

# Conservation Easements as a Way to Preserve Wisconsin's Farmland: Why Wisconsin Should Adopt a Transferable Tax Credit Program

Jennifer E. Krueger

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>

 Part of the [Environmental Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Repository Citation

Jennifer E. Krueger, *Conservation Easements as a Way to Preserve Wisconsin's Farmland: Why Wisconsin Should Adopt a Transferable Tax Credit Program*, 99 Marq. L. Rev. 1073 (2016).

Available at: <http://scholarship.law.marquette.edu/mulr/vol99/iss4/8>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

**CONSERVATION EASEMENTS AS A WAY TO  
PRESERVE WISCONSIN'S FARMLAND:  
WHY WISCONSIN SHOULD ADOPT A  
TRANSFERABLE TAX CREDIT PROGRAM**

*Conservation easements are a tool landowners can use to protect their land and preserve it for generations to come. Given the new emphasis society places on preserving the environment, many states have enacted some form of a conservation easement program where landowners who encumber their property with a conservation easement can receive a benefit for doing so. Wisconsin and Virginia are two states with this type of program. Wisconsin's conservation easement program allows a landowner to donate his land and the state pays him the difference in the market value. Virginia's program, on the other hand, allows a landowner to donate a conservation easement with the option of receiving a transferable tax credit in exchange for the donation. To help grow Wisconsin's program and use it more effectively to protect Wisconsin's farmland, Wisconsin should adopt a conservation easement program modeled after Virginia's program where a landowner receives a transferable tax credit in exchange for donating a conservation easement.*

I.	INTRODUCTION .....	1074
II.	CONSERVATION EASEMENT BACKGROUND.....	1079
	A. Conservation Easements Generally .....	1079
	B. Conservation Easements for Protecting Farmland.....	1083
III.	CONSERVATION EASEMENTS IN WISCONSIN .....	1085
	A. The Purchase of Agricultural Conservation Easements Program.....	1085
	B. The Statistics on Wisconsin's Conservation Easement Programs .....	1087
IV.	CONSERVATION EASEMENTS IN VIRGINIA .....	1088
	A. The Open-Space Land Act and the Virginia Land Conservation Incentives Act of 1999.....	1088
	B. The Statistics on Virginia's Conservation Easement Programs .....	1090
V.	USING TAX CREDITS AS A CONSERVATION EASEMENT INCENTIVE.....	1092
VI.	CONCLUSION.....	1098

## I. INTRODUCTION

Agriculture is Wisconsin's top industry.<sup>1</sup> In fact, the State of Wisconsin ranks either first or second in each category of dairy production—including most cheeses—and first in the production of cranberries.<sup>2</sup> However, there are fewer farms with each passing year, which leads one to wonder just how much longer Wisconsin will be able to live up to its title as America's Dairyland.<sup>3</sup> In 2008, there were 76,400 farms in Wisconsin.<sup>4</sup> By 2013, there were only 69,800 farms.<sup>5</sup> Some of these farms are being sold and converted to other uses, such as subdivision or other commercial development.<sup>6</sup> But the point is that Wisconsin farmland is disappearing. Because Wisconsin is America's Dairyland, it is important to preserve Wisconsin's farmland and preserve its heritage.<sup>7</sup>

One such way to help protect agriculture in Wisconsin is through a conservation easement program that offers transferable tax credits as a benefit to farmers who participate in the program. Currently, Wisconsin offers the Purchase of Agricultural Conservation Easement (PACE)

---

1. U.S. DEP'T OF AGRIC., 2014 WISCONSIN AGRICULTURAL STATISTICS (2014), [http://www.nass.usda.gov/Statistics\\_by\\_State/Wisconsin/Publications/Annual\\_Statistical\\_Bulletin/bulletin2014\\_web.pdf](http://www.nass.usda.gov/Statistics_by_State/Wisconsin/Publications/Annual_Statistical_Bulletin/bulletin2014_web.pdf) [<https://perma.cc/W6M4-P4ZA>].

2. *Id.* at 3. The dairy categories are milk production, cheese (total excluding cottage cheese), American cheese, cheddar cheese, Italian cheese, mozzarella cheese, and dry whey. *Id.* In the category of total cheese production, Wisconsin produced 2.86 billion pounds of cheese, which makes Wisconsin the number one cheese producer in the nation. *Id.* at 36.

3. *Id.* at 4; *see also* James K. Matson, *Wisconsin's Working Lands: Securing Our Future*, WIS. LAW., Dec. 2009, at 6, 6 ("Wisconsin's population is growing steadily, and some of the state's best farmland is being permanently lost at an alarming rate.").

4. U.S. DEP'T OF AGRIC., *supra* note 1, at 4.

5. *Id.*

6. *Id.* at 11 (noting that 98 farms totaling 4,419 acres were sold in 2013 and diverted to uses other than agriculture); Matson, *supra* note 3, at 6 (noting that the increased population in Dane County—60,000 more people at that time—is leading to the development of some of "the state's highest-producing agricultural" land). In an article about protecting the public interest in conservation easements, Professors Nancy A. McLaughlin and Mark Benjamin Machlis note that "the rate of development is accelerating" and this development creates "substantially irreversible" destruction of "rural agricultural communities." Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1565–66 (2008).

7. As will be discussed later, the Wisconsin legislature believes it is important to preserve Wisconsin's farmland. *See infra* Part III.A; *see also* WIS. STAT. §§ 93.73(1)(a)–(c) (2013–2014) ("The legislature finds . . . [t]hat the preservation of farmland is important for current and future agricultural production in this state, . . . [t]hat the preservation of farmland is important for the current and future state economy . . . [t]hat the purchase of agricultural conservation easements . . . serve important public purposes of statewide significance.").

program; however, it has not been adequately funded in recent years and consequently does not offer farmers the protection they need to be able to keep farming their land.<sup>8</sup> The lack of funding could be for a variety of reasons; however, the expense involved in running a purchase program likely plays a role.<sup>9</sup> To make a program that is more widely available and more easily funded, Wisconsin should consider adopting a program modeled after Virginia's conservation easement program that gives a landowner transferable tax credits for donating a conservation easement.

Virginia's conservation easement program consists of two acts: (1) the Open-Space Land Act and (2) the Virginia Land Conservation Incentives Act of 1999.<sup>10</sup> Together, these two acts allow a landowner to donate a perpetual conservation easement in exchange for a transferable income tax credit.<sup>11</sup> By offering a transferable tax credit, the program offers some flexibility because the landowner has the option of using the tax credit himself or selling the tax credit to another Virginia taxpayer.<sup>12</sup>

Wisconsin would benefit from adopting a program with a transferable tax credit that is structured similar to Virginia's program because it would be able to more easily fund a conservation easement program to protect its farmlands and maintain its status as America's Dairyland. The tax credit would require indirect funding, as opposed to the direct funding currently required for Wisconsin's purchase program,<sup>13</sup> and the transferability of the tax credits would allow the landowner to realize benefits similar to a purchase program if he chooses to sell his tax credits to another Wisconsin taxpayer.

---

8. Act of July 12, 2015, 2015 Wis. Act 55, § 479; Act of June 30, 2013, 2013 Wis. Act 20, § 198, 2013 Wis. Sess. Laws 85, 131–32; Am. Farmland Tr. & Gathering Waters Conservancy, *Pace FAQ*, WIS. FARMLAND, <http://wisconsinfarmland.org/working-lands-programs/pace-in-wisconsin/pace-faq/> [<https://perma.cc/WG54-XYXL>] (last visited Jan. 1, 2016) (stating that there is currently no funding for the PACE program but that organizations, such as the Gathering Waters Conservancy and the American Farmland Trust, “continue to advocate for a strong statewide PACE program in Wisconsin”).

9. AM. FARMLAND TR., PURCHASE OF AGRICULTURAL CONSERVATION EASEMENTS 2 (2015), [http://www.farmlandinfo.org/sites/default/files/PACE\\_Overview\\_AFT\\_FIC\\_2015\\_1.pdf](http://www.farmlandinfo.org/sites/default/files/PACE_Overview_AFT_FIC_2015_1.pdf) [<https://perma.cc/M7KL-LM6V>] (naming the expense of the purchase program as one of the “drawbacks”); WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., WISCONSIN PURCHASE OF AGRICULTURAL CONSERVATION EASEMENT (PACE) PROGRAM: EVALUATION REPORT 41 (2012), <http://datcp.wi.gov/uploads/Environment/pdf/PACEReportJune2012.pdf> [<https://perma.cc/EAA7-LVAM>] (stating that “[t]his voluntary program is relatively expensive” and suggesting new ways to operate the program that would cut costs).

