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Some Green for Some Green in West Virginia: An Overview of the West Virginia Conservation and Preservation Easements Act

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I. INTRODUCTION

I am I plus my surroundings and if I do not preserve the latter, I do not preserve myself.¹

¹ Jose Ortega y Gasset, Meditations on Quixote, “To the Reader” (1914).
In 1995, the West Virginia legislature enacted the Conservation and Preservation Easements Act.\(^2\) In doing so, the legislature recognized the important role that conservation and preservation easements play in maintaining the natural, scenic and historic resources of West Virginia.\(^3\) As a general matter, conservation and preservation easement statutes are illustrative of federal and state government working together to provide incentives for land conservation without expressly regulating the use of privately owned tracts of land. As such, these statutes provide a free market alternative to land use regulation.

An easement gives its holder the right to use another person's property.\(^4\) By contrast, a negative easement prevents a property owner from doing a specified lawful act upon or to his or her land.\(^5\) A conservation easement is a negative easement restricting the amount and variety of development that may occur on a specified tract of land.\(^6\) Such an easement restricts development only to the extent necessary to preserve the significant attributes of the property.\(^7\) Hence, any property owner whose property has natural, scenic or historic attributes may grant a conservation or preservation easement.\(^8\)

In keeping with the nature of conservation easement statutes in the United States, the West Virginia Act provides economic incentives to holders of large tracts of land for commitments the landowners make to conserving their land and keeping it free from development. This economic incentive is a reduction of the landowner’s

\(^2\) See W. VA. CODE §§ 20-12-1 to -8 (1996). Throughout this Note this legislation will be referred to as “the Act” or “the West Virginia Act.”

\(^3\) W. VA. CODE § 20-12-2 (1996) (“The West Virginia Legislature recognizes the importance and significant public benefit of conservation and preservation easements in its ongoing efforts to protect the natural, historic, agricultural, open-space and scenic resources of this state.”). Generally, “[a] conservation easement is a legal agreement a property owner makes to restrict the type and amount of development that may take place on his or her property.” JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK 5 (1988).

\(^4\) BLACK’S LAW DICTIONARY 509 (6th ed. 1990); see also, RESTATEMENT (FIRST) OF PROPERTY § 450 (1944).

\(^5\) BLACK’S LAW DICTIONARY 510 (6th ed. 1990); see also, RESTATEMENT (FIRST) OF PROPERTY § 452 (1944).

\(^6\) DIEHL & BARRETT, supra note 3, at 5.

\(^7\) Id. at 7.

\(^8\) Id. at 6.
federal income tax liability. And so, where altruistic reasons do not provide a sufficient incentive for a property owner to grant a conservation or preservation easement, a property owner may claim a federal income tax deduction if the easement is given as a gift. In most jurisdictions, conservation and preservation easements can last for a term of years or they can last in perpetuity. However, only easements granted in perpetuity can qualify for federal tax advantages.

It is important for West Virginia lawyers to know about the Conservation and Preservation Easements Act and about how it can benefit their clients. For example, the Act may be of interest to clients who possess large land holdings in the State. Such clients may be in a position to reduce their federal income tax liability by donating one or more conservation easements. Alternatively, the Act may find application for coal companies that have removed coal from and reclaimed a tract of land that is owned by the company. In such a situation, the coal company could grant a conservation easement on the tract of land and reduce its tax liability. Finally, the Act may find application with clients who have an unselfish love of West Virginia and of its wilderness and open-space and who are deeply and personally committed to preserving the State’s natural beauty.

This Note examines the West Virginia Conservation and Preservation Easements Act, noting similar acts in other jurisdictions, and assesses the practical application of the Act. This Note will also consider the mechanics of how the Act works and will discuss the tax benefits available to clients who donate a

\[9\] See 26 U.S.C. § 170(h) (1994). While this Note will focus on the benefits that donors of conservation easements can realize for inter vivos donations, it is important to realize that donation of a conservation easement can result in significant estate tax benefits as well. For example:

Assume a landowner has a property worth $1,000,000 without [a conservation]
easement and $500,000 when encumbered by an easement. Whether the donation
of the easement is made during the donor’s life or at the donor’s death, the size
of the estate is dramatically reduced and the size of the estate tax is dramatically
reduced. While this estate tax savings is always important, it is particularly
important in the case of a land-rich and cash-poor donor whose estate otherwise
would have to sell the land in order to pay the estate tax. A qualified conservation


\[11\] The West Virginia Act indicates that “a conservation or preservation easement created after the effective date of the article may be perpetual in duration, but in no event shall be for a duration of less than twenty-five years.” W. VA. CODE § 20-12-4 (1996).

