



Conservation Land Property Tax Exemptions

The Mohonk Preserve Experience

By David C. Wilkes and Glenn D. Hoagland



What is the value of preserved open space? That may seem like an esoteric question, but it is one that we answer every day in real dollar terms for those privately owned parcels of land that meet the strict criteria for an exemption from property taxes. Put another way, where a municipal or school budget must be levied, and some lands are deemed worthy of the benefit of a tax exemption, the cost is borne by other landowners. Tax exemptions in general represent the value that the community places, through legislation and local review, on certain desirable land uses and types of organizations that have been recognized to provide a valuable service or benefit to their community or constituency that government cannot afford to deliver with taxpayer dollars. And these exempt entities cannot survive – or would do so at an unacceptably diminished capacity – absent the civic financial support that comes in the form of property taxes forgone by the taxing authority.

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Open spaces that are not owned by government in the form of municipal or state parks, or held by private owners, are likely to be acquired, held, and managed for public benefit by nonprofit land conservation organizations or "land trusts." Of all the myriad tax exemptions available, the exemptions given to nonprofit land trusts that own preserved open space can be among the most provocative when a local government is struggling to close a budget gap and facing taxpayer pressure resulting from the prospect of increased tax rates. They are also, in the view of this article's authors, among the most necessary.

This is, no doubt, a value judgment, but one that is amply supported by academic research, principles of good governance, the evolution of civil society in Western culture, sound reason, and general popular opinion spanning many decades. The tax exemption of real property used by nonprofit organizations to further their public benefit activities reflects a broadly based public policy that has evolved in support of this sector of our society.

This article examines the historical and current legal framework and rationale for conservation land exemptions in New York State; debunks some of the popular myths that exaggerate the extent to which such exemptions cut into the public fisc; and considers the significant value added by the encouragement of preserved open space, even if somewhat intangible. Portions of the article highlight the Mohonk Preserve's experience in defending its exemption as well as the tax-related actions of the Town of New Paltz, in which the Preserve is partly located, but the principles and policies described apply well beyond the boundaries of New Paltz.

Defining Open Spaces That Are Conservation Priorities

We define open space as land that has been deemed to have significant value for conservation in its natural state. Most often, such land has been identified through public planning processes where citizens and planning experts are tasked with inventorying and prioritizing the most significant lands that should be permanently conserved and remain undeveloped for the environmental, health, and economic benefits they yield to a community or region.¹

Such conservation open space may be forestland that provides such valuable natural functions as storing car-

bon that would otherwise be released as greenhouse gas, filtering pollutants out of the air, retaining soils on steep slopes, acting as a watershed, purifying water filtering through the forest floor to recharge aquifers that supply drinking water; or may be wetland, stream corridors, or floodplains that manage large rainfalls by serving as natural spillways to attenuate flooding and absorb storm-water runoff. Such open spaces can be valued for the services that nature provides for free, and thus calculated in terms of long-term cost avoidance and savings to government.² In addition to these "ecosystem services" that help make communities resilient, such lands often protect important plant and wildlife habitat to allow for species to breed and migrate across the landscape.

Open space may have scenic views enjoyed by the public; it may be farm land contributing to the food supply; or it may have historic, cultural or landscape attributes important to our heritage. Furthermore, such protected open space may provide recreational access for walking, hiking, cycling, horseback riding, cross-country skiing, snowshoeing, and in some site-specific locations, activities such as rock climbing. It may inspire artists, photographers, and writers.³ Moreover, protected lands may be made publicly available to bring people of all ages closer to nature, for family and community-oriented nature programs or formal education for grade school to the college level. Examples include guided nature observation outings led by naturalists, school field studies that extend the K-12 curriculum to the outdoors for school-children, or scientific study and observation of natural phenomena that are conducted either by expert scientists or college faculty and their students. Citizen science programs engage participants in collecting data such as bird nesting, breeding and migrations, and insect surveys, and conducting other surveys of flora and fauna to record species present and add to observational databases. Further, such protected open spaces may attract volunteers individually or in groups to perform such community services as trail maintenance and litter cleanup, or serve as guides to interpret the resource to others, or to assist others in wayfinding.

Legislatures across the United States, and New York's local governments in particular, have at times struggled to define preserved open space in the context of exemption law and the criteria that must be met to qualify for

exempt status. And despite a solid foundation established through court decisions at the highest level, in some communities in New York tax-exempt conserved land faces an annual practical threat to its existence.

In New York State, local government finances are based primarily on property taxes. As exemptions proliferate in some communities, taxable assessed value is removed from the tax rolls resulting in a shift of the tax burden to privately owned, non-exempt property. However, in some communities, there has been an expressed willingness to accept some tax shift if it is to preserve open spaces valued by the community. For example, those residents of the town and village of New Paltz, who responded to a 2004 survey as part of the development of the town's Open Space Plan, affirmed the following:

- 77% said the town and village should actively pursue protecting open space as a strategy to keep New Paltz fiscally healthy and affordable.
- 66% supported concentrating development in or near the village center of New Paltz, and preserving open space in outlying areas.
- An overwhelming number (82%) supported policies to retain agricultural activity in the community.
- Over two-thirds of respondents (67%) favored some level of a tax increase to support open space protection.
- Of those who would accept a tax increase for open space, two-thirds supported a range of \$10 to \$100 per year. Another third supported a range of \$100 to \$300 per year.
- Over 75% of the people believed the community should pursue innovative strategies to protect open space.⁴

In addition to tax-exempt lands held by nonprofits, all communities have some government-owned properties that are not taxed, such as firehouses, police stations, municipal offices, town refuse recycling facilities, sewage treatment plants, and school district property. Yet, in New York State, these nontaxable municipal and school properties are lumped in with nonprofit exempt properties in the overall calculation of exempt properties. The result is an unwarranted mashing-up of all non-taxable properties, taxpayer confusion, and an exaggeration of the impact resulting from non-governmental exempt property. We will discuss this further below.

