

# ELR

## NEWS & ANALYSIS

### Appraising Conservation Easement Donations: The Need for More Uniform Standards and Greater Oversight

by Jessica A. Steinberg

*Editors' Summary: Standardized appraisal methods for charitable contributions of conservation easement donations do not currently exist. Without such standards, landowners may potentially overvalue their donations of conservation easements to land trusts. The Internal Revenue Service (IRS) has recognized this abuse of the tax laws and has threatened to severely limit or eliminate the charitable contribution deduction program for conservation easements. In this Article, Jessica A. Steinberg refutes the notion of limiting the charitable contribution program and proposes the establishment of uniform appraisal methods and greater oversight by the IRS. She argues that without the deduction incentive, many landowners may be unwilling to donate conservation easements on their property, which will lead to less land preserved. More uniform appraisal methods and greater oversight of the appraisal process will enable the IRS to curb potential abuse of the tax laws and ensure that landowners continue to donate conservation easements on their property in perpetuity.*

#### I. Introduction

Conservation easements are an important land preservation tool. In 2003, a Land Trust Census found that private land trusts held more than 17,847 conservation easements, covering over five million acres of land.<sup>1</sup> This figure does not include the millions of acres of land national conservation organizations hold.<sup>2</sup> Tax benefits are a form of government subsidy that creates an incentive for landowners to donate a conservation easement on their property and preserve their property in perpetuity. However, existing laws relating to the tax valuation of land subject to an easement are ripe for abuse. Unless the law changes, stricter standards likely will be implemented and charitable contributions will decline. In the absence of this heavily subsidized incentive, landowners may become reluctant or unwilling to donate conservation easements. This, in turn, will result in an undersupply of conservation easements and ultimately lead to less land preserved. Therefore, a program is needed to ensure that the Internal Revenue Service (IRS) maintains its current position of allowing taxpayers to take charitable contribution deductions for donating conservation easements on their property. This Article proposes the establishment of uniform appraisal methods and greater oversight by the IRS of apprais-

als to ensure taxpayer compliance with the revised appraisal rules. Specifically, this Article proposes a pre-approval conservation easement valuation process to dissuade the IRS from severely limiting the conservation easement deduction program.

Easements are restrictions on real property interests. In addition to being an important land preservation tool, easements include rights-of-way for utilities, streets, or public access. Conservation easements, a particular type of easement, permanently restrict future development while still enabling landowners to retain some use of their land. They protect natural habitat, preserve open space, preserve areas for public recreation, and preserve historically important land areas.<sup>3</sup> In addition to preserving natural resources for future generations to enjoy, the landowner qualifies for a charitable tax deduction under the Internal Revenue Code (the Code or the I.R.C.).

In order for the landowner to qualify for an income tax charitable deduction, the easement must be granted in perpetuity<sup>4</sup> by a qualified conservation organization, usually a land trust or governmental body.<sup>5</sup> Additionally, if the landowner intends to claim a charitable tax deduction of \$5,000 or more, he must obtain a qualified appraisal for the conservation easement. Current valuation methods are tenuous, inconsistent, and can be manipulated because: (1) the

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1. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 8 (2d ed. 2005).
2. *Id.* For example, as of 2004, the National Park Service held conservation easements on 253,348 acres. *Id.*

3. Internal Revenue Code (I.R.C.) §170(h)(4) (2007); Connie Kertz, *Conservation Easements at the Crossroads*, 34 REAL EST. L.J. 139, 140 (2005).

4. Treas. Reg. §1.170A-14(a) (2006).

5. Kertz, *supra* note 3, at 142. Hereinafter, this Article will refer to all qualified conservation organizations as "land trusts."

landowner typically has an incentive to obtain a high value for the conservation easement; (2) appraiser subjectivity plays a prominent role in appraisals; and (3) there is scant oversight of the conservation easement appraisal process.

When land trusts and individual taxpayers attempt to minimize their tax burden through inflated valuations of donated easements, the public begins to question the legitimacy of the federal tax system and conservation easement program.<sup>6</sup> When taxpayers overvalue charitable deductions for conservation easements, the transactions do not accurately reflect economic reality, improperly minimize a taxpayer's tax responsibilities, and shift a tax burden to the general public. As a result, the IRS may greatly scrutinize conservation easement donations and deductibility requirements and decrease or eliminate the tax incentives for donating conservation easements. Landowners, who may be unwilling to donate an easement on their property without the tax incentive, may decide not to place a conservation easement on it. Ultimately, less land may be preserved if the IRS takes such a drastic step. In a time when increasing populations put development pressures on the existing open spaces, conservation easements are a necessary and valuable land preservation tool.

Abuse of the existing tax laws can result from "conservation buyer transactions"<sup>7</sup> and from overvaluation of appraised conservation easements. This Article does not advocate changing the current tax law. Rather, this Article addresses the current tax system relating to conservation easement donations and proposes reforms to that system.

Part II of this Article provides an overview of conservation easements and the role that land trusts play in holding conservation easements. Part III discusses the tax benefits of conservation easements and how transfer by a taxpayer of a conservation easement makes eligible the taxpayer to federal income, estate, and gift tax deductions. Part IV describes the current methods by which conservation easements are valued. Additionally, this section explains the potential for abuse of the federal tax code's current valuation methods. Part V proposes changing the current appraisal valuation methods to include a sliding Appraisal Scale<sup>8</sup> and

greater oversight of appraisals to ensure that conservation easement valuations are performed competently and correctly. Part VI explores the policy implications of these proposals and suggests that any program of tax benefits to third parties must benefit society as a whole.<sup>9</sup>

## II. Overview of Conservation Easements and the Role of Land Trusts

### A. What Are Conservation Easements?

Conservation easements are perpetual restrictions on the type or extent of development of real property.<sup>10</sup> Conservation easements protect properties with significant conservation or historic preservation values, or property that will be restored for conservation purposes.<sup>11</sup> Donating conservation easements reflects a landowner's decision to voluntarily undertake restrictions on the use of his property<sup>12</sup>; they are successful land preservation tools because they "use financial incentives to promote non-coercive development restrictions."<sup>13</sup> This preferential tax treatment<sup>14</sup>—allowing charitable contribution deductions for donating a conservation easement—provides landowners with compensation for giving up a property right while simultaneously encouraging landowners to voluntarily "practice conservation on their properties."<sup>15</sup>

The Uniform Conservation Easement Act (UCEA)<sup>16</sup> defines a "conservation easement" as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations" whose purposes include maintaining "or protecting the natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."<sup>17</sup> Holders of an easement

6. *Charitable Giving Problems and Best Practices: Hearing Before the Senate Comm. on Finance*, 108th Cong. 1-2 (2004) (statement of Mark W. Everson, Comm'r, IRS) [hereinafter Everson Testimony].

7. Although some conservation buyer transactions may be abusive, and further investigation should be pursued, this Article does not address such transactions. See C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 47 (2005). In a conservation buyer transaction, the seller donates a conservation easement on the property and then sells the easement-encumbered property to a buyer. This transaction becomes problematic in the eyes of the IRS when a land trust purchases the property, puts a conservation easement on the property, and then sells the easement-encumbered property with the condition that the buyer also makes a cash donation to the land trust. *Id.* For example, a New York land trust buys farmland for \$1 million and then puts a conservation easement on the property. Because of the development restriction the conservation easement creates, the property is appraised for \$500,000. The land trust then offers the farmland for sale for \$500,000, on the condition that the buyer makes a cash contribution to it for \$500,000 in addition to the purchase price. Thus, the farmland is permanently protected, the land trust has received its full purchase price from the sale and donation, and the buyer is eligible to take a charitable contribution deduction. *Id.* at 47-48. A set of 2003 *Washington Post* articles exposed The Nature Conservancy's engagement in this type of transaction. See Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks With Few Curbs on Land Use*, WASH. POST, May 6, 2006, at A1.