\[12\] DIEHL & BARRETT, supra note 3, at 7.

conservation easement.\textsuperscript{13}

II. THE WEST VIRGINIA CONSERVATION AND PRESERVATION EASEMENTS ACT

A. The West Virginia Common Law of Easements Prior to the Conservation and Preservation Easements Act

West Virginia common law defined an easement to be "the right one person has to the use the lands of another for a specific purpose and is a distinct estate from the ownership of the soil itself."\textsuperscript{14} In West Virginia, easements can be created by prescription,\textsuperscript{15} by express grant,\textsuperscript{16} by a covenant operating as a grant,\textsuperscript{17} by exception or reservation,\textsuperscript{18} or by implication.\textsuperscript{19}

As is the case in nearly every American jurisdiction, there are two distinct types of easements.\textsuperscript{20} The first is an easement appurtenant.\textsuperscript{21} An easement appurtenant has a dominant estate and a servient estate.\textsuperscript{22} These types of easements run with the land, and thus, can be transferred and devised.\textsuperscript{23}

\textsuperscript{13} In order to enhance the readability of this Note, the term "conservation easement" will refer to both conservation and preservation easements unless otherwise noted.

\textsuperscript{14} Kelly v. Rainelle Coal Co., 64 S.E.2d 606, 613 (W. Va. 1951).

\textsuperscript{15} See, e.g., Town of Paden City v. Felton, 66 S.E.2d 280 (W. Va. 1951); Riddle v. Department of Highways, 179 S.E.2d 10 (W. Va. 1971).


\textsuperscript{17} See, e.g., West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W.Va. 600 (W. Va. 1883); Hennen v. Deveny, 77 S.E. 142 (W. Va. 1913).


\textsuperscript{19} See, e.g., Town of Paden City, 66 S.E.2d 280; Myers v. Stickley, 375 S.E.2d 595 (W. Va. 1988).


\textsuperscript{21} Id.

\textsuperscript{22} Id; see also Holland v. Flanagan, 81 S.E.2d 908, 912-13 (W. Va. 1954).

second type of easement is an easement in gross.\(^{24}\) An easement in gross does not have dominant or servient estates.\(^{25}\) Instead, this type of easement imposes a servitude on land, the benefit of which runs to a specified individual.\(^{26}\) Unlike the easement appurtenant, an easement in gross cannot be transferred or devised by the person to whom the easement was initially given.\(^{27}\) Hence, easements in gross are destined to terminate upon the death of their original grantee.

The common law of easements in West Virginia does not serve well the goal of sustained land conservation as contemplated by modern conservation easements. By its very nature, a conservation easement is a negative easement in gross. As such, the holder of a conservation easement could not transfer the easement or convey it by inheritance. Thus, even if an easement in gross were given for conservation purposes, under West Virginia common law it would die with its original grantee. Moreover, no organization that would have an interest in acquiring such an easement would likely have sufficient capital with which to purchase the conservation easement from the fee owner. And rare is the property owner who will grant away the right to develop his property as he wishes without an economic incentive to do so. Therefore, "recogniz[ing] the importance and significant public benefit of conservation and preservation easements in its ongoing efforts to protect the natural, historic, agricultural, open-space and scenic resources of this state[,]"\(^{28}\) the West Virginia legislature enacted the Conservation and Preservation Easement Act in 1995.

B. The Mechanics of the West Virginia Conservation and Preservation Easements Act

The West Virginia Conservation and Preservation Easements Act is based on the Uniform Conservation Easement Act.\(^{29}\) Under the West Virginia Act, a conservation easement is a non-possessory interest that a holder has in real

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\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) W. VA. CODE § 20-12-2 (1996).

property.\textsuperscript{30} The interest can by appurtenant or it can be in gross.\textsuperscript{31} It may impose limitations on the use of the property or require its holder to accept affirmative obligations to conserve or preserve the property.\textsuperscript{32} However, these characteristics alone do not constitute a conservation easement. Central to the definition of conservation easement is that the easement be given for conservation purposes. The West Virginia Act indicates that this requirement is satisfied where the easement preserves the natural, scenic or open-space aspects of the property or where the easement assures that the property will be available for use as agricultural, forest, recreational or open-space land.\textsuperscript{33} This requirement is also fulfilled where the easement protects the wildlife and natural resources or enhances the land, air or water quality on the property or preserves historical, architectural, archeological or cultural portions of the property.\textsuperscript{34} The Act defines a preservation easement as a non-possessory interest that the holder of the easement has in a historical building.\textsuperscript{35}