No exemption finds uniform support throughout a municipality. Starkly differing views are often expressed about the merits of exempting preserved open space: for some, it is a significant and worthy benefit that enhances not only the quality of life in their community, but their own property value; for others, is an unjustified addition to the tax burden that unfairly discriminates among landowners. Preserved open space is challenging to “value” from a purely economic standpoint, because it is removed from what some might consider to be its highest and best economically productive use as improved or developed

The exemptions given to nonprofit land trusts that own preserved open space can be among the most provocative.

land. And yet others would contend that as open space it is most useful, valuable, desirable and necessary to the fabric, balance, and robust health of the community as a whole. “Value” can be quite subjective. Bertram Lewis, an appraiser, wrote that “there is no such thing as ‘value,’ except in the eyes of the beholder. And one must understand where the beholder is coming from.”⁵

The Legal Basis for New York's Open Space Conservation Tax Exemption

Plainly, not every individual within a community will make actual use of all the properties that enjoy exemptions (whether preserved natural areas, churches, schools, and even hospitals), and often may outright oppose the mission of one or more organizations that claim qualification for a particular exemption. And yet, exempt status is provided by legislative consensus and local review and approval, generally on an annual basis. The field of exemption law is flush with examples of hotly and frequently litigated questions of qualification, reflecting the ongoing tension that has always existed where one property owner seeks to be relieved of a tax obligation that is borne by its neighbors.⁶ Like nearly all tax issues, what is done for one landowner impacts every other landowner. As a result, exemption statutes are strictly construed against the one seeking the exemption.⁷ But exemptions are also not to be construed so literally and narrowly that the construction defeats the purposes of the exemption.⁸

In some states, preserved open land is sheltered from property taxation (or at least statutorily valued in a manner that ignores development potential) by clear legislative directive that refers to open space or some other related term.⁹ While this article focuses on the framework for wholly exempt property, there are also many types of partial exemptions (sometimes called preferential assessments). These vary widely and include partial exemptions for industrial and commercial property, Urban Renewal housing, medical offices, private subsidized multi-family housing, etc.¹⁰ Our focus, however, is on open space conserved by nonprofit land conservation organizations (land trusts) that acquire and own land deemed to be of significant public benefit, thus qualifying for removal of real property from the tax rolls for purposes of town, county and school district taxes, including ad valorem levies and special district assessments.¹¹ In New York State, preserved open space owned and managed for the

benefit of the public by nonprofit land trusts qualifies for such a “whole” exemption and removes all property tax obligations from a parcel of land. This whole exemption for land conservation falls under the “charitable purpose” category of Real Property Tax Law (RPTL) § 420-a.

New York’s case law has settled the question as to the validity of the publicly beneficial use and purpose of land owned and managed by qualified nonprofits for multiple conservation and environmental education values, and thus qualification for a whole exemption from taxation. However, nowhere in the words of the statute is to be found an express mention of preserved conservation land, although perhaps this will someday be addressed by the Legislature.

Nonetheless, under RPTL § 420-a, the law provides, in part:

Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral and mental improvement . . . purposes, and used exclusively for carrying out thereupon . . . such purpose[] either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.¹²

Typical organizations falling under the “charitable” category of this provision are beneficial to the public interest and include churches, philanthropies, anti-poverty organizations, organizations for the advancement of human rights, land and wildlife conservation organizations, educational institutions, hospitals, and many others. The exemption from taxes of these types of organizations is considered mandatory, and the mandatory classification applies equally to qualifying religious and educational corporate missions.¹³ The “mandatory” exemption class is in distinction from the “permissive” class, provided by RPTL § 420-b, where an assessor can determine a use to fall under § 420-b and thus be taxable. The two classes are sometimes confused or misapplied.

The landowner must satisfy two broad requirements to qualify for the § 420-a mandatory exemption. The ownership organization must have a not-for-profit purpose, and the use of the property must be exclusively for executing that purpose. Interestingly, the use, or even multiple uses, need not be carried out by the owner itself, so long as the entities and uses involved satisfy the requirements of the statute. The legal interpretation of “ownership” and “exclusive use” have broad interpretations in the case law that often stretch beyond what you might guess from a simple read, and a comprehensive examination of these terms is beyond the scope of this article. However, clearly, because conserved open space land has been held to qualify in some circumstances for the § 420-a exemption, and yet is not expressly mentioned in the statute, it will be helpful to look at how some nonprofit organizations devoted to preserving nature,

and a use of property that provides the public with the benefits of such preservation, came to be squarely within the scope of the charitable exemption category of RPTL § 420-a.

The underlying support for tax exemptions generally comes from one or a combination of two long-held civic rationales. First is the “burden” theory, which suggests that the property’s use for a particular purpose relieves government of a cost that it would otherwise incur and, therefore, the private performance of a public responsibility creates a savings or a government cost avoidance that offsets the loss of tax revenue. Second is the “benefit” theory, which is less concerned with fiscal implications and instead posits that government should encourage property uses that benefit the community by lessening the owner’s share of the tax burden.¹⁴

Under the benefit theory, land identified as significant for conservation by a public planning process that has identified it as a conservation priority for a community, region or state, that is owned and managed by a nonprofit organization, promotes environmental and human health, advances the education of the community and provides other related services to the community, so it is deserving of a tax break.¹⁵ Partly as a result of this dynamic, and the somewhat odd nature of the legislation that protects preserved open space in New York State, significant litigation was required to establish this form of tax exemption, which came about in 1979, in a historic decision by the Court of Appeals in *Mohonk Trust v. Board of Assessors of Town of Gardiner*.¹⁶ This decision has since been cited in several subsequent cases establishing well-settled law on the tax exemption of legitimate conservation organizations and the lands they hold in trust for the public.

Exemptions for nonprofit organizations fall generally under one of two statutes: either RPTL § 420-a, mandatory exemption class,¹⁷ or § 420-b, permissive class, in which certain tax-exempt entities may be taxed. The permissive class statute allows municipalities to adopt a local law by which organizations organized exclusively for bible tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, library, medical society, patriotic or historical, as well as others, may be taxed.

