles the holder of the easement to enter upon the servient tenement. *See supra* note 31. Prior to the enactment of the CES, the State of New York acquired affirmative easements in the form of public fishing, hiking, swimming, and boat-launching privileges as a less-costly alternative to fee acquisition by purchase or condemnation. *See* Letter from Langdon Marsh, Executive Deputy Commissioner of the New York State Department of Environmental Conservation, to Frank Murray, Program Associate of the Governor's Staff (July 20, 1983) (Department of Environmental Conservation acquired easements in about 15,745 acres of land before enactment of the CES, not including program easements for public fishing rights and access); *see also* Adirondack Mountain Reserve v. Board of Assessors, 99 A.D.2d 600, 471 N.Y.S.2d 703 (public

quent enforcement provision of the CES which provides that "[i]t is not a defense in any action to enforce a conservation easement that . . . [i]t imposes affirmative obligations . . . ."[41]

The statutory definition of conservation easement and the above enforcement provision are inconsistent. The apparent reason for this inconsistency is that the New York State Legislature adopted verbatim an entire section of the Uniform Conservation Easement Act (UCEA),[42] dealing with common law defenses to the enforcement of conservation easements, without adopting the corresponding definition of conservation easement.[43] The UCEA definition clearly autho-

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trail easement acquired by state in Adirondack Mountain region), *aff'd mem.*, 64 N.Y.2d 727 (1984). See *infra* note 191 for a more complete discussion of *Adirondack Mountain Reserve*. The CES was designed to encourage these activities. *See* N.Y. ENVTL. CONSERV. LAW § 49-0301 (McKinney Supp. 1984-1985) (providing in statement of legislative purpose that the CES was designed in part for the "maintenance, enhancement and improvement of recreational opportunities").

It is submitted that an affirmative easement "limits or restricts" the use of real property, and therefore falls within the definition of conservation easement, because the owner of the servient tenement is prohibited from, for example, erecting a fence across the right of way or otherwise unreasonably interfering with the exercise of the easement holder's privilege to enter upon the servient tenement. *See* Grafton v. Moir, 130 N.Y. 465, 471, 29 N.E. 974, 976 (1892) (stating that owner of servient tenement "shall not so contract the alley-way, either vertically or laterally, as to deprive the plaintiff of a reasonable and convenient use of the right of passing to and fro"); Rahabi v. Morrison, 81 A.D.2d 434, 438, 440 N.Y.S.2d 941, 945 (1981) ("[I]n alleging that the defendants have wrongfully interfered with his use and enjoyment of the land burdened by the easement by erecting a permanent chain link fence, the plaintiff has stated a good cause of action for an injunction.").

[41] N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(e) (McKinney Supp. 1984-1985).

[42] *Compare* UNIF. CONSERVATION EASEMENT ACT § 4(1)-(7), 12 U.L.A. 55, 60-61 (Supp. 1985) *with* N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(a)-(g) (McKinney Supp. 1984-1985). The legislative history indicates that portions of the CES were borrowed from the UCEA. *See* Letter from Russell L. Brenneman to Governor Mario M. Cuomo (Aug. 23, 1983) ("I served as co-reporter for the Uniform Conservation Easement Act . . . . Some of the language in the New York bill is quite obviously borrowed from the Uniform Act."); Letter from Frances Dunwell, Associate Director of Scenic Hudson Inc., to Ben Wiles, Assistant Counsel to the Governor (Oct. 14, 1983) ("[The language] is taken directly from the Uniform Conservation Easement Act . . . ."); Memorandum from Henry G. Williams, Commissioner of the New York State Department of Environmental Conservation, to Governor Mario M. Cuomo (1983) ("[The subject bill] is in substantive conformance with the Uniform Conservation Easement Act approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1981.") [hereinafter cited as Williams Memorandum].

[43] The UCEA defines conservation easement, in part, as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations." UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 55, 57 (Supp. 1985). The UCEA also provides that "[a] conservation easement is valid even though . . . it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder." *Id.* § 4(5), at 61. These provisions are consistent because the UCEA definition authorizes the imposition of affirmative obligations in conservation easements.

The New York State Legislature modified the UCEA's definition of conservation easement by deleting the reference to affirmative obligations, but neglected to modify the corresponding

rizes the imposition of affirmative obligations in conservation easements.[44] The above enforcement provision, therefore, which is an anomaly in the New York statute, makes sense in the context in which it appears in the UCEA.[45] The New York courts are thus faced with the choice of either stretching the definition of conservation easement to include affirmative obligations or reading the enforcement provision out of the statute.

If the New York courts determine that affirmative obligations are excepted from the definition of conservation easement, then the enforceability of an affirmative obligation to repair or maintain an historic structure, for example, would depend upon common law or other statutory provisions. New York belongs to a small minority of jurisdictions[46] which prohibit affirmative covenants from "running with the land," except in limited circumstances.[47] It is doubtful

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enforcement provision. The CES assumes the existence of a conservation easement in its treatment of common law defenses to the enforcement of conservation easements under N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney Supp. 1984-1985). It then provides that the imposition of an affirmative obligation in such a conservation easement is not a valid defense. *Id.* § 49-0305(5)(e). Section 49-0305(5)(e), therefore, is a nullity because a conservation easement may not impose affirmative obligations under the CES definition. *See supra* note 40 and accompanying text. Stated differently, the existence of an affirmative obligation may not provide a defense to the enforcement of a conservation easement because a recorded land use agreement imposing affirmative obligations is not a conservation easement, and has nothing to do with the CES.

[44] *See* UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 55, 57 (Supp. 1985). See also *id.* § 4 commissioner's comment, at 61, which provides:

> Achievement of conservation or preservation goals may require that affirmative obligations be incurred . . . . For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. . . . [B]oth interests [are treated] as easements and . . . neither would be unenforceable solely because it is affirmative in nature.

Id.

[45] *See supra* note 43.

[46] *See* Reno, *supra* note 21, § 9.16, at 386.

[47] The general rule in New York is that a covenant to do an affirmative act is regarded as a personal contract between the parties to the promise, and is not enforceable against successors to the estate of the promisor. *See Restrictive Covenants* § 3.03, in 4A WARREN'S WEED, NEW YORK LAW OF REAL PROPERTY (4th ed. 1977). This "narrow English rule," Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 256, 15 N.E.2d 793, 796 (1938), has been subject to numerous exceptions over the years. *See, e.g.*, Nicholson v. Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959) (covenant to furnish steam heat and maintain steam pipes); Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938) (covenant to pay sum of money); Mott v. Oppenheimer, 135 N.Y. 312, 31 N.E. 1097 (1892) (covenant to maintain party walls); Soundview Woods, Inc. v. Town of Mamaroneck, 14 Misc. 2d 866, 178 N.Y.S.2d 800 (Sup. Ct. 1958) (covenant to lay water pipes), *aff'd without opinion*, 9 A.D.2d 789, 193 N.Y.S.2d 1021 (1959). The rule, however, has not been abandoned.

whether, in the absence of statutory authority, a New York court would enforce a conservation easement that purports to impose affirmative obligations binding in perpetuity.[48]

3. The Public Purpose Limitation

The CES provides that conservation easements may be established for the purpose of preserving the "scenic, open, historic, archaeological, architectural, or natural condition" of real property [49] in a manner which is consistent with the CES' broad declaration of policy and statement of purpose.[50] The Legislature has attempted to limit the use of the conservation easement tool to certain properties, the preservation of which will yield some public benefit. This attempted public purpose limitation is of yet without substance because the CES does not establish objective criteria to determine, for example, whether a particular property is truly "scenic" or "historic," and therefore worthy of preservation.[51] As a practical matter, to the ex-

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[48] Most conservation easements will probably be of perpetual duration to qualify such easements for federal income tax benefits. *See infra* notes 118-22 and accompanying text. New York courts have been reluctant to permit affirmative covenants of perpetual duration to "run with the land." *See* Nicholson v. Broadway Realty Corp., 7 N.Y.2d 240, 246, 164 N.E.2d 832, 835, 196 N.Y.S.2d 945, 950 (1959). In *Nicholson*, the court pointed out that the covenant involved did not impose an "undue restriction on alienation or an onerous burden in perpetuity [because] . . . by its terms it may run with the land only as long as both buildings are standing and in use." *Id.* In Eagle Enters. v. Gross, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976), the court of appeals echoed the theme expressed by the court in *Nicholson*:

> The affirmative covenant is disfavored in the law because of the fear that this type of obligation imposes an "undue restriction on alienation or an onerous burden in perpetuity" . . . . [T]he covenant falls prey to the criticism that it creates a burden in perpetuity, and purports to bind all future owners, regardless of the use to which the land is put. Such a result militates strongly against its enforcement. On this ground also, we are of the opinion that the covenant should not be enforced as an exception to the general rule prohibiting the "running" of affirmative covenants.

Id. at 510, 349 N.E.2d at 820, 384 N.Y.S.2d at 720-21 (citation omitted) (quoting Nicholson v. Broadway Realty Corp., 7 N.Y.2d at 246, 164 N.E.2d at 835, 196 N.Y.S.2d at 950). Based on *Nicholson* and *Eagle Enterprises*, it is doubtful whether under New York common law a would-be conservation easement purporting to impose affirmative obligations binding in perpetuity would be enforceable against successors to the burdened property.

[49] *See* N.Y. ENVTL. CONSERV. LAW § 49-0303(1) (McKinney Supp. 1984-1985).

[50] *See id.* § 49-0301.

[51] Under the CES, eligible not-for-profit corporations may acquire conservation easements without governmental approval. *See id.* § 49-0305(3)(a); *see also infra* notes 59-63 and accompanying text (eligible donees under CES). For examples of states requiring governmental approval, compare DEL. CODE ANN. tit. 7, § 6904 (Supp. 1984) (providing that acquisition of conservation easement by charitable corporation or trust requires written certificate of acceptance from state agency); MASS. ANN. LAWS ch. 184, § 32 (Michie/Law. Co-op. Supp. 1984) (providing that acquisition of conservation or preservation restriction by charitable corporation or trust

tent that the donor of a conservation easement desires to receive federal income tax benefits, extensive Treasury Department regulations, which define, *inter alia*, "open space," "scenic," and "public benefit," will govern the permissible purposes for which a conservation easement may be established.[52]

B. Creation of Conservation Easements

A conservation easement is an interest in real property which must be embodied in a written instrument, in compliance with the New York General Obligations Law.[53] The duration of a conservation easement is presumed to be perpetual unless otherwise provided in the instrument.[54] The instrument creating a conservation easement must satisfy certain formal requirements[55] and must be duly recorded and indexed in the manner prescribed by the New York Real Property Law.[56] Unlike the treatment of common law interests in real property under the recording act, a conservation easement is without legal effect unless recorded.[57] Upon recordation, a copy of the conservation

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requires approval of local government and state agency); and MONT. CODE ANN. § 76-6-206 (1983) (providing that acquisition of conservation easement by private organization is subject to advisory review of local planning authority). The question of whether a particular building is historic, for example, and therefore eligible for statutory protection, is apparently left to the discretion of the recipient not-for-profit corporation. The CES authorizes the New York State Department of Environmental Conservation to promulgate regulations establishing "standards for conservation easements . . . appropriate to achieve the policy and purpose of this title." N.Y. ENVTL. CONSERV. LAW § 49-0305(7)(a) (McKinney Supp. 1984-1985). These forthcoming regulations may provide objective criteria to determine which properties should receive the extraordinary protection and potential real property tax benefits, *see infra* notes 158-94 and accompanying text, afforded by a conservation easement. An "historic" building or site, for example, could be defined in the state regulations as a building or site which is listed on the state register of historic places. *See* N.Y. PARKS & REC. LAW § 14.07 (McKinney 1984) (New York State Register); *see also* UTAH CODE ANN. § 63-18a-1 (1978).

[52] *See infra* notes 131-50 and accompanying text; *see also* N.Y. ENVTL. CONSERV. LAW § 49-0305(7)(a) (McKinney Supp. 1984-1985) (stating that forthcoming state regulations shall not "preclude taxpayers who own or convey conservation easements from qualifying for benefits under federal . . . tax laws").

[53] *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(1) (McKinney Supp. 1984-1985) (incorporating by reference N.Y. GEN. OBLIG. LAW § 5-703 (McKinney 1978) (statute of frauds)).

[54] *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(1) (McKinney Supp. 1984-1985).

[55] *See id.* § 49-0305(4) (McKinney 1984).

[56] *See id; see also* N.Y. REAL PROP. LAW § 291 (McKinney 1968) (recording act).

[57] The CES provides: "An instrument for the purpose of creating, conveying, modifying or terminating a conservation easement shall not be effective unless recorded." N.Y. ENVTL. CONSERV. LAW § 49-0305(4) (McKinney 1984). The quoted language suggests that an unrecorded conservation easement is void for all purposes, and therefore would be ineffective against a bad faith purchaser of the property subject to the unrecorded conservation easement. In contrast to an unrecorded conservation easement, the conveyance of a common law easement which is not

easement must be forwarded to the New York State Department of Environmental Conservation for record-keeping.[58]

A conservation easement may be donated either to a "public body" or a "not-for-profit conservation organization" (NPCO).[59] A NPCO is a not-for-profit corporation organized to promote the conservation or preservation of real property which qualifies as tax exempt under federal law.[60] The term "public body" includes the state,[61] a municipal corporation,[62] and the Palisades Interstate Park Commission.[63] Under existing law, counties, towns, cities, and villages may acquire what are essentially conservation easements under section 247 of the New York General Municipal Law.[64] A prospective donor of a conser-

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recorded is effective against a purchaser of the servient tenement with actual or inquiry notice of the easement. *See* Goldstein v. Hunter, 257 N.Y. 401, 405, 178 N.E. 675, 676 (1931) ("Good faith means also want of notice. If the defendants had had notice, actual or constructive, regarding the easement, their rights would be subordinate thereto."); 487 Elmwood, Inc. v. Hassett, 83 A.D.2d 409, 412, 445 N.Y.S.2d 336, 339 (1981) ("In the absence of recording . . . defendants would be subjected to liability if they had actual notice of plaintiff's claim of right." (citation omitted)).

[58] *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(4) (McKinney 1984).

[59] *See id.* § 49-0305(3)(a) (McKinney Supp. 1984-1985) (authorizing NPCOs and public bodies to hold conservation easements); *see also id.* 49-0303(2) (defining NPCO); *id.* § 49-0303(3) (defining public body).

