

A Primer on Conservation Easements and Greenspace for the Property Tax

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Introduction

In 1992, the Georgia Legislature adopted the Uniform Conservation Easement Act (codified as O.C.G.A. §44-10-1 et al.). The Act authorizes and promotes the use of conservation easements in Georgia “to retain or protect natural, scenic or open space values; assure availability for agricultural, forest, recreational, or open space use; protect natural resources; maintain or enhance air or water quality; and preserve the historic, architectural, archaeological or cultural aspects of real property.”

In 1998, the Institute of Ecology surveyed Georgia’s county tax assessors to determine where conservation easements exist and the state of assessors’ knowledge of conservation easements. One hundred and eight counties returned the survey; nine counties responded yes to having perpetual conservation easements; and 107 counties requested more information on conservation easements. Since that time, the number of conservation easements in Georgia has dramatically increased, as has landowner and local government interest, due to the creation of the Georgia Greenspace Program by state legislation.

In fiscal year (FY) 2001, the Georgia Greenspace Program distributed \$30 million to 41 counties for the permanent protection of greenspace. For FY 2002, 59 counties will receive \$30 million and \$30 million has been requested for FY 2003. In order to receive these funds, a county must demonstrate how they will permanently protect approximately 20 percent or more of their geographic area as greenspace. The monies provided by the Greenspace Program will be insufficient to purchase 20 percent of a county’s land base in fee simple, the traditional method of preserving greenspace. Local governments, therefore, are encouraged to pursue less-than-fee ownership or conservation easements as a way to extend their greenspace funds.

A conservation easement is an agreement in which the owner of the property conveys certain rights to a governmental agency or charitable organization for public benefit. The easement is recorded with the deed to the property and is binding on future owners. The agreement can be either for a specified number of years or in perpetuity. Typically, the agreement restricts the type and amount of development that is allowed on the property. The

rights conveyed vary according to the particular attributes of a property and the goals of the landowner and the easement holder. In the case of a perpetual easement, the rights are permanently extinguished once conveyed and can never be exercised by any one or any entity. Because a conservation easement restricts the allowable uses of the property, the restrictions are likely to alter the highest and best use of the land resulting in a lower fair market value and property tax assessment.

While this line of reasoning may seem straightforward, the assessment of land encumbered by a conservation easement has been treated with considerable variation. For instance, Gwinnett County tax assessors use the assessed values for agricultural land enrolled in the Conservation Use program to assign values to land encumbered by conservation easements (S. Pruitt, pers com). This seems to satisfy landowners and Gwinnett County's chief appraiser who consider it expedient and fair. In Jackson County, on the other hand, a landowner challenged his 2001 tax assessment for property encumbered by a conservation easement. The landowner was not satisfied with the local tax assessor's consideration of the encumbrance in determining the land's fair market value. The challenge was heard before the Jackson County Board of Equalization. Subsequently, the Board agreed with the landowner that the easement did affect the highest and best use of the property and reduced the fair market value assessment. The Jackson County Tax Assessors Office is appealing the decision to the Superior Court. The Deed of Conservation Easement for this parcel has been included as Attachment A.

Landowners who voluntarily place a conservation easement on their land are entitled by law for a reassessment of their property (Georgia's Uniform Conservation Easement Act; codified as O.C.G.A. §44-10-1 et al.). These landowners deserve, *a priori*, a degree of certainty that their encumbered land will be reassessed appropriately. Establishing guidelines in this area will help to provide a degree of uniformity in the reassessment, diminish landowners' fears of reassessment, and thus promote the preservation of greenspace. The Office of Public Service and Outreach at the University of Georgia's Institute of Ecology in cooperation with the Georgia Department of Revenue's Property Tax Division, will hold a roundtable discussion in an effort to reach a consensus on the appropriate methods for valuing land encumbered by conservation easements. The Department of Revenue has asked us to develop this summary for their assessors so that they will be prepared for this discussion.