The Court of Appeals’s *Mohonk Trust* decision unanimously reversed lower court rulings, determining that wild lands held by The Mohonk Trust¹⁸ for conservation purposes indeed qualify as wholly exempt in the mandatory class under the statute.¹⁹ Justice Gabrielli, writing for the Court, stated:

Clearly, the Trust land is not used for religious, hospital or cemetery purposes. We conclude that it is, however, used primarily for an assortment of “charitable . . . educational [and] moral improvement of men, women, or children” purposes, for we see no reason why these categories should not encompass lands

used for environmental and conservation purposes which are necessary to the public good and which are open to and enjoyed by the public. . . .²⁰

Contained within this opinion was another key clarification:

“[W]hile exemption statutes should be construed strictly against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that it defeats the exemption’s settled purpose is to be avoided. . . . Accordingly, ‘exclusive’ as used in the context of these exemption statutes has been held to connote ‘principal’ or ‘primary.’ . . . Hence, purposes and uses merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption.” (*Matter of Association of Bar of City of N.Y. v. Lewisohn*, 34 NY2d 143, 153).²¹

The Court thus affirmed an important distinction that had been made by an amendment to § 421(1)²² in 1971 to add “organized and conducted” for exempt purposes.²³ Before 1971, an applicant for a charitable exemption qualified only if it was “organized” exclusively for exempt purposes. The determination was limited to an examination of its organizational documents, that is, its certificate of incorporation and by-laws. The Court interpreted the addition of the word “conducted” to mean that determination of an organization’s purposes may turn on the extent to which it pursues the various purposes for which it was created. Therefore, in the mandatory class, the determination is no longer dependent solely on the language of the applicant’s organizational documents, and assessors are instructed to apply a broader organizational purpose test, as well as a use test.²⁴

The *Mohonk* case also addressed an assertion that because individuals from the Smiley family, who founded the Trust and donated land to it, continued to reside and operate a business on adjacent land, the purported public benefit was a mere pretext to shield from taxation what was essentially a private enclave. The Court opined that tax-exempt status should not be denied because those who have donated property to an exempt organization continue to enjoy the same benefits afforded other members of the public who live in the vicinity of the land.

[W]e reject the suggestion that simply because the Smiley family may receive some benefits by reason of the fact that their hotel is adjacent to the Trust property, the Trust thereby is converted into a commercial organization. The Trust itself is plainly a nonprofit organization which serves an essential public need. Hence, in the absence of any indication that the Trust is merely a device used to shield a profit-seeking enterprise, which is not the case here, the fact that nearby landowners in fact do benefit by the existence and operation of the Trust is irrelevant to its tax-exempt status.²⁵

On the basis of the *Mohonk Trust* decision, the Court of Appeals then held, in *North Manursing Wildlife Sanctuary, Inc. v. City of Rye*,²⁶ that a wildlife sanctuary operated for

the benefit of the public, but which placed some limits on the number of visitors to the property, as well as where they could go within the property in order to protect the bird habitat, was not in fact a private park operated for the benefit of the landowners of North Manursing Island.

The Evolution of the Nonprofit Sector and Property Tax Exemptions

Modern charitable exemptions can be traced back at least as far as the Statute of Charitable Uses in England, enacted in 1601.²⁷ The colonists brought with them to America the English tradition of conferring special status and benefits on associations dedicated to “charitable” causes. Thus, colonial America was hospitable from its inception to exempting uses that were deemed to have community value. Following the Revolution, charitable associations organized and evolved under state corporate governance laws, and states continued the colonial practice of conferring property tax exemptions on charitable organizations.²⁸

When Alexis de Tocqueville toured America in 1831, “with the intention of examining in detail as scientifically as possible all the mechanism (ressorts) of . . . American society . . . [sic],”²⁹ he described what he saw as the expanding nonprofit sector.

Americans of all ages, all conditions, and all dispositions constantly form associations . . . religious, moral,

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serious, general or restricted, enormous or diminutive . . . if it is proposed to inculcate some truth or to foster some feeling by the encouragement of a grant example, they form a society.³⁰

The work of the various kinds of charitable organizations that make up the nonprofit sector in America today has become a significant factor in the economy and cultural life of communities across the nation. The nonprofit sector has evolved as the third sector of society, alongside the private and the government sectors, and is closely intertwined with both. In New York's Hudson Valley, for example, a 2006 report by the Dyson Foundation estimated that the aggregate economic impact of nonprofits in the seven-county Mid-Hudson Region was about \$6.5 billion, or 14% of the total output of the region.³¹ This included a total of 89,000 jobs attributable to the nonprofit sector and about 23% of the wage and salary positions of the region. And while some nonprofit organizations are legally exempt from property and other taxes, the revenues their activities generate to the state and local government nonetheless span a range of taxes and fees. Analyzing revenue from only two of these taxes, personal income tax receipts and state and local sales tax receipts, it was estimated that the nonprofit sector contributes about \$109 million annually in the Mid-Hudson area.³²

The property tax exemption based upon charitable purposes was first enacted in New York in 1799. In addition to the two provisions of the RPTL previously described, the New York State Constitution, in Article 16, also provides authority for the exemption of land used exclusively for religious, educational, or charitable purposes and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit. Since 1799,

the mandatory exemption remained substantially intact in subsequent legislative enactments³³ and survived the amalgamation of these statutes.³⁴ In 1893, the statutory exemptions relating to property owned by a charitable organization and used for charitable purposes began to take a form similar to that now found in § 420-a of the RPTL. The language contained in the Laws of 1893 remained substantially unchanged when the Tax Law was codified in 1896³⁵ and was set forth in subdivision 7, section 4 of that law.³⁶ The language was changed in 1948 when a legislative amendment was adopted to permit a tax-exempt organization to lease its property to another tax-exempt organization.³⁷ However, a more detailed review of the subject of exemptions on property leased by one charitable organization to another is beyond the scope of this article.

At the federal level, the U.S. government initially enacted a statute exempting charitable associations from taxation in 1894, when it passed the first income tax law. Today, organizations that qualify for exempt status as "publicly supported charities" under § 501(c)(3) of the Internal Revenue Code must serve "religious, charitable, scientific, testing for public safety, literary, or educational purposes." They must not distribute proceeds from their work for the pecuniary benefit of individual members or employees, but rather must reinvest the proceeds in their mission to serve a broad membership and/or the general public, and they must not campaign for candidates for public office. Nonprofits that qualify for § 501(c)(3) status are entitled to exemptions from corporate taxes and are also generally exempt from property and sales taxes at the state and local levels.