[60] *See id.* § 49-0303(2) (incorporating by reference I.R.C. § 501(c)(3) (1982)); *see also* N.Y. NOT-FOR-PROFIT CORP. LAW § 102(a)(5) (McKinney 1970) (defining a not-for-profit corporation); *id.* § 201(b) (providing that a not-for-profit corporation may be established for a charitable or educational purpose); *id.* § 202(a)(4) (setting forth the power of a not-for-profit corporation to acquire by gift real property wherever situated); Mohonk Trust v. Board of Assessors, 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979) (holding that ownership of wilderness area by private trust for environmental and conservation purposes constituted "charitable" use entitled to tax exemption); cases cited *infra* note 162.

The activities of NPCOs in acquiring conservation easements are thus subject to supervision by the New York State Attorney General, *see* N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a)(1) (McKinney 1970), and the Internal Revenue Service, *see* I.R.C. § 503(a), (b) (1982).

[61] The term "state" is not defined in the New York Environmental Conservation Law, and the general definition provided in the New York General Construction Law is not helpful in determining which creatures of state government are included in such definition. *See* N.Y. GEN. CONSTR. LAW § 47 (McKinney 1951). The broad definition of "public body" in the original CES, *see* 1983 N.Y. Laws ch. 1020, § 2, was amended to exclude any "public benefit corporation, or any other agency or instrumentality of the state," *see* 1984 N.Y. Laws ch. 292, § 2 (McKinney). Therefore, such creatures should not now be eligible to acquire conservation easements under the state branch of the definition of public body. *Accord* 1975 Op. N.Y. Att'y Gen. 250 (stating that on analysis of legislative history, "state," as used in N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1973 & Supp. 1984-1985), does not include political subdivisions of New York State).

[62] The applicable definition of "municipal corporation" for purposes of the CES is limited to a county, town, city, or village. *See* N.Y. ENVTL. CONSERV. LAW § 49-0303(3) (McKinney Supp. 1984-1985) (incorporating by reference N.Y. GEN. MUN. LAW § 2 (McKinney 1977)).

[63] *See generally* N.Y. PARKS & REC. LAW §§ 9.01-.09 (McKinney 1984).

[64] N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1984-1985). Municipalities may acquire limited property interests in the nature of conservation easements to protect "open spaces" and "open areas." Section 247 interests are similar to conservation easements because

vation easement, therefore, may choose to contribute pursuant to the CES or section 247 when the anticipated donee is a municipality.[65]

C. *Enforcement of Conservation Easements*

Perhaps the primary purpose of the CES is to render conservation easements more durable than easements and covenants recognized at common law.[66] The CES eliminates various common law defenses to the enforcement of easements and covenants,[67] and makes conservation easements indefeasible by adverse possession, laches, estoppel or waiver, or any general law which does not expressly state an intent to defeat a conservation easement.[68]

An owner of restricted property who violates the terms of a conservation easement may be sued by the holder of the easement, the grantor, or a NPCO or public body designated in the instrument creating the easement as a third-party enforcer.[69] The CES authorizes

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first, the enforceability of § 247 interests is not subject to common law defenses, *id.* § 247(4) (McKinney Supp. 1984-1985) ("Such enforceability shall not be defeated because of . . . any rule of common law."); *see also* Letters contained in Legislative Bill Jacket, 1977 N.Y. Laws ch. 964, including Letter from Mario M. Cuomo, New York Secretary of State, to Judah Gribetz, Counsel to the Governor (July 1, 1977) ("This bill would prevent covenants, easements or development rights from being defeated because of lack of privity of estate, or the absence of a dominant tenement."), and second, because the § 247 interest must be taken into account in determining market value for purposes of real property tax assessment, *see* N.Y. GEN. MUN. LAW § 247(3) (McKinney 1974); *see also* 1 N.Y. STATE BD. OF EQUALIZATION & ASSESSMENT 112 (Op. Counsel 1972).

Although a municipality may opt to acquire what might loosely be described as a conservation easement under § 247, the CES and § 247 do not entirely overlap. Section 247's references to "open spaces" and "open areas" are limited to land; § 247 interests may not be utilized to protect buildings or other man-made resources. *See* N.Y. GEN. MUN. LAW § 247(2) (McKinney 1974) ("[A]ny county . . . may acquire . . . the fee or any lesser interest . . . *to land within such municipality.*" (emphasis added)); *see also* Governor's Memorandum on Approval of 1960 N.Y. Laws ch. 945, *reprinted in* [1960] N.Y. LEGIS. ANN. 564 ("Under the bill it will be possible for a municipality to acquire an easement, without buying the land, which will protect the land from development and assure its later availability for recreational and other natural use."). Moreover, § 247 interests are not presumed to be of perpetual duration, *see* Op. N.Y. Comp. 79-275 (1979) (unpublished), and may be sold by the municipality to a private developer. *See* Devitt v. Heimbach, 109 Misc. 2d 463, 440 N.Y.S.2d 465 (Sup. Ct. 1981). A public hearing after due notice is required for a municipality to acquire a § 247 interest by purchase, gift or otherwise. *See* N.Y. GEN. MUN. LAW § 247(2) (McKinney 1974).

[65] *See supra* note 64.

[66] *See infra* note 87 and accompanying text.

[67] *See supra* notes 27-37 and accompanying text.

[68] N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney Supp. 1984-1985).

[69] *See id.* The concept of third-party enforcement rights was adopted from the UCEA. *See* UNIF. CONSERVATION EASEMENT ACT § 1(3), 12 U.L.A. 55, 57 (Supp. 1985). The designation of a third-party enforcer provides a check on the holder to guarantee that such holder will continue to abide by the grantor's intentions over succeeding generations. As stated in the comment to

redress in the form of injunctive relief and monetary damages.[70] The CES confers standing on the remote grantor of a conservation easement, who may no longer own an interest in the restricted property, to bring a lawsuit years after the initial grant to the possible vexation of the current owner and the holder of the conservation easement.[71]

D. Extinguishment of Conservation Easements

In general, conservation easements may be modified or extinguished in accordance with a provision included in the creating instrument,[72] in an action to quiet title pursuant to section 1951 of the New York Real Property Actions and Proceedings Law,[73] or by the

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the UCEA:

> Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement . . . . Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc. . . . the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act.

Id. § 1 commissioner's comment at 58.

[70] The CES provides that "[a] conservation easement may be enforced in law or equity." N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney Supp. 1984-1985). Because conservation easements impose restrictive burdens, *see supra* notes 38-48 and accompanying text, the remedy most commonly sought for breach of a conservation easement would probably be an injunction to restrain the owner of the restricted property from engaging in proscribed activities. The holder of the conservation easement, however, might also seek monetary damages, for example, to pay for repair of the facade of an historic building which had been altered in violation of the terms of a conservation easement.

[71] *See* N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney Supp. 1984-1985). A proposed amendment to the CES, which was omitted from the final version of the successful 1984 amendments, sought to delete the provision conferring standing on the "grantor," and to limit standing to the holder, a designated third-party enforcer, and "an owner of an interest in the real property burdened by the easement." N.Y.S. 7183, 207th Sess. (1984). This proposed amendment would have prohibited the remote grantor, who no longer owns an interest in the restricted property, from enforcing the terms of a conservation easement.

[72] *See* N.Y. ENVTL. CONSERV. LAW § 49-0307(1)(a), (2)(a), (3)(a) (McKinney Supp. 1984-1985). In the case of NPCO-held conservation easements, the parties might include language in the instrument creating the easement providing for the modification or extinguishment of the easement under certain circumstances, or omit such language entirely, as they see fit. In the case of conservation easements held by public bodies, the instrument creating the easement must include language, consistent with forthcoming state regulations, providing for the modification of such conservation easements when the burdened land is required for public utility or cable television services. *Id.* § 49-0305(7)(b). In either case, an overbroad extinguishment provision might render the conservation easement nondeductible for federal income tax purposes. *See infra* notes 151-57 and accompanying text.

[73] *See* N.Y. ENVTL. CONSERV. LAW § 49-0307(1)(b), (2)(b), (3)(c) (McKinney Supp. 1984-1985) (incorporating by reference N.Y. REAL PROP. ACTS. LAW § 1951 (McKinney 1979 & Supp. 1984-1985)). A "nonsubstantial" restriction on the use of land may be extinguished in New York if

exercise of the power of eminent domain.[74] In the case of a conservation easement held by the state in lands situated in the Adirondack or Catskill Parks,[75] the action to quiet title option is supplanted by a special hearing conducted by the New York State Department of Environmental Conservation.[76] Various provisions of the CES authorize the modification or extinguishment of conservation easements when the burdened land is required for utility transmission or generating facilities.[77]

State-held conservation easements are automatically extinguished[78] if a court of competent jurisdiction determines that such easements constitute "lands of the state" protected by the celebrated "forever wild" clause of the New York State Constitution.[79] The forever wild clause provides that the wild forest character of certain state-owned

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the court determines that the restriction is of "no actual and substantial benefit to the persons seeking its enforcement." N.Y. REAL PROP. ACTS. LAW § 1951(2) (McKinney 1979). *See generally* Board of Educ. v. Doe, 88 A.D.2d 108, 452 N.Y.S.2d 964 (1982); Orange & Rockland Utils. v. Philwold Estates, Inc., 70 A.D.2d 338, 421 N.Y.S.2d 640, *aff'd*, 52 N.Y.2d 253, 418 N.E.2d 1310, 437 N.Y.S.2d 291 (1981). In the case of a conservation easement, the "persons seeking its enforcement" might include the remote grantor of the easement, a third-party enforcer, or the holder of a conservation easement in gross, *see supra* notes 69-71 and accompanying text, none of whom own adjoining property. The courts may experience difficulty in applying the substantial benefit requirement of § 1951 to the conservation easement, the primary purpose of which is the production of public benefit. *See supra* notes 49-52 and accompanying text.

[74] *See* N.Y. ENVTL. CONSERV. LAW § 49-0307(1)(c), (2)(c), (3)(b) (McKinney Supp. 1984-1985).

[75] For a brief description of the Adirondack and Catskill Parks, see *infra* note 80.

[76] *See* N.Y. ENVTL. CONSERV. LAW § 49-0307(3)(d) (McKinney Supp. 1984-1985). Under the original version of the CES, 1983 N.Y. Laws ch. 1020, § 2, conservation easements held by public bodies in lands situated in the Adirondack or Catskill Park could be modified or extinguished only upon a determination by the New York State Department of Environmental Conservation at a special hearing, and approval of such determination by the Legislature. *Id.*

[77] *See* N.Y. ENVTL. CONSERV. LAW § 49-0307(2)(d), (3)(e) (McKinney Supp. 1984-1985).

[78] *See id.* § 49-0311. Section 49-0311 provides:

> [I]f a conservation easement created pursuant to this title is determined by any court of competent jurisdiction to be land or water or an interest in land or water subject to the provisions of article fourteen of the constitution then the authority of the state to hold or acquire such easement and the conveyance to the state of such easement shall be *void ab initio*.

Id. (emphasis added). A property interest deemed "void ab initio" means an interest which is void from the beginning, as if such interest never existed. *See* New York & Long Island Bridge Co. v. Smith, 148 N.Y. 540, 547, 42 N.E. 1088, 1089 (1896) ("The word 'void' is often used in an unlimited sense, implying an act of no effect, a nullity *ab initio* . . . ." (emphasis in original)).

[79] N.Y. CONST. art. XIV, § 1. Article XIV, § 1 provides:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

Id.

lands situated in the forest preserve counties[80] must be scrupulously protected from commercial exploitation.[81] The critical question of

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[80] The forest preserve consists of state-owned lands situated within 16 designated forest preserve counties. *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) (McKinney 1984). Excluded from this definition are any lands situated within the limits of any village or city, lands that are not wild and not situated within the Adirondack or Catskill Park, and certain lands acquired by the environmental conservation department under other provisions of the Environmental Conservation Law. *Id. See generally* Comment, *Permissible Uses of New York's Forest Preserve Under 'Forever Wild,'* 19 SYRACUSE L. REV. 969, 971-73 (1968). As stated by the court in Helms v. Reid, 90 Misc. 2d 583, 394 N.Y.S.2d 987 (Sup. Ct. 1977):

> The forest preserve which includes land within both the Adirondack and Catskill regions in 16 different counties designated by the Environmental Conservation Law, actually only consists of the State-owned land within these counties which is wild. The forest preserve does not consist of solid blocks of State-owned land, but rather resembles a "quilt" or "patchwork" pattern of private holdings intermixed with forest preserve lands.

Id. at 590, 394 N.Y.S.2d at 994.

The Adirondack and Catskill Parks are two geographical areas carved out of the center of the forest preserve. *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(1), (2) (McKinney 1984). The boundaries that define the perimeter of the two parks are commonly referred to as the "blue line" because official maps of the region have for some time outlined the parks with a blue dotted line. Comment, *supra*, at 973.

[81] The magnitude of the protection afforded by the forever wild clause is illustrated by the case of Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 170 N.E. 902, *aff'g* 228 A.D. 73, 239 N.Y.S. 31 (1930). In *MacDonald*, the Legislature authorized the conservation department to construct a bobsled run on forest preserve land near Lake Placid for use during the 1932 Winter Olympic Games. *See* 1929 N.Y. Laws ch. 417. In holding the act unconstitutional, a unanimous court of appeals stated:

> However tempting it may be to yield to the seductive influences of outdoor sports and international contests, we must not overlook the fact that constitutional provisions cannot always adjust themselves to the nice relationships of life. The framers of the Constitution . . . intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting down of these trees to any substantial extent for any purpose.

253 N.Y. at 241-42, 170 N.E. at 905. *See also* Helms v. Reid, 90 Misc. 2d 583, 590, 394 N.Y.S.2d 987, 994 (Sup. Ct. 1977) ("Historically, the forest preserve was given constitutional protection to bring a halt to the commercial exploitation of the State's forest preserve, and presumably, to protect them for use by all of the people of the State."). In expounding the meaning of the phrase "forever kept as wild forest lands," the lower court in *MacDonald* stated:

> We must preserve it in its wild nature, its trees, its rocks, its streams. It was to be a great resort for the free use of all the prople [sic], but it was made a wild resort in which nature is given free rein. Its uses for health and pleasure must not be inconsistent with its preservation as forest lands in a wild state. It must always retain the character of a wilderness.

