

# Fighting the Lure of the Infinite: Lease Conservation Easements at the Urban Fringe

by Jacob T. Cremer

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## *Editors' Summary*

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Today, local, state, and federal governments provide incentives intended to conserve agricultural uses. One of those incentives, the conservation easement, is flourishing in both quantity and acres conserved. Perpetual conservation easements are generally assumed to be superior to shorter term lease conservation easements because of a preference for stronger, more permanent restrictions. Some commentators question the sensibility of this preference, pointing out that citizens are most often interested in conserving agricultural land on the urban fringe. This type of land use is best conserved by lease conservation easements, and least likely to be conserved by perpetual conservation easements. Alternatives, such as state and federal amendments allowing lease conservation easements to receive the same tax benefits as perpetual conservation easements, may allow for more effective conservation of agricultural uses of land.

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## I. Agricultural Conservation

The future ain't what it used to be.

—Yogi Berra<sup>1</sup>

It is a bad plan that admits of no modification.

—Publius Syrus, *circa first century, B.C.*<sup>2</sup>

### A. Whither Goes the Future?

Imagine the year is 2110. Your main concern as the vice president of a design, planning, and construction firm is to locate new master-planned communities. After studying housing markets, demographics, and government amenability to development, you select the sites for your company to develop. While your design team works on site plans, you negotiate with the landowners to acquire the land and with government officials to secure the necessary permits. You are working on your newest project.

You predict that central Florida, between Orlando and Lake Okeechobee, will see significant economic growth over the coming decade. Traditionally the breadbasket of Florida agriculture, Florida's heartland has not grown anything other than a backyard garden in at least a generation. Developing nations now grow the world's crops much more cheaply than Floridians ever could. Though some consumers were at first leery of African oranges, they could not resist the low prices, and the state's few remaining farms are little more than boutique vineyards.

Despite predictions otherwise after the housing bust of 100 years ago, Florida saw even more explosive population growth in the 21st century than it did in the 20th century. The corridors along the state's interstate system traverse what from the air would look like a single metropolitan area spanning the entire state. While such growth would have alarmed many 20th century Floridians, those today enjoy the metropolitan atmosphere of their state, preferring to enjoy the affordable open spaces of the many countries now specializing in ecotourism. Today's Floridians have outsourced their open space to pursue a highly specialized economy in an attempt to compete with China, which long ago became the world's sole economic superpower.

Unlike the many redevelopment community builders in Florida today, your company still specializes in what was once known as greenfield development. You have located the perfect site for your next community, but it seems too good to be true. The 500-acre tract is surrounded on every side

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1. ASHTON APPLEWHITE ET AL., AND I QUOTE 473 (2003).

2. JOHN BARTLETT, FAMILIAR QUOTATIONS 896 (Blue Ribbon Books 10th ed. 1919) (referencing Maxim 469).

by a cityscape stretching dozens of miles and is flat, well-drained, and close to several important regional employment centers. The land was part of a long-abandoned cattle ranch, owned by a family that found the operation to be uneconomical as land values steadily increased and farm subsidies were eliminated after free-trade spats with agricultural powerhouse Brazil. The family has been trying to sell the land for years unsuccessfully. Even the state and local governments are not interested in purchasing the land because it has been used for so many years for agriculture that it has little or no ecological value.

Reviewing the property records, you realize the problem. Around the year 2010, the property owners had encumbered the property with a conservation easement for the tax benefits. In itself, this is only an annoyance to you. Usually, moving forward is as simple as buying the land, buying back the easement, and extinguishing it. Thus, the land is left unencumbered and developable. Then you notice that this conservation easement purported to be perpetual, unlike the many shorter term easements you dealt with before. Seeing that the county and an international nonprofit conservation organization held title to the conservation easement, you call their land managers and inquire whether they would be interested in selling the easement. To your surprise, they would love to sell, as the land is now mostly worthless for the conservation purposes they envisioned on holding the easement to being with. Unfortunately, the terms of the easement prevent them from ever transferring the easement or extinguishing it themselves to allow development. Just five years ago, they requested that a judge allow them to sell the easements to another developer, and the judge refused. Even though they presented thousands of pages of analysis showing that the property only had value for development, the judge reported he could find no reason to ignore the intent of the property owners who had originally encumbered the property.

As you consider your options, you wonder what could have been so different 100 years ago that landowners, governments, and community activists would have the hubris to imagine that their judgments about the use of a property would be forever best. Why was no one then concerned about the risks of an uncertain future?

## B. Agricultural Conservation Policies

Back in the present, in 2010, many communities elect to protect, preserve, or conserve various land uses. Agriculture is frequently one of these uses, for a variety of reasons. Agriculture may bolster local economies, improve employment rates, offer food security, foster healthy land development patterns, and coincide with rural and environmental amenities like cultural maintenance, open-space retention, and natural buffering between adverse land uses.<sup>3</sup>

3. Jacob T. Cremer, *Tractors Versus Bulldozers: Integrating Growth Management and Ecosystem Services to Conserve Agriculture*, 39 ELR 10541, 10541 (June 2009) (referencing Lori Lynch, *Protecting Farmland*, in LAND USE PROBLEMS AND CONFLICTS 281, 281 (Stephan J. Goetz et al. eds., 2005); Jeanne S. White, *Beating Plowshares Into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 113

Once community leaders decide to conserve agriculture, they face a choice among the many policy alternatives available for conservation, but they may have to make an effort to discover the full universe of choices. These conservation policies were largely developed to protect ecologically sensitive and important lands, and they remain more focused on environmental goals than on agricultural productivity. However, there is growing recognition that the two are tightly intertwined. Agriculture is oftentimes compatible with other goals, such as the preservation of habitat.<sup>4</sup> Thus, if ecological goals are important, conserving agriculture may be a good way to do so because agriculture balances these goals with economic activity.<sup>5</sup>

The policy alternatives that community leaders must consider can be generalized into five categories: full property interests; partial property interests; taxation; market-based incentives; and command-and-control regulation.<sup>6</sup> These categories may be overbroad, but they serve as a good template for introducing conservation policies. The best way to differentiate between these policies is based on their efficiency and equity outcomes. From an economic perspective, “the costs of implementing any conservation policy can be divided between opportunity cost[s] and transaction costs.”<sup>7</sup>

Regardless of which policy type is used, successful policies will increase the financial viability of agriculture by supplementing the returns or lowering the costs of working the land. Agriculture is a business, first and foremost, rather than simply a land use. Land value is the first of two components of agricultural viability.<sup>8</sup> This first component is important because it increases the costs of farming as land values rise: renting farmers pay increasing amounts to use the land, and landowning farmers face an increasing opportunity cost of farming.<sup>9</sup> The second component is the profitability of the agriculture.<sup>10</sup> Like any business, it must earn a return on investments, which in this case happens to be planted in the dirt.