Conservation or preservation easements are created most often by an express grant of the easement by the grantor to the holder.\textsuperscript{36} This allows the easement’s provisions to be customized to suit the specific needs of the grantor and the holder.\textsuperscript{37} There are two categories of entities that the Act permits to be

\begin{itemize}
  \item \textsuperscript{30} W. VA. CODE § 20-12-3(a) (1996).
  \item \textsuperscript{31} W. VA. CODE § 20-12-3(a) (1996).
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id. However, in adopting the Uniform Act, the Maine legislature omitted language relating to the preservation of property with historic value. ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-B (West 1988). \textit{Cf.} UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).
  \item \textsuperscript{35} W. VA. CODE § 20-12-3 (1996). This provision was not present in the Uniform Act and adopting jurisdictions do not have similar language. \textit{See} UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).
  \item \textsuperscript{36} A conservation easement may not be created by a governmental agency through eminent domain unless that governmental agency so condemns the entire fee interest of the property. W. VA. CODE § 20-12-5 (1996).
  \item \textsuperscript{37} Diehl & Barrett, \textit{supra} note 3, at 147-208 (discussing the grant of a conservation easement and providing a form easement); Id. at 209-39 (discussing the grant of a preservation easement). \textit{See also} West'S Legal Forms, Real Estate Transactions §§ 34.53-.58 (2d ed. 1986).
\end{itemize}
holders of a conservation easement. The first is a governmental entity that is permitted, either by West Virginia law or by federal law, to acquire and maintain an interest in land. The second is a charitable organization that is exempt from taxation and that has been founded for conservation or preservation purposes.

Once created, a conservation easement must be recorded no later than sixty days after the date that the easement is to be effective.

In order to sidestep the common law pitfalls that await a negative easement in gross for conservation purposes, the West Virginia Conservation and Preservation Easements Act also provides that a conservation easement will not be invalid: if it is not an easement appurtenant, if it can be assigned or devised to another person or entity, if it has not been recognized by West Virginia common law, if it is a negative easement, if it mandates affirmative duties of the owner of the burdened land or the holder the easement, or where privity of estate is lacking. Except for these specifications, a conservation easement can be

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38 W. VA. CODE § 20-12-3(b)(1) (1996). Under this provision, the West Virginia Department of Natural Resources may qualify as a holder to maintain conservation easements in West Virginia. Id.

Other jurisdictions that have statutes similar to the Uniform Act have made only minor modifications to this provision of the Act. Cf. UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).

39 W. VA. CODE § 20-12-3(b)(2) (1996). Specifically, the West Virginia Code provides that a holder of a conservation or preservation easement can be a charitable corporation, charitable association or charitable trust registered with the secretary of state and exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986... the purposes or powers of which include retaining or protecting the natural, scenic, agricultural or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational or open-space use; protecting natural resources and wildlife; maintaining or enhancing land, air or water quality; or preserving the historical, architectural, archaeological or cultural aspects of real property.

Id. An example of such a non-profit entity which has the financial resources to hold a conservation easement in perpetuity in West Virginia is the Appalachian Conservancy.

Other jurisdictions that have statutes similar to the Uniform Act have made only minor modifications to this provision of the Act. Cf. UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).

40 W. VA. CODE § 20-12-6(b) (1996) (stating that “[u]pon proper recording, the provisions of this article apply retroactively to the effective date of the easement”).

41 W. VA. CODE § 20-12-6(a)(1)-(7) (1996). Other jurisdictions that have statutes similar to the Uniform Act have made only minor modifications to this provision of the Act. See UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).

The Comment to the Uniform Act provides that “[o]ne of the Act’s basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends.” UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163, 179 (1996).
created, transferred, changed or terminated by the same methods as traditional easements.\textsuperscript{42} Moreover, the Act allows a conservation easement to be of perpetual duration, but mandates that the easement last for at least twenty-five years.\textsuperscript{43}

The West Virginia Act also addresses the relation of pre-existing interests in land that is the subject of a proposed conservation easement. The Act states that such pre-existing interest will not be adversely affected by a conservation easement.\textsuperscript{44} However, this protection is waived where the owner of the pre-existing interest is a party to the easement or where the owner expressly manifests her intention to comply with the terms of the easement.\textsuperscript{45} Additionally, the Act expressly indicates that it “shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of this article among states enacting similar laws.”\textsuperscript{46} Finally, “the granting of a conservation or preservation easement shall not subsequently restrict the right of the fee owner to further grant any other interest in real property to any person or entity when the grant does not materially impair the prior conservation or preservation

\textsuperscript{42} W. VA. CODE § 20-12-4(a) (1996). Other jurisdictions that have statutes similar to the Uniform Act have made only minor modifications to this provision of the Act. See, UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).