10. VA. CODE ANN. §§ 10.1-1700 to -1704, 58.1-510 to -513 (2012 & Supp. 2015).

11. *Id.*

12. VA. CODE ANN. § 58.1-513 (2012).

13. *See* WIS. STAT. §§ 91.60–70 (2013–2014).

Wisconsin does offer other options, such as a farmland preservation agreement<sup>14</sup> and farmland preservation zoning,<sup>15</sup> to protect farmlands. The problem with these programs, though, is that they do not offer the permanent protection that a conservation easement can offer, and because permanent protection is needed to ensure the protection of Wisconsin's farmland for future generations, a conservation easement is a better choice. For example, the default term for a farmland preservation agreement is fifteen years.<sup>16</sup> That means that after fifteen years the protection the farmland once enjoyed expires and the land is open for development and other uses.<sup>17</sup> If a landowner encumbers his farmland with a conservation easement, though, the protection typically extends into perpetuity,<sup>18</sup> which makes it hard to extinguish the protection offered by a conservation easement and provides farmland with more permanent protection from development and use that is inconsistent with agricultural uses.<sup>19</sup> Wisconsin's farmland preservation zoning is also subject to change because the property can be easily rezoned for other uses when so desired.<sup>20</sup>

A conservation easement that continues into perpetuity unless otherwise noted provides the more permanent protection needed.<sup>21</sup> In fact, many conservation easement programs require a perpetual conservation easement to qualify for any tax incentives.<sup>22</sup> A conservation

---

14. *Id.*

15. *Id.* §§ 91.30–.50.

16. *Id.* § 91.62(1)(a). A farmer that places agricultural restrictions on his property through a farmland preservation agreement or whose land is restricted to agricultural uses under farmland preservation zoning can even claim a farmland preservation credit for use on his income taxes. *Id.* §§ 71.57, 71.613(3)(d)(4).

17. *See id.*

18. *See, e.g.,* Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 48 (2005).

19. Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 717–22 (discussing the perpetual nature of conservation easements and what that means); McLaughlin & Machlis, *supra* note 6, at 1567–71 (discussing the fact that the perpetual nature of a conservation easement is what is needed to ensure a public benefit); Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 2013 UTAH L. REV. 811, 830–35 (discussing their opinions on the perpetual nature of conservation easements, how conservation easements can be amended, and how conservation easements can be terminated).

20. *See* WIS. STAT. § 91.48(1) (noting that land zoned for farmland preservation may be rezoned to take it out of such a zoning district).

21. *Id.* § 700.40(2)(c).

22. *E.g.,* I.R.C. § 170(h)(2)(c) (2012) (allowing a tax credit only for perpetual conservation easements); COLO. REV. STAT. § 39-22-522(2)(a)–(b) (2015) (allowing a tax

easement program, then, is more useful in helping protect Wisconsin's farmlands now and for the future.<sup>23</sup> Given the perpetual nature of a conservation easement and the long-term goals of conservation efforts,<sup>24</sup> this Comment will only focus on conservation easements as a tool to protect Wisconsin's farmland because conservation easements are perpetual in nature and offer a more permanent source of protection than farmland preservation agreements, farmland preservation zoning, and other options that can be used to protect farmland from development.

Furthermore, exacted conservation easements and any other conservation easements that are not the result of a willing landowner voluntarily entering into a conservation easement with an easement holder are outside the scope of this Comment.<sup>25</sup> The conservation easement programs discussed in this Comment deal solely with voluntary conservation easements that result from a landowner's willing participation to protect his land.

---

credit only for perpetual conservation easements); VA. CODE ANN. § 58.1-512(C)(2) (2012 & Supp. 2015); see also Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 4 (2004).

23. The traditional land use model favored full development, but the current trend is to strike a better balance between development and conservation to have sustainable development. E.g., Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 470 (2013).

24. See WIS. DEP'T OF AGRIC., *supra* note 9, at 41 (“[T]he effectiveness of the conservation easement program will likely be reduced as time periods are reduced.”); McLaughlin, *supra* note 22, at 41–47 (discussing a number of surveys where the landowners who partook in a conservation easement program were primarily motivated by “long-term stewardship of their land” and concern for the future).

25. For a discussion on different ways to acquire a conservation easement and even for a comparison between conservation easements and other traditional land use regulations, see generally Korngold, *supra* note 23; Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043 (2006) [hereinafter Owley, *The Emergence of Exacted Conservation Easements*]; Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261 (2011) [hereinafter Owley, *The Enforceability of Exacted Conservation Easements*]; Laurie A. Wayburn, *Conservation Easements as Tools to Achieve Regulatory Environmental Goals*, 74 LAW & CONTEMP. PROBS. 175 (2011). In fact, Laurie A. Wayburn suggests that regulatory acts that force conservation and preservation on landowners are insufficient to accomplish the environmental goals behind the regulations and it is necessary to include a voluntary conservation easement program where landowners are willing to conserve their land. Wayburn, *supra*, at 179–81 (“These regulatory acts were, and are, essentially powerful hammers that could be used as threats to curb certain behaviors. However, they were not designed to engage the private-landowner collaboration so essential to achieving proactive restoration on the scale needed for species or natural systems to thrive.”); see also McLaughlin & Machlis, *supra* note 6, at 1567 (noting that many jurisdictions lack a land use planning tool that accomplishes what a conservation easement can accomplish, which has led to the popularity of conservation easements).

This Comment also mainly discusses state-level programs and does not discuss in detail the federal program offered for conservation easement donations.<sup>26</sup> The federal tax deduction offered in exchange for a conservation easement is independent of any program that may be offered by the state as evidenced by the fact that federal law authorizes its own tax benefits separate from any state benefits offered.<sup>27</sup> However, the operation of one program can inform the operation of the other. In other words, the experience with the federal tax deduction offered for a donation of a conservation easement can show why a state should or should not adopt a tax deduction as an incentive for donating a conservation easement. Therefore, much of the discussion pertaining to tax deductions is based on the operation of the federal tax deduction offered for a conservation easement donation, but this Comment does not advocate for or against any changes to the federal program.

Instead, it is essential to have a strong state-level conservation easement program because, “[a]t the end of the day, conservation is best understood as a land use issue.”<sup>28</sup> State and local governments, not the federal government, are best equipped to handle land use issues, which is demonstrated by the fact that state-level programs are more widely used than federal-level programs, as will be shown later in this Comment.<sup>29</sup>

---

26. For more of a discussion of the federal tax program, see Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROBS. 29 (2011); see McLaughlin, *supra* note 22.

27. See I.R.C. § 170.

28. Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 7 (2012); see also Korngold, *supra* note 23, at 488 (calling a conservation easement an “essential land use decision”). These authors likely call a conservation easement a land use issue because deciding to place a conservation easement on a piece of property shapes the way a community can operate and develop and perpetually reserves a piece of property for a particular use that cannot be altered by zoning ordinances. For more discussion on how conservation easements can be used to accomplish regulatory environmental protection goals, see Wayburn, *supra* note 25.

29. Colinvaux, *supra* note 28, at 18 (noting that state and local land trusts account for 55% of conserved land); Korngold, *supra* note 23, at 475 (noting that state-level conservation easement programs have protected 5,589,793 acres with 30,399 conservation easements and the federal-level programs have protected 4,700,130 acres with 23,876 conservation easements); McLaughlin, *supra* note 22, at 22–24 (stating that Virginia’s conservation easement program did not experience growth until Virginia enacted its income tax credit incentive). What is more, some argue that to effectively and efficiently use conservation easements, the programs need to be at the state level because (1) programs administered at the local level do not have adequate resources to enforce a conservation easement and (2) programs at the federal level are unable to track and properly enforce all the conservation easements they hold. See Halperin, *supra* note 26, at 43–44. One example of why conservation easement programs should be at a local level rather than at the federal level is that, if the program is federally administered, it is easier for a landowner to abuse a conservation easement program by

Therefore, this Comment's main focus is on how Wisconsin itself can strengthen its conservation easement program to protect its own farmland and remain America's Dairyland.

Part II of this Comment provides a brief background of and introduction to conservation easements. It describes what a conservation easement is and how it has traditionally been used. Part III of this Comment describes Wisconsin's program authorizing the purchase of agricultural conservation easements, and Part IV describes Virginia's conservation easement program where a landowner can donate a conservation easement for agricultural purposes in exchange for an income tax credit that he can use himself or sell to another Virginia taxpayer. Part V of this Comment analyzes the benefits of a conservation easement program that offers a transferable tax credit as the incentive for donating a conservation easement.