8. See *infra* Part V.

9. William T. Hutton, *The Munificent Conservation Easement: Tax Issues & Planning Strategies*, SM041 ALI-ABA 65 (2006).

10. Conservation easements enable the preservation of stated conservation values while simultaneously allowing limited, productive use of the land. Kertz, *supra* note 3, at 141.

11. BYERS & PONTE, *supra* note 1, at 17. Properties that contain forests, wetlands, wildlife habitat, beaches, scenic areas, historic buildings, battlefields, farms and ranches, and various landscapes may all be eligible for preservation under a conservation easement. *Id.*

12. James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions 2* (Resources for the Future (RFF), Discussion Paper No. 32, 1999) [hereinafter RFF Paper]. The easement restriction can either be purchased or donated. *Id.*

13. *Id.*

14. The charitable tax deduction benefits will be explained in Part III *infra*.

15. James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 251 (2000) [hereinafter Boyd et al.].

16. UCEA (1981), available at [http://www.law.upenn.edu/bll/ulc/ucea/2007\\_final.htm](http://www.law.upenn.edu/bll/ulc/ucea/2007_final.htm). The Act—approved by the American Bar Association and adopted by 22 states, the District of Columbia, and the U.S. Virgin Islands—was enacted "[t]o authorize the creation of permanent easements on real property for conservation and historic preservation purposes." UNIFORM LAW COMM'RS, A FEW FACTS ABOUT THE UNIFORM CONSERVATION EASEMENT ACT (1981), available at [http://www.nccusl.org/update/uniformact\\_factsheets/uniformacts-fs-ucea.asp](http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-ucea.asp). New York has not adopted the Act. See *id.*

17. UCEA §1(1). Other names for conservation easements include: "scenic easements, agricultural conservation easements, open space

include governmental bodies and charitable organizations, such as corporations, associations, or trusts.<sup>18</sup> Several states have adopted the UCEA outright, but New York enacted its own conservation easement statute in 1983.<sup>19</sup> New York's statute incorporates part of the UCEA, but also varies in some parts.<sup>20</sup> Similar to the UCEA, the New York statute authorizes public bodies and tax-exempt I.R.C. §501(c)(3) nonprofit conservation corporations to hold conservation easements.<sup>21</sup> Different from the UCEA, New York's statute requires the Department of Conservation to promulgate regulations and establish standards for conservation easements.<sup>22</sup>

In addition to state statutes, federal tax law defines a conservation easement. Under the Code, a conservation easement is a legal agreement between two parties, the landowner, and a "qualified organization."<sup>23</sup> This agreement places a restriction on the land and prohibits development and/or certain uses of the land in perpetuity. Landowners partner with public agencies or nonprofit land trust organizations.<sup>24</sup> Landowners either donate part or all of the value of their property to a "qualified organization"<sup>25</sup> or they receive the market-rate value for the property interest.<sup>26</sup> The

land trust then holds permanently enforceable rights over the easement, and the landowner agrees to use that property only in ways that the easement permits.<sup>27</sup> The landowner retains ownership of the property and may sell or convey the property in the future, subject to the easement restriction.<sup>28</sup>

Although conservation easements primarily benefit the wealthy on an individual or micro level,<sup>29</sup> on a societal or macro level, they protect the environment and can preserve land for public enjoyment. They are an attractive tool because "they can be tailored to fit a specific property or to fit a specific landowner's financial circumstances or goals."<sup>30</sup> Additionally, when private ownership of land will afford permanent conservation of the property, conservation easements are a significant preservation tool.<sup>31</sup> Because conservation easements restrict future development on the donated land, allow limited use of the land, such as farming, ranching, or timber harvesting, and preserve environmentally significant areas for the benefit of future generations, they preserve wetlands, protect biodiversity, and safeguard watersheds.

### B. The Role of Land Trusts

Land trusts<sup>32</sup> are nonprofit organizations that "actively work[ ] to conserve land" by acquiring easements or land

easements, historic preservation easements, and conservation restrictions." ANTHONY ANELLA & JOHN B. WRIGHT, *SAVING THE RANCH* 15 (2004).

18. UCEA §1(2). A charitable organization includes all organizations defined as charitable under the common law, regardless of their status under the tax code. *Id.* §1(2) cmt.

19. N.Y. ENVTL. CONSERV. LAW §§49-0301 to 49-0311 (McKinney 2006). The statute's statement of purpose provides the following:

The legislature hereby finds and declares that in order to implement the state policy of conserving, preserving and protecting its environmental assets and natural and man-made resources, the preservation of open spaces, the preservation, development and improvement of agricultural and forest lands, the preservation of areas which are significant because of their scenic or natural beauty or wetland, shoreline, geological or ecological character, and the preservation of areas which are significant because of their historical, archaeological, architectural or cultural amenities, is fundamental to the maintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.

*Id.* §49-0301.

20. See generally *id.*; see also Karin Marchetti & Jerry Cosgrove, *Conservation Easements in the First and Second Federal Circuits, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 78, 93 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).
21. N.Y. ENVTL. CONSERV. LAW §49-0303; Marchetti & Cosgrove, *supra* note 20, at 93.
22. N.Y. ENVTL. CONSERV. LAW §49-0305(7).
23. I.R.C. §170(h). "Conservation easements are perpetual restrictions on the development of real estate in order to preserve stated conservation values." Kertz, *supra* note 3, at 141.
24. BYERS & PONTE, *supra* note 1, at 7.
25. I.R.C. §170(h)(3).
26. BYERS & PONTE, *supra* note 1, at 9-10. There are two types of easements that qualify as conservation easements: (1) donative easements; and (2) "bargained sale" easements. The "bargained sale" easement is the sale of land at a price less than the fair market value of the property; such a sale entitles the seller to income tax deductions for the difference between the sale price and the fair market value of the property. Dutchess Land Conservancy (DLC), *Conservation Easements*, <http://www.dutchessland.org/dlcConservationEasements.htm> (last visited Sept. 21, 2007). Valuation methods will be discussed in Part IV *infra*.

27. Jeff Pidot, *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform* 3 (Lincoln Inst. of Land Pol'y, Pol'y Focus Rep., 2005).

28. *Id.* at 3.

29. Wealthy landowners who generate higher incomes than poor landowners receive a greater tax benefit from the same transfer. For example, assume that the tax rate for wealthy taxpayer (WT) is 35% of his adjusted gross income (AGI) and the tax rate for poor taxpayer (PT) is 15% of his AGI. Assume further that WT's gross income for the year is \$1 million and PT's gross income for the year is \$30,000. Additionally, both WT and PT are eligible to take a charitable contribution deduction of \$100 during the taxable year. Assume, for simplicity purposes, that there are no other available deductions or credits and that the tax is imposed on each dollar of gross income.

	Scenario A: WT	Scenario B: WT (with deduction)	Scenario A: PT	Scenario B: PT (with deduction)
Gross Income	\$1,000,000	\$1,000,000	\$30,000	\$30,000
Deduction	0	(minus) \$100	0	(minus) \$100
AGI	\$1,000,000	\$999,900	\$30,000	\$29,900
Tax Rate	(multiply by) 35%	(multiply by) 35%	(multiply by) 15%	(multiply by) 15%
Gross Tax Owed	\$350,000	\$349,965	\$5,000	\$4,485

WT receives a greater overall savings of \$35, as compared to PT's overall savings of \$15, because of WT's different income level (and thus WT's different tax rate). See I.R.C. §63.

30. ANELLA & WRIGHT, *supra* note 17, at 97.

31. Pidot, *supra* note 27, at 33.

32. The term "land trust" does not have a fixed or legal meaning and "is applied to a wide array of organizations." SALLY K. FAIRFAX & DARLA GUENZLER, *CONSERVATION TRUSTS* 151 (2001). Such organizations include private nonprofit organizations that promote land preservation and environmental awareness by accepting conservation easements. *Id.* at 152. Therefore, this Article will also refer to such organizations as "land trusts."



