

# Smart Growth and Green Buildings Committee Newsletter

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## SMALL PARCELS, ISLAND BIOGEOGRAPHY, AND THE CONSERVATION EASEMENT TAX EXPENDITURE

Frank Piccininni

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### Introduction

As the human population continues to grow, so too does our impact on the environment. The impacts of human land use on the natural system include global climate change, increased runoff of nutrients and pollutants into fresh and salt water, reduced quality and quantity of groundwater, the destruction of critical wildlife habitat, and a reduction in flood-buffering capacity. *See generally* Frank Piccininni, *Adaptation to Climate Change and the Everglades Ecosystem*, 26 ENVTL. CLAIMS J. 63, 65–69 (2014) (describing human impacts on the Florida Everglades). Fortunately, scientifically informed land use policies can bolster the structure and function of our ecosystem and help promote environmental stewardship. *Cf.* Frank Piccininni, *The Evolving Nature of Environmental Risk: A Responsible Approach for Residential and Commercial Real Estate*, 26 ENVTL. CLAIMS J. 308, 317 (2014).

Toward that end, federal, state, and municipal governments have enacted a myriad of statutes and regulations to prevent or eliminate damage to the environment. As noted by environmental law scholars, the benefits of environmental law greatly outweigh the costs to the regulated community. *See* Lois J. Schiffer & Timothy J. Dowling, *Reflections*

*on the Role of the Court in Environmental Law*, 27 ENVTL. L. 327 (1997). Yet, the enforcement of environmental law is often an extremely contentious endeavor. *See* Steven L. Yaffee, *Why Environmental Policy Nightmares Recur*, 11 CONSERVATION BIOLOGY 328 (1997). This is partially explained by the fact that the benefits of stringent environmental regulation reach the general public broadly, whereas the costs tend to burden individuals. Flint B. Ogle, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573 (1993). Government and local nonprofit organizations seek to ameliorate this dilemma through cooperative efforts such as conservation easements. Thus, the intent of this article is to recommend the further incorporation of ecological principles into conservation easement law.

### Conservation Easements

Conservationists have successfully promoted environmental stewardship through Internal Revenue Code provisions that enable conservation easements. 26 U.S.C. § 170(h). Conservation easements are voluntary tools for the protection of land through private land use agreements. Although some conservation easements establish a term basis (e.g., 10–20 years), the Internal Revenue Code requires the easement to encumber the land in

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perpetuity. Notably, conservation easements bind the land and not the donors. Subsequent owners of the property, therefore, are subject to the rights and responsibilities of that contract, ensuring that the conservation benefits are perpetual. Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673 (2007).

Typically, donors seeking a charitable deduction under the Internal Revenue Code must convey their entire interest in the property; an exception is made, however, for “qualified conservation contribution[s].” 26 U.S.C. § 170(E). A qualified conservation contribution must be a donation of land “exclusively for conservation purposes.” Conservation purposes include the preservation of land for outdoor recreation or education, protection of natural habitat, the preservation of open space, or the preservation of a historically important land area or structure. 26 C.F.R. § 1.170A-14(d)(1). Generally, conservation easements are negative in nature; easement donors surrender the right to develop the land in exchange for tax benefits.

Donors of land receive a tax deduction proportional to the value of the development rights they surrender. 26 C.F.R. § 1.170A-14 (h). The most commonly employed valuation technique for determining lost economic value is the “before and after method.” *See generally* Shea B. Airey, *Conservation Easements in Private Practice*, 44 *REAL PROP. TR. & EST. L.J.* 745, 749 (2010). Pursuant to treasury regulations, qualified appraisers must make an objective determination of how likely it is that the land will be developed absent the encumbrance of the easement. *Id.* This analysis must take into account any land use restriction currently impacting the land, such as zoning. According to this valuation technique, small parcels that cannot be subdivided without a variance from a local zoning or environmental review board do not lose value upon establishment of a conservation easement and are not entitled to an income tax deduction. *Id.* Accordingly, owners

of small parcels have little economic incentive to establish conservation easements. Yet, science strongly suggests that small parcels present a valuable opportunity to mitigate the degradation and fragmentation of the environment. *See* James R. Miller & Richard J. Hobbs, *Conservation Where People Live and Work*, 16 *CONSERVATION BIOLOGY* 390 (2002).