\textsuperscript{43} W. VA. CODE § 20-12-4 (1996). However, this provision is expressly limited by another section of the Act which states, in pertinent part, that the Act does not affect the power of a court to modify or terminate a conservation or preservation easement in accordance with the principles of law and equity consistent with the public policy of this [Act] . . . Nevadwithstanding provision of law to the contrary, conservation and preservation easements shall be liberally construed in favor of the grants contained therein to effect the purposes of those easements and the policy and purpose of this [Act].

W. VA. CODE § 20-12-5(b) (1996).

While most jurisdictions that have statutes similar to the Uniform Act have made only minor modifications to this provision of the Act and have retained the presumption of perpetuity that is expressed, the Kansas statute is drafted to create a presumption that the easement will last only through the grantor’s life time. See, UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996).

\textsuperscript{44} W. VA. CODE § 20-12-4(d) (1996). Note that this rule is applicable even in the presence of “an unrecorded lease for the production of minerals or removal of timber.” Id.

\textsuperscript{45} W. VA. CODE § 20-12-4(d) (1996). See also, UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1996) (Other jurisdictions that have statutes similar to the Uniform Act have made only minor modifications to this provision; however, Kansas provides even greater protection to owners of pre-existing mineral interests in that the only situation in which a pre-existing mineral interest is waived is where the owner of the interest is also the grantor of the easement.).

\textsuperscript{46} W. VA. CODE § 20-12-8 (1996).
Subject to specified notice requirements, a fee owner may grant an interest in real property beyond the conservation or preservation easement.48

C. A Historical Perspective

Conservation easements have been used in the United States as a means of land preservation in Boston as early the 1880s.49 By the time of the Great Depression conservation easements were in widespread use.50 During that time, and continuing into the next decade, conservation easements developed as a tool for protecting “scenic views along federal and state highways.”51 Then, “[a]s the use of scenic highway easements developed, the applicability of the device to the broader objectives of open space and historic preservation was urged.”52

Responding to various scholarly writings on the issue of conservation easements, state legislators began to draft legislation to clarify the meaning and effect of this new land protection device.53 Hence, “coincident with the growth of scenic highway easement legislation, state statutes were enacted to enable a broader range of conservation and preservation objectives to be accomplished through the use of non-possessory easements in gross.”54 In the early days of conservation easement legislation, statutes permitted only governmental entities to hold these non-possessory easements.55 Later, states extended this permission to private non-profit organizations as well.56

Massachusetts enacted the first comprehensive legislation concerning

47 Id.
48 Id.

49 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.02 (1996).
50 Id.

51 Id. at 34A.02[1].
52 Id. at 34A.02[2][a].

53 Id.

54 POWELL, supra note 49, at 34A.02.
55 Id.

56 Id.
conservation and preservation easements in 1969. The National Conference of Commissioners on Uniform State Laws approved the Uniform Conservation Easement Act in 1981. The statutory language of the West Virginia Act is very similar to the statutory language of the Uniform Conservation Easement Act. While not every state has enacted legislation based on the Uniform Conservation Easement Act, nearly every American jurisdiction has some form of conservation easement statute.

57 Id. (citing MASS. GEN. LAWS ANN., ch. 184, §§ 31, 32). 


III. PRACTICAL ASSESSMENT OF THE WEST VIRGINIA
CONSERVATION AND PRESERVATION EASEMENTS ACT

A. Tax Implications of the West Virginia Conservation and Preservation Easements Act

1. Federal Income Tax Aspects of the West Virginia Conservation and Preservation Easements Act

The West Virginia Conservation and Preservation Easement Act itself does not specifically discuss the tax implications to the grantor of a conservation easement.\(^{61}\) However, the federal income tax code creates a deduction for the grantor of a conservation easement.\(^ {62}\) This federal income tax benefit that the grantor receives is the primary economic incentive awaiting the grantor of a conservation easement.\(^ {63}\) Furthermore, federal law allows a taxpayer a deduction from the taxable income for charitable contributions made during the taxable year.\(^ {64}\)

A landowner may qualify for the federal income tax deduction for the donation of a conservation easement if the easement meets specified Internal Revenue Service ("IRS") criteria.\(^ {65}\) The IRS mandates that the easement be given in perpetuity\(^ {66}\) and be held by a qualified organization\(^ {67}\) solely for conservation

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\(^{61}\) Unlike federal law, West Virginia state law does not permit a deduction in state income taxes for the grantor of a conservation or preservation easement.