“or by engaging in the stewardship of such . . . easements.”<sup>33</sup> A conservation easement enables land trusts to protect the stated conservation purposes of land without owning the property outright. Property ownership rights remain with the property owner, and the management and enforcement powers over the easement rest with the land trust.<sup>34</sup> Generally, land trusts employ some or all of the following techniques geared toward conservation, including: (1) buying land; (2) accepting easement donations; (3) accepting land donations; (4) buying conservation easements; and (5) acquiring “land or easements that are reconveyed to another public or private institution.”<sup>35</sup>

Although government agencies may hold conservation easements, landowners generally prefer to donate a conservation easement to private land trust organizations. Land trusts “appeal to a broad range of constituencies because they appear to have the flexibility to make decisions and investments more quickly than governmental agencies.”<sup>36</sup> Plus, because land trusts are usually within the landowner’s community, a landowner likely feels a stronger connection to a localized organization than to a governmental agency.<sup>37</sup>

Land trusts may purchase or accept donations of conservation easements, but accepting donations is less resource-intensive for land trusts. The land trust is able to protect the land without being responsible for direct management activities that accompany land ownership.<sup>38</sup> For example, the Dutchess Land Conservancy (DLC)<sup>39</sup> is a land trust in New York that prefers not to hold fee simple title in land for conservation purposes.<sup>40</sup> DLC is typical among land trusts in that it prefers to receive donations of conservation easements rather than owning land because of “the additional management requirements it takes to own land.”<sup>41</sup>

Once the land trust holds a conservation easement on a property, it is then responsible for perpetual stewardship—managing and enforcing the easement’s conservation purposes.<sup>42</sup> The land trust’s perpetual stewardship responsibilities include an ongoing responsibility to regularly monitor the easement,<sup>43</sup> document its monitoring activities,

maintain contact with the current landowner, and enforce the terms of the easement if violated.<sup>44</sup> For example, Landowner X donates a conservation easement on Blueacre, a 50-acre tract of wetlands and open space, to Land Trust A. Land Trust A must establish a monitoring program that clearly establishes the purpose and frequency of the monitoring activities on Blueacre. Land Trust A will most likely monitor Blueacre once a year by visiting the property. Additionally, Land Trust A should keep thorough records of the visits and maintain contact with Landowner X throughout the year. The quality of the land trust’s monitoring activities will dictate the strength and veracity of the conservation easement program.<sup>45</sup>

In addition to monitoring responsibilities, land trusts must enforce the terms of the easement if the landowner has violated the easement’s conservation values. Enforcing the easement’s restrictions is essential to preserving the conservation purposes of the easement, stimulating public confidence in easement programs, ensuring the land trust’s legal authority to enforce the easement, retaining the land trust’s tax-exempt status, and ensuring the viability of conservation easements as land conservation tools.<sup>46</sup> The land trust is legally responsible for upholding the terms of the easement and must continuously monitor the easement it holds and protect against any violations of the easements’ terms.<sup>47</sup> Because the likelihood of violating the easement’s conservation values increases as property owners change and the land is transferred to subsequent owners, the land trust must be prepared to enforce the terms of the easement’s restrictions in perpetuity.<sup>48</sup>

There is a potential danger that land trusts will not “have the resources to enforce the restrictions” of the easements they hold.<sup>49</sup> Some land trusts have many staff members and assets in the millions and billions of dollars, while other land trusts only have a few volunteer members and assets in the hundreds of dollars.<sup>50</sup> For example, the Westchester Land Trust (WLT) currently holds 150 easements that cover 2,400 acres of land.<sup>51</sup> In 2006, landowners donated conservation easements as small as 1 acre and as large as 43 acres.<sup>52</sup> WLT’s annual operating budget is \$1.2 million, and it has 11 full-time staff positions.<sup>53</sup> DLC, in contrast, holds 264 ease-

33. BYERS & PONTE, *supra* note 1, at 535. The Land Trust Alliance (LTA) is an umbrella interest group that classifies nonprofit organizations as land trusts if the organization pays its dues to LTA and employs some or all of LTA’s delineated conservation techniques. FAIRFAX & GUENZLER, *supra* note 32, at 21; *see also* Land Trust Alliance, *Homepage*, <http://www.lta.org> (last visited Aug. 21, 2007).

34. BYERS & PONTE, *supra* note 1, at 17.

35. FAIRFAX & GUENZLER, *supra* note 32, at 21. Generally, land trusts either purchase or accept donations of a conservation easement or land. BYERS & PONTE, *supra* note 1, at 8.

36. FAIRFAX & GUENZLER, *supra* note 32, at 152.

37. *Id.*

38. BYERS & PONTE, *supra* note 1, at 17. Maintenance and oversight costs may be substantially less than the costs of purchasing the fee simple title. *Id.*

39. DLC preserves land and open space in Dutchess County, New York. *See* DLC’s website, *supra* note 26.

40. E-mail Interview with Rebecca Thornton, Executive Director & President, DLC (Mar. 14, 2007) (on file with author) [hereinafter Thornton Interview].

41. *Id.*

42. Conservation purposes may include preserving land for agriculture, scenic value, or watershed preservation. BYERS & PONTE, *supra* note 1, at 17.

43. Land trusts generally monitor their conservation easements once a year. *Id.* at 145. Some conservation easements may be more vulnerable than others (i.e. easements that protect fragile ecosystems, easements with public-access provisions or affirmative rights or obliga-

tions, or easements in populated areas or with several abutting properties) and require more frequent monitoring. *Id.* If a term of the easement is violated, then regular monitoring activities will enable the violation to be found early; the sooner a violation is found, the easier it is to rectify without resorting to legal action. *Id.* at 144.

44. *Id.* at 143. The land trust’s monitoring activities ensure that the stated conservation values and purposes of the land under the conservation easement are preserved. *Id.*

45. *See id.*

46. *Id.* at 156-57.

47. *Id.* at 156.

48. *Id.* Careful drafting of the conservation easement initially and regular monitoring by land trusts will help decrease the likelihood of easement violations. *Id.* at 157.

49. Lindstrom, *supra* note 7, at 10 (internal quotations omitted). *See* 26 C.F.R. §1.170A-14(c)(1) (2007) (“qualified organization” must “have the resources to enforce the restrictions” of the easement).

50. Lindstrom, *supra* note 7, at 10.

51. E-mail Interview with Paul Gally, Executive Director, WLT (Mar. 7, 2007) (on file with author).

52. *Id.*

53. *Id.*

ments which cover 25,000 acres.<sup>54</sup> DLC has an annual operating budget of \$760,670, with six full-time and two part-time employees.<sup>55</sup> For smaller land trusts, monitoring and enforcement of conservation easements in perpetuity may be difficult because of resource inadequacies. An easement endowment or other stewardship funding program may prove beneficial to enforcing the conservation purposes of easements.<sup>56</sup>

### C. Criteria for Evaluating Conservation Easements

In order for conservation easements to fulfill their conservation purposes, they must achieve three important goals: (1) their creation, appraisal, and enforcement “must be rigorous, publicly transparent, and accountable”; (2) they must be devised to “create meaningful and durable public benefits”; and (3) both land trusts and landowners must “implement, monitor, enforce, and uphold easements” in perpetuity to further the public benefits of the easement.<sup>57</sup>

Critics of conservation easements contend that the easements are an “expensive, haphazard, and untested approach” for land preservation.<sup>58</sup> Such critics believe that regulation is a less expensive, more uniform alternative.<sup>59</sup> Additionally, critics contend that the charitable money and public funds<sup>60</sup> used to maintain conservation easements would serve the public better if they were used to purchase outright ownership of the lands instead of entrusting preservation of conservation values to the landowner.<sup>61</sup> However, once the landowner donates a conservation easement on his property to a land trust, the land trust becomes responsible for perpetual stewardship. The land trust has the legal right to enforce the easement’s conservation purposes if the landowner violates such purposes.