Traditional command-and-control regulation has utterly failed to conserve agriculture.<sup>11</sup> Regulation has failed because it incorrectly focuses on land uses and excludes the incentives

(1998)). Although politically popular, there are many critics of agricultural subsidy policies as inefficient social policies. See, e.g., Daniel A. Sumner, *Agricultural Subsidy Programs*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson, 2d ed. 2007), available at <http://www.econlib.org/library/Enc/AgriculturalSubsidyPrograms.html>.

4. JAMES BOYD ET AL., RES. FOR THE FUTURE, THE LAW AND ECONOMICS OF HABITAT CONSERVATION: LESSONS FROM AN ANALYSIS OF EASEMENT ACQUISITIONS 4 (1999), available at <http://www.tff.org/documents/RFF-DP-99-32.pdf>.  
 5. See *id.* For a study concluding that balancing is both possible and desirable, see, e.g., James Cox et al., *Fla. Game and Freshwater Fish Comm'n, Closing the Gaps in Florida's Wildlife Habitat Conservation System* (1994).  
 6. These were developed by broadening the categories in Boyd et al., *The Law and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 212-19 (2000).  
 7. *Id.* at 212.  
 8. Cremer, *supra* note 3, at 10542.  
 9. See Susan Offutt, *Forward: The Significance of the Value of Farmland*, in GOVERNMENT POLICY AND FARMLAND MARKETS: THE MAINTENANCE OF FARMLAND WEALTH xv-xvi (Charles B. Moss & Andrew Schmitz, eds., 2003).  
 10. Cremer, *supra* note 3, at 10543.  
 11. See Jesse J. Richardson, *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 166-70, 182 (2007).

presented to the agriculturalist and landowner.<sup>12</sup> Businesses cannot be regulated into existence, after all. The numerous planning tools in this category include agricultural (large-lot) zoning and agricultural and forest districts.<sup>13</sup>

Full property interests involve outright purchase of lands, taking them off the market for conservation. Though transaction costs of land transfers are relatively low because of standardization of sales contracts, opportunity costs may be considerable. Public entities and nonprofits are generally not equipped to farm profitably. They do not respond to market incentives and competition in the same way that a profitable enterprise would. Florida is attempting something of this sort with its administration of Babcock Ranch as a state-run agricultural enterprise,<sup>14</sup> but it is questionable whether this enterprise, focusing on appeasement of various stakeholders, can create as much value as a private enterprise.

Thus, market-based incentives, taxation, and partial property interests are seen as the more promising policy alternatives. This Article focuses on the most important partial property interest used for conservation of agriculture.

### C. Conservation Easements

At their simplest, conservation easements are agreements between landowners and another party, usually a government agency or nonprofit organization. Landowners agree to refrain from using land in certain ways and, less frequently, promise to use land for narrowly defined uses. The modern view of property rights describes ownership as a bundle of rights, which might include the rights to extract resources, expel trespassers, and rent or sell the property.<sup>15</sup> In many cases, conservation agreements purport to forever extinguish certain of these rights, such as the right to develop or build upon the land. Consequently, they purposefully restrict options available in the future for the land.

Conservation easements are most often perpetual, but they do not have to be. Generally, however, the law gives preference to perpetual conservation easements.<sup>16</sup> Federal tax rules and the corresponding Treasury regulations encouraging the donation of conservation easements require that

they be perpetual.<sup>17</sup> The Uniform Conservation Easement Act,<sup>18</sup> on which many states based their conservation easement-enabling legislation, interprets the easements as perpetual, unless the agreements contain clear term limitations. Three states—California, Florida, and Hawaii—specifically require conservation easements to be perpetual.

Commentators and the general public have also preferred perpetual conservation easements.<sup>19</sup> The law literature, economics literature, and popular press are replete with praise for easements that will forever “protect” or “preserve” land for future generations. As Julia Mahoney points out, the farmer without a conservation easement is oftentimes treated as nothing more than a potential developer. “Only when he changes the institutional arrangements associated with his property . . . to a governmental or nonprofit entity committed to preservation, does he garner praise for ‘protecting’ his land.”<sup>20</sup>

Recently, some commentators have questioned the automatic acceptance that longer is necessarily better.<sup>21</sup> They point out a number of reasons to think nonperpetual easements might be more desirable than perpetual easements. One of the most important critiques is that the economics of nonperpetual easements are better, or that the purported net social benefits of perpetual easements might actually turn out to be a net social cost.<sup>22</sup>

Perhaps the biggest benefit cited is that lease conservation easements are more equitable than perpetual conservation easements. Leases lessen the risk of burdening future generations.<sup>23</sup> Because it cannot be foreseen with any certainty which lands will be worth conserving, perpetual easements stand a significant risk of burdening future generations with the costs of releasing land from conservation easement agreements. Reaping the benefits of these easements now, through sales, tax advantages, and open-space amenity values, while shifting costs of monitoring and changing institutional arrangements to the future may be inequitable for future generations.<sup>24</sup> With the shorter period of time for lease easements, any bad arrangements will be unburdened within a generation.

If commentators are correct that there are significant problems with perpetual conservation easements, we might

12. *See id.* at 164.

13. There are many detailed analyses of these tools. *See, e.g.*, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 606-17 (2d ed. 2007); Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283 (2004); White, *supra* note 3. Some authors indicate these tools have shown some success, though there seems to be a lack of empirical evidence for these claims. Richardson, *supra* note 11, at 167.

14. *See* Florida Fish & Wildlife Comm'n, Babcock Ranch Preserve, [http://myfwc.com/RECREATION/WMASites\\_BabcockRanchPreserve\\_index.htm](http://myfwc.com/RECREATION/WMASites_BabcockRanchPreserve_index.htm).