The threshold criteria are that a charitable organization must be nonprofit and must operate for the public benefit.

The more difficult issue can be determining what is charitable in nature. When seeking or renewing a real property tax exemption in New York State, the applicant organization must submit forms, prescribed by the State Office of Taxation and Finance, to the local assessor seeking either an initial exemption or annual renewal of exemption. The answers to questions on the forms must include specific and sufficient detail about primary and secondary purposes and activities, and about how the organization was formed. When attempting to determine whether a nonprofit is a charity entitled to a mandatory exemption under RPTL § 420-a, or should otherwise be in the permissive class under RPTL § 420-b, the assessor is instructed to request documentation from the organization evidencing its federal charity status. Assessors are instructed:

In most instances, the applicant will be exempt from federal income taxes under section 501(c)(3) of the Internal Revenue code. . . . Since the IRS requires organizations to be nonprofit in order to be exempt from federal income taxes, the assessor may consider the applicant's federal exempt status to be proof that it satisfies the nonprofit requirement of sections 420-a and 420-b.³⁸

Assessors are further advised: "However, exempt status under the Internal Revenue Code is not conclusive with regard to exempt status under the Real Property Tax Law."³⁹ Assessors are also encouraged to check with the New York State Department of Law, Charities Bureau, which maintains a registry of (a) organizations administering charitable assets; (b) organizations soliciting more than \$25,000 per year in charitable funds; and (c) organizations receiving any property for charitable purposes in the state.

Some categories of exemptions, such as those for bona fide religious or educational purposes, so long as properly applied to the individual facts, are relatively straightforward and are accepted by most as a given part of the tax structure. Since 1938 these uses have been incorporated into the New York State Constitution in Article 16, § 1, and also in the statute. "Although the word 'charitable' is not defined in the [state] constitution or in general statutory terms, case law sets important precedent and helps define charitable use."⁴⁰ A case in 1917 developed a flexible definition of "charitable." In *Estate of Rockefeller*, the court stated that "a charitable use . . . may be applied to almost any thing that tends to promote the well-doing and well-being of social man."⁴¹ The exemption category of "religious" under RPTL § 420-a leads one naturally to think of churches, synagogues, and the like. Others, such as exemptions related to desirable types of construction for purposes such as affordable housing, may be objected to by some on policy grounds but are reasonably straightforward to apply and clear enough in the statutory descriptions.

And then some forms of property tax exemption, while settled law in New York by the courts, nonetheless

beg for greater clarity in the enabling statute. Land conservation is clearly such a use.

There is case law predating and following the *Mohonk Trust* decision that confirms that use of land for conserva-

Some categories of exemptions are relatively straightforward and are accepted by most as a given part of the tax structure.

tion purposes is considered a charitable use. For example, in *People ex rel. Untermeyer v. McGregor*,⁴² decided in 1946, the preservation of park-like grounds devoted to the exhibition of flowering plants was held to be a charitable use. In *Untermeyer*, the testator bequeathed his estate to the public to be used as a park. When the state renounced the gift, the executors of the estate formed a nonprofit corporation and sought an exemption for the land. The Court of Appeals held that the public use and enjoyment of park-like grounds "for physical activity and relaxation [and for] aesthetic pleasure and inspiration" was charitable in nature and thus exempt under the statute.⁴³

*In re De Forest*⁴⁴ concerned a trust that had been created to preserve certain forests, lakes and mountains in the Adirondacks. The exemption had been denied because there was private profit. However, the court stated in dicta that where a trust is created "for the general purpose of preserving forests or the scenic beauty of lands . . . and the property is dedicated to the general public use it is undoubtedly valid as a charitable trust."⁴⁵

In *New York Botanical Gardens v. Assessors of Town of Washington*,⁴⁶ the Town of Washington had denied a previously granted exemption to a nonprofit, the Cary Arboretum, part of the Bronx Botanical Garden, on the basis that its primary purpose was "scientific," which is in the "permissive class" under then-RPTL § 421(1)(b) (now RPTL § 420-b). The property was open to the public, subject to supervision and limitations on access, and nature trails were maintained for the public use. Numerous educational programs had been established in collaboration with high schools, colleges and universities. The Court held that the land in question was

dedicated to a number of general activities, the most predominant of which are conservation, preservation, instruction, recreation and ecological study. . . . [T]he use to which this particular parcel is put accomplishes several exempt purposes, including educational, charitable and moral improvement purposes. We see no reason to depart from our prior holdings that lands used for such a combination of purposes should be deemed to fall within the broader categories of absolutely exempt uses.⁴⁷

The Court of Appeals affirmed, holding that in seeking to withdraw a previously granted exemption, the municipality bears the burden of proving that the property is subject to taxation.

Public Policy in New York State Encourages Forest and Wildlife Conservation

Is there a policy basis for the work of tax-exempt nonprofit organizations in protecting land identified as important for conservation? The state Constitution declares:

Forest and wildlife conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation.⁴⁸

constitutional bar to their removal.⁵⁰ In 1981, these sections became § 420-a, the “mandatory class” and § 420-b, the “permissive class.”⁵¹ The § 420-b uses, which are now subject to assessor discretion and may be taxed, include, as previously noted, entities organized exclusively for bible tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, library, medical society, patriotic or historical, and other purposes.

The creation of two distinct classes, one of which is constitutionally protected and the other which is not, is significant to the protection of conservation lands. While there was no constitutional bar to the removal of § 420-b (permissive) uses, there remains a constitutional bar to the removal of conservation lands held by nonprofit organizations and dedicated for the benefit of the general public, even if not explicitly expressed in the language of

Nearly one-half of properties that are not taxed statewide are government or school-owned public property, and generally classified as “exempt.”

New York State continues to directly acquire land to be owned and managed by the state. However, increasingly the state has also relied on nonprofit land trusts to acquire and hold such priority conservation lands for eventual transfer to the state, and has made state funds available, through annual legislative appropriation to the Environmental Protection Fund, to nonprofit land trust organizations in the form of competitive grants. Funds are awarded (which must be matched by private philanthropic support) to acquire and manage land in nonprofit ownership that will likely never be transferred to the state, but which has been identified in the New York State Open Space Conservation Plan as a priority for conservation.⁴⁹ Carrying out these state policies for land conservation is another way for a charitable nonprofit land trust organization to demonstrate public benefit, and the leverage of public sector investments, in return for mandatory exemption under RPTL § 420-a.