Bureaucratic issues within governmental agencies may create obstacles to purchasing land outright for perpetual preservation. Although funding is an issue with respect to perpetual stewardship, monitoring costs for preserving property are generally less than the overall costs of purchasing the fee simple title and then preserving the property’s conservation purposes.<sup>62</sup> Therefore, continuing the conservation easement program and enabling land trusts to be holders of easements are sound policy objectives.

## III. Tax Benefits of Conservation Easements

Landowners donate conservation easements to land trusts for a variety of reasons. Altruism or a personal connection to

the land is one reason landowners preserve their property against future development.<sup>63</sup> A 1985 Land Trust Exchange<sup>64</sup> survey of easement holders found that donors claimed “love for the land” as the primary motivation for easement donations.<sup>65</sup> Of those surveyed, 67% claimed “love for the land” as the driving factor.<sup>66</sup> Another important motivation for donating conservation easements is the federal tax benefits; of those surveyed, 22% stated that tax benefits were the driving factor.<sup>67</sup> Additionally, of the respondents who claimed that “love for the land” was the primary motivation to donate conservation easements, 54% ranked tax benefits as the secondary incentive.<sup>68</sup>

Although altruism is a main factor for some landowners to donate conservation easements, these statistics indicate that many landowners likely are motivated in no small part by the charitable contribution deduction incentive. Government regulation, like the incentive-based policies of charitable contribution deductions, is needed to ensure that landowners, who are not entirely (or even necessarily) driven by altruism to preserve their property, have financial incentives for donating conservation easements on their property. This part details the primary tax benefits landowners receive from donating conservation easements: (1) income tax deductions for charitable contributions; (2) estate tax benefits; and (3) gift tax exclusions. Because these benefits exist within federal tax law, the potential for abusing the tax law to reap the greatest possible charitable deduction also exists.

### A. Income Tax Deductions for Charitable Contributions

One reason for the widespread popularity of conservation easements and their utility as land preservation tools is the potential for landowners to reap income tax benefits.<sup>69</sup> These tax benefits reflect a policy choice to use the tax laws to protect parcels of property with specific ecological and environmental characteristics.<sup>70</sup> The Tax Reform Act of 1976 gave landowners “explicit statutory approval” of tax deductible charitable contributions in the form of conservation easements.<sup>71</sup> The ability to claim a charitable contribution deduction basically compensated landowners “for not exercising the most valuable stick of their real property bundle.”<sup>72</sup> That stick is a property owner’s right to develop his/her land. Stephen Small, the author of the regulations under I.R.C. §170,<sup>73</sup> noted that “it would not be inaccurate

54. Thornton Interview, *supra* note 40.

55. *Id.*

56. Lindstrom, *supra* note 7, at 11. Because this Article concentrates on the potential for abusing the Federal Tax Code through valuation methods of conservation easements, this Article will not elaborate on the potential funding issues related to land trusts.

57. Pidot, *supra* note 27, at 37.

58. *Id.* at 32.

59. *Id.*

60. These funds are indirect subsidies from the charitable contribution tax benefits that landowners receive when they deduct the value of the conservation easement on their income tax return. The federal government must account for such indirect subsidies in other areas of the national budget. For example, the IRS may increase an individual’s income taxes to account for the subsidy that landowners receive.

61. Pidot, *supra* note 27, at 32.

62. Thornton Interview, *supra* note 40.

63. Boyd et al., *supra* note 15, at 245.

64. The Land Trust Exchange is now known as the Land Trust Alliance. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 41 (2004).

65. *Id.* at 41-42.

66. *Id.* at 41.

67. *Id.* at 42.

68. *Id.*

69. Roderick H. Squires, *Introduction to Legal Analysis, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 69 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

70. *Id.*

71. See RFF Paper, *supra* note 12, at 26.

72. Squires, *supra* note 69, at 69.

73. Small wrote the federal income tax regulations on conservation easements while an attorney-adviser in the Office of Chief Counsel of the IRS. Law Office of Stephen J. Small, Esq., P.C., *About Stephen*

to say that the most significant development in the law concerning easements is simply the continuing development of favorable law for easement donors and charitable donee organizations, including land trusts.<sup>74</sup>

Landowners who donate open space or scenic easements to a conservation organization, without any expectation of economic benefit, are eligible for a charitable contribution deduction under §§170 and 2522 of the Code.<sup>75</sup> Under the Code, landowners are allowed an income tax deduction for the value of a “qualified conservation contribution”<sup>76</sup> of a “qualified real property interest to a qualified organization, exclusively for conservation purposes.”<sup>77</sup> The Code and the U.S. Treasury Regulations define each phrase. A “qualified real property interest” is the “entire [property] interest of [the] donor” or a “perpetual conservation restriction” that restricts the use of the property in perpetuity.<sup>78</sup> “Qualified organization[s]” include governmental bodies and charitable organizations that meet I.R.C. §501(c)(3) requirements.<sup>79</sup> The qualified organization must have the resources to protect and enforce the restrictions in perpetuity.<sup>80</sup> Such resources include money and monitoring abilities so that present and/or future generations do not abuse the purpose of the easement, to preserve and/or protect the land’s natural resources. The qualified organization must have the means necessary to “enforce the restrictions.”<sup>81</sup> The Code, the Treasury Regulations, and the IRS guidance documents are silent regarding the amount of resources a qualified organization needs to protect and enforce the conservation restrictions in perpetuity.<sup>82</sup>

J. Small, <http://www.stevesmall.com/stephensmall.aspx> (last visited Aug. 21, 2007).

74. Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection Into the Twenty-First Century*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 55, 60 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (quoting STEPHEN J. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 1 (1988-1995 Supp.)) (internal quotations omitted).

75. Rev. Rul. 73-339, 1973-2 C.B. 68.

76. A “charitable contribution” is “a contribution or gift to or for the use of” the government, provided that the contribution was made exclusively for a public purpose; “[a] corporation, trust, or community chest, fund, or foundation [that is] organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ; a post or organization for war veterans . . . ; . . . a domestic fraternal society, order, or association . . . ; [or] a cemetery company . . . .” I.R.C. §170(c).

77. *Id.* §170(h). This income tax deduction only relates to donative easements; it does not relate to bargained for easements. Lindstrom, *supra* note 7, at 43-44.

78. Treas. Reg. §1.170A-14(b). “A ‘qualified conservation contribution’ is most commonly known as a ‘conservation easement.’” Lindstrom, *supra* note 7, at 7. Requiring that the property may only be used for residential purposes is one example of a restriction on the use of property.

79. Treas. Reg. §1.170A-14(c). To meet the §501(c)(3) requirements, an organization must be publicly supported, must be accountable to the public, and must have the resources to protect and enforce the land restrictions in perpetuity. See McLaughlin, *supra* note 64; Everson Testimony, *supra* note 6.

80. Treas. Reg. §1.170A-14(c).

81. *Id.*

82. The lack of guidelines for perpetual stewardship may create problems if the landowner sells the encumbered property at some point in the future, and the subsequent landowners do not want to adhere to the conservation document. Such issues, however, are beyond the scope of this Article.

“Conservation purposes” include preserving outdoor recreation or education for the general public, protecting relatively natural habitat of flora and/or fauna, preserving open space, and preserving historically significant land areas.<sup>83</sup> The regulations allow an income tax deduction equal to the value of the conservation easement even if the donor receives an “incidental benefit” as a result of the restriction placed on the property that limits the donor’s use of said property.<sup>84</sup> To be eligible for the charitable contribution deduction these easements must be enforceable in perpetuity.<sup>85</sup> Even though taxpayers only donate a partial interest in the property, they are still entitled to a deduction.<sup>86</sup> However, if the landowner donates property to a qualified organization “with a reasonable expectation of an economic benefit to the taxpayer in his trade or business,” then such transfer does not qualify as a charitable contribution.<sup>87</sup>

The Treasury Regulations further illuminate the definition of charitable contributions. “A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.”<sup>88</sup> The Code and Treasury Regulations require that a conservation easement have a “publicly beneficial conservation purpose,” but neither the Code nor the Treasury Regulations provide objective criteria for meeting such a standard.<sup>89</sup>

### B. Estate Tax Benefits

Estate taxes are imposed on the transfer of property from a decedent’s estate to his/her beneficiaries.<sup>90</sup> Estate tax is imposed on the “taxable estate,” an amount equal to the gross estate less any allowable deductions.<sup>91</sup> A decedent’s gross estate includes the value of all property decedent possessed and/or had interest in at the time of death. The estate tax is due nine months after decedent’s date of death.<sup>92</sup>

I.R.C. §2055 provides that the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to various entities.<sup>93</sup> If an individual, by his will, places

83. Treas. Reg. §1.170A-14(d). The conservation easement must have an enumerated “conservation purpose” to be entitled to an income tax deduction. See Lindstrom, *supra* note 7, at 11.