15. *See generally* J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. R. 347 (1967).

16. Interestingly, there is some debate over just how long “forever” and “perpetuity” might be, some of it stemming from a Wyoming case, *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007). Compare Andrew M. Wayment & C. Timothy Lindstrom, *Conservation Easements: Forever Is a Very Long Time*, ADVOC., Aug. 2009, and C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008), with Jessica Rutzick, *Conservation Easement in the Rocky Mountain West: “Perpetuity” Is Relative*, ADVOC., Dec. 2007.

17. I.R.C. §170(h) (2006); Treas. Reg. §1.501(c)-1(d) (as amended in 1990); *see also* C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS (2008).

18. National Conference of Commissioners on Uniform State Laws, Uniform Conservation Easement Act §2(c) (1982), available at [www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf](http://www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf).

19. This appears to be part of a much broader modern shift in property rules, away from the traditionally disfavored perpetual property. *See, e.g.*, Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285 (2009).

20. Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 575 (2004).

21. For an excellent, concise critique by one of the perpetual easements most prominent critics, see Julia D. Mahoney, *Land Preservation and Institutional Design*, 23 J. ENVTL. L. & LITIG. 433 (2008). For an interesting rebuttal to Professor Mahoney’s position, see James L. Olmsted, *Representing Noncurrent Generations: The Problem of Now*, 23 J. ENVTL. L. & LITIG. 451 (2008).

22. *See generally* Mahoney, *Land Preservation and Institutional Design*, *supra* note 21.

23. *See* Barton H. Thompson, *The Trouble With Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 605 (2004).

24. *Id.*

expect to see parties using new, but related, instruments to satisfy their needs. This Article introduces one such instrument being used in Florida: Hillsborough County's Agriculture Stewardship Program (ASP). An economic analysis can help explain when lease conservation easements might be preferred to perpetual easements. The case for lease conservation easements is probably the strongest at the urban fringe, an area that is often used to make the case for perpetual conservation easements.

## II. Working Around Perpetuity

For geographic, demographic, and economic reasons, Florida is an ideal place to study how to balance development pressures and conservation goals.<sup>25</sup> Florida "is a natural target for study" because "the state has become an important laboratory for new conservation initiatives and studies."<sup>26</sup> This is partly due to the importance of agriculture to the state economy. Agriculture has an estimated \$100 billion impact on Florida's economy,<sup>27</sup> which is about 14% of the state's gross domestic product (GDP).<sup>28</sup> The state produces more oranges, grapefruit, tangerines, and sugarcane than any other state.<sup>29</sup> It grows the second most greenhouse and nursery products, sweet corn, and strawberries.<sup>30</sup> It raises much of the country's fresh market tomatoes, bell peppers, cucumbers, and watermelons.<sup>31</sup>

Agriculture is similarly important to Hillsborough County, which surrounds Tampa Bay on the Gulf of Mexico. Agriculture and supporting business provide an economic impact of \$1.4 billion to Hillsborough County, along with 20,122 jobs and \$294 million in earnings, according to a 2005 study.<sup>32</sup> The county government has long been concerned about the viability of a farm community in a rapidly growing metropolitan county. For example, the local metropolitan statistical area's real GDP increased by approximately 19% in the five-year period from 2002-2006, while the farming sector only grew by approximately 16%.<sup>33</sup> During that period, agriculture represented only 0.56% of the region's GDP.<sup>34</sup>

25. See BOYD ET AL., *supra* note 4, at 4.

26. *Id.* at 3-4.

27. See ALAN W. HODGES, ECONOMIC CONTRIBUTIONS OF AGRICULTURAL, FOOD MANUFACTURING, AND NATURAL RESOURCE INDUSTRIES IN FLORIDA IN 2006 9 (2008), available at [http://www.florida-agriculture.com/economic\\_impact.htm](http://www.florida-agriculture.com/economic_impact.htm).

28. See BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, GROSS DOMESTIC PRODUCT BY STATE, <http://www.bea.gov/regional/gsp/> (last visited Jan. 20, 2010) (reporting a 2006 Florida GDP of \$716,505,000).

29. Fla. Dep't of Agric., Overview of Florida Agriculture, <http://www.florida-agriculture.com/agfacts.htm> (last visited Jan. 1, 2010).

30. *Id.*

31. *Id.*

32. OFFICE OF THE COUNTY ADMIN., HILLSBOROUGH CO., FLA., HILLSBOROUGH COUNTY AGRICULTURE STEWARDSHIP PROGRAM 1 (2006) [hereinafter PROGRAM], available at [www.hillsboroughcounty.org/econdev/resources/publications/agriculture/agstewardshipprogdespublic.pdf](http://www.hillsboroughcounty.org/econdev/resources/publications/agriculture/agstewardshipprogdespublic.pdf).

33. This analyzes the Tampa-St. Petersburg-Clearwater Metropolitan Statistical Area, which includes Hernando, Hillsborough, Pasco, and Pinellas Counties. "Farms" only includes crop and animal production, and not silviculture, aquaculture, or recreational hunting and fishing. U.S. Dep't of Commerce, Bureau of Economic Analysis, Gross Domestic Product by Metropolitan Area, <http://www.bea.gov/regional/gdpmetro/> (last visited Jan. 20, 2010) (download on file with the author).

34. *Id.*

As far back as 1974, the county was studying its agricultural sector. Then, the county's comprehensive plan predicted the county would have virtually no agriculture by the year 2000.<sup>35</sup> The situation has not proven that dire. From 1987-2002, farm acreage in the county only decreased by 1%, from about 288,000 to 285,000 acres.<sup>36</sup> However, this hides the decrease in agricultural land during 1987-1997, from 43% to 37% of the county's area. By 2002, though, it had increased to 42% of the county's land.<sup>37</sup>

### A. The Agriculture Stewardship Program

In response to these issues, Hillsborough County created the Agriculture Industry Development Program.<sup>38</sup> The program's most original initiative is Hillsborough County's ASP, which was unveiled in late 2006 to widespread support from political leaders and the agriculture industry.<sup>39</sup> The Board of County Commissioners unanimously approved the program, noting support from the county's Agriculture Economic Development Council, Florida Farm Bureau, the county planning department, and the county attorney's office, among others.<sup>40</sup> Interest in a program for providing incentives for agricultural conservation had been under development for some time—beginning with a county staff study committee, which recommended pursuit of voluntary incentive-based programs—and the major details had been finalized by the summer.<sup>41</sup>