The Discretionary Exemption Under RPTL § 420-b and Its Potential for Abuse

From 1938 until 1971, New York’s real property tax exemptions were contained only in RPTL § 421(1) and Article 16 of the state Constitution. In 1971 and 1972, the Legislature modified the scheme and added RPTL § 421(1)(b), under which exemptions could be granted or denied at the discretion of the local assessor, provided a municipality first adopted a local enabling law. The all-inclusive language of the original RPTL § 421(1) was segregated into the narrowly affirmed, constitutionally protected religious, charitable and educational uses in § 421(1)(a), and the new § 421(1)(b) with uses that had been categorized by the courts as distinct from the constitutionally protected categories, and there was thus no

RPTL § 420-a. As shown, New York’s highest Court has confirmed that land conservation is a charitable use.⁵² Furthermore, it has been confirmed that

organizations which qualify for exemption under Section 420-a of the RPTL are not statutorily required to apply for exemptions, as the provisions of the [RPTL] expressly state that property once exempt remains exempt so long as it continues to be owned and used for exempt purposes, and there is no requirement that the owner and user continually prove exempt status after it has been initially established.⁵³

Why is this significant, and what would justify a land trust’s fear that it might be miscategorized for consideration as permissive rather than mandatory exemption from taxes? In 1982, barely three years after the *Mohonk Trust* decision, the Town of New Paltz passed a local law⁵⁴ that would appear to have been in response to the new “permissive class” created by the Legislature the year before. The local law did not reference the authority conferred by § 420-b; it makes for challenging reading. In its first section, the law conflates all enumerated § 420-a and § 420-b uses into one, lengthy, run-on sentence that attempts to define “nonprofit organization” and adds “museum, environmental and *conservation*” (emphasis added). This is followed by a second section, “Taxation of Property of Certain Organizations,” which states,

All properties of nonprofit organizations, as defined [herein] in the Town of New Paltz shall be taxable by the Town of New Paltz for all purposes, including special ad valorem levies and special and regular assessments by districts established pursuant to the Town Law.⁵⁵

Thus the town appears to be assuming local taxing authority for both § 420-a and § 420-b properties, regard-

less of their constitutional protection from taxation, and obscuring or contravening the distinctions expressly created by the § 420-a and § 420-b classifications in the RPTL.

Interestingly, the New Paltz local law remained dormant for more than 30 years; it was not applied until 2014, when it was cited by the town as the basis to threaten to remove the long-held and previously granted exemptions of several exempt nonprofits in the Town of New Paltz.

Among those that were denied exemptions on certain properties previously granted such exemptions were Open Space Institute, Inc., a nonprofit land conservation organization formed in 1974, which has protected over 850 acres that it had already held as exempt in the town; Wallkill Valley Land Trust, a nonprofit land conservation organization established in 1985 and holding land exempted previously; and Historic Huguenot Street, one of America's oldest nonprofit educational museum corporations originally chartered in 1894 and chartered by the New York State Board of Regents in 1971.

Aside from the local law's near incomprehensibility, its most significant flaw is that it incorrectly puts "environmental and conservation" into a permissive class, which is contrary to the long history of protection afforded to such organizations by the courts. Whether by design or simple draftsman's error, this has created confusion and led to unwarranted and legally impermissible challenges to established exemptions. Such practices flout the guidance and legal opinions provided by the New York State Department of Taxation and Finance and the aforementioned judicial decisions, which provide a roadmap based on well-settled law.⁵⁶ One is also left to wonder whether the Town of New Paltz is the only local government in New York State to have sought to generate additional and unauthorized tax revenue by such means.

Of course, in the grander scheme, so long as such local laws remain on the books, whether enforced or not, they create a tool by which local government can disrupt nonprofit operations; impose additional and unnecessary costs to unravel the damage done; extract non-tax concessions in exchange for settlement; create the annual threat of a costly legal battle over entitlement to a mandatory exemption; and, most significantly, raise the specter of turning an otherwise supportive community against the nonprofit that simply seeks to preserve its constitutional right so that it can continue to operate.

The resolution is a simple one. Legitimate sample local laws drafted to serve the true purpose of RPTL § 420-b are readily available, as is guidance provided by New York State's Counsel to the Office of Real Property Tax Services (ORPTS) as well as informed local municipal counsel. No qualifying nonprofit should be left to wonder each year whether it may be strong-armed into a tax payment or some other concession merely as a result of local politics and inartfully drafted local laws that do not meet constitutional muster.

"Exempt Property" Exaggerations That Mislead the Public

There is a widely held perception that exempt nonprofits (such as land trusts) occupy a significant share of the non-taxable assessment roll and thus pose a major fiscal burden to local governments. In reality, the burden from these nonprofit exemptions statewide, and in most municipalities, is *de minimis*.

Nearly one-half of properties that are not taxed statewide are government or school-owned public property, and generally classified as "exempt," regardless of the fact that the non-taxable nature of the property is inherently different from privately owned property qualifying under RPTL § 420-a. Statistics published annually by the State Department of Taxation and Finance show that "wholly exempt, private organizations" account for only 1.6% of the total number of exemptions statewide, with the majority, 95.2%, of those exemptions being partial exemptions given to myriad private entities such as to encourage development, etc.

When viewed from the standpoint of the *percent* of exempt value, "wholly exempt private" exemptions account for 14.9% while "wholly exempt public," i.e., government properties, total 49%.⁵⁷ Government property is not tax-exempt. It has been relieved of the burden of local taxation because it was not taxable in the first instance. Real property owned by local governments and school districts is technically not immune from taxation, but as a practical matter, it would be a futile gesture for government to tax itself.⁵⁸

Ulster County, New York, is an example of a county in which the burden of nonprofit exemptions is relatively low. As compared to all 57 upstate counties analyzed by the Department of Taxation and Finance, Ulster was the fourth lowest in incidence of exempt value on the 2012 assessment rolls, at 14.12%. In the Ulster County Town of Gardiner, a more rural town, the percent of wholly exempt assessed value is only 2%. This 2% comprises 56 exempt parcels, but on closer examination, 25 of those 56 properties are actually town government properties, leaving just 31 parcels of the total being held by exempt nonprofit organizations.