\(^{62}\) See 26 U.S.C. § 170(h) (1994). This article will discuss the general statutory and regulatory provisions of this federal income tax deduction. In-depth treatment of these provisions has been addressed by authors in other forums. See, e.g., SMALL, supra note 9.

\(^{63}\) POWELL, supra note 49, at 34A.03[1] (citations omitted).

\(^{64}\) 26 U.S.C. § 170(a)(1) (1994). A comprehensive discussion of the federal income tax deduction that comes from the donation of a conservation easement is beyond the scope of this Note. However, a brief discussion is necessary in order to adequately discuss the economic benefit to the donor of a conservation easement.

\(^{65}\) DIEHL & BARRETT, supra note 3, at 12-13.


\(^{67}\) 26 U.S.C. § 170(h)(1)(B) (1994). Note also that 26 U.S.C. § 170(h)(3) (1994) further discusses the issue of whether an organization is qualified within the meaning of 26 U.S.C. § 170(h)(1)(B) (1994). It is sufficient to say that any organization that is permitted to be a holder under W. VA. CODE § 20-12-3(b) (1996) will be a qualified organization for federal income tax purposes.

If the donated conservation easement meets the above criteria, the federal tax law permits the donor of a conservation easement to deduct the value of that easement from his or her federal income tax liability.\footnote{See, e.g., 26 U.S.C. §§ 170(f)(3)(B), (h) (1994).} The value of the conservation or preservation easement equals the difference between the value of the property without the restrictions of the easement and with the restrictions of the easement.\footnote{DIEHL & BARRETT, supra note 3, at 8. Note also that in order to qualify for the federal tax deduction, the value of the easement must be determined according to the federal regulatory guidelines for valuation and appraisal set forth in 26 C.F.R. §§ 1.170A-14(h) & 1.170A-14(i) (1996).} However, federal tax law prohibits a property owner from completely eliminating his or her taxable income in a given year, regardless of the value of the easement that he or she donated. Specifically, federal tax law limits a taxpayer’s deduction to a maximum of thirty percent of the taxpayer’s gross income in a given year.\footnote{26 U.S.C. § 170(b)(1)(C)(i) (1994).} However, the unused remainder of value of the easement will not be lost if it cannot be deducted in its entirety during the tax year that it is donated. Rather, the value of the easement not deducted may be carried over as a charitable deduction over the next five years or until the value of the easement is exhausted, whichever occurs first.\footnote{26 U.S.C. § 170(b)(1)(C)(ii) (1994).}

This ability to carry the federal income tax deduction is especially

\footnote{26 U.S.C. § 170(h)(1)(C) (1994).}


\footnote{See, e.g., 26 U.S.C. §§ 170(f)(3)(B), (h) (1994).}
important for clients who have large land holdings that would be eligible for a conservation easement. These clients can reduce their federal income tax liability for many years simply by staggering the donation of conservation easements.

A brief example would be helpful. Suppose Client has an annual taxable income of $70,000\(^7\) and owns vast natural open-space land holdings upon which a qualified governmental entity or charitable organization is interested in acquiring a conservation easement. A conservation easement on Parcel One of Client's property would reduce the value of the property by $40,000. A conservation easement on Parcel Two of Client’s property would reduce the value of the property by $20,000. And, a conservation easement on Parcel Three of Client’s property would reduce the value of the property by $90,000. Under federal law, Client can only reduce his or her taxable income by thirty percent in any given tax year.\(^7\) With a taxable income of $70,000, this means that Client can deduct $21,000 per year due the donation of a conservation easement on Client’s land holdings. Further, assuming that Client has no additional charitable deductions, any excess can be carried forward for only five years under federal law.\(^8\) Thus, if Client were to donate conservation easements on Parcel One, Parcel Two, and Parcel Three in the same tax year, Client’s tax liability can be reduced by a total of $150,000.\(^8\) Under federal law, Client could deduct $21,000 in the present tax year and $21,000 in each tax year thereafter for the next five years or until the amount of Client’s gift has been deducted, whichever comes first.\(^8\) This is a total of $126,000 and the excess $24,000 would not be deductible.\(^8\) Clearly, Client will not be permitted to deduct the full value of his or her gift of $150,000 if he or she donates conservation easements on all parcels in the same tax year.