According to Stephen Gran, the program's manager, the ASP, at its heart, is "a voluntary program to encourage the economic viability of agriculture by recognizing and rewarding the benefits that agriculture provides to the community."<sup>42</sup> Its purpose is to "discourage the premature conversion of farmland by easing the financial pressures that cause some farmers to sell their land for non-agricultural development

35. ALACHUA CO. ADVISORY COMM. ON RURAL CONCERNS, MINUTES: FEBRUARY 22, 2007 (2007) (discussing a presentation by Stephen Gran, Agriculture Industry Development Manager, Hillsborough Co., Fla.), available at [http://boards.alachua.fl.us/Agenda\\_MinutesView.aspx?ID=715](http://boards.alachua.fl.us/Agenda_MinutesView.aspx?ID=715).

36. This does not include forestry or aquaculture. U.S. Dep't of Agriculture, Nat'l Agriculture Statistics Svc., 1987, 1992, 1997, & 2002 Censuses of Agriculture, <http://www.agcensus.usda.gov/> (last visited Jan. 20, 2010) (download on file with the author).

37. *Id.*

38. Econ. Dev. Dep't., Hillsborough Co., Fla., Agriculture Industry Development Program, <http://www.hillsboroughcounty.org/econdev/agriculture/> (last visited Jan. 20, 2010).

39. See HILLSBOROUGH CO. Bd. OF CO. COMM'RS, MINUTES FOR THE SEPTEMBER 7, 2006 BOCC REGULAR MEETING 34 (2006) [hereinafter MINUTES FOR SEPTEMBER 7], available at <http://www.hillsboroughcounty.org/agendas/home.cfm>.

40. *Id.*; HILLSBOROUGH CO. Bd. OF CO. COMM'RS, CAPTIONING FOR THE SEPTEMBER 7, 2006 BOCC REGULAR MEETING (2006) [hereinafter CAPTIONING FOR SEPTEMBER 7], available at <http://www.hillsboroughcounty.org/agendas/home.cfm>.

41. See HILLSBOROUGH CO. Bd. OF CO. COMM'RS, MINUTES FOR THE JUNE 7, 2006 BOCC REGULAR MEETING 35 (2006), available at <http://www.hillsboroughcounty.org/agendas/home.cfm>; HILLSBOROUGH CO. Bd. OF CO. COMM'RS, CAPTIONING FOR THE JUNE 7, 2006 BOCC REGULAR MEETING (2006) [hereinafter CAPTIONING FOR JUNE 7], available at <http://www.hillsboroughcounty.org/agendas/home.cfm>.

42. MINUTES FOR SEPTEMBER 7, *supra* note 39.

and to promote the agriculture industry by improving its economic viability.<sup>43</sup>

The ASP was developed because the county was improving its growth management policies, identified in its comprehensive plan, by better protecting agricultural properties.<sup>44</sup> The county's current comprehensive plan promotes the county's efforts to support agriculture with three explicit objectives and numerous policies. Objective 29, the most pertinent, provides that "[i]n recognition of the importance of agriculture as an industry and valuable economic resource, Hillsborough County shall protect the economic viability of agricultural activities by recognizing and providing for its unique characteristics in land use planning and land development regulations."<sup>45</sup> Many of the policies related to these objectives promote agriculture's economic, open-space, and environmental benefits to the surrounding communities.<sup>46</sup> Policy 29.8 specifically recognizes the ASP: "Hillsborough County shall continue to support programs such as the *Agriculture Stewardship Program* as a vehicle to encourage the economic viability of agriculture by recognizing and rewarding the benefits or services that agricultural land provides to the community."<sup>47</sup>

County staff identified several reasons the program was worth pursuing. First, the ASP recognizes agriculture as not simply a land use, but as a business that cannot exist if unprofitable. By "easing the financial pressures" that result from high land values and tax assessments, agricultural businesses are made more viable.<sup>48</sup> Second, the ASP supports growth management principles by discouraging premature conversion of farmland to other uses. If agricultural uses remain because they become economically viable, that land is less likely to be developed than is fallow land.<sup>49</sup> Third, the ASP aids the county budget, since "agricultural land . . . demands far fewer governmental services than other more urbanized areas,"<sup>50</sup> since for every \$1 that agriculture pays in taxes, it only requires \$0.16 in services.<sup>51</sup> Additionally, the ASP helps direct development into urban areas where services are already available or planned, reducing financial impacts on the county.<sup>52</sup> Finally, the ASP recognizes the ecosystem services agriculture provides to communities, such as wildlife habitat, aquifer recharge, ecosystem connection, and buffering.<sup>53</sup>

Many around Florida are taking note of Hillsborough County's program. Other counties are modeling programs on the ASP. Indian River County's Agricultural Advisory Committee recommended that its Board of County Commissioners consider something similar to Hillsborough County's program.<sup>54</sup> Likewise, an Alachua County study group recommended that its Board of County Commissioners consider the idea.<sup>55</sup> Recently, nearly three dozen of Florida's top planning professionals searched for the best and most innovative planning and growth management tools being used in the state. This group highlighted the ASP and its progress in its agricultural land conservation section.<sup>56</sup> Similarly, a summary of a recent conference, held by a private-public partnership and focusing on innovative ways of thinking about growth management, agricultural land use, and stewardship, recounted the most frequently mentioned new planning strategies.<sup>57</sup> One of these was market-based economic incentives for agriculture, and its primary example was Hillsborough County's ASP.<sup>58</sup>

## B. Program Mechanics

The ASP is based on a lease conservation easement or a resource conservation agreement and results in a formal contract between landowners and Hillsborough County.<sup>59</sup> The county administers the program and monitors all participants.<sup>60</sup> Landowners agree to place certain restrictions on their land for a given 10-year term, and in return, Hillsborough County rewards the participating landowners with annual agriculture stewardship grants.<sup>61</sup> These restrictions prevent the landowner from converting agricultural land to nonagricultural uses.<sup>62</sup> Grants are paid annually and are equal to 75% of the ad valorem taxes paid on the land and "agriculture production-related structures" in the prior year.<sup>63</sup>

To qualify for the ASP, the Hillsborough County property appraiser must have already classified land as agricultural and structures as agriculturally related by the year of appli-

43. PROGRAM, *supra* note 32, at 2.

44. CAPTIONING FOR JUNE 7, *supra* note 41.

45. HILLSBOROUGH CO., FLA., COMPREHENSIVE PLAN, FUTURE LAND USE ELEMENT 50 (2008), available at <http://www.theplanningcommission.org/hillsborough>. Objective 30 recognizes that because "the continued existence of agricultural activities is beneficial, the county will develop, in coordination with appropriate entities, economic incentives to encourage and expand agricultural activities," and Objective 31 is to "[p]rotect the natural resources necessary to sustain agricultural activities." *Id.* at 50-51.