Georgia's Greenspace Program [<http://www.state.ga.us/dnr/greenspace>]

The Georgia Greenspace Program was created pursuant to Senate Bill 399 (codified as O.C.G.A. §36-22-1 et al.) during the 2000 legislative session. The program focuses on the

protection of greenspace in developed and rapidly developing counties, and their municipalities. The program is voluntary, non-competitive, and county-based. Eligible counties are awarded a grant if they develop and implement plans to permanently protect at least 20 percent of the county's geographic area (land and water) as natural, undeveloped greenspace. Lands identified by the county for permanent protection must address one or more of nine Greenspace Program goals. Each of these goals provides some measure of public benefit. Greenspace and the goals of the program are defined as follows:

"Greenspace - permanently protected land and water, including agricultural and forestry land whose development rights have been severed from the property, that is in its undeveloped, natural state or has been developed only to the extent consistent with, or is restored to be consistent with, one or more of the following goals:

1. water quality protection for rivers, streams, and lakes;
2. flood protection;
3. wetlands protection;
4. reduction of erosion through protection of steep slopes, areas with erodible soils, and stream banks;
5. protection of riparian buffers and other areas such as marsh hammocks that serve as natural habitat and corridors for native plants and animal species;
6. scenic protection;
7. protection of archaeological and historic resources;
8. provision of recreation in the form of boating, hiking, camping, fishing, hunting, running, jogging, biking, walking, skating, birding, riding horses, observing or photographing nature, picnicking, playing non-organized sports, or engaging in free play; and
9. connection of existing or planned areas contributing to the goals set out in this paragraph."

The statute assigns responsibility of program administration to the Department of Natural Resources. A five-member Georgia Greenspace Commission, administratively attached to the Department of Natural Resources, establishes program policies and reviews and approves community greenspace plans. Serving on the commission as ex-officio members are Mr. J. Frederick Allen, Director of the Georgia Forestry Commission and Mr. Lonice C. Barrett, Commissioner of the Department of Natural Resources. As provided by the statute Governor Barnes appointed the Honorable C. Jack Ellis, Mayor of the City of Macon; Mr. Clay C. Long, a

principal of Atlanta law firm Long Aldridge & Norman, and Mr. Stephen H. Macauley of the Macauley Companies, with Mr. Long serving as Chairman.

The statute also creates a Georgia Greenspace Trust Fund to which state appropriated funds are deposited. These monies are used to subsidize the costs of acquiring real property or conservation easements that qualify as greenspace. In FY 2001, 41 counties were eligible for the program and grant awards for each county were calculated via 1999 residential property taxes. For example, Gwinnett County was awarded \$3.3 million and Jackson County was awarded \$139,450.

Conservation Easements

Ownership of land includes several legally recognized rights including the rights to subdivide, farm, harvest timber or minerals, and limit public access. Landowners can elect to sever one or more of these rights in order to protect a specified conservation value. These rights are donated or sold to a qualified easement holder, which retires the rights and ensures they will never be used. The landowner still holds title to the property, including the rights to sell, donate or transfer the property. In addition, the landowner may continue to use the land for purposes not specifically prohibited by the terms of the easement.

The agreement that documents the conveyance of these rights is called a conservation easement. A conservation easement is a voluntary agreement between a landowner and a qualified easement holder. Conservation easement agreements are flexible documents. Their terms are negotiated between the landowner and the easement holder, typically prohibiting or limiting subdivision or development of the land. In Georgia, the agreement can be for a specified number of years or in perpetuity. The details of the agreement are recorded in a Deed of Conservation Easement in the office of the clerk of the Superior Court in the county in which the land is located (see Attachment A). The agreement is binding on both present and future owners of the property¹. It is the responsibility of the easement holder to monitor the property to ensure that the terms of the agreement are not being violated and to pursue legal recourse if necessary.