84. Treas. Reg. §1.170A-14(e)(1).

85. Treas. Reg. §1.170A-14(g). Conservation easements are not subject to the Rule Against Perpetuities (RAP) because the RAP primarily focuses on preventing “unreasonable restraints on the alienation of title to property.” Lindstrom, *supra* note 7, at 23. Although conservation easements impose use restrictions on property, they immediately vest in a land trust upon delivery of the conservation document, and “they do not impose any restraint on the alienation of title.” *Id.*

86. Lindstrom, *supra* note 7, at 7-8.

87. Rev. Rul. 73-339, 1973-2 C.B. 68.

88. Treas. Reg. §1.170A-14(a). Subsection (b)(2) provides that a “perpetual conservation restriction is a qualified real property interest” and defines “perpetual conservation restriction” as “a restriction granted in perpetuity on the use which may be made of real property.” *Id.* §1.170A-14(b)(2). Subsection (d)(1) defines “conservation purposes” to include preserving land for the general public’s use; protecting relatively natural habitats and ecosystems; preserving open space; and preserving historically important land areas or structures. *Id.* §1.170A-14(d)(1).

89. See Pidot, *supra* note 27, at 27.

90. I.R.C. §2001.

91. *Id.* §2051.

92. *Id.* §6075(a).

93. *Id.* §2055.



a conservation easement on real property and devises the easement to a land trust, I.R.C. §2055(f) provides that the value of the easement, if “qualifying,” may be deducted from the taxable value of the estate.<sup>94</sup> A “qualified interest” is one “for which a deduction is allowable” under §2055.<sup>95</sup>

I.R.C. §2031(c) provides for an estate tax exclusion for qualified conservation easements.<sup>96</sup> If an executor makes an election,<sup>97</sup> then excluded from the gross estate is the lesser of “the applicable percentage of the value of land subject to a qualified conservation easement . . . or the exclusion limitation.”<sup>98</sup> The conservation easement reduces the total value of the estate by the fair market value of the charitable contribution.<sup>99</sup> Because the conservation easement reduces the value of the estate, the estate taxes due are less.<sup>100</sup>

An executor or trustee may also elect to donate, on behalf of the decedent, a postmortem conservation easement. Such postmortem conservation easement allows for an executor to take an estate tax charitable deduction for the gift of a qualified conservation easement, which is made after the decedent dies but prior to filing decedent’s estate tax return.<sup>101</sup> This is an important post-mortem tax planning tool because it enables a decedent’s heirs to place a conservation easement on the property if decedent died before granting the easement.<sup>102</sup>

### C. Gift Tax

An individual who donates a conservation easement to a land trust may also be exempt from gift tax requirements. A gift tax applies to the transfer by gift<sup>103</sup> of any property.<sup>104</sup> However, charitable transfers are not subject to the gift tax.<sup>105</sup> The value of a donation of a conservation easement to

a land trust does not “count against” the \$1 million credit because the donation is a charitable gift.<sup>106</sup> So, a lifetime transfer alone does not bring an immediate economic benefit to the taxpayer, but it does have secondary estate planning benefits. When the landowner donates part or all of his property to a land trust, the value of the land is reduced.<sup>107</sup> Because of this reduced value, the taxpayer may be able to make more tax-effective lifetime gifts of this property (to non-charities) for estate planning or other purposes, i.e., it is “cheaper” to make a gift of one-third interest in property worth \$1 million than a one-third interest in property worth \$1.5 million. In 2007, an individual could give up to \$12,000 per year<sup>108</sup> in property value or money without incurring a gift tax; the individual also could apply his or her “applicable credit” to contributions of up to \$1 million during his/her lifetime.<sup>109</sup>

## IV. Abuse of Easements

### A. Valuation Methods Overview

Tax benefits create an incentive for landowners who may be unwilling to donate a conservation easement on their property. In order to receive these tax benefits, a landowner must hire an appraiser to value the easement-encumbered property to determine the amount of the charitable contribution deduction.<sup>110</sup> As described in detail below, the subjectivity and lack of uniformity that currently governs the appraisal process enables some landowners to take advantage of the system and claim charitable deductions for overvalued conservation easements.

“Valuation is one of the thorniest aspects of conservation easements.”<sup>111</sup> Practically every IRS challenge to conservation contribution deductions “have focused on valuation” of conservation easement.<sup>112</sup> Factors that go into valuing easements both are objective and subjective, economic and aesthetic.<sup>113</sup> In 1973, the IRS issued Revenue Ruling 73-339, which determined that “[a] gratuitous contribution of an open space or scenic easement in perpetuity without expectation of economic benefit to the donor is a charitable contribution deductible under sections 170(h) and 2522 of the Code.”<sup>114</sup> Although the Revenue Ruling only applied to

chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . .” *Id.*

106. BYERS & PONTE, *supra* note 1, at 94.

107. See McLaughlin, *supra* note 64, at 36-37. See also BYERS & PONTE, *supra* note 1, at 94 (landowner may reduce the value of land by granting a conservation easement to a land trust).

108. A married couple could make a gift up to \$24,000, provided that the couple agreed to split the gift. Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 780-81 (2004).

109. I.R.C. §2010.

110. Maureen Rudolph & Adrian Gosch, *A Practitioner’s Guide to Drafting Conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RESOURCES J. 143, 152 (2000). An appraiser is “an impartial, disinterested person of suitable qualifications” who creates a “valuation or estimation of value of the property.” *Id.* (quoting 4A PATRICK J. ROHAN, REAL ESTATE FINANCING §2H.01 (1999)) (internal quotations omitted).

111. Pidot, *supra* note 27, at 27.

112. Hutton, *supra* note 9, at 80.

113. SMALL, *supra* note 99, at 17-3.03(1).

114. Rev. Rul. 73-339, 1973-2 C.B. 68. The “before and after method,” described in Part IV.A.2. *infra*, is the difference in the fair market

94. BYERS & PONTE, *supra* note 1, at 95 (“conservation easements will continue to play an important role as an estate planning tool”). See also I.R.C. §2055(f) (“A deduction shall be allowed under subsection (a) in respect of any transfer of a qualified real property interest (as defined in section 170(h)(2)(C)) which meets the requirements of section 170(h) (without regard to paragraph (4)(A) thereof).”).

95. I.R.C. §2055(e)(3)(D).

96. “Qualified conservation easement” is defined as “a qualified conservation contribution of a qualified real property interest.” *Id.* §2031(c)(8)(B). See also Stephen J. Small, *An Important Estate Tax Incentive for Landowners*, <http://www.privatelandownernetwork.org/plnpro/taxlaw.asp> (last visited Aug. 21, 2007). If an individual owns land subject to a conservation easement, which meets the requirements of I.R.C. §§170(h) and 2031(c) at the time of the individual’s death, then the estate can exclude an additional percentage of the value of that land in addition to the reduction in value already associated with the conservation easement. *Id.*

97. The executor must make the election “on or before the due date (including extensions) for filing the return of the tax imposed.” Such an election is irrevocable once made. I.R.C. §2031(c)(6).