## **Ecological Principles and the Conservation Easement Tax Expenditure**

In their seminal book *The Theory of Island Biogeography*, Robert H. MacArthur and Edward O. Wilson engendered a paradigmatic shift in the way biologists view the structure and function of natural systems. ROBERT H. MACARTHUR & EDWARD O. WILSON, *THE THEORY OF ISLAND BIOGEOGRAPHY* (Princeton Univ. Pr. 1967). A key insight derived from MacArthur and Wilson’s book and its progeny is that, in general, large preserves are preferable to several small preserves of equivalent spatial area. *See* William F. Laurance, *Theory Meets Reality: How Habitat Fragmentation Research Has Transcended Island Biogeographic Theory*, 141 *BIOLOGICAL CONSERVATION* 1731 (2008). This is because relatively larger preserves have a reduced spatial area of “edge effects,” support larger populations of individual species, have been shown to have increased species richness relative to smaller preserves, and are more likely to contain a full range of habitat successional stages. *Id.* at 1733–34.

Although the importance of protecting large contiguous tracts of land is clear, researchers now realize that habitat connectivity is also a critical factor in the maintenance of system health. *Id.* The nature of human land use between the preserve “islands” profoundly influences species survivorship. *Id.* Residential green infrastructure can provide valuable wildlife habitat and promote connectivity between larger preserves. Susannah B. Lerman & Paige S. Warren, *The Conservation Value of Residential Yards: Linking Birds and People*, 21 *ECOLOGICAL APPLICATIONS* 1327 (2011).

The field of urban ecology has informed our understanding of the complex trade-off between spatial area and connectivity effects. *See* Mark A. Goddard et al., *Scaling Up from Gardens: Biodiversity Conservation in Urban Environments*, 25 *TRENDS IN ECOLOGY & EVOLUTION*, 90 (2010). A growing body of evidence suggests that the scale of response is species specific. *Id.* Biologically informed management planning can help landowners design their habitat patch for particular species, while simultaneously coordinating efforts with neighbors to “scale up” small parcel level conservation efforts to the landscape level. *Id.* Unfortunately, the Internal Revenue Code’s current focus on lost economic value does not support such scientifically informed management planning. *See* Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 *COLUM. J. ENVTL. L.* 1, 31–37 (2012).

As noted by legal scholars, the current conservation easement valuation scheme is not a useful measure of conservation benefit. *Id.* at 23–26. Thus, it has been suggested that the tax incentive amount should be tied to either a set percentage of the current market value of the property or the cost basis of the property. *Id.* The former measure avoids the current speculative nature of appraising for lost economic value because appraisers routinely provide estimates of current market value. *Id.* The latter measure is simple in that landowners necessarily have to maintain records of their cost basis to calculate taxable gain upon disposition. *Id.* Either approach would allow owners of small parcels to receive a financial benefit for establishing a conservation easement on their property.

## Beyond the Conservation Purposes Test

Under current law, the conservation purpose of each individual easement is set forth in the “whereas clause” of the easement contract. Generally, the easement simply recites the above-listed conservation purposes and, as such, any conservation value is haphazard at best. *See generally* Adina M. Merenlender et al., *Land*

*Trusts and Conservation Easements: Who Is Conserving What for Whom?*, 18 *CONSERVATION BIOLOGY* 65 (2004) (noting that little information is available about the land or natural resources being conserved). In order to ensure conservation value, conservation easements should be positive in nature; the percentage of the fair market value or cost basis awarded to the donee of the easement should be correlated with the effort spent actively managing the land. Colinvaux, *supra* at 61 (concluding that “the value of the tax expenditure should no longer be defined by what is lost, but rather by what is gained.”).