Qualified easement holders include a government entity or a charitable organization such as a land trust. An example of a government entity is the City of Alpharetta, which holds a conservation easement on wetlands. Land trusts are nonprofit organizations that work with

¹ Georgia's Uniform Conservation Easement Act specifies that a landowner may enter into a conservation easement for a specified term of years or in perpetuity. For purposes of our discussion we refer only to perpetual conservation easements and are in fact unaware of the existence of any limited term conservation easements in the state.

private landowners to protect land for conservation. They are operated at the local, regional, state, and national level. They acquire land, conservation easements, management agreements, or other interests in real property for the purpose of enabling public benefit from the land. There are over 40 land trusts in Georgia. As of 1999, there were at least 70 conservation easements in Georgia protecting 37,723 acres (Institute of Ecology, 1999).

Placing an easement on their land does not necessarily mandate a landowner to provide the public access to their land. In some cases conservation easements are initiated with the intent of public access such as providing river or lake access or for educational purposes. In these cases, the landowner and the easement holder can negotiate the terms of public access and document them in the Deed of Conservation Easement.

The Internal Revenue Service and Conservation Easements

Since 1977, federal income tax law has recognized the donation of a conservation easement as a tax-deductible charitable gift, provided the easement is granted in perpetuity and “exclusively for conservation purposes” to a qualified organization as defined under section 170(c) of the federal tax code. Landowners may also realize estate tax benefits due to reduced land values. The conservation purposes for which easements may be donated are defined in section 170(h)(4) of the federal tax code:

- “(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 ecosystems,
- (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 a historically important land area or a certified historic structure.”

The tax benefits received are based on the valuation of the development rights and the land uses eliminated by the easement. A professional appraisal must be conducted to determine the fair market value of the conservation easement and thus the value of the gift. The Internal Revenue Service applies a “before-and-after” approach in appraising the value of conservation easements. This method starts with the estimation of the property’s fair market value. The fair market value of unencumbered land, especially in developing areas, often reflects the value of

land for its highest and best use. This is the Before value. The value of the encumbered property is then estimated in its current use. This is the After value. The value of the conservation easement is the difference between the Before and After values.

The effect of a conservation easement on the fair market value of the land can vary considerably. A review of properties encumbered by conservation easements in Massachusetts, for example, showed downward reassessments ranging from as little as 13 percent to as much as 95 percent of the unencumbered assessed value (Stockford, 1990). Interviews with fourteen private land trusts and government agencies active in preserving farm land throughout the nation revealed that the value of conservation easements can range from 25 to 85 percent of the unencumbered fee value (Lassner, 1998)². The wide range in values may be attributed to the variations in the terms of the agreements. The more restrictive the conditions of the easement, the higher the percentage; the more development rights an owner retains, the lower the percentage.

Ensuring Public Benefit

How can we be sure that a conservation easement furthers the public interest and is not an attempt to dodge taxes? First, a landowner must show that their conservation easement will accrue significant public benefit to be eligible for federal income and estate tax abatement. Regulation §1.170A-14(d)(iv)(A) of the federal tax code lists factors to be considered in the evaluation of public benefit (see Attachment B). In addition, a landowner must convey the transferred rights to a qualified easement holder. The IRS recognizes both government entities and land trusts for this purpose. The main purpose of most land trusts is to protect land for the benefit of the public. To receive charitable status from the IRS a land trust must develop bylaws, which includes a mission statement. For example, the Gwinnett Open Land Trust's mission statement reads simply " (to) preserve open and greenspace in Gwinnett County with environmental, historical and archaeological value." [<http://www.gwinnettlandtrust.org>]. Gwinnett County tax assessors rely on this mission statement as evidence of public benefit when reassessing property for which the land trust holds a conservation easement (S. Pruitt, pers com). Recognition of the conservation easement as a charitable gift by the IRS should be sufficient evidence for public benefit.