98. *Id.* §2031(c)(1). The “exclusion limitation” is \$200,000. *Id.*

99. STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS 20-4 (4th ed. 1997).

100. *Id.*

101. I.R.C. §2031(c)(9). See also BYERS & PONTE, *supra* note 1, at 96 (observing that if decedent intended to make conservation easement donation but was either unable to do so during his lifetime or neglected to include donation in his will, then executor or trustee of estate may make such an election).

102. BYERS & PONTE, *supra* note 1, at 98.

103. A “gift” is the amount by which the value of the property transferred exceeds the value of the consideration received. I.R.C. §2512(b).

104. *Id.* §2501(a)(1).

105. *Id.* §2522(a). A deduction is allowed for “gifts made during such year to or for the use of . . . a corporation, or trust, or community

these two particular conservation purposes, the Tax Reform Act of 1976 enabled landowners to take a charitable contribution deduction for conservation easements.<sup>115</sup>

Generally, easements are valued by reference to the subject parcel's highest and best use, which typically involves developing property to its maximum permissible density.<sup>116</sup> Easements range from 10% to over 90% of the property's unrestricted fair market value.<sup>117</sup> The property's appraised value depends upon its value as a commodity in the marketplace.<sup>118</sup> For example, land that is primarily used for raising cattle will be appraised differently than the same land if such land produces nontraditional commodities, such as scenic views, wildlife habitat, or open space.<sup>119</sup> Because a conservation easement restricts development on the property and limits future use of the property, it decreases the value of the property.<sup>120</sup> In general, the more development restrictions the conservation easement places on the property, the lower will be the entire property's fair market value.<sup>121</sup> To illustrate, consider the following hypotheticals.

*Hypothetical 1:* Landowner A donates a conservation easement on his 100-acre property, Blueacre, restricting all but residential development on his property. The value of Blueacre at its highest and best use (subdivision) is \$1 million. Because of the conservation easement, however, the fair market value of Blueacre is reduced to \$600,000.

*Hypothetical 2:* Assume the same facts as in Hypothetical 1 except that Landowner A's conservation easement on Blueacre allows both residential development and farming. Because the easement is not as restrictive as in Hypothetical 1, the fair market value of Blueacre is reduced to \$750,000. In Hypothetical 2, Landowner A has placed fewer restrictions on the property, making Blueacre's fair market value post-easement greater than in Hypothetical 1.

A landowner will usually hire an appraiser to value the easement-encumbered property. If the landowner claims a charitable deduction of real property greater than \$5,000, then the landowner must hire a qualified appraiser.<sup>122</sup> The qualified appraiser values the easement for tax deduction

value of the property before the easement is attached and the fair market value of the property after the easement is attached. *Id.*

115. Pub. L. No. 94-455, 90 Stat. 1916 (codified as amended in scattered sections of 26 U.S.C.).

116. Stephen J. Small, *Proper and Improper Deductions for Conservation Easement Donations, Including Developer Donations*, <http://www.privatelandownernetwork.org/plnpro/improperdeductions.asp> (last visited Aug. 21, 2007).

117. BYERS & PONTE, *supra* note 1, at 91. The "fair market value" of property is defined as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." Treas. Reg. 1.170A-1(c)(2).

118. ANELLA & WRIGHT, *supra* note 17, at 97.

119. *Id.*

120. *Id.*

121. BYERS & PONTE, *supra* note 1, at 91. When very restrictive conservation easements are placed on tracts of developable open space in areas of intense development pressure, the easement value will be high; conversely, when conservation easements are placed on land that is not developable, remote, or not subject to development pressure, then the easement value will be low. *Id.*

122. Treas. Reg. §1.170A-13(c)(2).

purposes.<sup>123</sup> The Treasury Regulations define "qualified appraiser"<sup>124</sup> and "qualified appraisal."<sup>125</sup> If a land trust purchases a conservation easement, a qualified appraisal is required when the purchase price is set; if a conservation easement is donated to a land trust, then a qualified appraisal is required when the donor determines his/her tax deductions and other tax subsidies.<sup>126</sup> When a taxpayer claims that the valuation of the easement is 200% or more than what the IRS values the easement, then the taxpayer may be subject to penalties.<sup>127</sup> Additionally, the appraiser may be subject to penalties if he values the conservation easement at 150% or more than the IRS-determined value.<sup>128</sup>

The fair market value of the transferred property on the date of donation is the deductible amount of the conservation easement.<sup>129</sup> In order to determine the property's fair market value, two types of valuation methods may be used: (1) the comparable sales method; and (2) the before and after method. The IRS prefers the comparable sales method, but because of the difficulties employing this method, the before and after method is typically used. Both methods are described in detail below.

## 1. The Comparable Sales Method

The IRS prefers, but does not usually receive, appraisals of conservation easements that are based on valuations of comparable, already appraised, conservation easements.<sup>130</sup> This "comparable sales" method requires the appraiser to use "actual easement sales as comparables."<sup>131</sup> The price of a comparable sale becomes the fair market value of the donated easement.<sup>132</sup> Unforced sales of similarly situated

123. *Id.*

124. A "qualified appraiser" is an individual who holds him/herself out to the public as an appraiser or performs appraisals on a regular basis; is qualified to make appraisals of the type of property being valued (as determined by the appraiser's background, experience, education and membership, if any, in professional appraisal associations); is independent; and understands that an intentionally false or fraudulent overstatement of the value of the appraised property may subject the appraiser to civil penalties. *Id.* §1.170A-13(c)(5)(i). An appraiser who helps prepare or present an appraisal knowing that the appraisal will be used in connection with the tax laws and will result in the understatement of another's tax liability will be subject to disciplinary action. *Id.*

125. A "qualified appraisal" means an appraisal document that, inter alia, (1) relates to an appraisal that is made not earlier than 60 days before the date of contribution of the appraised property and not later than the due date (including extensions) of the return on which a deduction is first claimed under §170; (2) is prepared, signed, and dated by a qualified appraiser; (3) includes (a) a description of the property appraised; (b) the fair market value of the property on the date of contribution and the specific basis for the valuation; (c) a statement that such appraisal was prepared for income tax purposes; (d) the qualifications of the qualified appraiser; and (e) the signature and taxpayer identification number of such appraiser; and (4) does not involve an appraisal fee that violates certain prescribed rules. *Id.* §1.170A-13(c)(3).

126. Pidot, *supra* note 27, at 27.

127. BYERS & PONTE, *supra* note 1, at 92.

128. *Id.*

129. Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 137 (1983).

130. Pidot, *supra* note 27, at 28. This method is referred to as the "comparable sales" valuation method. See also Lindstrom, *supra* note 7, at 38.

131. Lindstrom, *supra* note 7, at 38.

132. 26 C.F.R. §1.170A-14(h)(3)(i).



easement-encumbered property may provide the most relevant evidence of the property's value.<sup>133</sup> For an appraiser to use this method, a "substantial record" of easement sales or donations in the marketplace must exist for comparison.<sup>134</sup> The operation of this method is illustrated by the following example:

*Hypothetical 3:* Landowner M wants to donate a conservation easement on his 50-acre wooded property, Redacre, to Local Land Trust. Landowner M hires Appraiser E to appraise his property. Appraiser E finds a substantial record of comparable 50-acre wooded properties appraised at \$150,000. The appraiser, therefore, appraises the fair market value of Landowner M's conservation easement at \$150,000.

However, this method is difficult to employ for several reasons. First, the specific factors used to value easements are both subjective and objective.<sup>135</sup> Second, appraisers often are unable to locate similar, easement-encumbered property, and, even if they do, easement appraisals typically are not publicly available.<sup>136</sup> Finally, an established conservation easement market typically does not exist for appraisers to use as a source of comparison.<sup>137</sup> A truly comparable property is one "whose *likelihood* of future development is equivalent to that of the property subject to easement."<sup>138</sup> It is insufficient for properties to be physically identical if the potential for future development on such properties is different.<sup>139</sup> Therefore, the appraisers rarely use the comparable sales method.