46. See, e.g., Policies 29.1, 29.6, 30.6, and 31.6. *Id.* at 50-52.

47. *Id.* at 50.

48. CAPTIONING FOR JUNE 7, *supra* note 41.

49. See *id.*

50. See *id.*

51. ALACHUA CO. ADVISORY COMM. ON RURAL CONCERNS, *supra* note 35.

52. *Id.*

53. See Stephen Gran, *Hillsborough County Approves Agriculture Stewardship Program*, BERRY/VEGETABLE TIMES, Nov. 2006, at 3, available at <http://strawberry.ifas.ufl.edu/BerryTimes/2006/BVT1106.pdf>; CAPTIONING FOR SEPTEMBER 7,

*supra* note 40 (noting these "green payment" programs are gaining favor for agricultural land retention" and that the "concept has been endorsed by two former secretaries of agriculture").

54. INDIAN RIVER CO. AGRIC. ADVISORY COMM., MINUTES OF THURSDAY, NOVEMBER 16, 2006, at 5 (2006), available at [www.ircgov.com/Boards/AAC/2006/Minutes/AAC111606M.pdf](http://www.ircgov.com/Boards/AAC/2006/Minutes/AAC111606M.pdf).

55. ALACHUA CO. ADVISORY COMM. ON RURAL CONCERNS, *supra* note 35.

56. CTR. FOR URB. & ENVL. SOLUTIONS, FLA. ATL. UNIV, FLORIDA PLANNING TOOLBOX 8 (2007), available at <http://www.cuesfau.org/toolbox/docs/Florida-PlanningToolbox.pdf>.

57. FLA. EARTH FOUND., AG LANDS, DEVELOPMENT, AND THE FUTURE OF FLORIDA 1 (2006), available at <http://www.arapahocitrus.com/files/Report14FINAL.pdf>.

58. *Id.* at 2 (identifying the ASP as a program that helps farms "make sense financially" through the use of green payments).

59. See CAPTIONING FOR SEPTEMBER 7, *supra* note 40.

60. CAPTIONING FOR SEPTEMBER 7, *supra* note 40.

61. PROGRAM, *supra* note 32, at 2.

62. *Id.*

63. *Id.* at 2-3. Note that this program is not simply a tax exemption. The Florida Constitution would prohibit this, as it provides for only the property tax assessment exemption. See *Canaveral Port Authority v. Dep't of Revenue*, 690 So. 2d 1226 (Fla. 1996). The Florida Constitution only allows for an assessment based on the actual use of properties being used for conservation purposes, FLA. CONST. art. VII, §4(b), or a complete exemption for perpetually encumbered conservation properties, FLA. CONST. art. VII, §3(f).

cation.<sup>64</sup> These uses and structures are defined in Florida's Greenbelt law.<sup>65</sup> To be classified agricultural, lands must be used primarily for bona fide agricultural purposes, meaning good-faith commercial agricultural use of the land.<sup>66</sup> They must also be zoned for agricultural uses.<sup>67</sup> If land is diverted into nonagricultural uses or is no longer used for agriculture, it may no longer be assessed as agriculture.

If a property qualifies for the ASP, then the landowner may apply during the application period, from November 1 to December 15 each year.<sup>68</sup> Funding for the program is limited, however, and qualified applications are accepted on a first-come, first-served basis.<sup>69</sup> The program was capped at \$1 million funding annually, based on an original estimated cost of \$1,048,852, representing a 50% participation rate for eligible properties.<sup>70</sup> After the ASP budget is fully allocated, qualified properties are put on a waiting list.<sup>71</sup> Approximately 9,000 acres and 220 properties participate in the ASP.<sup>72</sup> Because properties are expected to remain in the program for a 10-year term, unless more funding becomes available, no new properties are likely to enter the ASP in the short term.

Because the ASP is designed to be a flexible program, with incentives for participation, landowners may leave the ASP voluntarily.<sup>73</sup> If the landowner requests to leave the program, the land is diverted from an agricultural to a nonagricultural use, or the land ceases agricultural use, then the agreement is terminated, and the landowner is penalized with a grant recapture fee based on years of participation, shown below in Table 1.<sup>74</sup> For flexibility, portions of properties may leave the program and be treated on a pro-rata basis.<sup>75</sup> If the program is ever terminated by the Board of County Commissioners or not funded for a year, the landowner may terminate the agreement with no penalty.<sup>76</sup> After the 10-year term has concluded, the landowner has the option of remaining in the program on a year-to-year basis. If the landowner chooses to leave the program after the 10-year term, there is no grant recapture payment, and the landowner has the option of remaining in the program on a year-to-year basis, with priority given over new applicants.<sup>77</sup>

<b>Years in Program</b>	<b>Grant Repayment Amount</b>
After Year 1	Repay 1 Year of Grant
After Year 2	Repay 2 Years of Grant
After Year 3	Repay 3 Years of Grant
After Year 4	Repay 4 Years of Grant
After Year 5	Repay 5 Years of Grant
After Year 6	Repay 4 Years of Grant
After Year 7	Repay 3 Years of Grant
After Year 8	Repay 2 Years of Grant
After Year 9	Repay 1 Year of Grant
After Year 10	Repay 0 Years of Grant

### C. State-Law Barriers to Lease Conservation Easements

The ASP does appear to have been based, in some ways, upon traditional conservation easements. Easements conserve a land use using market forces to value the partial property interest. Similarly, the ASP entices farmers using market forces, through payments linked to land values, through tax-referenced payments, recognizing the primacy of financial incentives for conservation purposes. And just as conservation easements take the right to develop out of the landowner's hands, the ASP disallows uses other than agriculture for a time. Finally, like a traditional easement, ASP contracts are completely voluntary exchanges between willing landowners and a governmental organization.