In the more populous neighboring Town of New Paltz, wholly exempt parcels total 31% of the assessed value in the town. However, New Paltz has more municipal infrastructure; it is where the properties of the New Paltz Central School District are located and is also home to a major state university campus and the state Department of Environmental Conservation regional headquarters. Accordingly, about a third of these "exempt" parcels are government property, so just about 66% of the exempt parcels are actually held by wholly exempt nonprofit organizations.⁵⁹ By treating government property as "exempt," and then merging it with nonprofit exempt property for statistical purposes, New York State presents a misleading picture of the impacts of land being off the

tax rolls. This basic distinction – that much of what is not taxed is in fact government land excused from taxation – is often ignored, and the result is an inflation of the exemption statistics and an exaggeration of the loss of tax revenue due to the exempt landholdings of nonprofits.

The Effect of Access Fees and Public Access Limits on the Exemption

An argument often used by municipalities seeking to challenge a land conservation organization’s exemption (as well as those of other types of nonprofits) is that the organization charges a fee for access or use of some or all of its facilities or services. Challenges have also contended that public access to the exempt property is too limited. The courts have repeatedly affirmed that neither the charging of fees nor reasonably limiting public access for mission-related reasons defeats exempt use or purposes. In *Mohonk Trust*, it was noted that the Trust is supported not only by outside charitable contributions, but in part by the day fees it charges to visitors from the general public and annual memberships providing year-round access available to anyone who wishes to purchase one. Thus, the Trust was serving a broad public and not limiting access to specific classes of individuals or to specific individuals. This income is used to maintain the Trust land and carry on a variety of educational programs across the entire property, in accordance with its land conservation mission.

In an interesting decision on this point, the Court of Appeals, in *Symphony Space v. Tishelman*,⁶⁰ reversed a lower court finding that a nonprofit theater and performing arts organization was not entitled to the exemption provided by RPTL § 420-a because the group rented its theater to outside groups, and often charges admission, creating a “commercial patina” that tended to negate the application of the charitable and educational categories, in that it is not organized and conducted exclusively for an exempt purpose. Citing *Mohonk Trust*, the Court reversed, stating,

[T]he word “exclusive” has been held to connote “principal” or “primary” [and that a] “commercial patina” alone is not enough to defeat tax-exempt status especially when such rentals [or admission fees] are merely incidental or auxiliary to the main exempt purpose and do not realize a profit but are used to cover petitioner’s costs. Moreover, restrictions placed on the use of or public access to the property do not strip the property of its tax-exempt character which requires that it be “open to and enjoyed by the public,” as long as the restrictions imposed are not inconsistent with the public purpose for which the property is being used.⁶¹

Likewise, in *North Manursing* and in *New York Botanical Garden*, the Court held that a wildlife sanctuary would qualify for an exemption even if not entirely open to the public and that, as managers of land with a nature preserve purpose, placing reasonable limitations on where

people could go within the property to protect its more fragile natural areas, including bird habitats, did not defeat the use of the property by the public in a meaningful way and thus defeat its exemption. Similarly, in *Adirondack Land Trust v. Town of Putnam Assessor*,⁶² the Appellate Division held that a remote parcel on Lake George, acquired by the nonprofit trust for environmental and conservation purposes, but with limited public access, was in keeping with its mission as a nature preserve. The Court observed:

Use of property as a wildlife or nature sanctuary is a use in keeping with charitable purposes. Furthermore, it is recognized that “restricted access to and use of a wildlife sanctuary is essential lest the sanctuary fail of its purpose.” That the restrictions are necessitated by the . . . land itself, rather than by the owner’s affirmative acts, is irrelevant, if they are not inconsistent with maintaining the habitat in its natural state and protecting the wildlife – which on petitioner’s land includes a threatened species, the timber rattlesnake – from undue interference.⁶³

In the state manual guiding assessors on making nonprofit status determinations pursuant to RPTL §§ 420-a and 420-b, assessors are advised to verify that the services being provided and activities engaged in by the nonprofit are appropriate to its stated purposes. Under the section “Administration of Services” there is guidance that in order to be considered as operating in furtherance of exempt purposes an organization (1) must be controlled by persons who are competent to manage the organization and who have no personal financial interest in it, and (2) must make its services available to an entire community (in some cases, to the general public and, in other cases, to the organization’s membership) rather than to specific individuals.

The conditions under which an organization charges for services may be requested by the assessor to ensure that services are not limited just to certain specific classes of individuals. Under “Financial Criteria,” guidance to assessors indicates that an organization satisfies the nonprofit requirement if its net income does not inure to the benefit of private shareholders or individuals, but rather is used in furtherance of corporate purposes.⁶⁴

Summary and Recommendations

The landmark *Mohonk Trust* decision, subsequent cases, and opinions of counsel to ORPTS that have relied upon *Mohonk*, establish that conservation land owned and used by a bona fide entity qualifies under New York State law for tax-exempt status under the umbrella of having a charitable purpose. These decisions expressly recognize the importance and value of preserved open space to our quality of life and natural environment. We opened this article by inquiring into the value of open space. While it is apparent that there may be no reliable way to formulaically determine its market worth, open space undoubt-

edly has been acknowledged to hold great intangible and intrinsic value to New Yorkers that is worthy of promotion, and that matches or exceeds any costs incurred by reason of forgone tax revenue.⁶⁵

Nonprofit organizations complement and supplement the work of both the private and government sectors. Nonprofit land conservation organizations conserve land in private ownership and management for the benefit of the public. They are supported largely by voluntary philanthropic contributions from individuals, often supplemented by modest site access fees from visitors, memberships, or program service fees from participants to defray ongoing management costs, and are thus a viable alternative to taxpayer-funded open space purchase, and public ownership and management.