## 2. The Before and After Method

Because comparable sales by which to measure the fair market value of conservation easements typically do not exist,<sup>140</sup> appraisers generally employ the before and after valuation method.<sup>141</sup> In the "before and after" method, the value

of the easement is the amount by which the fair market value of the property before the imposition of the easement exceeds the fair market value of the property after the imposition of the easement.<sup>142</sup> This may be represented by the formula  $VE = FMVB - FMVA$ , where VE stands for value of conservation easement, FMVB stands for fair market value before easement, and FMVA stands for fair market value after easement.

The highest and best use of the land requires that the appraisal reflect the "most profitable, likely and legal use for the property."<sup>143</sup> The highest and best use of the property must account for the existing use of the property and "an objective assessment" of the possibility that the property may be developed.<sup>144</sup> If the current zoning does not permit a proposed use of the property, but the requisite zoning changes are likely to occur, then the appraised value may reflect the currently impermissible use as the highest and best use of the property.<sup>145</sup> The fair market value must take into account any effect that current zoning, conservation, or historic preservation laws may restrict development of the property.<sup>146</sup> The difference between the value of the unencumbered property and the value of the encumbered property represents foregone costs the landowner incurs because the landowner may not fully develop the property.<sup>147</sup> The value of the conservation easement will determine what amount the donor is eligible to deduct for tax purposes.<sup>148</sup>

*Hypothetical 4:* Landowner B owns Greenacre, an undeveloped 200-acre tract of woodland, with a highest and best use value of \$1,000,000. Landowner B donates an easement with respect to Greenacre to a qualified conservation organization for a qualified conservation purpose. After this donation, Greenacre's value is reduced to \$600,000 because the easement restricts future development

133. See U.S. DEP'T OF JUSTICE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 20 (2000), available at <http://www.usdoj.gov/enrd/land-ack/yb2001.pdf> [hereinafter UNIFORM APPRAISAL STANDARDS]. Such sales are treated as comparable sales. *Id.*

134. Lindstrom, *supra* note 7, at 38 (internal quotations omitted). Marketplace figures of existing easement-encumbered property are used as comparisons. SMALL, *supra* note 99, at 17-6. A substantial record of these marketplace figures must exist for an appraiser to use them for valid and meaningful comparison. 26 C.F.R. §1.170A-14(h)(3)(i).

135. SMALL, *supra* note 99, at 17-6.

136. Pidot, *supra* note 27, at 28.

137. Rudolph & Gosch, *supra* note 110, at 154.

138. RFF Paper, *supra* note 12, at 29. The "comparable sales" approach is useful for estimating income of a property given future development; it is an unhelpful approach for determining the timing of future development. *Id.*

139. *Id.*

140. Madden, *supra* note 129, at 137.

141. Treas. Reg. §1.170A-14(h)(3):

If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting other restriction and the fair market value of the encumbered property after the granting of the restriction.

See Rev. Rul. 73-339, 1973-2 C.B. 68 ("before and after" method to be used in valuing conservation easements); Lindstrom, *supra* note

7, at 38; Pidot, *supra* note 27, at 28. However, "as a result of the donation of a perpetual conservation restriction, the donor or related person receives, or can reasonably expect to receive, financial or economic benefits that are greater than those that will inure to the general public from the transfer, no deduction is allowable under this section." Treas. Reg. §1.170A-14(h)(3).

142. Treas. Reg. §1.170A-14(h)(3). The appraiser typically employs a three-step process, in which the appraiser determines: (1) the value of the property at its highest and best use—what a buyer would be willing to pay for the property at its highest and best use; (2) the value of the property with the conservation easement attached and development rights precluded; and (3) any enhancement value (for example, if the landowner owns contiguous property not subject to the conservation easement). ANELLA & WRIGHT, *supra* note 17, at 98.

143. SMALL, *supra* note 99, at 17-8 (quoting NATIONAL TRUST FOR HISTORIC PRESERVATION & LAND TRUST EXCHANGE, APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF HISTORIC PRESERVATION AND LAND CONSERVATION EASEMENTS 16 (1984)). The property's "highest and best use" is the "most profitable use to which the property could be put without the easement's restrictions." Pidot, *supra* note 27, at 28.

144. 26 C.F.R. §1.170A-14(h)(3)(ii).

145. SMALL, *supra* note 99, at 17-8.

146. 26 C.F.R. §1.170A-14(h)(3)(ii).

147. See McLaughlin, *supra* note 64. "[T]he diminution in value of the subject property" because of the conservation easement becomes the value of the conservation easement. Hutton, *supra* note 9, at 80. Additionally, if the easement enhances the value of other properties the donor owns, such enhancement must be considered as an offset when appraising the subject easement. *Id.*

148. H. Barton Thomas, *Conservation Easements: Tax Facts and Fictions*, 47-MAR Advocate (Idaho) 13, 13 (2004); see also Lindstrom, *supra* note 7, at 38.

of the property.<sup>149</sup> To determine the value of the easement, the “after” value (\$600,000) is subtracted from the “before” value (\$1 million). Therefore, the value of the conservation easement is \$400,000. In other words,  $VE(400) = FVMB(1,000) - FMVA(600)$ .<sup>150</sup>

Various factors are considered to determine the correct amount of income tax savings. These factors include: (1) the length of time the donor has owned the property; (2) previous and current use of the property; (3) the donor’s income; and (4) the value of the donated property.<sup>151</sup>

### B. Problems With Conservation Easement Valuation

Conservation easements are not a typical form of property; they are not frequently or easily traded, they lack substantial resale opportunities, and they do not have homogenous traits.<sup>152</sup> These characteristics create a highly illiquid market for conservation easements.<sup>153</sup> The unconventional nature of conservation easements may create overcompensation problems when landowners donate conservation easements to land trusts.<sup>154</sup> Because there is little, if any, comprehensive comparable market data of easement-encumbered property values, vast speculation exists regarding the different effects of conservation easements on property values.<sup>155</sup> Because the market data does not readily exist to verify donation values, landowners are able to claim inflated deduction values without much recourse.<sup>156</sup> This in turn imposes a scarcity of market prices to confirm donation value and creates the potential for landowners to claim inflated deductions.<sup>157</sup> Additionally, the likelihood of being audited is fairly low.

To obtain a sound appraisal, a landowner should hire a competent, experienced appraiser.<sup>158</sup> However, landowners

typically are motivated by their desire to obtain the highest possible valuation to maximize their potential tax benefits.<sup>159</sup> The IRS does not require that any specific provisions or language be included in conservation easement documents.<sup>160</sup> The lack of uniformity with appraisal standards leads to a lack of uniformity in appraisals.<sup>161</sup> Because there is no uniform standard, and because appraisals are considered by some as “part art and part science,” appraisal results will differ depending on the appraiser’s expertise, experience, and chosen methodology.<sup>162</sup> Unreasonably high appraisal values may attract the attention of the IRS.<sup>163</sup> The easement holder may ask the donor if it can review the appraisal to determine whether the valuation would likely be sustained on an IRS audit.<sup>164</sup> However, the IRS does not require that easement holders review easement documents to ensure proper appraisals. Plus, even if the holder does review the appraisal documents, the landowner is still liable for overvaluation even if the holder assures the landowner that the appraisal was proper.<sup>165</sup>

Conservation easements are meant to ensure that the property under the easement will not be developed or development will be severely limited.<sup>166</sup> The easement restrictions promise that the easement will have significant conservation values and create a public benefit.<sup>167</sup> However, conservation easements are intangible and have value to the extent that their conservation purposes are realized in perpetuity. But easements are appraised in the present, based on present values.<sup>168</sup> Because the easement’s value in perpetuity is not captured in the present value analysis, appraisers must base their appraisal on the property’s current value rather than its future value and benefit. There are few, if any, market comparables with respect to conservation easements.<sup>169</sup> “Appraisers’ speculation about whether zoning or other regulations are going to be changed in the future is a serious problem.”<sup>170</sup> The future value of the property will affect the appraised value and in particular, the easement-encumbered, or “after,” value. The greater the potential for future development on the property, the larger the appraised after value.<sup>171</sup>