Such a valuation scheme would transform the role of land trusts from organizations that simply hold development rights in trust into active stewards of the land. Land trusts can develop land use plans that specifically consider connectivity between larger preserves and species-specific habitat planning. For example, research has demonstrated that many amphibians breed in ponds, but reside in the surrounding terrestrial habitat for the vast majority of the year. *See, e.g.*, Jarrett R. Johnson et al., *Seasonal Terrestrial Microhabitat Use by Gray Treefrogs (Hyla versicolor) in Missouri Oak-Hickory Forests*, 64 *HERPETOLOGICA* 259 (2008). I have personally observed gray treefrogs (*Hyla versicolor*) and spring peepers (*Pseudacris crucifer*) in the uplands adjacent to the Nissequogue River in Long Island, New York. Individual parcels located in the core habitat surrounding the Nissequogue River and its associated “waters” can be targeted by land trusts and government agencies to promote the conservation of habitat for these arboreal amphibians.

In addition, conservation easements can also provide a unique opportunity to shape social norms. Researchers have uncovered spatial patterns in residential landscaping that are related to socioeconomic factors. For example, a “neighbor effect” has been described in which patterns of vegetation are spatially auto-correlated (i.e., tend to be clustered together in space). Jean Zmyslony & Daniel Gagnon, *Residential Management*



*of Urban Front-Yard Landscape: A Random Process?*, 40 LANDSCAPE AND URBAN PLANNING 295, 295 (1998). This “neighbor effect” can have deleterious consequences on the environment as a homogenous landscape can reduce biodiversity and overall system health. *See* Goddard, *supra* (characterizing lawns as “weed free biological deserts”). Yet, if properly harnessed, social norms can become a powerful force in which properly managed landscapes can simultaneously support the well-being of people and wildlife. *See* Lerman & Warren, *supra* (finding a positive correlation between bird diversity and human satisfaction with the environment).

## Conclusion

Every parcel of land—regardless of its size—provides an important opportunity for conservation. This is especially true if parcels are treated as part of an interconnected mosaic of green spaces specifically tailored to provide wildlife corridors and increase the connectivity between larger preserves. Although further ecological research is needed to determine the optimal size and characteristics of conservation easements, the conservation community needs to move beyond the “conservation purposes test.” This endeavor will lead to a greater environmental awareness and, in turn, may foster the evolution of a modern land ethic. *See* ALDO LEOPOLD, A SAND COUNTY ALMANAC, 167, 167 (Oxford Univ. Pr. 2001) (1949) (“We can be ethical only in relation to something we can see, feel, understand, love, or otherwise have faith in.”).

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## GREEN REMEDIATION

Mike McLaughlin

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The notion that cleaning up contaminated property should be a net benefit to the environment seems obvious. From the earliest days of Superfund, many realized that in some cases the cure could be more dangerous than the disease. It made little sense to make a community endure massive numbers of heavy trucks sharing the road for years with school buses and carpools to “remediate” an old landfill by digging it up and hauling it to another community.

In protecting human health and the environment, we should try to optimize our use of resources to balance protection with resource conservation—we should seek to reduce the “environmental footprint” of remedial actions while continuing to be protective.

Over the last ten years or so, the concept of “green remediation” has grown. In 2006, the National Society of Professional Engineers added a new section to its code of ethics; it states that engineers must “strive to adhere to the principles of sustainable development in order to protect the environment for future generations.” In 2008, the Environmental Protection Agency (EPA) Office of Solid Waste and Emergency Response (OSWER) published a technology primer titled *Green Remediation: Incorporating Sustainable Environmental Practices into Remediation of Contaminated Sites* (Apr. 2008). The Interstate Technology & Regulatory Council (ITRC) expanded the concept to cleanups generally with its 2011 technical guidance, *Green and Sustainable Remediation: A Practical Framework*.