While the exemption granted by tax policy to such entities causes a *de minimis* tax burden shift to taxable properties within a municipality, many believe the quality of life dividends these lands generate are well worth the cost. The forgone revenues from taxing these lands is more than made up in offsetting revenues from increased property values near open space and economic activity and jobs sustained from outdoor recreation and tourism. Home values are arguably significantly enhanced by proximity to a major destination such as the Mohonk Preserve. Moreover, such lands generate free ecosystem services to protect natural resources that keep communities resilient and environmentally healthy. Immersion in nature for adults, families, and schoolchildren, and participatory volunteerism in land stewardship and natural science, are priceless, life-affirming experiences that help forge indelible individual and societal land ethics.

One might ask whether the New York State Legislature should revisit and tighten the language of RPTL §§ 420-a and 420-b to improve clarity for assessors and nonprofits, particularly as the law applies to preserved open space. Changes to § 420-a would also likely require a state constitutional amendment to clarify portions of Article 16. We would respond that while such amendments might make it less likely that local governments would attempt to remove such exemptions, such changes should be unnecessary because the courts have definitively clarified that land conservation for public benefit is included within the scope of the charitable category of § 420-a and, in some cases, may also be considered uses that qualify as educational as well as for moral and mental improvement, or a combination thereof. The State Department of Taxation and Finance provides ample guidance to local assessors on how to review and determine a nonprofit's classification under §§ 420-a and 420-b, and also provides extensive application forms and supporting documentation requirements for nonprofits to make the case for their exemptions.

As discussed, the combined incremental tax shift burden to taxpayers resulting from exempt §§ 420-a and 420-b properties in most municipalities is relatively

minimal. However, given the need to raise revenues and balance municipal budgets, § 420-b does provide municipalities with discretion and a roadmap as to which non-protected exemption options they may wish to close to increase revenue by denying those exemptions over which they have legitimate discretion. Municipalities should understand, however, and perform a cost/benefit analysis, as to whether and how such decisions could

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impact the delivery of programs and services by qualifying § 420-b nonprofits that the community may have come to rely on. Perhaps most important is to ensure that municipalities enact clear local laws enabling them to properly apply § 420-b, and that assessors have the guidance to properly apply the law. Legal counsel can play a key role serving municipal and nonprofit clients to advise and educate both assessors and nonprofits as to their roles and responsibilities in the process.

Nonprofits must become more adept at communicating with their local assessor, and more thorough in describing and documenting their nonprofit status annually, on their § 420-a and § 420-b forms in order to assist the assessor in understanding the organization's mission and purposes, and in timely filing their applications prior to the applicable deadline in each municipality.⁶⁶

Legal advisors can make sure nonprofits know and understand their tax-exempt status and which exemption category applies, whether "mandatory" or "permissive," and ascertain that these clients are informed about their exemption rights as conferred by court decisions, statutes, state policies, and the New York State Constitution. In most cases, this will avoid protracted tax proceedings that may be financially costly to both sides, as well as result in the loss of strong community support for the nonprofit organization. ■

1. 2014 Draft New York State Open Space Conservation Plan (Plan) & Draft Generic Environmental Impact Statement – The Draft Plan is an update and revision of the 2009 Plan; September 2014 Andrew M. Cuomo, Governor. <http://www.dec.ny.gov/lands/98720.html>; see also *Town of New Paltz Open Space Plan: A Framework for Conservation*; May 2006; Behan Planning Associates, LLC; Copyright 2006 Behan Planning Associates, LLC. This open space plan was created by a joint committee composed of citizens from the Village and the Town of New Paltz as a cooperative inter-municipal effort. The joint committee was aided by several community planning consultants throughout the project, including AKRF, Inc. (for inventory services in 2003), Shingebiss Associates (for fiscal/conservation finance research services in 2004), and culminating with final assistance from Behan Planning Associates, LLC (for open space planning consulting services and plan report preparation). <http://www.townofnewpaltz.org/building/pages/open-space-plan-2006.>

2. *The Economic Benefits of Protecting Healthy Watersheds*, U.S. Env'tl. Prot. Agency, 841-N-12-004, April 2012.