228 A.D. at 81-82, 239 N.Y.S. at 40. Even under the strict interpretation of the forever wild clause in *MacDonald*, certain reasonable uses of forest preserve lands are not constitutionally proscribed. As stated by the court of appeals: "The Forest Preserve and the Adirondack Park within it are for the reasonable use and benefit of the public . . . . A very considerable use may be made by campers and others without in any way interfering with this purpose of preserving them as wild forest lands." 253 N.Y. at 240-41, 170 N.E. at 905 (citation omitted). *See also* Helms v. Reid, 90 Misc. 2d at 606, 394 N.Y.S.2d at 1004 (holding Adirondack Park Land Use and Development Plan, regulating permissible uses of forest preserve, not violative of forever wild clause).

whether a conservation easement constitutes "lands" for purposes of the forever wild clause is unresolved.[82]

The draconian automatic extinguishment provision[83] was added in the 1984 amendments to the CES.[84] The automatic extinguishment provision was designed as a concession to utility interests concerned that the possible extension of forever wild protection to conservation

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[82] The definition of "land" found in other New York statutes encompasses an incorporeal hereditament such as the common law easement. *See* N.Y. GEN. CONSTR. LAW § 40 (McKinney 1951); N.Y. REAL PROP. LAW § 2 (McKinney Supp. 1984-1985); *see also In re* City of New York, 304 N.Y. 215, 223, 106 N.E.2d 897, 900-01 (1952) ("Such estate is an incorporeal hereditament, in the nature of an easement . . . . This incorporeal hereditament is of course an interest in land constituting real property." (citations omitted)). The only reported case regarding whether an easement constitutes "lands" for purposes of the forever wild clause is New York State Conservation Council, Inc. v. Diamond, 74 Misc. 2d 513, 345 N.Y.S.2d 291 (Sup. Ct. 1973). In *Diamond*, the state owned an appurtenant easement of ingress and egress over Overlook Mountain Road, situated in the forest preserve, upon which the state allegedly permitted an obstruction to be erected. *Id.* at 514-15, 345 N.Y.S.2d at 293. The petitioner alleged that the easement constituted land subject to the forever wild clause, and therefore, the state owed petitioner certain duties with respect to the use of such land. *Id.* In holding that the ownership of a common law appurtenant easement in the forest preserve is constitutionally different from the ownership of "land," the court stated:

> This provision . . . relied upon by petitioners dealing with the care, custody and control of the forest preserve, refers to lands now owned, or the ownership of which may hereafter be acquired, and not to lands over which the State has merely an easement. The State has only a limited interest in the road in question.

Id. at 515, 345 N.Y.S.2d at 293-94. Whether *Diamond* may be cited for the proposition that conservation easements do not constitute "lands" for purposes of the forever wild clause is doubtful. In contrast to the common law easement of ingress and egress involved in *Diamond*, the terms of a given conservation easement might impose drastic restrictions on land use which amount to more than only a "limited interest" in the burdened land. It is interesting to note that the CES includes conservation easements in its definition of "state lands" for purposes of real property tax assessment. *See* N.Y. REAL PROP. TAX LAW § 530(2) (McKinney 1984).

[83] The automatic extinguishment provision may have harmful federal income tax consequences for donors of conservation easements. *See infra* note 157 and accompanying text.

[84] After signing the 1983 version of the CES, *see* 1983 N.Y. Laws ch. 1020, Governor Cuomo stated:

> My enthusiasm for the bill is tempered by the concern which many have expressed that this bill could delay the construction of the Marcy South transmission line. This project is a key element in our strategy to meet the State's energy requirements and any unnecessary delay in its construction would be a serious concern to me.
>
> . . . I hope to work with the sponsors of this bill and with others in the future to develop adequate language to guarantee that conservation easements held by the State may be modified or extinguished under appropriate circumstances.

Governor's Memorandum on Approval of 1983 N.Y. Laws ch. 1020 (Dec. 31, 1983), *reprinted in* [1983] N.Y. LEGIS. ANN. 424. The "adequate language" mentioned by the Governor came in the form of a 1984 program bill, which added the automatic extinguishment provision to the CES. *See* 1984 N.Y. Laws ch. 292, § 6 (McKinney); Memorandum of Legislative Representative of City of New York, *reprinted in* 1984 N.Y. Laws ch. 292, at A-605 (McKinney) ("By modifying the procedure to extinguish or modify . . . conservation easements, the possibility would be lessened that such easements could be used to obstruct or substantially delay the construction of important projects such as the Marcy South [electric transmission] line.").

easements would hinder plans to route transmission lines through the forest preserve counties.[85]

II. Federal Income Taxation

The elaborate framework of provisions in the CES that ensure the enforceability of conservation easements notwithstanding certain common law defenses[86] was designed, at least in part, as a response to existing federal income tax law.[87] Federal income tax law recognizes as charitable contribution deductions only conservation easements "protected in perpetuity"[88] under state law.[89] The CES en-

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[85] *See supra* note 84.

[86] *See supra* notes 27-37 & 66-68 and accompanying text.

[87] The CES authorizes the New York State Department of Environmental Conservation to promulgate regulations establishing standards for conservation easements. *See* N.Y. Envtl. Conserv. Law § 49-0305(7)(a) (McKinney Supp. 1984-1985). Section 49-0305(7)(a) expressly states: "[S]uch standards shall not preclude taxpayers who own or convey conservation easements from qualifying for benefits under federal . . . tax laws . . . ." *Id.* The legislative history indicates that the CES was designed in part to bring New York real property law into conformity with the requirements for obtaining the federal income tax deduction for charitable contributions of conservation easements. *See, e.g.*, Letter from Frances Dunwell, Associate Director of Scenic Hudson Inc., to Henry Williams, Commissioner of the New York State Department of Environmental Conservation (July 28, 1983) ("[The CES] would allow New York to take advantage of federal support, through the income tax deduction, for the preservation of farmland, habitat for endangered species, scenic vistas along highways, and the restoration of historic houses."); Legislation Report from David S. Sampson, Chairperson, Environmental Law Section of the Committee on Historic Preservation, New York State Bar Association (June 23, 1983) ("This legislation brings New York State into conformity with federal tax regulations in that it recognizes that partial easements of land may be transferred in perpetuity, even if they are given in gross."); Williams Memorandum, *supra* note 42 ("[I]n New York easements are only enforceable in perpetuity if they are appurtenant . . . . [F]ederal tax incentives are available in New York only for appurtenant easements, thus eliminating many appropriate uses.").

[88] I.R.C. § 170(h)(5)(A) (1982). *See also id.* § 170(h)(2)(C); *infra* notes 151-57.

[89] Whether a conservation easement is "protected in perpetuity" for federal income tax purposes depends upon whether the law of the state in which the property is situated recognizes the validity, value, and enforceability of conservation easements. Hambrick, *Charitable Donations of Conservation Easements: Valuation, Enforcement and Public Benefit*, 59 Taxes 347, 350 (1981). *See also* 48 Fed. Reg. 22,942 (1983) (to be codified at Treas. Reg. § 1.170A-13(b)(3)) (proposed May 23, 1983) ("A 'perpetual conservation restriction' is a restriction granted in perpetuity on the use which may be made of real property — including an easement or other interest in real property that under state law has attributes similar to an easement . . . ."); Rev. Rul. 75-358, 1975-2 C.B. 76, 77 ("[U]nder the law of the state in which the property is located, a restriction or scenic easement is a valuable property right or interest in favor of the party for whose benefit the easement is created and is enforceable by that party."); National Office Technical Advice Memorandum No. 8032013 (Apr. 14, 1980) ("Under the law of the state in which the property is located, the easement must be a valuable property right or interest in favor of the party for whose benefit the easement is created and must be enforceable by that party.").

ables New Yorkers to obtain the favorable federal income and other tax consequences[90] which may result from the donation[91] of conservation easements. This section will consider first the federal income tax benefits obtainable by making a charitable contribution of a conservation easement, and then the requirements to qualify a conservation easement created pursuant to the CES as a charitable contribution under section 170(h) of the Internal Revenue Code (Code)[92] and its interpretive regulations, proposed by the United States Treasury Department on May 23, 1983.[93]

A. Tax Benefits Under Section 170

The donation of a conservation easement, which qualifies as a charitable contribution deduction,[94] may produce significant federal income tax savings for persons of substantial income.[95] The amount of the charitable contribution is the fair market value of the conservation easement,[96] which must be reduced in the case of appreciated

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[90] The potentially favorable federal and state estate and gift tax consequences resulting from the donation of conservation easements are beyond the scope of this Comment.

[91] Although this Comment focuses on the donation of conservation easements, the discussion would be equally applicable to so-called "bargain sales" of conservation easements to charitable organizations. *See generally* Elliott, Schneider & Weizmann, *Charitable Contributions — General Rules*, 281-2d TAX MGMT. (BNA) A-26 (1981); Moore, *Outright Charitable Giving: Sophisticated Use of Old Techniques and Development of New Techniques*, in NEW YORK UNIVERSITY FORTY-SECOND ANNUAL INSTITUTE ON FEDERAL TAXATION § 27.02 (S. Goldberg ed. 1984).

[92] I.R.C. § 170(h) (1982).

[93] 48 Fed. Reg. 22,940 (1983) (to be codified at Treas. Reg. § 1.170A-13).

[94] *See infra* notes 117-57 and accompanying text.

[95] Several provisions of the tax law make the charitable contribution deduction less beneficial for persons of modest income. *See* Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 146 (1983). Commentator Madden states:

> The upside-down effect of deductions means the government effectively pays a larger subsidy to higher bracket taxpayers for their charitable contributions. The deduction is meaningless to a taxpayer whose income is so low that he or she may fall outside the tax system. . . . The charitable deduction [also] "misses" a class of taxpayers who have land to donate, but not enough income to take advantage of the deduction.

Id. (footnotes omitted).

[96] *See* Treas. Reg. § 1.170A-1(c)(1) (1982); *id.* § 1.170A-7(c) (1972); *see also* 48 Fed. Reg. 22,947 (to be codified at Treas. Reg., § 1.170A-13(h)(3)(i)) ("The value of the contribution under section 170 in the case of a charitable contribution of a perpetual conservation restriction is the fair market value . . . at the time of the contribution."). Fair market value is defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the facts." Treas. Reg. § 1.170A-1(c)(2).

In general, the fair market value of a conservation easement equals the difference between the pre-easement fair market value of the unencumbered property and the post-easement fair

"ordinary income property"[97] or other appreciated property which

market value. *See* 48 Fed. Reg. 22,947 (to be codified at Treas. Reg. § 1.170A-13(h)(3)); Rev. Rul. 76-376, 1976-2 C.B. 53; Rev. Rul. 73-339, 1973-2 C.B. 68. The proposed regulations provide that the pre-easement value must take into account the current use of the property and also an "objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use." 48 Fed. Reg. 22,947 (to be codified at Treas. Reg. § 1.170A-13(h)(3)(ii)). For example, the valuation of a farm, subject to a conservation easement prohibiting residential development, might take into account the development potential of the farm provided that the subject property was zoned for residential use, the topography of the land and the available services could accommodate a residential development, and a viable market for new residences existed in the area. *See* Great N. Nekoosa Corp. v. United States, 544 F. Supp. 511 (D. Me. 1982), *aff'd*, 711 F.2d 473 (1st Cir. 1983); Thayer v. Commissioner, 36 T.C.M. (CCH) 1504 (1977).

The proposed regulations provide that the amount of the charitable contribution must be reduced to the extent that the conservation easement increases the fair market value of contiguous land owned by the donor or his family. *See* 48 Fed. Reg. 22,947-48 (to be codified at Treas. Reg. § 1.170A-13(h)(3)(i), (h)(4) (example 11)); *see also* Rev. Rul. 76-376, 1976-2 C.B. 53. Although the effect of the conservation easement on the value of contiguous land may reduce the amount of the contribution, the contrary proposition is not true, and the extent to which the value of contiguous land owned by the donor is decreased does not affect the amount of the charitable contribution. *See* Drey v. United States, 535 F. Supp. 287 (E.D. Mo. 1982), *aff'd per curiam*, 705 F.2d 965 (8th Cir.), *cert. denied*, 104 S. Ct. 99 (1983).

The valuation of conservation easements is essentially a job for the professional appraiser. The lawyer who disregards the appraisal process, however, may subject his client to serious penalties for valuation over-estimates. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 155(c), 98 Stat. 494, 693 (1984) (to be codified at I.R.C. § 6659 (c), (f)) (penalty imposed when valuation over-estimate exceeds 150% of correct valuation); *cf. GAO Analyzes Historic Preservation Tax Incentives*, 23 Tax Notes 329, 330 (1984) ("IRS data shows that taxpayers generally overvalued their conservation easement deductions by an average of about 220 percent."). For a more complete discussion of the valuation of conservation easements, see T. Coughlin, *supra* note 1; Hambrick, *supra* note 89, at 351-53; Madden, *supra* note 95, at 137-43; and Reynolds, *Preservation Easements*, 44 Appraisal J. 355 (1976).

[97] Section 170(e) of the Code requires a reduction from fair market value in calculating the amount of the charitable contribution for certain gifts of appreciated property. I.R.C. § 170(e) (1982). The purpose of § 170(e) is to discourage donors from escaping income taxation by making gifts of appreciated property rather than cash. Elliott, Schneider & Weizmann, *supra* note 91, at A-36.

The reduction rules of § 170(e) apply to "ordinary income property." The term "ordinary income property" includes property which would not qualify as a capital asset under I.R.C. § 1221 (1982) and capital assets which have not been held for a sufficient period to yield long-term capital gain if such assets were sold. *See* Treas. Reg. § 1.170A-4(b)(1) (1982); *see also id.* § 1.170A-4(b)(4) (providing that trade or business property, defined under I.R.C. § 1231(b) (1982), shall be treated as a capital asset for purposes of determining ordinary income property). The amount of any charitable contribution of ordinary income property is limited to the taxpayer's basis in the property. *See* I.R.C. § 170(e)(1)(A); *see also* Elliott, Schneider & Weizmann, *supra* note 91, at A-37.

To calculate the extent to which a charitable contribution of ordinary income property must be reduced in the case of a conservation easement, the donor's adjusted basis in the subject property before imposition of the conservation easement must be allocated between the conservation easement contributed and the encumbered property retained by the donor. *See* I.R.C. § 170(e)(2); Treas. Reg. § 1.170A-4(c)(1). The following formula is to be used in determining this allocation:

the taxpayer elects to have treated as ordinary income property.[98] Generally, the maximum charitable deduction allowable in the year in which a contribution is made is limited to fifty percent of the donor's adjusted gross income.[99] To the extent that the amount of a

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The adjusted basis of the contributed portion of the property shall be that portion of the adjusted basis of the entire property which bears the same ratio to the total adjusted basis as the fair market value of the contributed portion of the property bears to the fair market value of the entire property.

Id. § 1.170A-4(c)(1)(ii). As an illustration of this basis allocation, assume that D owns ordinary income property with a fair market value of $80,000 and an adjusted basis of $20,000. If D donates a conservation easement in such property worth $60,000, the amount of basis allocable to the easement is $15,000. *See* 48 Fed. Reg. 22,948 (to be codified at Treas. Reg. § 1.170A-13(h)(4) (example 10)). The amount of D's charitable contribution, then, must be reduced from its fair market value of $60,000 by subtracting the $45,000 of appreciation attributable to the conservation easement. After applying the reduction rules of § 170(e), the amount of D's charitable contribution is $15,000.