Then, Part VI concludes that Wisconsin should adopt a conservation easement program modeled after Virginia's conservation easement program because the program would be easier for the state to fund, thereby making it more readily available as a tool to protect the farmland that has made Wisconsin America's Dairyland. Such a program would entail enacting a conservation easement program where a farmer can receive a transferable tax credit in exchange for donating a perpetual conservation easement on his land that protects it from future development and ensures its availability for future agricultural use.

## II. CONSERVATION EASEMENT BACKGROUND

### A. Conservation Easements Generally

A conservation easement is a legal innovation based in common law principles of easements, real covenants, and servitudes.<sup>30</sup> Due to this mixed nature, conservation easements "are very much creatures of

---

encumbering a property already severely restricted by local land use regulations. See Colinvaux, *supra* note 28, at 17. It is less likely that a federally administered program will know all the land use restrictions placed on a property because many land use regulations are creatures of local law. See *id.*

30. See, e.g., Michael Allan Wolf, *Conservation Easements and the "Term Creep" Problem*, 2013 UTAH L. REV. 787, 788–89 (calling conservation easements "legislatively created hybrids" and proposing the use of the name "perpetual conservation restrictions" because of the hybrid nature of a conservation easement); see also James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 LAW & CONTEMP. PROBS. 51, 52–54 (2011) (calling conservation easements "remarkable legal instruments" that have aspects of zoning regulations, contracts, easements, and deeds).

state . . . legislation and regulation,”<sup>31</sup> and a conservation easement program is usually established by a conservation-easement enabling statute at the state level.<sup>32</sup>

The Uniform Conservation Easement Act (UCEA) is an example of a conservation easement enabling statute and serves as a model for states to enact their own conservation easement enabling statutes.<sup>33</sup> In fact, since the time of its adoption, many states—including Wisconsin and Virginia—have adopted the UCEA.<sup>34</sup> The UCEA was modeled after existing state-level conservation easement programs, one of which was Virginia’s program.<sup>35</sup> According to the Prefatory Note, the purpose of the UCEA was to bring some uniformity to the legal innovation known as a conservation easement that had been developing across the states.<sup>36</sup> In so doing, the UCEA deliberately chose the term “easement” and rejected “two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests.”<sup>37</sup>

The UCEA defines a conservation easement as

a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which

---

31. Wolf, *supra* note 30, at 795.

32. Olmsted, *supra* note 30, at 52–53 (“To overcome legal obstacles of the common law of easements, states have enacted conservation easement enabling laws, a number of which are based on the Uniform Conservation Easement Act (UCEA).”). Conservation easements can also be acquired through the use of eminent domain or through exactions rather than through an enabling statute; however, such uses of conservation easements are outside the scope of this Comment. This Comment focuses on conservation easements voluntarily entered into between a landowner and a qualified easement holder. For a discussion of other types of conservation easement, see Owley, *The Emergence of Exacted Conservation Easements*, *supra* note 25; Owley, *The Enforceability of Exacted Conservation Easements*, *supra* note 25; Korngold, *supra* note 23.

33. UNIF. CONSERVATION EASEMENT ACT (UNIF. L. COMM’N amended 2007), 12 U.L.A. 165 (2008 & Supp. 2016), [http://www.uniformlaws.org/shared/docs/conservation\\_easement/ucea\\_final\\_81%20with%2007amends.pdf](http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf) [<https://perma.cc/MBV8-YM67>].

34. Act of Apr. 10, 1988, ch. 720, 1988 Va. Acts 949 (adopting the UCEA); Act of Apr. 26, 1982, 1981 Wis. Act 261, 1981 Wis. Sess. Laws 1105; *Legislative Fact Sheet: Conservation Easement Act*, UNIF. L. COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> [<https://perma.cc/237U-X896>] (last visited Jan. 16, 2016).

35. K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 775 (2013). Virginia’s conservation easement program was in part chosen as a model for Wisconsin’s program because Virginia was used as a model in creating the UCEA, and the UCEA was adopted by Wisconsin. *See* WIS. STAT. § 700.40 (2013–2014). Virginia was also chosen because it has created a successful conservation easement program that has helped to protect many acres of its land. *See infra* Part IV.B.

36. UNIF. CONSERVATION EASEMENT ACT prefatory note, 12 U.L.A. 166–69.

37. *Id.*

include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.<sup>38</sup>

Essentially, a conservation easement is a legal agreement between a landowner and an easement holder that the landowner will abide by certain restrictions or obligations concerning the use and development of his land.<sup>39</sup> In other words, a conservation easement is a use restriction.<sup>40</sup> These use restrictions can serve a variety of conservation goals, including preserving agricultural land.<sup>41</sup>

Typical restrictions include restrictions on division, development, buildings, and other improvements.<sup>42</sup> For example, a conservation easement may restrict a landowner from dividing his property into more than two parcels and may limit him to one dwelling with accessory improvements, such as a garage or shed, in a building envelope.<sup>43</sup> If the conservation easement is also for agricultural purposes, it may limit the use of the property to agricultural activities or to uses that do not inhibit the use of the property as agricultural land in addition to any division or improvement restrictions.<sup>44</sup>

There is some standardization in conservation easement restrictions, as evidenced by the easement templates provided by places like the Virginia Outdoors Foundation (VOF)<sup>45</sup> and Wisconsin's Department of

---

38. *Id.* § 1(1), 12 U.L.A. at 174. This definition of a conservation easement was adopted by Virginia and Wisconsin. See VA. CODE ANN. § 10.1-1700 (2012 & Supp. 2015); WIS. STAT. § 700.40(1)(a).

39. McLaughlin, *supra* note 18, at 47.

40. Wolf, *supra* note 30, at 789 (stating that the basic purpose of a conservation easement is to restrict the use of the land); see also ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7 (2d ed. 2005) ("A conservation easement is a legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values.").

41. McLaughlin, *supra* note 18, at 47; see also Korngold, *supra* note 23, at 474.

42. See Christopher T. Albert & John A. McVickar, *Conservation Easements: Overview for Virginians*, VA. B. ASS'N NEWS J., Feb./Mar. 2006, at 11, 13.

43. See Virginia Outdoors Foundation, VOF Standard Template 6–14 (Dec. 2, 2015). VOF has this template posted on its website. *VOF Easement Template*, VA. OUTDOORS FOUND., <http://www.virginiaoutdoorsfoundation.org/protect/donating-an-open-space-easement-to-vof/vof-easement-template/> [<https://perma.cc/72R9-SWTZ>] (last visited Jan. 17, 2016).

44. Am. Farmland Tr. & Gathering Waters Conservancy, *supra* note 8.

45. *VOF Easement Template*, *supra* note 43.

Natural Resources;<sup>46</sup> however, standardization only applies to a certain extent.<sup>47</sup> In general, a conservation easement is a flexible tool that can be tailored to the landowner's needs and the property's resources.<sup>48</sup> Some have even likened a conservation easement to private zoning because of a landowner's ability to choose what type of use restrictions he wants to place on his land and his ability to tailor those restrictions to his property.<sup>49</sup>

To incentivize a landowner to place a conservation easement on his property, the statutory program may allow the landowner to sell or donate the conservation easement in exchange for cash or some sort of tax benefit.<sup>50</sup> If a landowner sells the conservation easement to the easement holder—which is typically the government or a land trust<sup>51</sup>—the landowner usually receives a payment equal to the amount of the diminution in value of his property, which is calculated as the value of the property before the conservation easement less the value of the property after the conservation easement.<sup>52</sup> If a landowner donates his conservation easement, he often receives either a tax deduction or a tax credit, which is often applicable to income taxes.<sup>53</sup> Tax deductions and tax credits are still typically calculated based on the diminution in value; however, the landowner receives a tax deduction or tax credit that represents a percentage of the diminution in value as opposed to any purchase price the landowner would receive from a purchased easement.<sup>54</sup> Tax deduction and tax credit calculations vary depending on

---

46. *Conservation Easements*, WIS. DEP'T OF NAT. RESOURCES, <http://dnr.wi.gov/Aid/Easements.html> [<https://perma.cc/E3QG-2EQG>] (last visited Dec. 24, 2014) (providing a template for a "DNR Standard Grant Easement").

47. McLaughlin & Pidot, *supra* note 19, at 813–16 (discussing their perspectives on how much standardized language a deed of conservation easement should contain).