However, the ASP does not resemble these easements in every sense. The most important distinction is temporal: ASP contracts are not meant to be perpetual. ASP contracts strongly resemble term conservation easements, which simply means they are not intended to last forever. More specifically, they are lease conservation easements.<sup>78</sup> Time is an important difference, because these arrangements do not transfer a property interest, nor do they extinguish one—both of which perpetual conservation easements are praised for doing.<sup>79</sup>

So far, then, the ASP would still seem to be a sort of conservation easement. However, conservation easements generally run with the land, meaning that when the owner transfers his interest in the land, the easement is not broken, but rather still restricts the new owner in the same way as the previous owner. ASP contracts, on the other hand, do not bind future landowners.

Why would such an arrangement develop without the additional security of a recordable instrument? State law may be the answer. State tax law, like federal tax law, does

64. *Id.* at 2.

65. *Id.*; FLA. STAT. §193.461 (2009).

66. FLA. STAT. §193.461(3)(b) (2009). An agricultural purpose "includes, but is not limited to, horticulture; floriculture; viticulture; forestry; dairy; livestock; poultry; bee; pisciculture, when the land is used principally for the production of tropical fish; aquaculture; sod farming; and all forms of farm products and farm production." *Id.*

67. *Id.*

68. PROGRAM, *supra* note 32, at 4.

69. *Id.* at 2.

70. MINUTES FOR SEPTEMBER 7, *supra* note 39, at 34.

71. PROGRAM, *supra* note 32, at 4.

72. CreativeTampaBay, The Buzz for the Week Beginning Monday, April 28, 2008, <http://www.creativetampabay.com/archives/305> (last visited Jan. 20, 2010).

73. See PROGRAM, *supra* note 32, at 3.

74. *Id.* at 3.

75. PROGRAM, *supra* note 32, at 3.

76. *Id.*

77. *Id.* at 4.

78. Joshua M. Duke & Lori Lynch, FREC Research Reports, Farmland Preservation Techniques: Identifying New Options 3 (2003), available at <http://dspace.udel.edu:8080/dspace/bitstream/19716/2339/1/FREC%20RR03-02.pdf>.

79. Boyd et al., *supra* note 4, at 4.

not recognize nonperpetual lease conservation easements.<sup>80</sup> This removes what is oftentimes the sole benefit a landowner receives from the dedication of a conservation easement. Yet, the ASP functions like a lease conservation easement. There is a strong incentive for any seller to induce the buyer to assume the ASP contract, since the seller will be responsible for any repayments due the county. Therefore, the ASP is about as close to a lease conservation easement as will be found in Florida.

### III. Economics of Lease Conservation Easements

Florida law presents a number of barriers to lease conservation easements but supports and even subsidizes perpetual conservation easements. Why, then, would Hillsborough County work so hard to develop a program employing a disfavored policy tool? Beyond any theoretical advantages lease conservation easements might provide, in practice, they are even more advantageous when used on the urban fringe because of a number of economic factors.

Consider the urban fringe, that amorphous “area of transition between well recognized urban land uses and the area devoted to agriculture.”<sup>81</sup> Because agriculture in the United States as a whole is not threatened, agricultural land policy is ultimately about the urban fringe.<sup>82</sup> Policies to conserve agriculture may have little impact overall on the nation’s balance of agricultural lands, but “they can make a profound difference in the quality of life at the margin, the interface between urban and rural land uses.”<sup>83</sup> This is important because some states, like Florida, have become predominantly fringe states, full of these rural-urban interfaces.<sup>84</sup> These interfaces arise and grow as economic pressures expand urban boundaries.<sup>85</sup> This pressure can be substantial, causing agricultural land at the fringe to be valued at up to 18 times more if converted to suburban uses.<sup>86</sup> It is precisely these urban pressures that

make lease conservation easements more attractive than perpetual conservation easements in these areas.

An analysis of Hillsborough County’s ASP reveals that for a number of reasons, lease conservation easements are appropriate when the goal is to conserve agricultural land on the outskirts of growing urban areas. In this common scenario, shorter term lease conservation easements are a better choice than perpetual conservation easements. Not only are lease conservation easements more efficient than perpetual conservation easements because they lower opportunity costs, transaction costs, and agency and monitoring costs, but when these easements are at the urban fringe, they lower all these costs even more than usual.

#### A. Opportunity Costs

At the urban fringe, opportunity costs of lease conservation easements are lower than for perpetual conservation easements. Opportunity costs are what must be foregone when one choice is chosen over another.<sup>87</sup> That is, they represent what could have been achieved by another solution but cannot be because another, mutually exclusive choice was made.

In general, lease conservation easements minimize the risks of foregone future possibilities for all parties. On one hand, for the easement holder, they reduce the costs and risk of not controlling enough easements to realize efficiencies of scale.<sup>88</sup> It may be worthwhile for an easement acquirer to achieve some optimal amount of conservation, even considering the risks that easement prices may be higher in the future and that leases may be easier agreements to exit.<sup>89</sup> The easement holder may also be required to bear the costs of maintaining the land in some way.<sup>90</sup> These could include periodic recordation costs, the agency and monitoring costs discussed below, or others. All these payments and choices have opportunity costs, since they might be better spent on other programs.

To the landowner, or to the agricultural business owner, leases reduce the cost and risk of not being able to shift to alternative income sources in the future. It is risky to not be able to shift to more intense land uses in the future, especially when even some agricultural uses might be called development in the future, like dikes or water catchment and retention areas. Consequently, landowners might be interested in participating in a conservation easement program, even if not in perpetuity. One landowner described them as “worthy of consideration, but generally a last-resort effort to raise cash,

80. See FLA. CONST. art. VII, §3(f) (providing “[t]here shall be granted an ad valorem tax exemption for real property dedicated in perpetuity for conservation purposes, including real property encumbered by perpetual conservation easements or by other perpetual conservation protections, as defined by general law”); FLA. STAT. §196.26 (2009) (“Land that is dedicated in perpetuity for conservation purposes and that is used exclusively for conservation purposes is exempt from ad valorem taxation.”).