Thus, in order to deduct the full amount of Client’s donation, Client

\(^7\) Although Client’s income would likely vary from year to years, this number will be assumed to remain constant for the purposes of this example.


\(^8\) $150,000 is the summation of the reductions in value due to a conservation easement to Parcel One ($40,000), Parcel Two ($20,000) and Parcel Three ($90,000).

\(^8\) This assumes that Client’s income will remain constant over the term of years depicted in the example; see supra, note 79.

\(^8\) $126,000 is the summation of a charitable deduction of $21,000 in the present year and each year thereafter for five years. If donated in this manner, Client will not be able to deduct $24,000 that he or she would otherwise have been entitled to.
should not grant conservation easements on Parcel One, Parcel Two and Parcel Three in the same tax year. Rather, Client should stagger the donation of the conservation easements. For example, Client may donate a conservation easement on Parcel Two in the present tax year. Client could then deduct the full reduction in value of the property, $20,000, in the present tax year. The following year, Client could donate a conservation easement on Parcel One and reduce his or her taxable income in that year by $21,000. The remaining $19,000 could be carried over into the following year when Client also donates a conservation easement on Parcel Three. At that point, Client is able to deduct $19,000 as carried over from the previous year in addition to $90,000 from the donation of a conservation easement on Parcel Three, a total of $109,000. Client could deduct $21,000 that tax year and $21,000 in each following year until the value of the easement is exhausted.

2. State Property Tax Assessment and Property Valuation in Light of the West Virginia Conservation and Preservation Easements Act

The West Virginia Conservation and Preservation Easements Act does not address what effect, if any, a conservation easement has on the market value of real property for the purposes of property tax assessment. The Uniform Act, upon which the West Virginia Act is based, is also silent on the issue. However, of the jurisdictions that have adopted the Uniform Act, some have added provisions that expressly indicate that the market value of real property shall be reduced, resulting in a property tax reduction appropriate in the situation where the property owner has encumbered his or her property with a conservation easement. Other jurisdictions expressly indicate that such a reduction in market

84 Recall that a conservation easement on Parcel One would reduce the value of that property by $40,000.

85 Recall that under federal law, Client may not claim a charitable deduction in any given year in an amount greater than thirty percent of Client's gross income. Thus, Client may only deduct $21,000 of his or her $40,000 gift in the present tax year. The remaining $19,000 is carried forward into the next tax year.

86 UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163, 166 (Prefatory Note) (stating that "the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system").

87 Such jurisdictions include Georgia and Indiana. The Georgia statute provides that:

[s] conservation easement may be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be
value is not appropriate. Many more jurisdictions are silent on the issue.

As stated above, West Virginia is one such jurisdiction that is silent. The West Virginia Act does not address the issue of what effect, if any, a conservation or preservation easement would have on the market value of real property for purposes of assessing property taxes to be levied against the property. For this reason, an examination of West Virginia law outside the Conservation and Preservation Easement Act is necessary to determine if a reduction in market value is appropriate for the purpose of determining property taxes.

The West Virginia Constitution provides that real property taxation is to be uniform throughout the State and is to be taxed according to its value. The West Virginia Code provides that the tax commissioner is responsible for appraising real property in order to ascertain its market value for property tax purposes. Under the West Virginia Code, market value is that the price that a parcel of real property would sell for in an arm’s length transaction between a willing buyer and a willing seller, absent compulsion by either party to buy or

notice to the board of tax assessors of such county of the conveyance of the conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county. Any owner who records a conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board of equalization.


The Indiana statute provides that “real property subject to a conservation easement shall be assessed and taxed on a basis that reflects the easement.” IND. CODE ANN. § 32-5-2.6-7 (Burns 1995).

One such jurisdiction is Idaho. The Idaho statute provides that:

[i]he granting of a conservation easement across a piece of property shall not have an effect on the market value of property for ad valorem tax purposes and when the property is assessed for ad valorem tax purposes, the market value shall be computed as if the conservation easement did not exist.

IDAHO CODE § 55-2109 (1994).