48. See McLaughlin, *supra* note 18, at 52.

49. See Korngold, *supra* note 23, at 468, 477–78 (noting that a conservation easement can be used to accomplish what is traditionally accomplished by public land use regulations, such as zoning); Olmsted, *supra* note 30, at 52 ("Functionally, conservation easements resemble privatized and individualized zoning and land use restrictions or, seen in another light, a form of privatized environmental regulation.").

50. See Korngold, *supra* note 23, at 471–72; see also McLaughlin, *supra* note 18, at 47.

51. McLaughlin & Machlis, *supra* note 6, at 1564.

52. Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992 ANN. SURV. AM. L. 235, 245–46 (1994); see also McLaughlin, *supra* note 22, at 68–69 (discussing the valuation methods for conservation easements).

53. See, e.g., Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 2013 UTAH L. REV. 755, 770; McLaughlin & Pidot, *supra* note 19, at 846–48.

54. See, e.g., Colinvaux, *supra* note 28, at 6 (describing how the federal tax deduction allowed for a donated conservation easement is calculated based on the lost economic value of

the program.<sup>55</sup> Scholars and studies seem to indicate that tax benefits are strong incentives for landowners to donate a conservation easement.<sup>56</sup>

As a default rule, conservation easements are conveyed “in perpetuity” and run with the land such that future owners are bound by the restrictions and obligations.<sup>57</sup> Therefore, a conservation easement establishes “a permanent form of public/private co-ownership” where the landowner retains the rights of possession and use of the land subject to the public’s interest in the conservation easement restrictions.<sup>58</sup>

### B. Conservation Easements for Protecting Farmland

The first conservation easements date back to the 1930s when the National Park Service acquired scenic easements along the Blue Ridge Parkway in Virginia.<sup>59</sup> The modern concept of using an easement for conservation purposes first arrived on the scene in the late 1950s.<sup>60</sup> In fact, “Wisconsin launched ‘the first major state-supported program to purchase conservation easements in the United States.’”<sup>61</sup> This program was designed for the acquisition of “scenic easements along highways adjacent to the Mississippi River.”<sup>62</sup>

Since the 1950s, the national popularity and use of conservation easements to protect land has grown dramatically, beginning particularly

---

the property).

55. For example, Virginia calculates its income tax credit as 40% of the fair market value of the conservation easement. VA. CODE ANN. § 58.1-512(A) (2012 & Supp. 2015).

56. *E.g.*, DEBRA PENTZ, CONSERVATION RESOURCE CENTER, STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS 10 (2007) (calling tax credits a “highly effective tool” for land conservation); McLaughlin, *supra* note 22, at 41–47 (indicating that the federal income tax deduction was a factor landowners considered when deciding to place a conservation easement on their properties); McLaughlin & Pidot, *supra* note 19, at 846 (noting that states offer tax credits “[t]o provide further inducement to the donation of conservation easements”).

57. McLaughlin, *supra* note 18, at 48; *see also* UNIF. CONSERVATION EASEMENT ACT § 2(c) (UNIF. LAW COMM’N amended 2007), 12 U.L.A. 165, 179 (2008).

58. McLaughlin, *supra* note 18, at 47–48.

59. Korngold, *supra* note 23, at 473; Justin R. Ward & F. Kaid Benfield, *Conservation Easements: Prospects for Sustainable Agriculture*, 8 VA. J. NAT. RESOURCES L. 271, 272 (1989).

60. McLaughlin, *supra* note 18, at 49 (discussing how the National Park Service was the first to use scenic easements in the 1930s but “the modern concept of a ‘conservation easement’ was first introduced by journalist William Whyte”).

61. Korngold, *supra* note 23, at 473 (quoting Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin’s Great River Road: A Progress Report on Perpetuity*, 66 J. AM. PLANNING ASS’N 177, 178 (2000)).

62. *Id.*

in the mid-1980s.<sup>63</sup> Today, some might even call the conservation easement “the single most popular private land protection tool.”<sup>64</sup>

The popularity of conservation easements as a land protection tool has led to their use in addressing the preservation of farmland.<sup>65</sup> Because of the “public/private co-ownership,” a conservation easement can protect land from development through government involvement but keep the property in private hands, thereby allowing farming operations and agricultural uses to continue.<sup>66</sup> A conservation easement is also useful because, unlike land use regulations, the restrictions can be tailored to the specific property and address the needs and concerns of the particular farming operation run on the property.<sup>67</sup> Conservation easements can also be useful for allowing the continuation of farming operations because the property remains in private hands—the conservation and protection of agricultural lands is best accomplished when the property remains in private hands because private ownership is the most likely arrangement for continuing any farming operations.<sup>68</sup>

Furthermore, there are benefits that often flow from the conservation easement that have made them a useful tool to protect farmland. For example, placing a conservation easement on a property can lead to property tax savings because after the property is encumbered with the conservation easement, its assessed value is almost always lowered, which results in lower property taxes for the landowner.<sup>69</sup> Therefore, the benefits of the conservation easement continue for the landowner even after the transaction is complete because the landowner can pay reduced taxes on his property.<sup>70</sup>

---

63. McLaughlin, *supra* note 19, at 689–92 (discussing the “extraordinary growth” of organization that hold conservation easements and acres encumbered by conservation easements).

64. McLaughlin, *supra* note 18, at 47.

65. *See, e.g.*, Quinn, *supra* note 52, at 238; Ward & Benfield, *supra* note 59, at 272, 275–76.

66. *See* McLaughlin, *supra* note 18, at 48.

67. BYERS & PONTE, *supra* note 40, at 9; Albert & McVickar, *supra* note 42, at 11.

68. *See* Albert & McVickar, *supra* note 42, at 11; *see also* Wayburn, *supra* note 25, at 179–81 (discussing how engaging the private landowner is essential to achieving the protection of the environment). *See generally* Korngold, *supra* note 23 (arguing that conservation easements are more efficient and effective than regulations to protect land).

69. McLaughlin, *supra* note 22, at 39–40; Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 169 (2007).

70. Richardson, *supra* note 69, at 169 (stating that lowered use-value assessments give “farmers an economic incentive to continue to use their land for agriculture”).

The use of conservation easements for farmland protection is criticized because conservation easements simply protect the land when what really needs to be done is help the farmer continue farming.<sup>71</sup> The need to help the farmer continue farming and do something more than simply protect the land from development has led states, such as Wisconsin, to adopt a program where the conservation easement is purchased rather than donated for a tax deduction or tax credit.<sup>72</sup> These programs are often referred to as Purchase of Agricultural Conservation Easement (PACE) programs or Purchase of Development Rights (PDR) programs, which usually operate by purchasing a property's development rights.<sup>73</sup> By purchasing the development rights from farmers, the farmers "are able to capitalize financially while not actually taking their land out of agriculture."<sup>74</sup> Therefore, a conservation easement that only offers a tax deduction or a nontransferable tax credit may not be enough of an incentive for farmers to encumber their properties with conservation easements because it does not help them continue their farming operations. A strong conservation easement program is a program that is widely available as a land protection tool and also provides an incentive for its target audience to participate in the program.

### III. CONSERVATION EASEMENTS IN WISCONSIN

#### A. *The Purchase of Agricultural Conservation Easements Program*

The Wisconsin legislature adopted a statutory program authorizing the purchase of agricultural conservation easements after finding "[t]hat the preservation of farmland is important for current and future agricultural production in this state" and "[t]hat the preservation of farmland is important for the current and future state economy."<sup>75</sup> Under this program, the Department of Agriculture, Trade, and Consumer Protection (DATCP) is authorized to purchase agricultural conservation easements defined as "nonpossessory interest[s] in real property

---

71. *Id.* at 168 ("[W]hile easements may prevent development on certain parcels of open space and rural land, easements fail to guarantee continued agricultural activity on the property."); Quinn, *supra* note 52, at 265.

72. AM. FARMLAND TR., *supra* note 9, at 2 (listing the "liquid capital" provided to farmers as one of the functions and purposes of a PACE program).

73. *See, e.g.*, CTR. FOR LAND USE EDUC., PLANNING IMPLEMENTATION TOOLS PURCHASE OF DEVELOPMENT RIGHTS (PDR) 1 (2006), [https://www.uwsp.edu/cn-ap/clue/Documents/PlanImplementation/Purchase\\_of\\_Development\\_Rights.pdf](https://www.uwsp.edu/cn-ap/clue/Documents/PlanImplementation/Purchase_of_Development_Rights.pdf) [<https://perma.cc/G6KK-9FX5>].