[98] The donor of a charitable contribution of "capital gain property" may elect to have such property treated as ordinary income property subject to the reduction rules of I.R.C. § 170(e) (1982). *See* I.R.C. § 170(b)(1)(C)(iii) (1982); *supra* note 97 (setting forth definition of ordinary income property); *infra* note 99 (discussing rationale for making election, based on percentage limitations applicable to capital gain property). "Capital gain property" means any capital asset (including trade or business property defined under I.R.C. § 1231(b) (1982)), the sale of which at its fair market value would have resulted in long-term capital gain. I.R.C. § 170(b)(1)(C)(iv); *see also* Treas. Reg. § 1.170A-4(b)(2) (1982).

If an election is made, the amount of the charitable contribution must be reduced by 40% of the amount of gain which would have been long-term capital gain if the contributed property had been sold at its fair market value. *See* I.R.C. § 170(e)(1)(B) (1982); Treas. Reg. § 1.170A-4(a)(2); *id.* § 1.170A-8(d)(2) (1972). In the case of a conservation easement in capital gain property, the amount of the charitable contribution should thus be reduced by 40% of the appreciation attributable to the conservation easment. *See also supra* note 97 (basis allocation).

[99] The charitable contribution is limited to a percentage of the donor's adjusted gross income (AGI). "AGI" is used throughout this Comment as a shorthand expression for the term "contribution base," which is defined in the Code as the donor's adjusted gross income without regard to any net operating loss carryback under § 172 of the Code. *See* I.R.C. § 170(b)(1)(E) (1982) (incorporating by reference I.R.C. § 172 (1982)).

At the risk of oversimplifying this complex area, the percentage limitations for charitable contributions are as follows: (1) a general 50% limitation applies to contributions to governmental units and "publicly-supported charities," *see* I.R.C. § 170(b)(1)(A); *see also* Jackson & Muller, *Charitable Contributions — Percentage Limitations*, 292-2d TAX MGMT. (BNA) A-2 to -10 (1981); (2) a special 20% limitation applies to contributions to "semi-public" and "private charities" and contributions for the use of any charitable organization, *see* I.R.C. § 170(b)(1)(B); Jackson & Muller, *supra; see also* Rockefeller v. Commissioner, 676 F.2d 35, 40 (2d Cir. 1982) ("Congress has intended the words 'for the use of' to mean roughly the equivalent of 'in trust for.' "); Treas. Reg. § 1.170A-8(a)(2) (1972) (stating that contribution "for the use of" generally means contribution in trust for donee); and (3) a special 30% limitation applies to contributions of capital gain property, *see* I.R.C. § 170(b)(1)(C); Treas. Reg. § 1.170A-8(d); *supra* note 98 (setting forth definition of capital gain property).

The taxpayer may elect to apply the 50% limitation to capital gain property in lieu of the 30% limitation. *See* I.R.C. § 170(b)(1)(C)(iii). If such an election is made, the reduction rules of § 170(e) apply to reduce the amount of the contribution by a portion of its appreciation. *See supra* note 97. To illustrate the application of this election provision, if a taxpayer made a charitable contribution of a capital asset with a basis of $10,000 and a fair market value of

charitable contribution exceeds the fifty percent limitation, such excess amount may be carried forward and deducted in five succeeding tax years.[100] The basis of the property retained by the donor must be adjusted to reflect that portion of the total basis which is allocable to the conservation easement.[101]

$10,001, the 30% limitation rule would be triggered because the property would give rise to a long-term capital gain if sold. If the taxpayer's AGI were $25,000, the amount of his deduction would be limited to $7,500 ($25,000 x 30%) in the year of the gift. If the § 170(b)(1)(C)(iii) election were made, however, the full amount of the contribution could be deducted (less a portion of the $1 appreciation) under the 50% limitation. *See* D. POSIN, FEDERAL INCOME TAXATION OF INDIVIDUALS 365-66 (1983). For a more complete discussion, see Elliott, Schneider & Weizmann, *supra* note 91, at A-40; Misiewicz, *A Systematic Approach to Factors Determining the Amount of A Charitable Contribution Deduction*, 59 TAXES 335 (1981).

This brief overview of percentage limitations illustrates the basic operation of the Code, but does not reflect those changes made by the Tax Reform Act of 1984. *See* Pub. L. No. 98-369, § 301(a)(1), 98 Stat. 494, 777 (1984) (to be codified at I.R.C. § 170(b)(1)(B)(i)) (increasing percentage limitation for certain contributions to private nonoperating foundations from 20% to 30%). *See generally* McCoy, *Modification to the Charitable Contribution Deduction Rules*, in THE TAX REFORM ACT OF 1984, at A-19 to -26 (BNA Portfolio No. 984, 1984).

[100] *See* I.R.C. § 170(d) (1982); Treas. Reg. § 1.170A-10 (1975). Contributions of "capital gain property" subject to a 30% limitation may also be carried over. *See* I.R.C. § 170(b)(1)(C)(ii) (1982); *see also* Jackson & Muller, *supra* note 99, at A-2; Misiewicz, *supra* note 99, at 338-40; *supra* note 99. The Tax Reform Act of 1984 extends the five-year carryover to contributions to private nonoperating foundations. *See* Pub. L. No. 98-369, § 301(a)(2), 98 Stat. 494, 777 (1984) (to be codified at I.R.C. § 170(b)(1)(B)). *See generally* McCoy, *supra* note 99.

To illustrate, assume a charitable contribution of 30% capital gain property worth $80,000 was made to a "publicly-supported charity." If the donor's annual AGI, *see supra* note 99, was $40,000, the amount of the deduction in the year of the gift would be $12,000 ($40,000 x 30%). The excess contribution of $68,000 could be deducted in $12,000 installments for five succeeding tax years for a total allowable deduction of $72,000.

[101] *See* I.R.C. § 170(e)(2) (1982); Treas. Reg. § 1.170A-4(c) (1982); *see also* Rev. Rul. 64-205, 1964-2 C.B. 62, 63 ("The basis of the taxpayer's property . . . must be adjusted by eliminating that part of the total basis which is properly allocable to the restrictive easement granted."). The proposed regulations provide that "the basis of the property retained by the donor must be adjusted by the elimination of that part of the total basis of the property that is properly allocable to the qualified real property interest granted." 48 Fed. Reg. 22,947 (to be codified at Treas. Reg. § 1.170A-13(h)(3)(iii)). *See also supra* note 97 (illustrating basis allocation).

Because of the necessity for basis allocation, tax savings may be obtained by waiting until the restricted property is fully depreciated before making a conservation easement deduction. *See* Coughlin, *Preservation Easements: Statutory and Tax Planning Issues*, 1 PRESERVATION L. REP. 2011 (1982). Commentator Coughlin states:

> For owners of depreciable property, there may be some advantage in making an easement donation after the building has been fully depreciated. Because basis must be allocated to the easement, the depreciable basis of a partially depreciated structure must be reduced incident to the donation. This reduces income tax deductions in later years in exchange for a current charitable contribution deduction for the value of the easement. By contrast, if the easement is donated after a building has been fully depreciated, the taxpayer receives what amounts to a second round of tax deductions: a charitable contribution deduction for the value of the easement on an asset whose utility as a tax shelter has been otherwise largely exhausted. Because the Code does not recognize "negative basis," the reduction in basis attributable to a charitable gift of an easement over fully

B. *How to Qualify a Conservation Easement for a Charitable Contribution Deduction Under Section 170(h)*

1. A Brief History[102]

The deductibility of a charitable contribution of a conservation easement was first recognized by the Internal Revenue Service in a 1964 revenue ruling.[103] This quiet beginning was almost abruptly ended by the Tax Reform Act of 1969,[104] which disallowed under section 170(f) charitable contributions of "partial interests" not in trust.[105] The charitable contribution deduction for conservation easements was disallowed because conservation easements were considered "partial interests."[106] In 1972, the Treasury Department promulgated a regulation which excepted from the partial interest rule a charitable contribution of "an open space easement in gross in perpetuity."[107] The 1972 regulation thus permitted a charitable con-

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depreciated property will not be recognized or taxed on disposal.
Id. at 2016 (footnotes omitted).

[102] For a complete analysis of the history of charitable contribution deductions for conservation easements under federal income tax law, see Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69 (1975); Hambrick, *supra* note 89; Kliman, *supra* note 2; Small, *supra* note 2.

[103] In Rev. Rul. 64-205, 1964-2 C.B. 62, the owners of woodland abutting a federal highway granted to the United States perpetual easements severely limiting the use and development of their property. The purpose of the easements was to protect the scenic view from the highway. The Internal Revenue Service ruled that the conservation easement was a cognizable and valuable interest in real property sufficient to support a charitable contribution deduction under § 170 of the Code. The restrictions imposed in these conservation easements pertained to the "type and height of buildings and type of activities for which they may be used, removal of trees, erection of utility lines, dumping of trash, use of signs, erection of sales booths and the size of parcels which are sold." 1964-2 C.B at 63.

[104] Pub. L. No. 91-172, 83 Stat. 487.

[105] Section 170(f)(3), added by the Tax Reform Act of 1969, denied the charitable contribution deduction for all partial interests not in trust except: (1) partial interests constituting the taxpayer's entire interest in the underlying property; (2) a remainder interest in a personal residence or farm; and (3) "an undivided portion of the taxpayer's entire interest in property." Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 487, 556-57 (amended 1976). *See also* Browne & Van Dorn, *supra* note 102, at 72. By adopting this partial interest rule, Congress inadvertently excluded the deduction for gifts of conservation easements recognized in Rev. Rul. 64-205, 1964-2 C.B. 62. *See* Browne & Van Dorn, *supra* note 102, at 73-81. See also *supra* note 103 and accompanying text for a discussion of Rev. Rul. 64-205, 1964-2 C.B. 62.

[106] *See supra* note 105.

[107] Treas. Reg. § 1.170A-7(b)(1)(ii) (1972). This 1972 regulation provides that "a charitable contribution of an open space easement in gross in perpetuity shall be considered a contribution of an undivided portion of the donor's entire interest in property to which Section 170(f)(3)(A) does not apply." Treas. Reg. § 1.170A-7(b)(1)(ii). The 1972 regulation artificially

tribution deduction for certain conservation easements.[108] In 1976, Congress for the first time provided express statutory authority, under section 170(f)(3)(B),[109] for a conservation easement deduction.[110]

In the Tax Treatment Extension Act of 1980,[111] Congress rewrote the law concerning the deductibility of conservation easements by adding a new section 170(h) to the Code.[112] The extent to which prior decisional law is rescinded by the 1980 Act is unsettled.[113] A series of

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brings the conservation easement within a statutory exception to the partial interest rule. *See* Browne & Van Dorn, *supra* note 102, at 74-75 ("Congress evidentially overshot the mark with the broad exclusionary rule of Section 170(f)(3) and then, using terminology which is both cryptic and inartistic as far as real property concepts are concerned, has undertaken . . . to make an exception for a partial interest otherwise squarely within the statutory prohibition.").

The "open space easement in gross" language of the 1972 regulation has been broadly interpreted. *See, e.g.*, Rev. Rul. 75-373, 1975-2 C.B. 77 (stating that "open space" includes easement granted to county for public bathing beach and recreational use); Rev. Rul. 75-358, 1975-2 C.B. 76 (deeming facade easement protecting architectural characteristics and appearance of building an "open space" easement); Rev. Rul. 74-583, 1974-2 C.B. 80 (stating that "open space" easement includes a trail easement). The quoted language, therefore, a fortiori, should include easements which are appurtenant to other property. *See* Browne & Van Dorn, *supra* note 102, at 79.

[108] *See supra* note 107.

[109] I.R.C. § 170(f)(3)(B) (1976) (amended 1977 & 1980).

[110] Tax Reform Act of 1976, Pub. L. No. 94-455, § 2124(e)(1), 90 Stat. 1520, 1919 (codified as amended at I.R.C. § 170(f)(3)(B) (1982)). The Act provided a charitable contribution deduction for "a lease on, option to purchase, or easement with respect to real property of not less than 30 years duration granted . . . exclusively for conservation purposes." *Id.* "Conservation purposes" were defined by the Act as: (1) the preservation of land areas for public outdoor recreation or education, or scenic enjoyment; (2) the preservation of historically important land areas or structures; or (3) the protection of natural environmental systems. *Id. See generally* Small, *supra* note 2, at 310-14. The Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126, eliminated any deductibility for term easements, and provided that conservation easements must be "granted in perpetuity" to be deductible. *Id.* § 309, 91 Stat. at 154. *See generally* Small, *supra* note 2, at 314-19.

[111] Pub. L. No. 96-541, 94 Stat. 3204.

[112] *Id.* § 6, 94 Stat. at 3206 (current version at I.R.C. § 170(h) (1982)). *See* Kliman, *supra* note 2, at 514 ("The Code has recently undergone another significant change with the enactment of the Tax Treatment Extension Act of 1980 resulting in a major revision in the law on conservation restrictions." (footnotes omitted)). One author summarized some of the significant changes brought by the 1980 Act as follows:

> The range of permissible conservation purposes is expanded to include open space easements on farmland and forest land subject to certain guidelines designed to assure public benefit; the spectrum of qualified donee organizations is limited to governmental units and so-called public charities and their satellites; prior valuation techniques are endorsed; the requirement of perpetual protection is specifically codified; accommodation is made for private exploitation of mineral deposits on contributed lands; and historic preservation easements are limited to certified historic structures.

Hambrick, *supra* note 89, at 350.

[113] *See* Kliman, *supra* note 2, at 526 n.66 ("Whether or not Congress intended to rescind the existing law is still an open question.").

Although the Tax Treatment Extension Act of 1980 retained the "undivided interest" excep-

private letter rulings interpreting the 1980 Act do not address the question.[114] The language of section 170(h) and its interpretive regulations[115] provide the best source for determining whether a conservation easement is deductible for federal income tax purposes.[116]

2. Section 170(h) and the Proposed Regulations

A conservation easement must be valid and enforceable under New York law and meet the specific criteria imposed by the Code to qualify as a charitable contribution for federal income tax purposes.[117] The Code requirements are threefold, and are discussed below.

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tion of I.R.C. § 170(f)(3)(B)(ii) (1982), committee reports indicate that it may no longer be relied upon for the donation of an open space easement in gross. *See* S. REP. No. 1007, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6736, 6746-47; H.R. REP. No. 1278, 96th Cong., 2d Sess. 14-15 (1980). To be deductible, a conservation easement must qualify as a "qualified conservation contribution" under I.R.C. § 170(h). *See* Kliman, *supra* note 2, at 526 n.66. Therefore, the 1972 Treasury Department regulation which allows a deduction based on this undivided interest exception, *see* Treas. Reg. § 1.170A-7(b)(1)(ii) (1972); *supra* note 107, is probably no longer authoritative. *See also* 48 Fed. Reg. 22,941 (1983) (to be codified at Treas. Reg. § 1.170A-7(e)) (proposed May 23, 1983) (providing that the 1972 regulation shall apply only to contributions made before the effective date of I.R.C. § 170(h)).