See, e.g., W. VA. CODE § 20-12-1 to -8 (1996).

W. VA. CONST. art. X, § 1, cl. 1.

W. VA. CODE § 11-1A-1(a) (1995). To accomplish his or her statutory duty, the tax commissioner is authorized to select and appoint persons to side in appraising real property throughout the State. W. VA. CODE § 11-1A-1(c) (1995). Nonetheless, the tax commissioner must prepare forms and other documents to guide the appraisers that he or she appoints. W. VA. CODE § 11-1A-1(b) (1995). Ultimately, however, it is the tax commissioner’s duty to ensure that laws regarding real property appraisal are properly enforced. W. VA. CODE § 11-1A-1(b) (1995).

Note that under chapter 11, article 1A, section 3(i) of the West Virginia Code, “value” and “market value” are used interchangeably. W. VA. CODE § 11-1A-3(i) (1995).
sell, respectively. In determining market value, the West Virginia Code describes several factors that the tax commissioner may take into account in appraising property. One of these factors is the ease of alienation of the property. In assessing ease of alienation, the West Virginia Code explicitly states that one factor that should be considered is the extent to which the property is burdened by dominant or servient easements. Thus, discretion is seemingly vested in the appraiser as to whether the conservation easement will be considered in when determining the market value of a particular tract of land.

However, the West Virginia Code ultimately vests authority in the tax commissioner to promulgate detailed regulations by which various types of real and personal property will be appraised. In formulating regulations regarding the valuation of real property, the West Virginia Code required that the tax commissioner use a uniform procedure for designated classes of property and that such procedure not vary from county to county throughout the West Virginia. The fundamental purpose of these regulations is to guide appraisers in determining the market value of real property. As mandated by the West Virginia Code, the tax commissioner has established regulations that guide appraisers regarding the valuation of different types of real property for property tax purposes.

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92 W. VA. CODE § 11-1A-3(i).
93 See, e.g., W. VA. CODE § 11-1A-3(i)(1) to (10) (1995).
95 W. VA. CODE § 11-1A-3(i)(3).
97 W. VA. CODE § 11-1A-1(a).
Not all of the valuation procedures for the different classes of property mandate that the appraiser consider the presence of dominant or servient easements in determining the ease of alienation. For example, the regulation that discusses the procedure for determining the market value of commercial and industrial property\textsuperscript{100} indicate that the appraiser must consider ease of alienation of the property as determined, in part, by the presence of either dominant or servient easements.\textsuperscript{101} However, this language is not dispositive regarding property valuation in the situation where a conservation easement encumbers a parcel of real property. Because the regulation does not specifically address whether the value of property will be reduced due to the presence of a conservation easement for property tax purposes, a court would be left to determine whether such a reduction is appropriate.

Finally, because the issue of whether property owners would receive a reduction in market value of their real property for purposes of property tax assessment is unresolved, counsel advising property owners regarding the advantages and disadvantages of donating a conservation easement should consider a few things. First, property tax reductions are unpopular with government officials at the local level.\textsuperscript{102} In particularly, county assessors, who must generate sufficient tax revenue to satisfy the requirements of their budgets may look unfavorably upon assessing property values in a way that would complicate their collection efforts.\textsuperscript{103} Additionally, if a county assessor is asked to value property according to a conservation easement, there is always the possibility that the property may be completely reassessed.\textsuperscript{104} And, if that piece of property has increased greatly in value since it was last assessed, the end result

\textsuperscript{100} Commercial property is defined as "income producing real property used primarily but not exclusively for the sale of goods or services, including but not limited to offices, warehouses, retail stores, apartment buildings, restaurants and motels." W. VA. CODE STATE R. § 110-1P-2.3.3 (1987) (effective date Jul. 26, 1991). A reduction in the amount of property taxes assessed may be particularly attractive for owners of historic structures that house inns, restaurants, shops or offices. A preservation easement, donated in perpetuity, would preclude razing the historic structure and constructing a new structure with more capacity, and thus, more economic value.

\textsuperscript{101} W. VA. CODE STATE R. § 110-1P-2.1.1 (1987) (effective date Jul 26, 1991) (stating, however, that in determining value, "primary consideration shall be given to the trends of price paid for like or similar property in the area or locality wherein such property is situated").

\textsuperscript{102} DIEHL & BARRETT, supra note 3, at 56-57 (stating further that "since the flow of federal and state funds to the local level has been so sharply curtailed in recent years, local officials and assessors may well fear the further loss of tax revenue that easements represent").