74. Richardson, *supra* note 69, at 168.

75. WIS. STAT. § 93.73(1)(a)–(b) (2013–2014).

imposing any limitation or affirmative obligation the purpose of which includes . . . assuring the availability of real property for agricultural . . . use.”<sup>76</sup>

Essentially this program allows the state to purchase an agricultural property’s development rights and limit the property’s development potential thereby ensuring its availability for agricultural use.<sup>77</sup> In fact, the likelihood that the land would be developed if not encumbered by a conservation easement is one of the criteria used to evaluate whether or not the state will purchase the agricultural conservation easement.<sup>78</sup>

Also, an eligible agricultural conservation easement must “[p]rohibit[] the land subject to the agricultural conservation easement from being developed for a use that would make the land unavailable or unsuitable for agricultural use.”<sup>79</sup> This does not mean that the agricultural conservation easement requires the land be used for agricultural uses.<sup>80</sup> It simply means that the land must remain available for agricultural uses and anything that inhibits that availability is not allowed by the agricultural conservation easement.<sup>81</sup> Hence, the PACE program does not impose an affirmative obligation on the landowner to use the property for agriculture; it simply restricts uses to those that are consistent and compatible with agricultural uses.

The PACE program also authorizes the state through the DATCP to pay a portion of the costs to acquire the conservation easement.<sup>82</sup> These costs are limited to (1) “[f]ifty percent of the fair market value of the agricultural conservation easement”<sup>83</sup> and (2) “[t]he reasonable transaction costs related to the purchase of the agricultural conservation easement.”<sup>84</sup> In short, Wisconsin’s PACE program offers money to the landowner who places a conservation easement on his property.

As noted earlier, this is an important piece of the program because simply placing an agricultural conservation easement on a property only protects the land from development but does not help a farmer continue

---

76. *Id.* §§ 93.73(1m)(a), 93.73(2)(a), 700.40(1)(a).

77. *See* Richardson, *supra* note 69, at 168 (“The purchase of development rights simply refers to the purchase of a conservation easement from the landowner by a public agency or charitable organization.”).

78. WIS. STAT. § 93.73(4)(j).

79. *Id.* § 93.73(7)(a).

80. *See id.*

81. *See id.*; Matson, *supra* note 3, at 44.

82. WIS. STAT. § 93.73(2)(a).

83. *Id.* § 93.73(2)(a)(1).

84. *Id.* § 93.73(2)(a)(2).

his farming operation.<sup>85</sup> However, as was also noted earlier, Wisconsin's PACE program is not readily available as a land protection tool, which is likely due to the expense of running a purchase program.<sup>86</sup>

In addition, when purchasing an agricultural conservation easement, the DATCP does not work directly with the landowner but instead works with a "cooperating entity."<sup>87</sup> PACE requires that a cooperating entity submit an application to the DATCP to be reimbursed for its purchase of an agricultural conservation easement.<sup>88</sup> This means that a landowner cannot apply directly to the PACE program and that there must be a third party involved whether it is a land trust, local government, or other approved entity.<sup>89</sup>

### B. *The Statistics on Wisconsin's Conservation Easement Programs*

According to the National Conservation Easement Database (NCED), there are 4,112 conservation easements in Wisconsin.<sup>90</sup> About 61.78% of these easements are through a state-level program.<sup>91</sup> It is unclear, though, how many of these conservation easements were entered into under the PACE program or were entered into under Wisconsin's Warren Knowles-Gaylord Nelson stewardship program (Knowles-Nelson program).<sup>92</sup> The purpose of the majority of conservation

---

85. "[E]asements fail to guarantee continued agricultural activity on the property." Richardson, *supra* note 69, at 168. It is important to allow landowners the chance "to capitalize financially while not actually taking their land out of agriculture." *Id.*

86. See WIS. DEP'T OF AGRIC., *supra* note 9. Like PACE programs, PDR programs are expensive to run. See CTR. FOR LAND USE EDUC., *supra* note 73, at 3 (giving the cost of PDR a "D" rating).

87. WIS. STAT. § 93.73(3).

88. *Id.* § 93.73(3), (9).

89. Eliminating the requirement that a third-party participate in the conservation easement may be another way to eliminate program expenses; however, the large role land trusts play in conservation easements programs suggests that a third party may be more helpful than hurtful. See McLaughlin, *supra* note 18, at 49–51 (discussing the growth in the number of land trusts involved in conservation easements); McLaughlin & Pidot, *supra* note 19, at 818–25 (discussing the important role land trusts play in the conservation easement process in enforcing and monitoring conservation easements and suggesting ways to improve that role).

90. *State of Wisconsin and All Easements*, NAT'L CONSERVATION EASEMENT DATABASE, <http://conservationeasement.us/reports/easements> [https://perma.cc/U6XZ-4XAH] (last visited Nov. 16, 2014). While the NCED does not provide a perfect picture of the state of conservation easements in Wisconsin, it still provides one of the best pictures available. See generally Olmsted, *supra* note 30 (discussing the problems with reporting conservation easements and the recent measures to make more information on existing conservation easements widely available).

91. *State of Wisconsin and All Easements*, *supra* note 90.

92. The Knowles-Nelson program is another conservation-oriented program in Wisconsin; however, this program focuses more on the government acquiring lands rather than

easements in Wisconsin as listed in the database are either “environmental system” or “unknown.”<sup>93</sup> Moreover, the database shows that there have been very few conservation easements in recent years.<sup>94</sup> According to the NCED, there were only 28 conservation easements in 2013, 19 in 2012, and 36 in 2011.<sup>95</sup> Given the unclear data in the NCED and the few conservation easements of recent years, it is hard to gauge the success of the PACE program with this information alone. However, the lack of funding for the PACE program makes it easy to determine that the PACE program is not successful.

At the present time, the PACE program appears to be either unfunded or receiving very little funding.<sup>96</sup> Given that the PACE program has seen very little activity due to a lack of proper funding, it is likely that the conservation easements reported in the NCED are not through the PACE program, and the PACE program has been largely unsuccessful in recent years. This means the PACE program as it currently stands is basically unavailable as a tool to protect Wisconsin’s farmland and carry on the state’s tradition as America’s Dairyland.

#### IV. CONSERVATION EASEMENTS IN VIRGINIA

##### A. *The Open-Space Land Act and the Virginia Land Conservation Incentives Act of 1999*

Virginia’s conservation easement program is found in the Open-Space Land Act.<sup>97</sup> The Open-Space Land Act authorizes the gift or purchase of

---

the government purchasing conservation easements where the land remains in private ownership. WIS. STAT. § 23.0917(2). The Knowles-Nelson program also appears to be aimed at protecting natural resources akin to rivers, streams, bluffs, etc. and does not aim to protect farmland. *Id.* (instructing DATCP to establish a subprogram for bluff protection, recreational boating aids, and the Baraboo Hills). It is important to note this program’s existence, though, because the PACE program is funded through the Knowles-Nelson program as one of the Knowles-Nelson program’s specific activities. *Id.* § 23.197(15).

93. *State of Wisconsin and All Easements, supra* note 90. According to the database, 41.23% of conservation easements in Wisconsin have an unknown purpose and 35.48% of conservation easements in Wisconsin have an environmental system purpose. *Id.*

94. *Id.*; *see also supra* text accompanying notes 7–9.

95. *State of Wisconsin and All Easements, supra* note 90.

96. Act of July 12, 2015, 2015 Wis. Act 55, § 479; Act of June 30, 2013, 2013 Wis. Act 20, § 198, 2013 Wis. Sess. Laws 85, 131–32; Am. Farmland Tr. & Gathering Waters Conservancy, *supra* note 8 (stating that there is currently no funding for the PACE program but that organizations, such as the Gathering Waters Conservancy and the American Farmland Trust, “continue to advocate for a strong statewide PACE program in Wisconsin”).