EPA focuses on five core elements of a green cleanup:

1. Minimize total energy use and maximize use of renewable energy;
2. Minimize air pollutants and greenhouse gas emissions;

3. Minimize water use and impacts to water resources;
4. Reduce, reuse, and recycle material and waste; and
5. Protect land and ecosystems.

EPA's Green Remediation Focus website ([http://www.clu-in.org/greenremediation/tab\\_d.cfm](http://www.clu-in.org/greenremediation/tab_d.cfm)) includes 31 case studies illustrating how the core elements were considered at specific remediation sites. There are some common approaches reflected in the case studies:

- Unpowered technologies (e.g., passive treatment systems such as limestone filters for drainage) and solar-powered technologies are used where feasible.
- Natural processes (e.g., phytoremediation or enhanced natural attenuation) can be both sustainable and protective.
- Minimize unnecessary site disturbance, keep earthwork (cut and fill) in balance, and/or use the same trucks to transport waste from the site and to transport clean backfill from off-site.
- Instead of buying new remediation equipment such as carbon filters or air strippers, re-use equipment from other sites.
- Recover materials from deconstruction for use on-site or elsewhere (e.g., crush concrete from old site structures for use as aggregate).

These sorts of techniques have been used at hundreds of remediation sites. For example, the former Telegraph Road landfill in northern Virginia is enrolled in Virginia's Voluntary Remediation Program (VRP). The landfill operated between 1977 and 1984, with waste covering about 60 acres to a depth of 50 feet. The site is located near Fort Belvoir, a rapidly growing military installation 15 miles south of the Pentagon. Given the proximity of the existing road network and utility infrastructure, and the demand for office and light industrial space in the corridor, redevelopment of the landfill would be smart growth.

However, there were several challenges to successful redevelopment of the site. A large landfill gas extraction system had been operating since the 1980s along one side of the landfill to control gas migration. But 20 years after the site closed, the rate of landfill gas generation was much smaller, and as a result, the gas extraction system only operated one or two days per week and used more supplemental propane fuel than landfill gas. The gas extraction system was replaced with a smaller gas migration control system consisting of vent wells equipped with solar-powered blowers to vent the small amounts of gas generated at the site.

Construction of buildings and storm water retention tanks atop the closed landfill produced significant amounts of excavated material. Removing thousands of cubic yards of excavated material to a licensed landfill would have required hundreds of trucks to haul material down the highway. Greenhouse gas emissions alone would have been over 50 tons, not to mention the costs of wear and tear on roads and bridges, safety, other air pollutants, etc.

Fortunately, Virginia law allows its Department of Environmental Quality (VDEQ) to designate remediation waste management units (RWMUs) within contiguous areas of contamination at VRP sites. A RWMU is an area of the site where excavated wastes can be visually screened and placed without the need for a formal solid waste disposal permit. Each RWMU is covered with an engineered cap when it reaches capacity. Three such units were constructed at the Telegraph Road landfill under VDEQ oversight. EPA's area of contamination policy, first announced in the preamble to the 1992 amendments to the Superfund National Contingency Plan, provides the federal framework for on-site management of remediation wastes (e.g., RWMUs), so long as the state concurs with the approach. Today, the former Telegraph Road landfill is the site of a 115,000-square-foot FedEx Ground distribution center, with space on the site for additional office or light industrial buildings.

The Route 66 creosote pit site in Flagstaff, Arizona, provides another example of the application of green remediation principles to reduce the environmental footprint of a remediation project. For more than 100 years, the site had been used for various industrial uses—railroad yard, electric power plant, and laundry—and the creosote pit, once used to treat railroad ties and power poles, required cleanup before the property could be redeveloped.