\textsuperscript{103} Id.

\textsuperscript{104} Id.
may be greater, even taking the effect of the conservation easement into account.\textsuperscript{105} Finally, in light of the federal income tax deduction based on the value of a conservation easement, a property tax reduction rarely provides a sufficient impetus for the donation of a conservation easement.\textsuperscript{106}

Therefore, because the West Virginia legislature did not give guidance to local tax assessors concerning how to value or assess land that is burdened by a conservation easement and because a reduction in property value due to the presence of a conservation easement would reduce a county’s tax base, local assessors may not be willing to give an appraisal that reflects the presence of the easement. For this reason, the West Virginia legislature should directly address this issue and explicitly allow or disallow a property devaluation based on the presence of a conservation easement. If such a reduction is permitted, the West Virginia Tax Department should be authorized to promulgate regulations concerning this valuation procedure in order to give guidance to local assessors and to insure that valuation of land burdened by a conservation easement is treated uniformly in all counties in the State.\textsuperscript{107}

\textbf{B. Effect of the West Virginia Conservation and Preservation Easements Act on Clients with Mineral Interests}

The federal tax deduction allowed under the West Virginia Conservation and Preservation Easement Act provides the most significant economic motivation for property owners to donate a conservation or preservation easement to a qualified governmental entity or non-profit organization. However, practitioners must be mindful that federal tax law does not permit this deduction for lands where surface mining rights pre-exist.\textsuperscript{108} And, in a state, such as West Virginia, where surface mining is prevalent, the population of property owners eligible to receive this federal income tax deduction could be significantly impaired.

Practitioners must also remember that West Virginia Act provides that

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}


\textsuperscript{108} The United States Code states that a conservation easement will not be considered to be exclusively for conservation purposes unless it is granted in perpetuity and there is no retention of mineral rights which allows coal to be removed via surface mining. 26 U.S.C. § 170(h)(5)(B)(i) (1994) (stating that a conservation easement is not given exclusively for conservation purposes "if at any time there may be extraction or removal of minerals by any surface mining method").
pre-existing mineral rights are paramount to a later granted conservation easement. However, the Act also indicates that these rights can be waived:

For the purposes of the Act, these rights are waived if the owner of the mineral interest is a party to the conservation easement or if the mineral owner explicitly agrees to comply with the easement’s restrictions. For this reason, in real estate transactions, counsel to conservation easement donors must take care and not consent to a provision that waives the mineral owner’s rights under the Act in favor of a conservation or preservation easement.

Finally, the West Virginia Act provides that where a fee owner donates a conservation easement on a parcel of property, the fee owner is not restricted in his or her ability to grant away a less than fee interest in the property at a later date so long as the conservation easement is not impaired by the later grant. Thus, it seems possible, albeit difficult, that the easement donor could donate an easement and, in the easement deed, explicitly reserve the right to remove natural gas from his or her property. Whether this could be done would depend on whether the entity who will be holding the conservation easement would consent to such a provision. The location of the gas well on the property and the manner of maintaining the well may factor in to the holding entity’s willingness in these situations. It is more difficult, if not impossible, to imagine a situation in which the fee owner could donate a conservation easement and reserve the right to remove other minerals such as coal or limestone, as removal would be much more disruptive to the natural environs of the property.

C. Preservation of Beautiful Lands

In 1990, West Virginia had a total population of approximately 1,792,000 residents. This population increased steadily during the following years to approximately 1,882,000 residents in 1994. As West Virginia continues to experience a steady growth in population, more and more farmland is being targeted by developers for both residential and commercial development. As a

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110 Id.
111 Id.
114 Id.
result, real estate developers seeking land are approaching West Virginians with large land holdings and are asking them to relinquish their holdings for development. In many cases, land owners have deeply rooted sentimental ties to their property and have a strong desire to see that their property remain undeveloped. A conservation easement can be very attractive to clients in this situation.\textsuperscript{115}

IV. CONCLUSION

The West Virginia Conservation and Preservation Act is certainly a land management device whose time has come in West Virginia. Wise use of this tool by lawyers, property owners and holding entities can help this state to achieve a balance between the wise use of its natural resources and the promotion of tourism. Although not appropriate in every situation where it could potentially be applied, the West Virginia Act is a device by which economic and environmental interests can converge for the benefit of both parties.

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\textsuperscript{115} \textit{See generally} \textit{STEPHEN J. SMALL, PRESERVING FAMILY LANDS (1992).}

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