97. VA. CODE ANN. §§ 10.1-1700 to -1704 (2012 & Supp. 2015). Virginia has also adopted the UCEA as the Virginia Conservation Easement Act. VA. CODE ANN. §§ 10.1-1009 to -1016 (2012). However, the adoption of the UCEA did not create a new source of authority for

open-space easements that “impos[e] limitations or affirmative obligations” on a landowner for the purposes of “assuring [the property’s] availability for agricultural . . . use.”<sup>98</sup>

To “further encourage the preservation and sustainability of Virginia’s unique natural resources,” Virginia enacted the Virginia Land Conservation Incentives Act of 1999.<sup>99</sup> Under this act, a landowner receives income tax credits worth 40% of the fair market value of any interest in land conveyed for agricultural use or agricultural preservation.<sup>100</sup> A conservation easement acquired under the Open-Space Land Act fits within this category because a conservation easement is an interest in land and it can be geared towards agricultural preservation.<sup>101</sup> To receive the tax credits for the conservation easement under the Open-Space Land Act, the landowner must submit an application to the Virginia Department of Taxation (VDOT).<sup>102</sup>

Once a landowner submits a satisfactory application, VDOT issues the tax credits for the landowner’s use.<sup>103</sup> To avoid abuses of the tax credit benefit offered to conservation easement donors, VDOT requires verification of the conservation easement value donation for donations of \$1 million or more.<sup>104</sup> It also imposes a limit on how many tax credits a landowner can use each year; a landowner cannot claim more than \$100,000 in tax credits nor can he claim tax credits in excess of his taxable income.<sup>105</sup> In regards to the latter limitation, the landowner is in essence

---

encumbering land with a conservation easement. *United States v. Blackman*, 613 S.E.2d 442, 448 (Va. 2005). The adoption of the UCEA was solely meant to provide clarity and consistency for the existing conservation easement enabling statutes. *Id.* It is also true that Virginia has a PDR program that authorizes the purchase of agricultural conservation easements; however, Virginia’s PDR program is run by local governments, and only twenty-two local governments have established such a program. *Local Governments that Protect Land*, VA. DEP’T CONSERVATION & RECREATION, <http://www.dcr.virginia.gov/land-conservation/wheretof5> [https://perma.cc/VLF4-2V2Q] (last visited Jan. 16, 2016).

98. VA. CODE ANN. § 10.1-1700. The Open-Space Land Act actually authorizes conservation easements for a variety of purposes; however, because this Comment’s main focus is on using conservation easements to protect farmland, only that portion of the statute will be analyzed. *See id.* (authorizing conservation easements for protecting open-space, natural resources, and recreational uses).

99. VA. CODE ANN. § 58.1-510 (2012).

100. VA. CODE ANN. § 58.1-512(A) (2012 & Supp. 2015).

101. *Id.* §§ 10.1-1700 to -1704.

102. *Id.* § 58.1-512(D)(1).

103. *See id.* § 58.1-512(D) (conditioning the issuance of tax credits on the following of the established procedures, one of which is the submission of an application meeting the listed criteria).

104. *Id.* § 58.1-512(D)(3)(a).

105. *Id.* § 58.1-512(C)(1).

restricted to using the tax credits as a way to reduce his taxable income and is prohibited from using the tax credits to secure a refund, unless he chooses to transfer his tax credits.<sup>106</sup> VDOT also sets an annual cap of \$100 million for new tax credits that can be issued.<sup>107</sup>

In addition to being able to use the tax credits, a landowner who receives tax credits under the Virginia Land Conservation Incentives Act of 1999 has the option of transferring the credits to another Virginia taxpayer.<sup>108</sup> Transfers of tax credits can be done through a tax-credit broker where another Virginia taxpayer can purchase these tax credits from the landowner who donated the conservation easement.<sup>109</sup> In such a case, the landowner receives a cash payment for his tax credits.<sup>110</sup> This option has been most useful for farmers in Virginia who have donated a conservation easement to save the family farm and escape mounting development pressures.<sup>111</sup>

### *B. The Statistics on Virginia's Conservation Easement Programs*

Virginia's conservation easement program has been described as "a uniquely elaborate conservation easement incentive program."<sup>112</sup> The program has also been largely successful, likely because of its unique incentives.<sup>113</sup> Of the 5,996 conservation easements in Virginia, 74.49% are through a state-level program.<sup>114</sup> Moreover, the majority of the conservation easements in Virginia have likely been through the Open-Space Land Act, which also makes the Open-Space Land Act by far the

---

106. *Id.*

107. *Id.* § 58.1-512(D)(4)(a).

108. *Id.* § 58.1-513(C)(1).

109. *See, e.g., Virginia's Land Preservation Tax Credit Program*, CONSERVATION PARTNERS, LLC, <https://www.conservationpartnersllc.com/tax-credit/> [<https://perma.cc/7TNB-AXDF>] (last visited Dec. 23, 2014). Conservation Partners, LLC is an organization in Virginia that helps landowners through the conservation easement process and coordinates the sale of tax credits. *About Conservation Partners, LLC*, CONSERVATION PARTNERS, LLC, <https://www.conservationpartnersllc.com/about/> [<https://perma.cc/W4FG-897K>] (last visited Jan. 6, 2015).

110. *See, e.g., Selling Land Preservation Tax Credits through Conservation Partners, LLC*, CONSERVATION PARTNERS, LLC, <https://www.conservationpartnersllc.com/selling/> [<https://perma.cc/C73M-TYXJ>] (last visited Dec. 23, 2014).

111. *See Richardson, supra* note 69, at 168–69.

112. Albert & McVickar, *supra* note 42, at 11.

113. *See PENTZ, supra* note 56, at 11–12 (noting the growth in Virginia's program after it adopted a tax credit program).

114. *State of Virginia and All Easements*, NAT'L CONSERVATION EASEMENT DATABASE, <http://conservationeasement.us/reports/easements> [<https://perma.cc/EU8Q-XGK7>] (last visited Jan. 17, 2016).

most popular of all the conservation programs offered to Virginia residents.<sup>115</sup> For example, the VOF—one of the leading conservation easement holders in Virginia—reported that it acquired 203 conservation easements in 2013.<sup>116</sup> The NCED reports that there were 256 conservation easements in 2013.<sup>117</sup> This means that 81.5% of the conservation easements in 2013 were likely undertaken under the authority of the Open-Space Land Act because that is the authority under which the VOF acquires conservation easements.<sup>118</sup>

Taken together, it is evident that Virginia's conservation easement program is successful and popular with landowners. It is also clear that much of this success and popularity did not come until Virginia enacted its state-level program where a landowner who donated a conservation easement received a transferable income tax credit.<sup>119</sup> Professor Nancy A. McLaughlin wrote shortly after Virginia enacted its program that “[t]he recent experience of the State of Virginia also indicates that tax incentives play a role in stimulating easement donations.”<sup>120</sup> This statement was based on the dramatic rise in conservation easements reported by the VOF.<sup>121</sup> The transferability of the tax credit is also important to the program because “[t]he average number of donations doubled and the acres protected tripled once credits were made transferable” in 2002.<sup>122</sup>

The data provided by the NCED also supports this conclusion because it reports a dramatic rise in the number of conservation easements starting in the year 2000.<sup>123</sup> Before 2000, Virginia's conservation easement program was rather stagnant with less than 100 conservation easements per year all but two years.<sup>124</sup> Since 2000, though,

---

115. *Id.* (listing 85.24% of the conservation easements in Virginia as “Open Space-Other,” 0.17% as “Open Space-Farm,” and 3.01% as “Open-Space Forest”).

116. *Easements & Acres by Year*, VA. OUTDOORS FOUND., <http://www.virginiaoutdoorsfoundation.org/news/stats/easementsacres-by-year/> [<https://perma.cc/8YXJ-YWTX>] (last updated Feb. 4, 2016).

117. *State of Virginia and All Easements*, *supra* note 114.

118. *See* VA. CODE ANN. §§ 10.1-1800 to -1801.1 (2012) (creating the VOF for the purposes of open space preservation and requiring the VOF to establish an Open-Space Land Preservations Trust Fund). The conservation easement deed template provided by the VOF also lists the Open-Space Land Act as its authority to enter into a conservation easement with a landowner. Virginia Outdoors Foundation, *supra* note 43, at 2.

119. McLaughlin, *supra* note 22, at 22–24.

120. *Id.* at 22.

121. *See id.* at 23–24.

122. PENTZ, *supra* note 56, at 13 (stating that about 75% of tax credits were transferred).

123. *State of Virginia and All Easements*, *supra* note 114.

124. *Id.*

the NCED reports at least 200 conservation easements per year with some years even experiencing numbers in the 400s and 500s.<sup>125</sup>

#### V. USING TAX CREDITS AS A CONSERVATION EASEMENT INCENTIVE

As noted earlier, conservation easement programs offer different incentives to landowners willing to place a conservation easement on their property.<sup>126</sup> The typical incentives are a purchase program, a tax deduction, or a tax credit.<sup>127</sup> Each type of incentive has advantages and disadvantages; however, a transferable tax credit is the best option because it provides an incentive to a variety of landowners,<sup>128</sup> makes a conservation easement program more widely available by making the program easier to fund,<sup>129</sup> and provides the government with the requisite control necessary to curb abuses of the program.<sup>130</sup>

Some would argue that purchase programs “serve as a constant check on supply and provide a cap on available funds.”<sup>131</sup> A government has limited resources with which to purchase conservation easements, and it would have to make “deliberate decisions . . . about which easements to acquire,” which may in turn achieve the conservation goals behind conservation easement programs.<sup>132</sup>

The problem with such purchase programs, though, is the very reason some support such a program: “the government’s purchase of a conservation easement involves a direct payout of public funds.”<sup>133</sup> A purchase program results in the government limiting the availability of conservation easements to match its limited resources to make the necessary payment to the landowner.<sup>134</sup> This limited availability to make direct payments of public funds obstructs conservation goals because many eligible and deserving landowners may be denied the protection of a conservation easement under a purchase program.<sup>135</sup> Therefore, the

---

125. *Id.*

126. *See supra* text accompanying notes 50–56.