Soil contaminated with creosote from wood-preserving operations can be considered a listed hazardous waste, and for the Route 66 creosote pit to dispose of excavated soils as a hazardous waste would have been expensive and required each truck to travel 80 miles (160 miles round-trip) to deliver the excavated material to a hazardous waste facility. A better approach was to work with the Arizona Department of Environmental Quality and EPA to determine that the waste did not require management as a hazardous waste (a so-called contained-out determination), thus allowing excavated material to be disposed of in a nearby non-hazardous waste landfill about 12 miles away (25 miles round trip). An added bonus was that the nearby landfill was close to a source of soil that could be used to backfill the excavation, thus further reducing the truck mileage needed to complete the job (after depositing contaminated soil at the landfill and cleaning the beds, trucks could pick up clean soil on their way back to the creosote pit).

Optimizing truck traffic saved over 1000 gallons of diesel fuel and ten tons of greenhouse gas emissions. Other green elements of the Route 66 creosote pit cleanup included using 10,000 gallons of reclaimed water instead of potable water for dust control, converting a tree that had to be removed into mulch for site restoration, and using native species to revegetate the site.

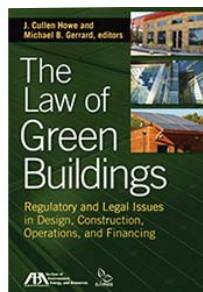
Today the Route 66 creosote pit site is a bus transfer facility, the first step in a planned redevelopment of this part of the south side of Flagstaff and the Flagstaff Urban Trail.

Green remediation makes good sense. In addition to using fewer resources, green remediation measures attract positive community interest—neighbors and government officials alike take pride in projects that employ sound environmental stewardship while cleaning up the environment for future generations.

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## A SURVEY IN LAND BANKING: NEW YORK'S COMMITMENT TO REVITALIZATION

Ashton H. Roberts

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Cities and towns across America are suffering from an epidemic: vacant, abandoned, unused, and foreclosed property. These problem properties are major nuisances that tear at the fabric of a community's economic, social, and environmental identity; uninhabited and unattractive structures do not entice prospective homebuyers or businesses that help rebuild local economies. Yet, despite diminished resources, progressive leaders across the country are implementing new approaches to combat the contagious blight and disinvestment associated with forgotten urban land. One approach is the creation of land banks.

A land bank is an independent entity authorized to seize and repurpose properties that have been tax delinquent or abandoned for at least 18 months. The primary focus of land bank operations is to acquire title to problem properties, eliminate the liabilities, and transfer the properties to new, responsible owners in a transparent and efficient manner that supports community-identified priorities. With a change in perspective, and the implementation of land banking, abandoned and unused properties transform from problems into possibilities.

The first land banks were used in an effort to combat serious population losses that devastated cities. Professor Frank Alexander, Emory School of Law, a leading authority on land banking in the United States notes that the first-generation land banks were successful overall but encountered four main obstacles: (1) a lack of dedicated or internally generated sources of funding, (2) properties entangled in a maze of archaic property tax foreclosure laws, (3) a lack of marketable and insurable property titles, and (4) a lack of intergovernmental collaboration. W. Dennis Keating, *Urban Land Banks and the Housing Foreclosure and Abandonment Crisis*, 93 ST. LOUIS U. PUB. L. REV. 93, 96 (2013).

New York State's Land Bank Program has directly tackled these obstacles. In July 2011, the New York legislature passed the Land Bank Act allowing ten cities, counties, or city/county combinations to apply for authority to create a land bank. The Land Bank Act grants special legal authority to land banks, including the authority to obtain property at low or no cost through the tax foreclosure process; hold the right of first refusal to purchase properties sold after tax foreclosure; possess land tax free; clear title and/or extinguish back taxes; lease properties for temporary uses; and negotiate sales based not only on the highest bid but also on the outcome that most closely aligns with community needs.