81. George S. Wehrwein, *The Rural-Urban Fringe*, 18 ECON. GEO. 217, 217 (1942). For the purposes of this Article, a more precise definition of the urban fringe is not necessary because it advocates for lease conservation easements in any locale a landowner might wish to employ them, not simply in the urban fringe. Economists and geographers, however, have studied this area and its characteristics a great deal. See, e.g., KIRAN WADHVA, *URBAN FRINGE LAND MARKETS* (1983); Robin J. Pryor, *Delineating Outer Suburbs and the Urban Fringe*, 51 GEOGRAFISKA ANNALER (SERIES B, HUMAN GEOGRAPHY) 33 (1969); Richard B. Andrews, *Elements in the Urban-Fringe Pattern*, 18 J. OF LAND & PUB. UTILITY ECON. 169 (1942).

82. Cremer, *supra* note 3, at 10542.

83. Lawrence W. Libby, *Rural Land Use Problems and Policy Options: Overview From a U.S. Perspective*, in *LAND USE PROBLEMS AND CONFLICTS* 13 (Stephan J. Goetz et al. eds., 2005).

84. Cremer, *supra* note 3, at 10542.

85. *Id.*

86. Jeanne S. White, *Beating Plowshares Into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 113 (1998).

87. David R. Henderson, *Opportunity Cost*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (David R. Henderson, 2d ed. 2007), available at <http://www.econlib.org/library/Enc/OpportunityCost.html>.

88. STEVEN J. EAGLE, CTR. FOR PRIVATE CONSERVATION, *CONSERVATION EASEMENTS AND PRIVATE LAND STEWARDSHIP* 19 (1998), available at <http://cei.org/pdf/1339.pdf>.

89. See RODNEY CLOUSER & STEPHEN GRAN, IFAS EXTENSION, U. FLA., *ISSUES AT THE RURAL-URBAN FRINGE: HILLSBOROUGH COUNTY AGRICULTURE STEWARDSHIP PROGRAM* (Nov. 2007), available at <http://edis.ifas.ufl.edu/pdffiles/FE/FE70100.pdf>.

90. Jeff Pidot, *Reinventing Conservation Easements*, 17 *LAND LINES* 2 (2005), available at <http://www.lincolnst.edu/pubs/PubDetail.aspx?pubid=1010>.

since forever is such a long time.”<sup>91</sup> Such sentiments are likely to be echoed elsewhere. Lease conservation easements lessen this cost and risk of the unknown by guaranteeing both parties equal measures of certainty and flexibility.

Beyond the losses to the parties to the transaction, considering the net benefit to society, these opportunity costs may be substantial, because lands under perpetual conservation easements run the risk of never being used to their full potential.<sup>92</sup> These are the costs of wasteful underutilization of the land.<sup>93</sup> Again, the specter of a risky, uncertain future looms. In the setting of an agricultural parcel on the outskirts of an urban area that is ripe for development, landowners can clearly see the development value of their land and may opt to wait to “cash out” on that value. Lease payments, however, remain a viable alternative because they allow a solution to emerge from negotiations.

Agricultural land on the urban fringe is particularly susceptible to this cost because it is often the best land for development, being both well-drained and relatively flat. Its great value is attested to by the high price the land can fetch. Although we may think of farms with a Jeffersonian romanticism as pristine, natural areas, they often exhibit significant environmental degradation.<sup>94</sup> Because “[c]onverting a farm into a wildlife refuge may require just as substantial an investment as establishing the refuge on the site of commercial office buildings,”<sup>95</sup> it may make more sense to develop agricultural land and conserve other lands. If agricultural lands with high development values and low ecological significance are not developed, society may be worse off when the development is foregone altogether or truly sensitive lands are developed. Lease conservation easements at least leave open the door for these considerations.

## B. Transaction Costs

Moreover, in the urban fringe, transaction costs of lease conservation easements are lower than for perpetual conservation easements. Transaction costs are those costs that are incurred in making an economic exchange.<sup>96</sup> For example, uniform programs such as the ASP are able to minimize transaction costs by using standardized contracts. Individual landown-

ers are not allowed to modify the contract with the county. Standardized contracts lower costs because they minimize the costs of bargaining. The costs of writing a contract are relatively fixed for any specific type of contract, and so by drafting one contract for many easement leases, the cost can be distributed over all leases.<sup>97</sup>

The great number of lots that are relatively smaller than in rural areas increases transaction costs in the urban fringe. Oftentimes, communities develop corridors or sectors of properties encumbered by easements in order to preserve open space or better protect ecological characteristics. Naturally, these actions become more attractive as cities grow larger and those attributes become relatively scarcer. More lots and landowners mean a greater potential one landowner will hold out from participation. That is, once a few easements are negotiated, as even more are negotiated, other landowners have a strong incentive to hold out from negotiations without a premium payment. While perpetual conservation easements are less likely when there are holdout problems,<sup>98</sup> the same is less true for lease conservation easements. Because of the shorter term, holdouts cannot command the same premium. Neighbors and easement holders can pressure holdouts by threatening lease nonrenewal in the future without fuller participation.

Proponents of perpetual conservation easements respond that, “[t]he cost of repeated bargaining may explain the prevalence of perpetual easement contracts.”<sup>99</sup> That is, perpetual easements need only be negotiated once, whereas lease conservation easements must be negotiated multiple times. This neglects two factors. First, perpetuity is riskier, and so more costly, than a shorter term lease. Forever is a long time, and contracting parties will want to be protected from innumerable contingencies, which requires more negotiation. Second, the usefulness of repetitious bargaining may outweigh any added costs. Landowners may prefer to pay a bit extra in return for the ability to reevaluate circumstances in the future, and society may be the better if it no longer makes sense to conserve the land.

## C. Enforcement Costs

Finally, in the urban fringe, enforcement costs of lease conservation easements are lower than for perpetual conservation easements. These are the costs of enforcing an agreement, once it is achieved.<sup>100</sup> The most obvious reason these costs are lower with lease conservation easements is because the enforcement costs are not perpetually constant. Over time, agreements become outdated and more difficult to interpret, making enforcement more difficult, especially far into the future.