[114] *See, e.g.*, Private Letter Ruling No. 8450065 (Sept. 13, 1984) (conservation easement in 5,367 acre parcel, containing active farmland, woodland, water supply, and historic farmhouses); *id.* No. 8449025 (Aug. 30, 1984) (conservation easement in historic residence located in historic district); *id.* No. 8428037 (Apr. 6, 1984) (conservation easement in cattle ranch); *id.* No. 8428034 (Apr. 6, 1984) (conservation easement in natural lands bordering state park); *id.* No. 8422064 (Feb. 28, 1984) (conservation easement in farmland situated in county agricultural district); *id.* No. 8420016 (Feb. 10, 1984) (conservation easement in pristine island encircled by heavily-developed shoreline); *id.* No. 8418032 (Jan. 23, 1984) (conservation easement in undeveloped forested peninsula along boundary of lake used throughout the year for public recreation); *id.* No. 8410034 (Dec. 2, 1983) (conservation easement protecting architectural features of residence and land surrounding building situated in federally-registered historic district); *id.* No. 8313123 (Dec. 20, 1982) (conservation easement in property situated in rural agricultural district); *id.* No. 8302085 (Oct. 14, 1982) (conservation easement for protection of natural habitat of trumpeter swans, great blue herons, and migratory route of big game animals); *id.* No. 8248069 (Aug. 30, 1982) (conservation easement in buildings and land situated in federally-registered historic district); *id.* No. 8247024 (Aug. 18, 1982) (conservation easement in ranch in scenic river valley); *id.* No. 8243125 (July 27, 1982) (conservation easement in ranch bordering National Park contributed to private land trust); *id.* No. 8233025 (May 18, 1982) (conservation easement in farmland near urban area). Such rulings may not be relied upon as precedent. *See* I.R.C. § 6110(j)(3) (1982).

[115] 48 Fed. Reg. 22,940 (1983) (to be codified at Treas. Reg. § 1.170A-13) (proposed May 23, 1983).

[116] The proposed regulations have not been adopted in final form as of this publication. It is submitted, however, that these proposed regulations are the best source for interpreting I.R.C. § 170(h) because the regulations closely track the statute and draw heavily from its legislative history.

[117] *See* Kliman, *supra* note 2, at 526; *see also supra* note 89.

To be deductible as a "qualified conservation contribution" under section 170(h) of the Code, a conservation easement must first constitute a "qualified real property interest."[118] This interest is defined broadly under the Code[119] to encompass conservation easements created pursuant to the CES.[120] A qualified real property interest must be "granted in perpetuity."[121] Therefore, although the CES does not prohibit the granting of non-perpetual "term easements,"[122] the donation of such an easement would not qualify for a charitable deduction.

The second Code requirement is that the conservation easement must be donated to a "qualified organization."[123] The definition of qualified organization includes governmental units,[124] publicly-supported charities,[125] charitable organizations meeting the public support tests of section 509(a)(2) of the Code,[126] and charitable organizations controlled by governmental units or publicly-supported charities and meeting the requirements of section 509(a)(3) of the Code.[127] The proposed regulations add the requirement that "an organization must have the resources to enforce the restrictions and must be able to demonstrate a commitment to protect the conservation purposes of the donation."[128] A "public body" under the CES

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[118] I.R.C. § 170(h)(1)(A).

[119] Section 170(h)(2)(C) defines "qualified real property interest" to include "a restriction (granted in perpetuity) on the use which may be made of the real property." *Id.* § 170(h)(2)(C). The proposed regulations provide: "A 'perpetual conservation restriction' is a restriction granted in perpetuity on the use which may be made of real property — including an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude)." 48 Fed. Reg. 22,942 (to be codified at Treas. Reg. § 1.170A-13(b)(3)).

[120] *See* 48 Fed. Reg. 22,942 (to be codified at Treas. Reg. § 1.170A-13(b)(3)); *see also* Hambrick, *supra* note 89, at 350 ("The word is broad enough to encompass all types of restrictive agreements regardless of variations in terminology found in state real property laws."); Kliman, *supra* note 2, at 527 n.71 ("The term easement was specifically dropped in the statute because of the confusion it had generated in the past, and the more general term 'restriction' was adopted."). For a discussion of the various types of common law property interests qualifying as "conservation easements" under the CES, see *supra* notes 19-26 and accompanying text.

[121] I.R.C. § 170(h)(2)(C). *See supra* note 119.

[122] *See supra* note 54 and accompanying text.

[123] I.R.C. § 170(h)(1)(B).

[124] *Id.* § 170(h)(3)(A). Section 170(c)(1) defines governmental unit as "[a] State . . . or any political subdivision of . . . the foregoing . . . but only if the contribution or gift is made for exclusively public purposes." *Id.* § 170(c)(1).

[125] *Id.* § 170(h)(3)(A). For a description of "publicly-supported charity," see *id.* § 170(b)(1)(A)(vi). *See also id.* § 170(c)(2); Treas. Reg. § 1.170A-9(e) (1980).

[126] I.R.C. § 170(h)(3)(B)(i) (incorporating by reference I.R.C. § 509(a)(2) (1982)).

[127] *Id.* § 170(h)(3)(B)(ii) (incorporating by reference I.R.C. § 509(a)(3) (1982)).

[128] 48 Fed. Reg. 22,942 (to be codified at Treas. Reg. § 1.170A-13(c)(1)).

should qualify as a governmental unit under the Code.[129] The question of whether a particular NPCO under the CES would qualify as a publicly-supported charity or other eligible donee under the Code is beyond the scope of this Comment.[130]

The final Code requirement is that the conservation easement must be donated "exclusively for conservation purposes."[131] The Code sets forth four principal objectives[132] which constitute permissible conservation purposes.[133] A conservation easement is not donated *exclusively* for conservation purposes unless the restricted property is "protected in perpetuity."[134] The remainder of this section will discuss the "conservation purpose" tests adopted in the proposed regulations and the requirement that a conservation purpose be protected in perpetuity.

In the context of historic preservation, a conservation easement

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[129] A "public body" under the CES includes the state or a municipal corporation, *see supra* notes 61-62, both of which qualify as governmental units under the Code. *See supra* note 124.

[130] The public support tests adopted in the regulations to determine the status of a NPCO under federal law are exceedingly complex. *See, e.g.*, Treas. Reg. § 1.170A-9 (1980). For a useful discussion of the various classes of donee organizations under § 170 of the Code, see Jackson & Muller, *supra* note 99, at A-3 to A-10. The annual Cumulative List of Organizations, Internal Revenue Service Publication 78, may be consulted to determine the status of a particular NPCO under § 170. *See* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 78, CUMULATIVE LIST OF ORGANIZATIONS (1980). The Internal Revenue Bulletin must also be consulted to determine whether a Publication 78 listing has been revoked by the Internal Revenue Service. For a discussion of the extent to which a prospective donor may rely on a Publication 78 listing, see Rev. Procedure 82-39, 1982-2 C.B. 759.

[131] I.R.C. § 170(h)(1)(C); *see* Kliman, *supra* note 2, at 528-29 ("The linchpin of the entire scheme for allowing charitable donations of conservation easements . . . [is] that the donation be made 'exclusively for conservation purposes.' ").

[132] *See* I.R.C. § 170(h)(4)(A). Section 170(h)(4)(A) provides:

> 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.

Id.

[133] Underlying the definitions of permissible conservation purposes, *see supra* note 132, is the fundamental policy that a deduction, which is essentially a tax expenditure of public funds, should be allowed only in those circumstances in which the public receives a clearly ascertainable benefit from the conservation easement. *See* Hambrick, *supra* note 89, at 354-56; Kliman, *supra* note 2, at 530. As stated by one author, "[t]he tax expenditure concept embodies two elements: 1) the imputed tax payment that would have been made in the absence of special provisions and 2) the simultaneous expenditure of that payment as a direct grant to the person benefitted by the special provision." Madden, *supra* note 95, at 143 n.217 (citing S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION 240-52 (1972)).

[134] I.R.C. § 170(h)(5)(A).

prohibiting the fee owner from altering the facade or interior of a building will not satisfy the "conservation purpose" test unless the building is either listed on the National Register of Historic Places[135] or situated within a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district.[136] Furthermore, there must be a "substantial and regular opportunity for the general public to view the architectural characteristics that are the subject of the easement."[137] Therefore, if a New York NPCO or public body were to accept the donation of a conservation easement in an ordinary suburban tract home or a secluded structure unavailable for public viewing, the donation would not be deductible under the Code.[138]

In the context of open space preservation, the donor of a conservation easement for the "scenic enjoyment"[139] of the general public must meet three hurdles to qualify his contribution for the charitable deduction.[140] First, an eight-part list of factors must be applied to determine whether the protected view is in fact "scenic."[141] In addi-

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[135] *Id.* § 170(h)(4)(B)(i). *See generally* 16 U.S.C. § 470a (1982).

[136] I.R.C. § 170(h)(4)(B)(ii).

[137] 48 Fed. Reg. 22,944 (to be codified at Treas. Reg. § 1.170A-13(d)(5)(iii)(B)).

[138] The examples used in the text are provided solely to illustrate the limitations imposed upon NPCO activity under federal law. It is doubtful whether in practice a NPCO would risk its tax exempt status by acquiring an abusive conservation easement. *See* Hambrick, *supra* note 89, at 354 ("[T]he possibility of self-dealing or improper exploitation of a conservation easement is very low, since the qualified conservation organization is subject to high standards of accountability and public support requirements."); *see also* E. WATSON, *supra* note 3. Commentator Watson states that "[t]he proposed accomplishments of an easement program should be integrated with the organization's policies and resources. Acceptance criteria for easements should be established to insure that easements are accepted only on properties that are important in terms of the organization's overall purposes." *Id.* at 9.

[139] I.R.C. § 170(h)(4)(A)(iii)(I). An example of a conservation easement for "scenic enjoyment" would be an easement to preserve a stretch of undeveloped property situated between a public highway and an ocean to maintain the view from the highway, or an easement to preserve woodland, farmland, or a unique natural land formation along a highway. *See* 48 Fed. Reg. 22,943-44 (to be codified at Treas. Reg. § 1.170A-13(d)(4)(ii)(B), (iv)(B)); *see also* Nyczepir v. New York, 76 Misc. 2d 804, 350 N.Y.S.2d 574 (Ct. Cl. 1973) (discussing valuation of scenic easement along highway taken by eminent domain); Kliman, *supra* note 2, at 534-35 ("The idea is purely an aesthetic one — namely, the use of conservation restrictions to prevent the type of development which would interfere with a scenic panorama or view of some property.").

[140] The concept of open space preservation also includes nonscenic easements acquired pursuant to a clearly delineated governmental conservation policy, such as a state program for flood prevention and control. *See* I.R.C. § 170(h)(4)(A)(iii)(II); 48 Fed. Reg. 22,943 (to be codified at Treas. Reg. § 1.170A-13(d)(4)(iii)).

[141] Section 1.170A-13(d)(4)(ii)(A) of the proposed treasury regulations provides the following list of factors to be considered in determining whether a particular view is "scenic":

(1) The compatibility of the land use with other land in the vicinity; (2) The degree of contrast and variety provided by the visual scene; (3) The openness of the land (which

tion, the general public must be provided with substantial "visual access" to the restricted property,[142] and the conservation easement must yield a "significant public benefit" based on an analysis of eleven additional factors.[143]

A conservation easement donated for educational or recreational purposes[144] must provide for "substantial and regular use of the general public or the community"[145] to qualify for the charitable deduction. The proposed regulations offer as examples of educational or recreational purposes the preservation of a water area for public fishing or boating, or a nature or hiking trail for the use of the public.[146]

A conservation easement donated for the conservation of pristine natural lands[147] must protect a "significant relatively natural habitat . . . or similar ecosystem"[148] to qualify for the charitable deduction. The proposed regulations offer as examples of "significant habitats" the habitats of a rare or endangered species of plant or animal, and natural areas such as a "high quality" terrestrial or aquatic community.[149]

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would be a more significant factor in an urban or densely populated setting or in a heavily wooded area); (4) Relief from urban closeness; (5) The harmonious variety of shapes and textures; (6) The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area; (7) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and (8) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state agency.

48 Fed. Reg. 22,943 (to be codified at Treas. Reg. § 1.170A-13(d)(4)(ii)(A)).

In an Internal Revenue Service hearing on the proposed regulations, one commentator, complaining that the standards set forth in the regulations are difficult to interpret, stated: "It's almost as if [the Internal Revenue Service] were setting aesthetic standards." *More Certainty Needed in Easement Regs, IRS Told*, 20 TAX NOTES 1058, 1058 (1983). This criticism seems particularly appropriate to the above-quoted list of "factors."

[142] 48 Fed. Reg. 22,943 (to be codified at Treas. Reg. § 1.170A-13(d)(4)(ii)(B)).

[143] *Id.* at 22,943-44 (to be codified at Treas. Reg. § 1.170A-13(d)(4)(iv)(A)). To illustrate the public benefit requirement, the proposed regulations state: "[T]he preservation of a vacant downtown lot would not by itself yield a significant public benefit, but the preservation of the downtown lot as a public garden would, absent countervailing factors, yield a significant public benefit." 48 Fed. Reg. 22,944 (to be codified at Treas. Reg. § 1.170A-13(d)(4)(iv)(B)).

[144] *See* I.R.C. § 170(h)(4)(A)(i). Conservation easements for recreational or educational purposes are typically in the nature of affirmative easements, *see supra* notes 31 & 40 and accompanying text, such as a public right of access to a lake for fishing or boating, or a right of way through a woods for hiking or nature study, *see* 48 Fed. Reg. 22,942 (to be codified at Treas. Reg. § 1.170A-13(d)(2)(i)).

[145] 48 Fed. Reg. 22,942 (to be codified at Treas. Reg. § 1.170A-13(d)(2)(ii)).

[146] *Id.* (to be codified at Treas. Reg. § 1.170A-13(d)(2)(i)).

[147] *See* I.R.C. § 170(h)(4)(A)(ii).

[148] 48 Fed. Reg. 22,942 (to be codified at Treas. Reg. § 1.170A-13(d)(3)(i)).

[149] *Id.* (to be codified at Treas. Reg. § 1.170A-13(d)(3)(ii)).

In summary, the scope of permissible purposes for which a conservation easement may be created under the CES is broader than the scope of "conservation purposes" under the Code.[150] In practice, therefore, the donation of only those conservation easements meeting federal standards will give rise to charitable contribution deductions.