127. *See, e.g.*, VA. CODE ANN. §§ 58.1-510 to -513 (2012 & Supp. 2015); WIS. STAT. § 93.73 (2013–2014).

128. *See* McLaughlin, *supra* note 22, at 39–40.

129. *See* PENTZ, *supra* note 56, at 10.

130. *See infra* text accompanying notes 133–38.

131. Colinvaux, *supra* note 28, at 47.

132. *Id.*

133. Korngold, *supra* note 23, at 471.

134. Halperin, *supra* note 26, at 45–46.

135. *See id.* (discussing how a direct spending program would require the government to rank applications and only allow the most deserving landowners to participate in the conservation easement program).

deliberate decisions required by the government under a purchase program do not best achieve conservation goals because a purchase program is so limited in application.

A tax deduction, by contrast, does not require direct funding, which can make it more widely available to landowners who donate a conservation easement.<sup>136</sup> However, offering a tax deduction as an incentive is highly criticized due to its propensity to attract abuse.<sup>137</sup> In fact, the federal program has weathered so much criticism that at one point Congress contemplated eliminating the federal tax deduction for a conservation easement.<sup>138</sup> Therefore, it appears that a tax deduction is not the best option to offer as an incentive for placing a conservation easement on one's property because of the tax deduction's track record for abuse.

Moreover, the tax deduction has been dubbed the "upside-down" incentive" because of the way it provides the most benefit to wealthy landowners and does little to nothing to benefit the average landowner.<sup>139</sup> Therefore, to provide something that actually benefits most landowners, it is unlikely that a tax deduction is the answer.

To make conservation easements a more widely available tool to protect farmland, it seems the best option would be to adopt a conservation easement program that offers transferable tax credits. The indirect funding of a conservation easement program through issuing tax credits makes it easier for a government to fund.<sup>140</sup> "[T]he state advances its goals of land conservation through tax policy rather than general-fund expenditures, and the public reaps the benefit of lands preserved as open space at a fraction of their cost."<sup>141</sup> When the conservation easement program is easier to fund, more landowners will be able to take advantage of it, and conservation of farmland can be more readily achieved.

Some criticize a program offering tax credits as a program that leads to gentrification because the "land rich [and] cash poor" are unlikely to

---

136. *Id.* at 45 ("[T]ax benefits can be distributed to the donor with minimal additional costs."). A tax benefit program is also "open ended, eliminating the need to prioritize or compare the merit of individual donations," which means more landowners will be able to take advantage of a tax deduction program as compared to a direct spending program. *Id.*

137. *E.g.*, Kate B. Deal, Note, *Incentivizing Conservation: Restructuring the Tax-Preferred Easement Acceptance Process to Maximize Overall Conservation Value*, 101 GEO. L.J. 1587, 1599–1601 (2013); Halperin, *supra* note 26, at 29–32; McLaughlin, *supra* note 22, at 50–51.

138. Halperin, *supra* note 26, at 43; McLaughlin, *supra* note 22, at 50.

139. McLaughlin, *supra* note 22, at 29; *see also* PENTZ, *supra* note 56, at 9.

140. *See* PENTZ, *supra* note 56, at 10.

141. *Id.*

see a tax credit as a viable incentive to place a conservation easement on their property.<sup>142</sup> However, if there is also the option to sell the tax credits, like how Virginia's program is structured, it seems that a state could create a conservation easement program that offers the best possible alternative to a purchase program, a tax deduction program, and a simple tax credit program.<sup>143</sup> A transferable tax credit program would create a program that is more widely available like a tax incentive program but still allows a landowner to realize a benefit similar to a purchase program if he chooses to sell his tax credits.<sup>144</sup>

A transferable tax credit program like Virginia offers is "egalitarian" in that the benefit realized by all landowners is the same, and the fear of an upside-down incentive can be abated.<sup>145</sup> However, the fear would be even less present if Wisconsin simply amended its PACE program to offer a transferable tax credit because the program would be specifically available to farmers for the purposes of protecting Wisconsin's agriculture, and there would be no need to worry that the program is only being used to benefit those with vast amounts of land.<sup>146</sup>

If Wisconsin adopted a program modeled after Virginia's conservation easement program, a landowner would apply to receive a conservation easement tax credit, and Wisconsin can (1) place a cap on how many tax credits are issued per year and (2) place a limit on how many tax credits each landowner can use per year. It can also offer a transferable tax credit to give the landowner the option of using or selling the tax credit, depending on what is most beneficial to him.

By requiring a landowner to apply for a tax credit, the state has control over how many tax credits are issued and how much the tax revenue will be affected. An application for tax credits creates an aspect of funding control identified by some as an advantage to a purchase program.<sup>147</sup> Requiring a landowner to apply for tax credits also avoids

---

142. See McLaughlin, *supra* note 22, at 28.

143. See Colinvaux, *supra* note 53, at 770 (proposing the adoption of a tax credit program because it would "provide some of the benefits of a direct spending program while retaining parts of the private aspect of the current [tax] deduction").

144. Eliminating a purchase program would eliminate the ranking of applications discussed by Halperin, *supra* note 26, which would mean that more than just the most deserving landowners would be able to participate in the conservation easement program.

145. See PENTZ, *supra* note 56, at 22–23 ("[T]he best way to ensure that conservation tax credits are an incentive to all landowners is to make credits transferable or refundable."); McLaughlin, *supra* note 22, at 39–40.

146. PENTZ, *supra* note 56, at 21 (setting a focus for what type of land the conservation easement program will protect is a good way to curb abuses and ensure a public benefit).

147. See Colinvaux, *supra* note 53, at 769 (citing the control the government would have

some of the abuses of a tax deduction program where a landowner would simply claim a deduction and the state would have to act retroactively to reverse any deduction claimed by the landowner.<sup>148</sup> If the state issues the tax credits pursuant to a landowner's application, it can determine at the time of the application if the landowner is in fact eligible for the tax credit and can preempt any improper claiming of a tax benefit.<sup>149</sup>

Also, if the state places a cap on how many tax credits are issued per year, it can control how much the tax revenue stream is affected and avoid the criticism that tax benefits are too expensive.<sup>150</sup> "Statewide caps offer state legislatures certainty regarding the maximum annual fiscal impact a program may have."<sup>151</sup> The control over how much the government will be required to indirectly fund through lost tax revenue maintains the aspect of control of a purchase program.<sup>152</sup> In other words, it is likely that a government can more easily fund a loss of tax revenue than raising the funds to purchase a conservation easement, which is demonstrated by the fact that Wisconsin's PACE program has been inactive and Virginia's program has thrived.<sup>153</sup>

Last, if the state places a limit on how many tax credits a landowner can use per year, the government can again control the impact on the tax revenue stream by knowing landowners with conservation easement tax credits can only claim so much each year. In fact, if the state so desired, it could track how many credits it has issued and plan for how many are likely to be used in any given year.<sup>154</sup> By tracking the newly issued and unused conservation easement tax credits, the state can budget for their use. Such a feature is preferable to a purchase program because, again, it

---

over the approval of conservation easement projects as a reason to change a tax deduction program to a purchase program).

148. Deal, *supra* note 137, at 1603–04 (noting that the IRS must pursue litigation to challenge the tax deductions claimed by landowners).

149. See PENTZ, *supra* note 56, at 25–29 (comparing an audit approach, a certification approach, and a transactional screening approach to issuing tax credits).

150. See *id.* at 19 ("[T]here are numerous ways to limit the fiscal impact of a program while still maximizing the public benefit. These include offering a credit for only a portion of the donated value of the land, placing caps on the credits, and setting a sunset date at which time costs and benefits of the program can be reviewed."). It is debatable, though, that tax benefits are too expensive because many only examine the amount of tax benefits claimed each year and do not actually look at the amount of tax revenue lost, which is much less than the amount of tax credits or tax deductions claimed each year. Colinvaux, *supra* note 28, at 9–10.