Less obviously, “[l]imited-term contracts make it easier to tie payments to results and reduce enforcement costs by rem-

91. Interview with Jack E. Cremer, Pres. & CEO, Cremer Wood Procurement, Inc. (Nov. 27, 2008). Cremer’s family owns thousands of acres and has been involved with agriculture and silviculture for at least four generations in north Florida. He personally has over 40 years of experience in silviculture. *Id.*

92. Some would go as far as arguing that the public benefits of conservation easements are at least as important, if not more so, than any public benefits arising from the transaction. See 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, 1561-65 (2008).

93. EAGLE, *supra* note 88, at 9.

94. See generally J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGICAL L.Q.* 263 (2000).

95. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, *supra* note 20, at 594-95.

96. The economic and legal importance of these costs was first developed in depth by Ronald Coase. David R. Henderson, *Ronald H. Coase*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (David R. Henderson, 2d ed. 2007), available at <http://www.econlib.org/library/Enc/bios/Coase.html>. See generally Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 44 (1960).

97. Boyd et al., *supra* note 6, at 227.

98. Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 *ARIZ. L. REV.* 541, 556 n.190 (2006).

99. Boyd et al., *supra* note 6, at 227.

100. See Hamish R. Gow, *How Private Contract Enforcement Mechanisms Can Succeed Where Public Institutions Fail*, 23 *AGRIC. ECON.* 253, 254 (2008).

edying violations with nonrenewal rather than litigation.”<sup>101</sup> Litigation, or even preparing to litigate, can be very expensive.<sup>102</sup> If a situation turns sour, both parties have the option of waiting it out. On the easement holder’s side, for example, there is no need to deal with disgruntled future landowners later.<sup>103</sup> The easement is simply not renewed.<sup>104</sup> The ASP, for instance, has automatic termination provisions if landowners renege on the agreement, where the county receives damages for its troubles.

Lease conservation easement payment schemes can also make litigation less expensive, when it occurs, because they usually involve periodic payments. Easement holders are better off when they can stop periodic payments, as with a lease, rather than sue for breach of contract, which is necessary with perpetual easements, since they are paid upfront in lump sum. Similarly, behavioral theory suggests that staggered payments are better than lump-sum payments for other reasons.<sup>105</sup> Since they require at least periodic contact, they engender at least a chance of relationships forming.<sup>106</sup> People tend to be less willing to breach agreements when they have a relationship with the opposing party.

Enforcement costs will be even lower in the urban fringe, where good relationships are more likely. Conservation easements at the urban fringe serve the local community. This local context makes it easier to build trust, because all parties at least have in common a desire to better their community. Oftentimes large, rural conservation easements have more regional, or even national, goals at their heart, such as the conservation easements around Florida’s Everglades or those surrounding national parks in the West.

#### IV. Conclusion

Judging by the great quantity of perpetual conservation easements voluntarily entered into in recent years, they must be economically rational to many landowners. Yet as promising as this conservation tool might be, many have fallen to the lure of the infinite and assumed perpetual conservation ease-

ments are necessarily better than shorter term lease conservation easements. This is unfortunate, since the very lands that citizens often most value being conserved—working agricultural land on the urban fringe—would be the lands most likely to be conserved by lease conservation easements, and perhaps the least likely to be conserved by perpetual conservation easements.

When the economic incentives are strong enough, we should expect to see landowners and governments innovating with new programs to fit their needs. One program in Florida, Hillsborough County’s ASP, indicates this through its attempt to function like a lease conservation easement by another name. Floridians would be better served giving landowners more flexibility. They should amend the state’s laws to allow lease conservation easements to receive the same tax benefits as perpetual conservation easements. Similar changes at the federal level could be beneficial. More broadly, the program points to the creative measures that may be necessary when community leaders wish to aid local agriculture, instead of simply throwing money at a problem.

In terms of efficiency, the ASP’s biggest shortcoming is that it does not ensure that the best or most desirable agricultural land is enrolled.<sup>107</sup> Because ASP funds are awarded on a first-come, first-served basis, it is impossible to ensure that lands that are the most productive, best situated, or most vulnerable to conversion will be enrolled. This could result in opportunity costs to the community, since there is a good chance that such a random enrollment will not result in either the optimum amount or quality of land. In other words, even if “successful” in other regards, this program will not leverage its community’s limited funds in the best, most efficient way possible. This is somewhat beside the point, however, as even with these inefficiencies, Hillsborough County has chosen to move forward with a pseudo-lease program, rather than a more permanent perpetual program.

Recall that you, our future protagonist, come from a world that is shockingly different from our own. There, the United States seems to no longer be the political and economic hegemon it once was. Americans appear to have discarded some once-popular social policies, such as farm and open-space protection, as ill-conceived subsidies and inefficacious luxuries. Floridians in particular have rejected the European welfare model in favor of Galt’s Gulch. While such a society is a long cry from the world in 2010, the changes from 1910 to 2010 have proven equally as unpredictable. We would do well not to tie our children in knots, as they try to set right what we set awry “fixing” other problems. As the economics of lease conservation easements at the urban fringe points out, when it comes to conserving our lands, we must lose the lure of the infinite.

101. Stern, *supra* note 98, at 573.

102. EAGLE, *supra* note 88, at 10.

103. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 772 n.120 (2002).

104. If dissolution of a perpetual easement is necessary, litigation may prove extremely expensive. And dissolution of a perpetual easement will not likely depend solely on economic rationale. One scholar reckons that most states will have the easements reviewed, not only by courts under an “impossible to perform” standard that makes dissolution extremely difficult to secure, but also possibly by review boards or panels. Thus, perpetual easement dissolution decisions are shifted to inefficient non-market decisionmakers. See Thompson, *supra* note 23, at 606. Professor Barton Thompson was not convinced that courts would be able to use judicial equitable doctrines to modify the easement’s terms. *Id.* The National Conference of Commissioners on Uniform State Laws seemed similarly unconvinced. See Uniform Conservation Easement Act §3 (comment). Likewise, Prof. Nancy A. McLaughlin and W. William Weeks of the Nature Conservancy are not convinced. See Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1 (2009). Lease conservation easements could avoid this complicated process by dissolving automatically at the end of their term, and in cases like the ASP, providing for automatic dissolution and damages upon the landowner’s breach.

105. *Id.* at 568-71.

106. *Id.* at 570.

107. CLOUSER & GRAN, *supra* note 89.