To be deductible, the conservation purpose sought to be furthered by a conservation easement must be "protected in perpetuity."[151] In general, a conservation easement protected in perpetuity means a conservation easement donated for an indefinite term[152] imposing burdens which are enforceable against successors to the donor's property.[153] Perpetuity status may be denied if on the date of the gift it appears that the conservation easement is extinguishable upon the happening of some future event which is not "so remote as to be negligible."[154] In *Briggs v. Commissioner*,[155] the United States Tax Court described the type of remote future event that would not affect the perpetuity status of a contribution as " 'a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction.' "[156] The occurrence of a contingency that would extinguish

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[150] Compare the discussion of the permissible purposes for which a conservation easement may be created in New York, *see supra* notes 49-52 and accompanying text, with the above discussion of conservation purposes, *see supra* notes 131-49 and accompanying text.

[151] I.R.C. § 170(h)(5)(A).

[152] *See* Madden, *supra* note 95, at 136-37 (" '[I]n perpetuity' does not necessarily mean forever; rather, it is a concept in property law which actually means that an interest is donated for an indefinite duration as opposed to for a term of years.").

[153] *See* 48 Fed. Reg. 22,945 (to be codified at Treas. Reg. § 1.170A-13(g)(1)). Proposed § 1.170A-13(g)(1) states in part: "[T]he interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation." *Id.*

[154] *Id.* (to be codified at Treas. Reg. § 1.170A-13(g)(2)). The "so remote as to be negligible" test is also used in related regulations. *See* Treas. Reg. § 1.170A-1(e) (1982) (transfers subject to a condition or power); *id.* § 1.170A-7(a)(3) (1972) (contributions of partial interests in real property); *id.* § 20.2055-2(b)(1975) (transfers subject to a condition or power).

[155] 72 T.C. 646 (1979), *aff'd without opinion*, 665 F.2d 1051 (9th Cir. 1981).

[156] 72 T.C. at 656 (quoting United States v. Dean, 224 F.2d 26, 29 (1st Cir. 1955)); *see also* Estate of Woodworth v. Commissioner, 47 T.C. 193, 196 (1966). In *Briggs*, petitioner Briggs assisted in organizing a foundation for the advancement of native American Indians, and donated a 184-acre California ranch to the foundation. The grant was subject to the condition that in the event the foundation failed to function or construct a cultural, educational, and medical center within seven years, the land would revert to the donor. 72 T.C. at 649. The estimated cost to construct the center was over four million dollars. *Id.* at 651. Briggs did not provide the foundation with funds to establish the center, and the directors of the foundation were without fund-raising or managerial experience. *Id.* at 657. The court held that, based on circumstances existing on the date of the gift, the possibility that the condition subsequent might occur was "real," and therefore, Briggs was not entitled to a charitable contribution de-

the easement, established by agreement of the parties to the transaction or arising from external circumstances, may be sufficiently probable to render a conservation easement non-perpetual, and therefore non-deductible.[157]

III. Real Property Taxation

The real property tax consequences of donating a conservation easement depend upon two separate considerations: first, the determination of whether the conservation easement should be recognized

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duction. *Id.* The court stated that "it was certainly foreseeable that [the foundation] needed funds to initiate its campaign . . . . There was no known or prospective source for payment of these expenditures on the date of the gift." *Id.*

[157] In *Briggs*, the contingency disallowing the deduction was a condition subsequent contained in the agreement between the donor and donee. 72 T.C. at 649. *See also* Klopp v. Commissioner, 19 T.C.M. (CCH) 973, 978 (1960) (holding that condition in conveyance that United States cease using land as an anti-aircraft missile site not "so improbable as to justify its being ignored"); Luxemburger, *Preservation Easements and Rehabilitated Buildings/Preservation Easements and Mortgaged Property*, 10 J. Real Est. Tax'n 273, 283 (1983) (stating that "a nonrecourse mortgage on non-income-producing real estate in which the owner's equity investment is small may prevent the gift from being classified as perpetual").

The proposed regulations recognize the further possibility that a charitable contribution may be rendered nondeductible based on the existence of a contingency external to the agreement of the parties. *See* 48 Fed. Reg. 22,945 (to be codified at Treas. Reg. § 1.170A-13(g)(2)) (stating that the statutory requirement in some states that use restrictions must be rerecorded every 30 years to remain enforceable is a contingency which is too remote to affect the perpetuity status of a conservation easement).

The question presented, then, is whether New York conservation easements will be denied perpetuity status because the CES provides that such easements may be extinguished in an action to quiet title pursuant to N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979 & Supp. 1984-1985). *See supra* note 73 and accompanying text. The proposed regulations recognize the possibility of extinguishment in a judicial proceeding in the nature of an action to quiet title, *see* 48 Fed. Reg. 22,946 (to be codified at Treas. Reg. § 1.170A-13(g)(5)(i)), and provide that the conservation purposes can nonetheless be treated as protected in perpetuity if the "proceeds" from the proceedings are paid over to the donee organization for use "in a manner consistent with the conservation purposes of the original contribution." *Id.* Therefore, the potentiality of a quiet title action should not deny New York conservation easements perpetuity status under federal law.

A more difficult question concerns whether the CES provision rendering conservation easements in the forest preserve "void ab initio" if the New York courts determine that such easements are subject to constitutional protection, *see supra* notes 78-85 and accompanying text, would prohibit perpetuity status under federal law. It is an open question whether the possible imposition of state constitutional protection, based on existing New York law, *see supra* note 82 and accompanying text, is "so remote as to be negligible." 48 Fed. Reg. 22,945 (to be codified at Treas. Reg. § 1.170A-13(g)(2)). It is submitted that until the New York courts resolve this matter, prudent counsel should not advise their clients to donate conservation easements to the state in property situated in the forest preserve without first obtaining a letter ruling or other Internal Revenue Service determination that such contributions will be deductible.

as a factor in the assessment of the burdened property,[158] and second, the valuation of the conservation easement. Assuming that the conservation easement is recognized by the assessor, and that the existence of the easement reduces the value of the burdened property, the donor's real property tax bill may be reduced. This portion of the Comment discusses the extent to which the CES and New York common law require an assessor to take into account the effect of a conservation easement on the value of burdened property,[159] and will briefly discuss the valuation of conservation easements.[160]

A. Recognition of Conservation Easements in Real Property Tax Assessment

Prior to its enactment, the CES was vigorously opposed[161] on the ground that the acquisition of conservation easements by public bodies and NPCOs, each of which are exempt from real property taxation,[162] would effectuate an erosion of the local assessment base,[163]

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[158] The term "burdened property" is used throughout this Comment as a shorthand expression for property which is subject to the terms of a conservation easement.

[159] *See infra* notes 161-86 and accompanying text.

[160] *See infra* notes 187-94 and accompanying text.

[161] *See* Letter from Robert C. Glennon, Counsel of the Adirondack Park Agency, to Maurice D. Hinchey, New York State Assembly Sponsor of the CES (Apr. 6, 1983) ("[T]he Adirondack Park Agency . . . has voted to oppose the above bill . . . [because] the bill should contain provisions similar to those for State-held easements, protecting the tax base of Adirondack municipalities from revenue loss as a result of any privately-held easements . . . ."); Letter from G. Oliver Koppell, Member of the New York State Assembly, to Henry G. Williams, Commissioner of the New York State Department of Environmental Conservation (June 14, 1983) ("[T]he proposed bill does not adequately protect local real estate tax revenues and creates a possible loophole for the wealthy."); *see also* Letter from Peter S. Paine, Jr., General Counsel of the Lake Champlain Committee, to Alice Daniel, Counsel to the Governor (July 26, 1983) ("[C]laims have been made that the absence of protection for the municipal tax base for easements held by private organizations will lead to massive erosions in the economic well-being of our area . . . .").

[162] *See* N.Y. REAL PROP. TAX LAW § 404 (McKinney 1984) (exempting the State of New York); *id.* § 406 (exempting municipal corporations); *id.* § 420-a (McKinney 1984 & Supp. 1984-1985) (exempting non-profit organizations — mandatory); *id.* § 420-b (McKinney 1984) (exempting non-profit organizations — permissive). A NPCO, as defined in the CES, falls within the mandatory class of exempt non-profit organizations. *See* Mohonk Trust v. Board of Assessors, 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979) (holding that preservation of wilderness area constitutes "charitable" purpose eligible for mandatory tax exemption); *accord* North Manursing Wildlife Sanctuary v. City of Rye, 48 N.Y.2d 135, 397 N.E.2d 693, 422 N.Y.S.2d 1 (1979); Catskill Center for Conservation & Dev., Inc. v. Voss, 63 A.D.2d 1091, 406 N.Y.S.2d 375 (1978). For an historical survey of the case law interpreting the exemption for non-profit organizations, see Beebe & Harrison, *A Law in Search of a Policy: A History of New York's Real Property Tax Exemption for Non-profit Organizations*, 9 FORDHAM URB. L.J. 533 (1981).

and thereby deprive local governments of needed tax dollars.[164] Proponents of the CES argued that due to various factors the actual reduction in the value of burdened property and the local assessment base would be slight.[165] Both sides in this debate apparently assumed that conservation easements would be taken into account in the assessment of burdened property. It is surprising, therefore, that the provisions of the CES dealing with the recognition of conservation easements for assessment purposes are at best incomplete.

The CES provides that state-held conservation easements in land situated within the Adirondack or Catskill Park[166] shall be recognized by the New York State Board of Equalization and Assessment in

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[163] To minimize the potential loss of local tax revenue, the CES provides that the state shall be subject to taxation on all conservation easements acquired by the state in lands situated in the Adirondack or Catskill Park. *See* N.Y. REAL PROP. TAX LAW § 533 (McKinney Supp. 1984-1985); *see also* N.Y. ENVTL. CONSERV. LAW § 9-0101(1), (2) (McKinney 1984) (boundaries of Adirondack and Catskill Parks). Section 533 provides that the state shall make compensatory payments to local governments in lieu of lost real property tax revenues. N.Y. REAL PROP. TAX LAW § 533.

In regard to these state payments to local governments in lieu of realty taxes, the CES provides that if a conservation easement is rendered void because a court determines that such easement would be protected by the forever wild clause of the state constitution, *see supra* notes 78-82 and accompanying text, then these payments "shall be retained by the recipient and shall be deemed to have been a grant-in-aid by the state." N.Y. REAL PROP. TAX LAW § 533. Presumably, a court determination that a conservation easement is constitutionally protected would extinguish the easement and cause a subsequent increase in the donor's assessment to the extent of the "in lieu" payments. It is an open question, however, whether the owner of the underlying fee, who has been paying reduced taxes because the state has made compensatory payments, will be liable to the state for reimbursement when such easement is extinguished.

[164] The revenue generated from the assessment of real property and the improvements on such property provides the primary economic fuel for local governments in New York State. *See* NEW YORK STATE DIV. OF EQUALIZATION & ASSESSMENT, REPORT ON PROPOSED REFORMS IN REAL PROPERTY TAX ADMINISTRATION 1 (1980) (stating that "[t]he real property tax is the primary revenue source for local governments in New York" and that "[f]or local governments it has been the most stable of all tax sources, serving traditionally as their revenue of last resort"); *see generally* 2 REPORT OF THE N.Y. STATE TEMPORARY STATE COMM'N ON STATE AND LOCAL FINS.: THE REAL PROPERTY TAX (1975) [hereinafter cited as REAL PROPERTY TAX REPORT].

[165] *See* Letter from William R. Ginsberg, Professor of Law at Hofstra University, to Frank Murray, Assistant Secretary to the Governor (Nov. 29, 1983) ("[V]iewing the jurisdiction as a whole, any slight diminution in assessed value that might occur due to conservation easements, could be more than offset by countervening economic benefits.")[hereinafter cited as Ginsberg Letter]; Letter from William S. James, Treasurer of the State of Maryland, to Governor Mario M. Cuomo (Sept. 6, 1983) ("[P]reservation easements are acquired or donated on undeveloped land; the assessments are low and classified as agricultural land . . . . As a consequence, there has been little change in assessments as a result of the creation of preservation easements."); Williams Memorandum, *supra* note 42 ("Since the major portion of the tax base is in *improvements* rather than open land, any tax decrease which might occur would be relatively minor." (emphasis in original)).

[166] *See supra* note 80.

making an assessment of such land.[167] Outside of this narrow class of conservation easements, however, the statute is silent. In the absence of guidance from the CES, common law rules of real property taxation remain in force to determine whether a conservation easement held by a municipal corporation, NPCO, or by the state, in lands situated outside the Adirondack or Catskill Park, should be recognized for assessment purposes.

1. The Assessment of Easements at Common Law

The dominant theme of real property taxation in New York is unitary assessment — one value is assigned to the fee simple estate, which is typically assessed to the owner of the fee.[168] The general rule

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[167] The CES provides for the recognition of certain state-held easements in an off-handed manner, and therefore, some explanation is required before quoting the precise statutory language.

The CES added § 533 to the Real Property Tax Law, which provides that state-held conservation easements in lands situated in the Adirondack or Catskill Park shall be subject to taxation for all purposes. *See* N.Y. REAL PROP. TAX LAW § 533 (McKinney Supp. 1984-1985); *supra* note 163. Section 533 also provides, *inter alia*, that the detailed procedure for the assessment of state lands under §§ 540-544 of the Real Property Tax Law shall apply to such conservation easements. N.Y. REAL PROP. TAX LAW § 533 (incorporating by reference N.Y. REAL PROP. TAX LAW §§ 540-544 (McKinney 1984 & Supp. 1984-1985)). Under § 542(3), the local assessor determines the extent of the state's tax liability. *Id.* § 542(3) (McKinney 1984) ("[I]n any assessing unit in which state lands are subject to taxation, the assessors shall notify the state board of the amount of any assessment of such state lands."); *see also* Kerwick v. Board of Equalization, 114 Misc. 2d 928, 453 N.Y.S.2d 151 (Sup. Ct. 1982). The CES changes this scheme by authorizing the New York State Board of Equalization and Assessment to assess certain state-held conservation easements, and in so doing, implicitly provides that such conservation easements shall be recognized for assessment purposes.

The CES provides that "[w]henever the state acquires a conservation easement . . . the state board shall be notified of such acquisition within thirty days. The state board shall determine the percentage of change, if any, in the total value of the parcel as a result of such easement." N.Y. REAL PROP. TAX LAW § 542(5) (McKinney Supp. 1984-1985). Compare § 542(5), which implicitly authorizes the separate assessment of conservation easements, with the more explicit language of N.Y. GEN. MUN. LAW § 247(3) (McKinney 1974 & Supp. 1984-1985) ("[T]he valuation placed on such an open space or area for purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land."). *See generally supra* note 64 and accompanying text.