Another safeguard to protect against unjust enrichment of an individual is Georgia's Greenspace Program. The rules of the Greenspace Program require eligible counties to develop a greenspace plan that is reviewed and approved by the Greenspace Commission. In

developing the plan, each county decides what its greenspace priorities are. In establishing their priorities, a county must consult the public by holding a public meeting. Many counties have far exceeded this requirement by also assembling a diverse citizen advisory committee to help develop their plan. Greenspace plans may either specify geographic areas for protection or particular kinds of land (e.g., farmland or riparian corridors). Providing permanent protect of land that has been identified as part of a county's greenspace plan clearly furthers the public interest.

The Economic Consequences of Conservation Easements

The effects of tax abatement for conservation easement-encumbered land in Georgia should be evaluated. At this time, it is our belief that such a program will have minimal affect on a county's ability to balance their budget. There are two reasons for this assumption. First, undeveloped land requires fewer municipal services and demands less from a county's coffers than developed land. Six cost of community services studies have been completed here in Georgia by the UGA College of Agricultural and Environmental Sciences and the Warnell School of Forest Resources. In every case, lands devoted to residential use cost more to service than was generated from property tax revenue. Open land, farmland and forested land, on the other hand, generated more in property tax revenue than they cost in public service.

Secondly, permanently protected land is likely to increase the market value of neighboring property. Several studies across the nation have shown the positive effects that open space has on neighboring property values. This principle has been referred to as the "betterment theory" and has been recognized by the IRS in the tax appraisal context (Stockford, 1990). The Georgia Forestry Commission has funded a study of the enhancement value of open space in the state, which will be published in fall 2002.

Next Steps for Georgia

The main goal for the roundtable is to develop a consensus on assessing lands encumbered by conservation easements. This section introduces ideas for tax incentive programs at the state level and is included for initiating dialogue on these programs.

Georgia, like most states, has a property tax incentive program to protect agricultural, forested, and environmentally sensitive lands. The Conservation Use program provides property tax breaks to eligible landowners that agree to keep their land in its current use for a period of ten years. Ironically, the Conservation Use program does not recognize landowners

² Author did not specify location of land trusts or government agencies that she interviewed.

that *permanently* restrict the development of their property with conservation easements³. In fact, only a handful of states have legislation specifically providing landowners with property tax benefits for adopting conservation easements⁴. A review of three state-level programs is provided (see Attachment C). A review of four additional state-level programs is in progress and will be made available when completed.

Georgia could go beyond assessments of property at its permitted use, and consider applying a lower tax rate or a lower percentage of market value assessment to lands encumbered by a conservation easement (Stockford, 1990). This would guarantee a property owner a lower tax burden regardless of the tax assessor's appraisal of the effect of the easement on the fair market value. The constitutionality of the subclassification of property for taxation purposes is currently being researched. Discussion of the feasibility of such programs in Georgia will be encouraged at the roundtable.

References

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³ The adoption of a conservation easement does not preclude the land owner from entering or remaining in the Conservation Use program.

⁴ It could be argued that the provision of the Uniform Conservation Easement Act requiring that land placed in a conservation easement be reassessed to reflect the effect of the easement on the fair market value is an incentive program but because this provision is not being applied by some assessors and does not appear to be applied uniformly in many cases, it is not effective.

Attachment A

Attachment B

Regulation §1.170A-14(d)(iv)(A) of the federal tax code lists factors to be considered in the evaluation of public benefit. They are:

1. Uniqueness of the property to the area;
2. Intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);
3. Consistency of the proposed open space use with public programs (whether federal, state or local) for conservation of the region;
4. Consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in 1.170A-14(c)(1) in close proximity to the property;
5. Likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;
6. Opportunity for the general public to use the property or to appreciate its scenic values;
7. Importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
8. Likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
9. Cost to the donee of enforcing the terms of the conservation restriction;
10. Population density in the area of the property;
11. Consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.

Attachment C