The special powers granted to land banks help to advance a number of social and environmental policies. As a general market mechanism, land banks can bridge the gap between the government and private sector. For example, the land bank in Newburgh, N.Y., performs lead and asbestos abatement for around only \$70,000, rather than a complete rehabilitation costing upward of \$200,000, and then provides developers with the "clean shells." By doing so, the land bank is able to save money, remediate an environmental hazard, and introduce properties to the private market for development and sale. *See* New York Land Bank Association, *New York State Land Banks: Combating Blight and Vacancy in New York Communities* 10 (2014). In Broome County, the land bank played an important role in advancing local planning goals. It acquired a former hotel and retirement home in Binghamton that have been vacant since 2010, and then selected a developer who plans to repurpose the large commercial property into a mixed use project that aligns with the city's 2014 comprehensive plan. *Id.* The Rochester land bank has helped promote New York's historical preservation goals. The land bank serves as a conduit for the secure transfer of title of large historic properties to new owners who can feasibly renovate them consistent with local and state guidelines for historic preservation. *Id.* at 11. The Syracuse land bank is another example. It has committed to 24 sustainable deconstruction



projects by diverting materials from structural demolitions away from local landfills. The materials can instead be salvaged and introduced into a resale materials market or up-cycled into new products. *Id.*

Forming a land bank in New York requires approval of the Empire State Development Corporation (ESD). The ESD's Land Bank Approval Guidelines coincide with the Land Bank Act and establish criteria for application approval. Before the ESD approves a land bank, the following factors must be assessed: the nature and extent of financial resources; the willingness of a municipality to sell the land bank delinquent tax liens; the capacity of the participating foreclosing government units and municipalities to undertake the acquisition, management, and disposition of land bank property; and the nature and extent of intergovernmental cooperation.

Since July 2011, through two selection rounds, eight communities in New York submitted applications to ESD and all eight were approved. These first land banks reflected diverse geographies and interests, solidifying the need for a variety of land bank styles: two local jurisdictions, four counties, and two regional banks were developed. Local and county personnel, supported by the CenterState Cooperation for Economic Opportunity and the Center for Community Progress, initially staffed most of the land banks. Land bank leaders' early initiatives focused on developing a peer-to-peer network, advocacy and education efforts, and securing financial commitments beyond those established by government appropriations.

In July 2013, Attorney General Schneiderman launched the Land Banks Community Revitalization Initiative. The initiative dedicated a portion of the funds awarded to New York under the National Mortgage Settlement to help land banks carry out various community development services, such as the demolition of blighted properties, the remediation of environmental hazards, and redevelopment of brownfield sites. The attorney general's initiative made \$33 million

available to be dispersed to land banks over two rounds of awards. In the first round, announced in October 2013, Schneiderman allocated \$13 million to the eight land banks statewide. Each land bank tailored its application to address unique local needs and priorities. The largest award of \$3 million was provided to the Greater Syracuse Property Development Corporation, which was then able to leverage the allocation to yield an additional \$5 million. There are an estimated 1800 vacant homes in Syracuse alone. During the first year, the Greater Syracuse Land Bank acquired over 400 properties, 60 of which were eventually resold. The second round of funding, up to \$20 million, was announced in 2014. In response to the recent land banking successes, New York also announced last year that it has opened up the application pool to 20 land banks. Another countywide land bank has since been established in Albany.

Nevertheless, New York land banks still face funding challenges. Although many of the land banks in New York have received one-time fund appropriations and grants, the land banks' capacity to become self-sufficient is still unknown. The funds from the sale of real property, rental income, architectural salvage, and the tax revenue derived from the Land Bank Act may not be enough.

**Ashton Roberts** *is a third-year Juris Doctor and Master of Environmental Law and Policy student at Vermont Law School, focusing on both environmental and criminal law.*

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- Behind the Scenes: An Insider's View on Environmental Enforcement Priorities, Results, and Strategies
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- Environmental and Transactional Issues at Former Industrial Sites: Case Studies on Decommissioning Power Plants
- Great Lakes, Greater Challenges
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- The Road to the Supreme Court: Today's Emerging Issues, Tomorrow's Cert-Worthy Cases
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- Committee Chairs Meeting
- Vice Chair Working Groups
- Council Meeting
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