[168] Section 304 of the Real Property Tax Law in pertinent part provides that "[a]ll assessments shall be against the real property itself which shall be liable to sale pursuant to law for any unpaid taxes." N.Y. REAL PROP. TAX LAW § 304(1) (McKinney 1984). As explained in an early case:

> The tax is imposed upon "all real property within this State," and, although the tax is entered in the assessment-roll as taxable to the reputed owner or occupant of the premises . . . it is none the less a tax upon the real estate which happens to be in his ownership or possession, and not a tax upon him . . . .

Paddell v. City of New York, 50 Misc. 422, 424, 100 N.Y.S. 581, 582-83 (Sup. Ct.) (quoting N.Y.

concerning the valuation of real property subject to separate legal interests, such as mortgagee, vendee, tenant, remainder, and cotenant interests, is that the assessor disregards these types of interests and makes an assessment of the "whole property" as if it were unencumbered.[169] Appurtenant easements[170] are a long-standing exception to the general rule, and their effect on value must be taken into account in the assessment of the servient tenement.[171]

The common law rule providing for the separate assessment of appurtenant easements in New York originated in *People ex rel. Poor*

TAX LAW § 3 (1896)), *aff'd without opinion*, 114 A.D. 911, 100 N.Y.S. 1133 (1906), *aff'd without opinion*, 187 N.Y. 552, 80 N.E. 1114 (1907), *aff'd*, 211 U.S. 446 (1908). *See generally* Menikoff, *The Taxation of Restricted-Use Property: A Theoretical Framework*, 27 BUFFALO L. REV. 419 (1978); Nichols, *Real Property Taxation of Divided Interests in Land*, 11 U. KAN. L. REV. 309 (1963).

To say that the assessment is "against the real property itself" is something of a fiction, however, because it is the owner, and not the property itself, who must pay the tax. In fact, a collecting officer may levy upon personal property of a resident owner in the event that delinquent real property taxes are not paid. *See* N.Y. REAL PROP. TAX LAW § 926 (McKinney 1972 & Supp. 1984-1985). *But see* City of Buffalo v. Cargill, Inc., 44 N.Y.2d 7, 374 N.E.2d 372, 403 N.Y.S.2d 473 (1978) (holding that personal liability for unpaid real property taxes is extinguished by tax sale of real property).

[169] The general rule is best explained in the case of People *ex rel.* Gale v. Tax Comm'n, 17 A.D.2d 225, 233 N.Y.S.2d 501 (1962), where the court states:

> [A] division of ownership or the independent holding of separate legal interests in taxable property will not affect the mode of assessment. . . . It was well settled at common law, unchanged by statute pertinent here, that the mortgagor, the vendee in posession [sic], the lessor, the life tenant, or the cotenants jointly, were bound to pay the entire tax on the property as if there were no mortgage, contract of sale, lease, remainder or cotenant interests.

Id. at 228, 233 N.Y.S.2d at 504-05 (citations omitted). The application of this principle caused a substantial hardship for the owner of burdened property in *Gale*. The owner of an apartment building executed a 21-year lease at the time of the Great Depression at an extremely low rental, with an option for a 21-year renewal at the same rental. The outstanding lease reduced the resale value of the property to $225,000 in 1954. In upholding an assessment of $365,000, the court stated: "[T]he true value of the property for assessment purposes is to be ascertained as if unencumbered by such a lease." *Id.* at 230, 233 N.Y.S.2d at 507.

In 5 N.Y. STATE BD. OF EQUALIZATION & ASSESSMENT 155 (Op. Counsel 1976), the principle of unitary assessment was explained as follows: "Under the in rem 'whole property' concept of real property taxation which exists in New York State, all property is assessed without regard to restrictions or encumbrances which are *personal to the owner*." *Id.* at 156 (emphasis in original) (citations omitted).

[170] See *supra* note 27 and accompanying text for a brief definition of appurtenant easements.

[171] The Restatement of Property sets forth the rationale for the special treatment afforded to appurtenant easements:

> [I]n levying a tax upon land separate legal interests in the land are ordinarily disregarded. But account can be taken of an easement appurtenant without increasing the complication of the process of tax collection and without decreasing the amount of the total levy by simply subtracting the value of the use authorized thereby from the servient tenement and adding it to the dominant tenement.

RESTATEMENT OF PROPERTY § 509 comment e (1944).

v. Wells.[172] The holding of the court in *Poor* is deceptively simple: if the assessment of the dominant tenement is increased by the value of an appurtenant easement, then the assessment of the servient tenement must be reduced by the value of the easement.[173] *Poor* and its progeny[174] require that the tax liability of a fee simple estate subject

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[172] 139 A.D. 83, 124 N.Y.S. 36, *aff'd*, 200 N.Y. 518, 93 N.E. 1129 (1910). The special facts of the *Poor* case prompted the court to make an exception to the general rule of unitary assessment. In *Poor*, a grantor conveyed land situated in New York City to five trustees for the purpose of establishing a private ornamental park for the benefit of 66 surrounding properties. 139 A.D. at 84, 124 N.Y.S. at 37. The owners of the surrounding lots received appurtenant easements in the park property, and promised to contribute toward the payment of any expenses the trustees might incur in preserving the land as "a place of common enjoyment and recreation." *Id.* at 85, 124 N.Y.S.2d at 37.

After the conveyance, the city assessors added the value of the 66 appurtenant easements to the ordinary assessment of the surrounding lots, increasing the assessed value of the lots by an aggregate amount in excess of the value of the park itself, if the park were to be sold free from restrictions. *Id.* at 86, 124 N.Y.S. at 38. The court found that the park property was so encumbered with easements that its resale value was reduced to virtually nothing. The city assessors, however, ignored the easements and assessed the park property as if it were an unencumbered fee. *Id.* The unitary assessment principle utilized by the assessors in *Poor*, if allowed, would have enabled the city first to increase the assessment of the surrounding lots by about $660,000 by taking the easements into account, and then to assess the park at its full value of about $540,000 by ignoring the existence of the easements. The special twist in *Poor* is that by virtue of the reimbursement agreement between the trustees and the surrounding lot owners, the lot owners would have ultimately paid at both ends of this double taxation scheme — once on the increased value of their lots and again when they reimbursed the trustees for the real property taxes levied on the park.

In carving out an exception to the general rule of unitary assessment, the court stated: "The city . . . having added to the market value of the surrounding lots . . . cannot assess over again against . . . the owners of the land benefited by the easement, the value of the park property itself which it has, in effect, already assessed and collected." *Id.* at 88, 124 N.Y.S. at 39.

[173] The court's statement of the rule in *Poor* is deceptively simple because it is based upon the assumption that the respective increase and decrease in the assessment of dominant and servient tenements is equivalent. As stated by the court:

> The city has . . . taken unto itself the advantage of the second of the propositions heretofore laid down, namely, that the dominant estate should be increased by the value of the easement. It cannot, in fairness and justice, do this and at the same time refuse to accede to the justice of the first of the propositions, namely, that the market value of the servient estate is lessened by the value of the amount of the easement.

139 A.D. at 87-88, 124 N.Y.S. at 39. In 1 J. BONBRIGHT, THE VALUATION OF REAL PROPERTY (1937), the validity of this assumption is questioned. Professor Bonbright states:

> [T]here is no necessary equivalence between the damage a landowner suffers by being subjected to an easement and the benefit other land obtains from that easement. An easement of passage over A's forest land to the road may greatly enhance the value of B's hotel property without correspondingly depreciating A's land; while on the other hand an easement of light over C's lot may merely make D's backyard slightly pleasanter while preventing C from building an apartment house.

Id. at 497.

[174] *See* Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914) (easements of air, light, and access); Knickerbocker Village, Inc. v. Boyland, 16 A.D.2d 223, 226 N.Y.S.2d 982 (1962) (statutory restrictions on sale), *aff'd mem.*, 12 N.Y.2d 1044, 190 N.E.2d 239, 239 N.Y.S.2d 878 (1963);

to an appurtenant easement must be apportioned between two parties — the owner of the servient tenement and the owner of the dominant tenement.[175] The rule also applies to covenants "running with the land."[176] A distinction should be drawn, however, between the

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People *ex rel.* Larchmont Manor Park Soc'y v. Smith, 268 A.D. 997, 51 N.Y.S.2d 686 (1944) (park property), *aff'd*, 294 N.Y. 920, 63 N.E.2d 116 (1945); Crane-Berkley Corp. v. Lavis, 238 A.D. 124, 263 N.Y.S. 556 (1933) (park property); Jackson v. Smith, 153 A.D. 724, 138 N.Y.S. 654 (1912) (easements of air, light, and access), *aff'd*, 213 N.Y. 630, 107 N.E. 1079 (1914); People *ex rel.* Topping v. Purdy, 143 A.D. 389, 128 N.Y.S. 569 (easements of air and access), *aff'd per curiam*, 202 N.Y. 550, 95 N.E. 1137 (1911); Grasser v. Graham, 97 Misc. 2d 417, 411 N.Y.S.2d 836 (Sup. Ct. 1978) (park property); Beach Bungalows, Inc. v. Bushwick Sav. Bank, 133 N.Y.S.2d 712 (Sup. Ct. 1954) (driveway easement), *aff'd*, 285 A.D. 1069, 141 N.Y.S.2d 503, *motion for leave to appeal denied*, 285 A.D. 1173, 142 N.Y.S.2d 367 (1955); Beeman v. Pawelek, 96 N.Y.S.2d 204 (Sup. Ct. 1949) (easement of way), *aff'd without opinion*, 276 A.D. 1057, 96 N.Y.S.2d 312 (1950).

[175] The rationale for the separate assessment of appurtenant easements is based upon two considerations. The first consideration is the policy that "double taxation" is unfair and should be avoided. *See* People *ex rel.* Topping v. Purdy, 143 A.D. 389, 394, 128 N.Y.S. 569, 573 ("[T]he adjoining properties . . . by the acquisition of easements appurtenant thereto, have been increased in value and should be assessed accordingly. . . . [T]he servient estate [should not] be taxed upon the basis of the easements which have been made appurtenant to the dominant estate."), *aff'd per curiam*, 202 N.Y. 550, 95 N.E. 1137 (1911); Beach Bungalows, Inc. v. Bushwick Sav. Bank, 133 N.Y.S.2d 712, 716 (Sup. Ct. 1954) ("This interest having been taxed to the owner of the dominant tenement, the value of this interest ought not to be taxed again to the owner of the servient tenement."), *aff'd*, 285 A.D. 1069, 141 N.Y.S.2d 503, *motion for leave to appeal denied*, 285 A.D. 1173, 142 N.Y.S.2d 367 (1955); RESTATEMENT OF PROPERTY § 509 comment d (1944) ("If this interest has been taxed against the owner of the dominant tenement the value represented by it ought not to be again taxed against the owner of the servient tenement."). A corollary to this first consideration is the assumption that separate assessment will not result in a loss of tax revenue. *See* Tax Lien Co. v. Schultze, 213 N.Y. 9, 11, 106 N.E. 751, 752 (1914) ("When an easement is carved out of one property for the benefit of another the market value of the servient estate is thereby lessened, and that of the dominant increased practically by just the value of the easement."). The second consideration concerns the nature of the appurtenant easement as a permanent interest in real property. *See supra* notes 20 & 27. In Knickerbocker Village, Inc. v. Boyland, 16 A.D.2d 223, 226 N.Y.S.2d 982 (1962), *aff'd mem.*, 12 N.Y.2d 1044, 190 N.E.2d 239, 239 N.Y.S.2d 878 (1963), for example, the court, in holding that a statutory sales price limitation should be ignored for assessment purposes, stated:

> It has not been held . . . that restrictions personal to the owner and which do not attach to or run with the land need be given effect in the assessment.
>
> . . . The personal nature of the disabilities relied on serve to demonstrate they are not in the category of easements required to be carved from the real property in the process of assessment.

Id. at 227-28, 226 N.Y.S.2d at 986.

[176] *See* 1 J. BONBRIGHT, *supra* note 173, at 496 ("When a piece of property is so encumbered with easements that no use can be made of it, the fee owner pays no tax. What is true of easements is also true of covenants binding the land."). Two New York cases have stated in dicta that the existence of a covenant "running with the land" should be taken into account in the assessment of burdened property. *See* Knickerbocker Village, Inc., v. Boyland, 16 A.D.2d 223, 227, 226 N.Y.S.2d 982, 986 (1962) ("It has not been held . . . that restrictions personal to the owner and which do not attach to *or run with the land* need be given effect in the assessment." (emphasis added)), *aff'd mem.*, 12 N.Y.2d 1044, 190 N.E.2d 239, 239 N.Y.S.2d 878 (1963); Crane-Berkley Corp. v. Lavis, 238 A.D. 124, 127, 263 N.Y.S. 556, 560 (1933) (stating in

assessment of appurtenant easements and easements in gross. At common law, the existence of an easement in gross is ignored in the assessment of the servient tenement.[177]

2. The Imperfect Application of Common Law Rules to the Conservation Easement

The *Poor* case established the rule in New York that the effect of an appurtenant easement on the value of the servient tenement must be recognized by the assessor.[178] The CES definition of "conservation easement" incorporates the common law definition of easement.[179] It appears, therefore, that conservation easements held by municipal corporations, NPCOs, or the state that are appurtenant to other property should be taken into account for assessment purposes, based on *Poor* and its progeny.[180] The question remains, however,

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regard to a filed map restricting the use of land to park purposes that "it seems . . . [the map] is the equivalent of a grant of an easement, and its result is to destroy . . . the taxable value of the park lands"). Other jurisdictions have held that covenants "running with the land" must be recognized for assessment purposes. *See* Supervisor of Assessments v. Bay Ridge Properties, Inc., 270 Md. 216, 310 A.2d 773 (1973) (covenants prohibiting disposition and erection of improvements reduced assessment); Lodge v. Inhabitants of Swampscott, 216 Mass. 260, 103 N.E. 635 (1913) (covenant not to build reduced assessment); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (covenant prohibiting sale of alcoholic beverages assessed to "dominant tenement").

[177] In RESTATEMENT OF PROPERTY § 509 comment c (1944), the rule regarding the assessment of easements in gross is explained as follows:

> When a tax is levied upon land, specific tracts are assessed upon the basis of their value as unencumbered land. An exception to this rule applies with respect to the value of land subject to an easement [appurtenant] . . . . This ground of exception is inapplicable to easements in gross. Hence, when land subject to such an easement is assessed for tax purposes, the value of the use authorized by the easement is not subtracted from the value of the land and if the land should be sold for non-payment of the tax the easement is extinguished.