3. *E.g.*, <http://www.mohonkpreserve.org/visit-us>.
4. New Paltz Open Space Plan, § 1, p. 42006.
5. Bertram Lewis, *Do Syndicators Overpay?*, Appraisal J. (Apr. 1985).
6. *See, e.g., Am.-Russian Aid Ass'n v. City of Glen Cove*, 41 Misc. 2d 622 (Sup. Ct., Nassau Co. 1964); *Mohonk Trust v. Bd. of Assessors Town of Gardiner*, 47 N.Y.2d 476 (1979); *People ex rel. Untermyer v. McGregor*, 295 N.Y. 237 (1946); 11 Op. Counsel SBRPS No. 48.
7. *See, e.g., United Parcel Serv., Inc. v. Tax Appeals Trib. of the State of N.Y.*, 98 A.D.3d 796 (3d Dep't 2012); *Astoria Generating Co. v. Gen. Counsel of the N.Y. State Dep't of Envtl. Conservation*, 299 A.D.2d 706 (3d Dep't 2002); *City of N.Y. v. Assessors of the Town of Roxbury*, 296 A.D.2d 625 (3d Dep't 2002); *Lackawanna v. State Bd. of Equalization & Assessment*, 16 N.Y.2d 222 (1965).
8. *Delancy St. Found. v. Bd. of Assess. Review of Town of Se.*, 112 A.D.2d 132 (2d Dep't 1985); *see also App. of N.Y. Conf. of Ass'n of Seventh-Day Adventists*, 80 N.Y.S.2d 8 (S. Ct. 1948), *rev'd on other grounds*, 275 A.D. 742 (4th Dep't 1949).
9. For example, in Connecticut, subject to qualification, property used for open space land preservation is exempt from taxation under CGS 12-81(7); the State of Washington provides that such lands are to be valued at their current use, i.e., as restricted from development, rather than their highest and best use, such that the resulting assessed value produces the equivalent of a partial exemption, *see* Washington Open Space Taxation Act (1970), Revised Code of Washington Chs. 84.33, 84.34, and Washington Administrative Code, Ch. 458-30; Rhode Island permits land burdened with a conservation easement to be assessed as part of the Farm, Forest and Open Space Program, which, like Washington, values based on "use value" rather than ordinary market value, *see* Rhode Island G.L. Ch. 44-27, § 44-27-2 and Ch. 44-5, § 44-5-12; In South Carolina, § 27-8-70 of the Conservation Easement Act of 1991 recognizes a similar form of assessment exemption of value for conservation lands, stating: "For *ad valorem* tax purposes real property that is burdened by a conservation easement must be assessed and taxed on a basis that reflects the existence of the easement."
10. For land conservation, New York has created incentives in the form of partial real property tax abatements for private owners of such qualifying working lands as active farmland enrolled in an Agricultural District (*see* N.Y. Agriculture & Markets Law, art. 25AA, § 305) and managed forest land enrolled in the Forest Tax Program (*see* RPTL § 480a). These partial tax abatements are in return for an agreement by the private owner to stay enrolled in farming or forestry programs for a specified term of years, and carry penalties for premature exit from the programs. In addition, those private landowners who voluntarily donate a permanent conservation easement on their land to government or to a qualified nonprofit conservation organization pursuant to New York State's conservation easement statute (*see* N.Y. Envtl. Conservation Law, art. 49, tit. 3) can obtain a limited real property tax credit of up to 25% of the town, county, and school district taxes, not to exceed \$5,000 (*see* Tax Law art. 9-A, § 210(22), art. 2, § 606(kk)). These partial exemptions recognize the limitations on development to which the landowner has agreed, and in theory they compensate for the diminution in the land's highest and best use value.
11. Land trusts are typically qualified as "publicly supported charities" under § 501(c)(3) of the I.R.C. and most often as N.Y. state nonprofit corporations under § 402 of N.Y. Not-for-Profit Corp. Law.
12. RPTL § 420-a(1).
13. *Id.*
14. William R. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, Temple L. Quarterly 53, p. 291, 307.
15. *Id.* at 314 and *see* n. 72 referencing the Restatement of Trusts. *N. Manursing Wildlife Sanctuary v. City of Rye*, 48 N.Y.2d 135 (1979).
16. 47 N.Y.2d 476 (1979).
17. Lands owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children, or cemetery purposes, or for any two or more such purposes, and used exclusively for carrying out thereupon such purposes.
18. Later renamed Mohonk Preserve, Inc.
19. Note that the statute in question was then RPTL § 421 and has since been renumbered as 420-a.
20. *Mohonk Trust*, 47 N.Y.2d at 484.
21. *Id.* at 483.
22. Now RPTL § 420-a.
23. 1971 N.Y. Laws, ch. 414.
24. State Office of Taxation and Finance, Exemption Administration Manual, Part 2: Private Community Service and Social Organizations.
25. *Mohonk Trust*, 47 N.Y.2d at 485.
26. 48 N.Y.2d 135 (1979).
27. Ginsberg, *supra* note 14, p. 314.
28. Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 Cornell J. L. & Pub. Pol'y, 1998.
29. *Id.* at 557 (quoting Alexis De Tocqueville, 2 Democracy in America 517 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840)).
30. George Wilson Pierson, *Tocqueville and Beaumont in America* 32 (John Hopkins Univ. Press 1996) (1938).
31. Kent Gardner, Ph.D., Sarah Boyce, MSPH, *The Nonprofit Sector: A Vital Economic Force in the Mid-Hudson Valley*, Dyson Found. (July 2006), <http://www.dysonfoundation.org/images/stories/documents/mhv%20nonprofit%20econ%20impact%20report.pdf>.
32. *Id.*
33. *See* 1801 N.Y. Laws ch. 179; 1823 N.Y. Laws ch. 262.
34. Rev. Stat. of N.Y. 1829, vol. 1, ch. 13, tit. 1, s. 4.
35. 1896 N.Y. Laws ch. 908.
36. *See Sisters of Saint Joseph v. City of N.Y.*, 49 N.Y.2d 429 (1980).
37. 1948 N.Y. Laws ch. 622.
38. Exempt Administration Manual, *supra* note 24 at p. 21.
39. *Id.* at 11.
40. Gail Miers, *Mohonk Trust v. Board of Assessors* 451, 456, Hofstra L. Rev., vol. 8, Iss. 2, Article 4, 1980.
41. 177 A.D. 786 (1st Dep't 1917).
42. 295 N.Y. 237 (1946).
43. *Id.* at 243.
44. 147 Misc. 82 (1933).
45. *Id.* at 85.
46. 55 N.Y.2d 328 (1982).
47. *Id.* at 336.
48. N.Y. Const. art. XIV, § 3(1)(a); *see* Envtl. Conserv. Law § 1-0101.
49. NYS Open Space Conservation Plan; *see also* Environmental Protection Fund, 1993 N.Y. Laws ch. 610.
50. Miers, *supra* note 40 at 455.
51. As amended by 1981 N.Y. Laws ch. 919.
52. *See also* Miers, *supra* note 40 at 456.
53. Opinion of Counsel, SBEA, No. 51.
54. Code of the Town of New Paltz, Chapter 127, Taxation, Local Law # 1, 1982.
55. *Id.*
56. *See, e.g.*, Opinion of Counsel, State Board of Real Property Services, No. 68, March 6, 1991.
57. Exemptions from Real Property Taxation in New York State: 2011 County, City & Town Assessment Rolls. NY State Department of Taxation & Finance, Office of Tax Policy Analysis, September 2012.
58. Ginsberg, *supra*, note 14, pp. 298-300.
59. "Wholly-Exempt Properties: What Do They Cost Ulster County Taxpayers?" Office of the Ulster County Comptroller, December 31, 2013.
60. 60 N.Y.2d 33 (1983).
61. *Id.* at 38-39 (citations omitted).
62. 203 A.D.2d 861 (3d Dep't 1994).
63. *Id.* at 862 (citations omitted).
64. Exemption Administration Manual, *supra* note 24 at pp. 22-24.
65. *See, e.g.*, "Economic Benefits of Open Space Preservation," Office of the State Comptroller, March 2010.
66. Refer to ORPTS Forms RP-420-a-Org and 420-b-Org; RP-420-a/b Use; Schedule A, RP-420-a/b-Org, Organization and Schedule A. If for annual renewal, Form RP-420-a/b Rnw-I (organization purpose) and RP-420 a/b Rnw-II (property use, and if necessary Schedule A, RP-420 a/b Rnw-I (non-profit status).

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