151. PENTZ, *supra* note 56, at 20.

152. See *id.*

153. See *supra* text accompanying notes 140–41 (discussing how the indirect funding of a tax credit can make a program easier to fund).

154. PENTZ, *supra* note 56, at 24.

is likely harder for a government to raise funding for a program than it is for the government to plan for a loss of tax revenue.

Also, limiting the amount of tax credits a landowner can use per year is advantageous as compared to a tax deduction for much of the same reasons as stated above. Limiting the amount of tax credits that can be used avoids the abuses of the system that have been experienced with tax deductions where a landowner claims a tax deduction when he is not in fact eligible for it and then the revenue stream is impacted more than it is supposed to be. Placing a limit on the amount of tax credits a landowner can use each year eliminates part of the “open ended” nature of a tax benefit program that subjects it to abuses.<sup>155</sup>

Tax benefits are criticized by some as being unrepresentative of the conservation easement’s value and as giving the landowner more than what the conservation easement is worth.<sup>156</sup> However, by adopting a program similar to the program in Virginia, this mismatch can be mitigated.<sup>157</sup> By only allowing a landowner to take a percentage of the diminution in value of his property, it is less likely that the tax credits will overstate the worth of the conservation easement.<sup>158</sup> Therefore, the overstatement of value argument is easily overcome. “For example, when credits are valued at 50 percent of the fair market value of the donation, the public receives \$2 of land protection for every \$1 offered as a tax incentive.”<sup>159</sup>

It is true that Wisconsin’s PACE program as it is currently structured may allow a landowner who donates an agricultural conservation easement to realize the full fair market value of his conservation easement.<sup>160</sup> This would appear to be a better benefit for a landowner than only a percentage of fair market value of his conservation easement

---

155. See Halperin, *supra* note 26, at 46.

156. *E.g.*, Colinvaux, *supra* note 28, at 6.

157. PENTZ, *supra* note 56, at 15 (noting that Virginia has adopted a conservation easement program that addresses some of the main concerns of a tax credit program).

158. Professor Roger Colinvaux explored a similar type of program in regards to the federal tax deduction allowed for donated conservation easements as a way to reduce abuse and waste but still keep an incentive for landowners to donate conservation easements. Colinvaux, *supra* note 28, at 7.

159. PENTZ, *supra* note 56, at 19.

160. See WIS. STAT. § 93.73(2)(am) (2013–2014) (“The willingness of a landowner to convey an agricultural conservation easement for less than full market value does not reduce the amount that the department may pay as its share of the cost to purchase the agricultural conservation easement.”); see also *id.* § 93.73(2)(a)(1) (noting that the department’s share of the agricultural conservation easement purchase is 50% but not limiting the landowner to this amount required of the department).

because, as stated before, the goal is not only to protect the farmland but also to provide enough of a benefit that allows a farming operation to continue. However, if the PACE program is not being widely used, the fact that it would allow a landowner to realize the full fair market value of his conservation easement seems irrelevant, and it would be better to create a program that allows a landowner to realize at least a percentage of the fair market value of his conservation easement than none at all.

Some also criticize tax benefits as too costly; however, this may only take into account the amount of tax benefits claimed rather than the amount of tax revenue actually lost.<sup>161</sup> When taking into account the amount of tax revenue that is actually lost, offering a tax benefit for a conservation easement donation appears to be much less costly.<sup>162</sup> For example, Professor Roger Colinvaux calculated that in the year 2008 when a total of \$1,216,043,000 was claimed in federal tax deductions, only \$425,615,000 was actually lost in tax revenue.<sup>163</sup> That is because the tax deduction claimed only represents the value of the conservation easement and does not actually represent the amount of tax dollars lost.<sup>164</sup> To find the tax dollars that have been lost, “the top marginal tax rate of the donor must be multiplied by the amount deducted.”<sup>165</sup> Therefore, a tax benefit, while it does result in lost tax revenue, is likely not as expensive as most claim it to be.

In short, tax credits offer a compromise between a purchase program and the tax deduction. Tax credits offer the control that makes a purchase program desirable, and they offer indirect funding as opposed to direct funding, which is what makes the purchase programs so selective and unavailable to the majority of landowners.

Moreover, the transferability solves the problem of offering tax benefits over a purchase price because the landowner's ability to realize a benefit similar to a purchase program avoids a benefit tailored to the benefit of wealthy landowners.<sup>166</sup> A transferable tax credit also appears to make a conservation easement program popular and widely available as a private land protection tool. As noted earlier, shortly after Virginia enacted its current conservation easement program, it experienced a dramatic jump in the amount of conservation easements donated through

---

161. Colinvaux, *supra* note 28, at 9.

162. *Id.* at 9–10.

163. *Id.* at 9.

164. *Id.*

165. *Id.*

166. PENTZ, *supra* note 56, at 17, 23 (stating that the transferability of the tax credit is what makes a tax credit program a benefit to all types of landowners).

the state-level program.<sup>167</sup> The state income tax credit seemed to “make easement donations attractive to landowners at the low end of the income and wealth scale who benefit little from the existing federal incentives.”<sup>168</sup>

## VI. CONCLUSION

To create a more useable conservation easement program, Wisconsin should adopt a program modeled after the conservation easement program enacted in Virginia. A conservation easement program offering transferable tax credits as the landowner benefit would make it easier for the state to fund the program, in turn making it more readily available to farmers in Wisconsin and more readily available as a tool to protect Wisconsin’s tradition as America’s Dairyland. Also, if the state allowed the transfer and sale of tax credits to other Wisconsin taxpayers, the program would do more than just protect the land, and it would help farmers continue farming.

As can be seen in the statistics provided by the NCED, Virginia’s conservation easement program has been much more active in recent years, and this activity is likely due to its structure as a state-level program that offers transferable tax credits as the incentive for encumbering one’s property with a conservation easement.<sup>169</sup>

A tax credit program would not leave the State of Wisconsin responsible for 50% of the fair market value of the conservation easement, nor would it need to be responsible for the transaction costs as it is now. A tax credit program would eliminate the direct funding aspect currently used under the PACE program. In fact, if the state offered a transferable tax credit, like Virginia does, any “direct” funding of the conservation easement would come from another Wisconsin taxpayer who purchases the tax credits.<sup>170</sup>

Professor Nancy A. McLaughlin divides the costs of a conservation easement into the market costs and the transaction costs.<sup>171</sup> The market costs are the costs to the landowner in placing a conservation easement

---

167. McLaughlin, *supra* note 22, at 23–24.

168. *Id.* at 29.

169. *See supra* Part IV.B.

170. Funding the PACE program through a transferable benefit was even already contemplated in an effort to find a way to fund the program while giving farmers the benefits they needed. *See* WIS. DEP’T OF AGRIC., *supra* note 9, at 43 (suggesting financing PACE with bonds that farmers could then sell for a lump sum payment). This shows the Board of Agriculture, Trade & Consumer Protection has been brainstorming to find a way to fund the PACE program while still giving farmers the benefits they are looking for.

171. McLaughlin, *supra* note 22, at 24.

on his property, i.e., the diminution in value.<sup>172</sup> The transaction costs are those costs associated with the conservation easement process, which usually includes legal and appraisal services at the very least.<sup>173</sup> Professor McLaughlin's discussion of the market and transaction costs associated with a conservation easement shows that these can be unpredictable and quite high.<sup>174</sup> Thus, it seems logical that a conservation easement program, like Wisconsin's PACE program, requiring direct funding of the market costs and the transactions costs would be hard to manage, which seems further supported by the fact that Wisconsin's PACE program has received little to no funding in recent years. Therefore, Wisconsin should contemplate adopting a program modeled after Virginia's conservation easement program where it would no longer be directly responsible for the fair market value and transaction costs, as it is now.

Given the current and historic importance of farming and agriculture in Wisconsin, it is important that the farming industry is protected. However, the current PACE program is doing little to protect Wisconsin's farmland. To better protect Wisconsin's farmland, Wisconsin should adopt a conservation easement program that is more readily available to farmers and one that also puts some cash in their pockets to help fund their farming operations. A system similar to Virginia's program can do just that, and then Wisconsin can carry on its tradition as America's Dairyland.

JENNIFER E. KRUEGER\*

---

172. *Id.*

173. *Id.*

174. *Id.* at 24–26.

\* J.D., 2016, Marquette University Law School, B.A., 2009, Marquette University. I would like to thank my husband for all his patience and understanding; I would not be where I am today without his support. I would also like to thank my family for all their encouragement; I would not have made it to this point without them.