Id.; *see also* Trinity Place Co. v. Finance Adm'r, 46 A.D.2d 373, 376, 362 N.Y.S.2d 475, 479 (1974) ("[T]he usual rule . . . is that when an appurtenant easement is valued for tax purposes, the value of the dominant estate is increased by the existence of the easement while the servient estate's value is thereby reduced. To apply this rule . . . a dominant tenement must exist." (citations omitted)), *aff'd*, 38 N.Y.2d 144, 341 N.E.2d 536, 379 N.Y.S.2d 16 (1975).

[178] *See supra* notes 172-73 and accompanying text.

[179] *See supra* notes 19-20 and accompanying text.

[180] A policy argument contrary to the position taken in the text could be made based on the fact that the eligible donees of conservation easements are exempt from real property taxation. *See supra* note 162. *Poor* and its progeny carved out an exception to the general rule of unitary assessment based, in part, upon the following two considerations: (1) the policy that "double taxation" is unfair; and (2) the assumption that separate assessment of the servient tenement would not result in a loss of tax revenue. *See supra* note 175. These underlying considerations are inapplicable to the conservation easement because: (1) double taxation cannot occur when

whether the common law rule that easements in gross must be ignored for assessment purposes[181] should be applied to conservation easements held in gross.

The CES eliminates the substance of the distinction which exists at common law between easements appurtenant and easements in gross.[182] It would be incongruous, therefore, to make the assessment of conservation easements depend upon such a distinction. Moreover, the public character of the conservation easement[183] distinguishes it from private restrictive agreements such as the common law easement in gross. The conservation easement is analogous to a public restriction, such as a zoning ordinance, which must be considered as a factor in the assessment of private property.[184] It seems appropriate, therefore, that the conservation easement should also be recognized.

It would produce an absurd result to make the assessment of property subject to a conservation easement depend upon whether the holder owns adjoining land.[185] If the courts were to require the exis-

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the owner of the dominant tenement is tax exempt; and (2) an overall loss of tax revenue may occur when a reduction in the assessment of the servient tenement is not offset by a corresponding increase in the tax liability of the dominant tenement. None of the decided cases, however, hold that the existence of an appurtenant easement should be ignored for assessment purposes when the owner of the dominant tenement is a tax-exempt organization. Moreover, in a recent New York case, Adirondack Mountain Reserve v. Board of Assessors, 99 A.D.2d 600, 471 N.Y.S.2d 703, *aff'd mem.*, 64 N.Y.2d 727 (1984), involving the assessment of property subject to a pre-CES agreement which the court dubbed a "conservation easement," the court implicitly held that the existence of an appurtenant easement should be recognized even though the owner of the dominant tenement is a tax-exempt organization. The court further held, however, that the type of restrictions imposed in the easement did not diminish the *value* of the burdened property. *Id.* at 601, 471 N.Y.S.2d at 705. For further discussion of *Adirondack Mountain Reserve*, see *infra* note 191.

[181] *See supra* note 177.

[182] *See supra* notes 27-30 and accompanying text.

[183] *See supra* notes 49-52 and accompanying text.

[184] *See* 5 N.Y. STATE BD. OF EQUALIZATION & ASSESSMENT 155, 156 (Op. Counsel 1976) (stating that "the local assessor reflects zoning restrictions to the extent they affect the market value of the property"); *see also* Weingarten v. Town of Ossining, 85 A.D.2d 697, 698, 445 N.Y.S.2d 480, 481 (1981) ("[Z]oning and reasonable developmental potential of unimproved land may properly be taken into account in determining the market value of property . . . .").

The conservation easement may be distinguished from zoning, however, because zoning is a legislative function, whereas a conservation easement may be established by an agreement between a non-elected, non-profit organization and a private individual. Furthermore, zoning applies generally in a community, whereas a conservation easement is tailored to restrict the use of a particular parcel of real property. *See generally* 1 E. YOKLEY, ZONING LAW AND PRACTICE §§ 2-1, -2, at 14-26 (4th ed. 1978). For a discussion of the extent to which a pre-CES agreement, referred to by the court as a "conservation easement," is analogous to a zoning ordinance, see Friends of the Shawangunks, Inc. v. Knowlton, No. 110, slip op. at 5-6 (N.Y. Mar. 19, 1985).

[185] A crazy patchwork would result if the courts rigidly applied the common law rule that easements in gross are ignored for assessment purposes with regard to conservation easements

tence of an appurtenancy relationship to obtain real property tax benefits, this requirement could be easily circumvented by conveying a token "anchor parcel" to the holder of the conservation easement.[186] It is therefore submitted that conservation easements should be treated uniformly by local assessors, and their effect on value should be recognized in the assessment of burdened property.

B. Valuation of Conservation Easements

Even if the existence of a conservation easement restricting the use of the donor's property is recognized for assessment purposes, whether such recognition effectuates a reduction in the donor's tax bill will depend upon the *valuation* of his property, both before and after the imposition of the conservation easement.[187]

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held in gross. If the common law rule were rigidly applied, a "conservation easement in gross" held by a municipal corporation, NPCO, or the state would not be recognized, except that a "conservation easement in gross" held by the state in lands situated within the Adirondack or Catskill Park would be recognized based on the specific authorization of the CES. *See supra* note 167 and accompanying text. A "conservation easement appurtenant," however, held by a municipal corporation, NPCO, or the state in lands situated anywhere in the state would be recognized for assessment purposes based on *Poor* and its progeny. *See supra* notes 172-76 and accompanying text.

If conservation easements held in gross were not separately assessed, the conservation easement might be extinguished in a tax sale of the burdened property. *See* Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914); *see also supra* note 177. Conservation easements subject to extinguishment in a tax sale might not be considered "protected in perpetuity" for purposes of the charitable contribution deduction available under federal income tax law. *Contra* Kinnamon, *supra* note 2, at 11 ("[T]he possibility of extinction of a conservation easement through a tax sale should also be treated as an event the possibility of which is so remote as to be negligible . . . ."). *See generally supra* notes 151-57 and accompanying text.

[186] Prior to the enactment of the CES, non-profit organizations used the "anchor parcel" technique to insure the enforceability of land use restrictions. *See* Ginsberg Letter, *supra* note 165. In the letter, Professor Ginsberg states that it is "already possible to use conservation easements in New York . . . . All that is necessary is the conveyance of a small 'anchor' parcel along with the restrictions on the balance of the retained land. . . . The legislation in question will merely clear away a common law legal anachronism . . . ." *Id.; see also* Letter from Timothy L. Barnett, Executive Director of the Adirondack Conservancy, to Langdon Marsh, Executive Deputy Commissioner of the New York State Department of Environmental Conservation (July 27, 1983) ("Our program or interests will not change as a result of the passage of the easement legislation . . . . [W]e will be able to proceed with our mission here efficiently and be relieved of holding tax exempt land simply to provide appurtenancies to easements.").

[187] Section 542, subdivision 5, of the New York Real Property Tax Law in pertinent part provides:

> The state board shall determine the percentage of change, if any, in the total value of the parcel as a result of such easement. This percentage, when applied to the last assessment placed on such parcel before acquisition of that easement, as adjusted for any change in level of assessment, shall be the measure of the value of this easement . . . .

N.Y. REAL PROP. TAX LAW § 542(5) (McKinney Supp. 1984-1985). It is submitted that this

The standard of value used in real property tax assessment is "market value."[188] The determination of market value is within the discretion of the local assessor.[189] Various factors may be considered by the assessor in determining market value, including the existing use of the property and the effect of the conservation easement upon such use.[190] A conservation easement which does not effectuate a reduction in market value will produce no real property tax benefits.[191]

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before-and-after approach which the statute authorizes for the valuation of certain state-held conservation easements should be applied by analogy to conservation easements held by municipal corporations and NPCOs. *See supra* notes 182-86 and accompanying text; *see also* Reynolds, *supra* note 96, at 358 ("Appraising the value of preservation easements is accomplished properly by appraising the property before imposition of the easement and again after imposition of the easement. The difference between the two value estimates is the value of the easement.").

[188] *See, e.g.*, Lane Bryant, Inc. v. Tax Comm'n, 21 A.D.2d 669, 670, 249 N.Y.S.2d 994, 995 (1964) ("[I]t is the market value of the property, at the time of the assessments, which is the standard of value." (citations omitted)), *aff'd*, 19 N.Y.2d 715, 225 N.E.2d 882, 279 N.Y.S.2d 175 (1967).

[189] In the context of an "open space agreement" under N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1984-1985), which is analogous to a conservation easement, *see supra* note 64 and accompanying text, the state board ruled that a municipality may not order a local assessor to reduce the assessment of burdened property by a specified percentage of assessed value. *See* 3 N.Y. STATE BD. OF EQUALIZATION & ASSESSMENT 21, 22 (Op. Counsel 1973) ("Such a direction to the assessor . . . is illegal and unenforceable since it is the assessor, and the assessor alone, who has the responsibility to assess property at full value or a uniform percentage thereof."). The professional judgment of the assessor is especially important in determining the market value of restricted property which is infrequently sold in the market. In the context of an open space agreement under N.Y. GEN. MUN. LAW § 247, the New York State Board of Equalization and Assessment has stated:

> [T]he assessor, or such appraisal personnel as he may employ, must use his best professional judgment as to the effect, if any, of the use restriction on the value of the property. After a period of years, the assessor would naturally use sales of similarly use-restricted parcels in the valuation process. In general, then, there are no hard and fast rules that may be used by the assessor in the first instance, and his judgment must necessarily be subjective.

6 N.Y. STATE BD. OF EQUALIZATION & ASSESSMENT 62, 62 (Op. Counsel 1977).

[190] *See* REAL PROPERTY TAX REPORT, *supra* note 164, at 19-20:

> Appraisers maintain that the primary criterion for determining the value of a parcel of real property is location. In fact, the value of a particular parcel of land depends on location, topography, municipal services, proximity to other uses, the use to which the land can be applied, zoning patterns, and a host of intangible factors.

Id. Some of the various factors which might be considered by the assessor in determining the value of a conservation easement include "the nuisance value of submitting to inspections by the donee, the nuisance value of seeking approval for any changes . . . [and the nuisance value of precluding] the right to excavate a swimming pool, to cut down living trees, or to add a driveway." Reynolds, *supra* note 96, at 360.

[191] In Adirondack Mountain Reserve v. Board of Assessors, 99 A.D.2d 600, 471 N.Y.S.2d 703, *aff'd mem.*, 64 N.Y.2d 727 (1984), petitioner, a corporation organized for the purpose of conserving natural resources in the Adirondack region, granted to the state a "conservation easement" prohibiting real estate development, mining, logging and other uses of the servient tenement, and a "public trail easement" establishing an affirmative right of ingress and egress along

For example, the donation of a conservation easement prohibiting commercial development of property with no prospects for commercial development would probably not reduce the donor's tax bill.[192] Conversely, a conservation easement prohibiting commercial development of farmland may have a dramatic effect on the donor's tax bill if the pre-easement assessment reflected the "development potential" of the land.[193] As a practical matter, however, the tax benefits obtainable by taking the easement into account may be offset by the need to reassess property which has appreciated in value subsequent to its most recent assessment.[194]

IV. Conclusion

The conservation easement is a statutory interest in real property

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trails, paths, and roadways. The easements were appurtenant to 9,000 acres of adjoining land purchased from petitioner by the state. Any potential development of the burdened property was subject to state conservation laws which prohibited development within one-half mile from the nearby Ausable Lakes and River, and provided that overall development intensity may not exceed 15 buildings per square mile. The petitioner retained ownership of land contiguous to the burdened property. 99 A.D.2d at 600, 471 N.Y.S.2d at 704.

In holding that the imposition of the easements did not diminish the value of the burdened property, the appellate division stated that the most valuable use of the property was "seasonal recreation" and that the easements "do not affect recreational use." *Id.* at 601, 471 N.Y.S.2d at 705. The court also noted that the easements benefited adjoining property owned by petitioner, and therefore, the overall burden imposed upon petitioner's land was slight. *Id.* at 601, 471 N.Y.S.2d at 705; *see also supra* note 96. In its affirmance, the court of appeals stated that "[t]here is support in the record for the . . . finding . . . that the easement did not diminish the highest and best use of petitioner's retained property." Adirondack Mountain Reserve v. Board of Assessors, 64 N.Y.2d at 728.

[192] *See supra* note 191; *see also* Addis Co. v. Srogi, 79 A.D.2d 856, 857, 434 N.Y.S.2d 489, 490 (1980) ("[F]air market value of this building should be determined in reference to its existing use. Property is assessed for tax purposes according to its condition on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future."); *accord* Allied Stores v. Finance Adm'r, 76 A.D.2d 835, 428 N.Y.S.2d 316 (1980).

[193] *See* 1 N.Y. State Bd. of Equalization & Assessment 112, 112 (Op. Counsel 1972):

> In an area where subdivision and development are taking place rapidly, it becomes difficult to determine the full value of vacant or open land. In such cases, the assessor must consider not only available sales, but also such factors as the actual use of the property and the adjoining properties, the extent of development, the length of time it would take to develop the area, the adaptability of a particular parcel for subdivision or development purposes, and the ability of the market to absorb all existing open or vacant land in the area.

Id.

[194] *See* E. Watson, *supra* note 3, at 7 ("[A]sking the assessor to consider the effect of an easement may cause the property to be reassessed in its entirety. This may in fact raise the property's assessment even after the easement is taken into consideration.").

that imposes durable restrictions on land use.[195] Although the statutory language concerning the imposition of affirmative obligations in conservation easements is contradictory, the definition of conservation easement suggests that restrictive agreements seeking to impose affirmative obligations are excepted from the protection afforded by the CES.[196]

The CES represents an attempt to bring New York real property law into conformity with existing federal income tax law, which provides a charitable contribution deduction for conservation easements protected in perpetuity. To obtain federal income tax savings, a prospective donor of a conservation easement must first create a valid property interest pursuant to the CES, and then transfer such property interest in accordance with the requirements of the Internal Revenue Code and applicable regulations.[197] The unfortunate inclusion of a provision in the CES rendering certain state-held conservation easements "void ab initio" may disqualify such easements for federal income tax benefits.[198]

The CES only partially addresses the question of the real property tax consequences of donating a conservation easement. The CES provides that certain conservation easements held by the state should be taken into account in the assessment of burdened property, but the statute is silent concerning the assessment of conservation easements held by other public bodies or NPCOs.[199] It is submitted that conservation easements should be treated uniformly by local assessors, and their effect on value should be recognized.[200]

As with any recent legislation, the future of conservation easements in New York will depend ultimately upon judicial resolution of the ambiguities inherent in the statute.

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[195] *See supra* notes 27-37 & 66-71 and accompanying text.
[196] *See supra* notes 38-48 and accompanying text.
[197] *See supra* notes 117-57 and accompanying text.
[198] *See supra* notes 78-85 & 157 and accompanying text.
[199] *See supra* notes 161-67 and accompanying text.
[200] *See supra* notes 178-86 and accompanying text.