The after value is particularly subject to uncertainty when few, if any, comparable properties with similar restrictions exist.<sup>172</sup> The before and after method is often subjective, lacks rigorous, uniform standards,<sup>173</sup> and is subject to infla-

the appraiser, the IRS may require that such payment be considered as income to the donor, as a bargain sale. *Id.*

149. See Lindstrom, *supra* note 7, at 32.

150. Under the Code and Treasury Regulations, Landowner B would be eligible, each year for six years, to deduct the lesser of either 30% of the charitable gift from his AGI or 50% of his contribution base minus any other gifts made to public charities. A “contribution base” is a taxpayer’s adjusted gross income. I.R.C. §170(b)(1)(F). If Landowner B had an AGI of \$500,000, then he would be able to deduct \$150,000 per year for the easement. See Treas. Reg. §1.170A-14(h)(4), ex. 4. \$150,000 is 30% of \$1 million. See I.R.C. §170(b). If Landowner B is unable to deduct the entire \$150,000 in year one, then he may carry forward and deduct the excess amounts each year for the next five years. I.R.C. §170(d).

151. Robert Levin, *Tax Benefits of Donating Conservation Land*, <http://www.privatelandownernetwork.org/plnlo/taxbenefits.asp>. Such factors include: how long the donor has owned the property; how the donor uses the property; how much the donor makes in income; and how much the property is valued. If the property is owned for more than one year, the tax benefits are generally greater. A property owner will generally reap a greater benefit if he has a higher income. Additionally, the greater the property is valued the larger the tax deduction.

152. RFF Paper, *supra* note 12, at 26.

153. *Id.*

154. *Id.* The market cost of a conservation easement is measured by the “before and after” method. McLaughlin, *supra* note 64, at 24-25.

155. SMALL, *supra* note 99, at 17-10.

156. RFF Paper, *supra* note 12, at 26.

157. *Id.* The social cost society bears then becomes greater than the value of the easement. *Id.*

158. BYERS & PONTE, *supra* note 1, at 90. Generally, it is the landowner’s responsibility, the individual donating the property, to obtain a qualified appraisal. *Id.* at 91. If the easement holder, the land trust, pays

159. Pidot, *supra* note 27, at 28.

160. *Id.*

161. *Id.*

162. *Id.* at 29.

163. BYERS & PONTE, *supra* note 1, at 92.

164. *Id.*

165. *Id.*

166. See *supra* notes 11-14 and accompanying text.

167. Pidot, *supra* note 27, at 27-28.

168. *Id.* at 28.

169. Marc Campopiano, *The Land Trust Alliance’s New Accreditation Program*, 33 *ECOLOGY L.Q.* 897, 911 (2006). The difficulties with using market comparables is discussed *supra* Part IV.A.1.

170. Pidot, *supra* note 27 at 29.

171. See BYERS & PONTE, *supra* note 1, at 91.

172. Pidot, *supra* note 27, at 28.

173. *Id.* Appraisals are “an inherently imprecise and often disturbingly subjective process.” RFF Paper, *supra* note 12, at 26.

tion, given the ambiguities related to fair market value.<sup>174</sup> There are three ways in particular which easement values may be inflated: (1) the appraiser may exaggerate the value of the land prior to donation, producing “an unreasonably high ‘before-easement’ value”; (2) the appraiser may overstate “the extent to which the easement would reduce the land’s value, resulting in an unreasonably low ‘after-easement’ value”; or (3) the appraiser may combine the above-mentioned methods in some way to obtain an unreasonably high conservation easement valuation.<sup>175</sup> Appraisals that are based on theoretical subdivision and maximum development of the property may result in the greatest allowable deduction, but generally have a negligible relationship to the property’s value in the marketplace under the current zoning laws and regulations.<sup>176</sup> Therefore, new appraisal standards need to be created, and these new standards should be subject to significant oversight by land trusts and the IRS.

## V. The Need for a Revised Appraisal System

The IRS has identified two primary objectives with respect to the charitable contribution conservation easements: (1) curtail abuse of the Code within tax-exempt and governmental entities; and (2) deter the misuse of these entities by individual taxpayers in order to avoid tax liabilities.<sup>177</sup> One possible way to achieve these objectives is to “restore and reinvigorate” the enforcement presence of the IRS.<sup>178</sup> Currently, the IRS may impose de minimis penalties or revoke an organization’s tax-exempt status if the organization misuses the Code.<sup>179</sup> Such enforcement measures may be inadequate to deter some landowners and appraisers from abusing the Code because there is no enforcement unless the IRS audits the taxpayer, and the chances of an audit are so low that landowners are generally willing to take such a risk. Additionally, problems arise because there is no standard for appraisers to follow when valuing conservation easements. “On the federal level it is possible that the tax benefits for conservation easement donations will be further expanded, and that reform measures, such as tightening appraisal requirements and standards for land trusts may be [sic] also be enacted.”<sup>180</sup> The Joint Committee on Taxation proposed to the U.S. Congress that the IRS disallow all deductions for contributions of conservation easements because of valuation difficulties.<sup>181</sup> As an alternative to no deduction, the Joint Committee on Taxation proposed that the taxpayer’s deduction for a gift of a conservation easement be limited to 33% of the easement’s value.<sup>182</sup> Eliminating the charitable

deduction for conservation easements or severely limiting the taxpayer’s claimed deduction may stem some abuse of the Code, but these actions create a disincentive for landowners to donate conservation easements. Therefore, the IRS should provide a uniform appraisal system and greater oversight of the existing appraisal process. These proposals will have the salutary effect of addressing the concerns of the IRS and the Joint Committee on Taxation while increasing the fairness to taxpayers and ensuring ease of compliance with the Code and its regulations.

### A. Uniform Federal Appraisal Standards

Apart from recognizing that valuation irregularities and abuses occur, the IRS must provide more rigorous and uniform standards to guide landowners, land trusts, and appraisers during the conservation easement valuation process.<sup>183</sup> The IRS highlighted the lack of uniform appraisal standards as an issue that must be addressed.<sup>184</sup> The lack of uniform standards of current appraisal methods create concerns because the methods are: (1) based on questionable conjectures of highest and best use of land; (2) based on the conclusion that the property’s total assets are present; (3) performed without accounting for local zoning laws; and (4) completed with insufficient professional standards.<sup>185</sup>

The U.S. Department of Justice (DOJ) has issued Uniform Appraisal Standards for Federal Land Acquisitions (the Federal Uniform Standards) of private land.<sup>186</sup> The purpose of the Federal Uniform Standards is to promote consistency in appraising real property when federal agencies acquire land through purchase, exchange, or eminent domain.<sup>187</sup> Market value appraisals are the basis for federal land acquisitions, and appraisers must “estimate the value of the land for its highest and best use.”<sup>188</sup> The DOJ’s standards require that an appraiser use the comparable sales approach if the highest and best use of the property is for subdivision purposes.<sup>189</sup> If comparable sales are not available, then the appraiser may use the development approach, which is a very “sensitive and complex method of valuation” that requires sufficient and credible evidence of documentation of potential costs.<sup>190</sup>

Although guidelines and standards exist for federal acquisitions of land, no such standards exist for private property owners to consult when they donate conservation easements on their property. This results in a lack of uniformity with respect to valuing private land donations. Therefore, to

174. Campopiano, *supra* note 169, at 911.

175. *Id.* at 911-12 (citing Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, 18 PROB. & PROP. 40, 44 (2004)).

176. Pidot, *supra* note 27, at 28. The current zoning regulations or ordinances may already restrict development, making such valuation methods even more illogical. *Id.*

177. Everson Testimony, *supra* note 6.

178. *Id.*

179. Mark W. Everson, Comm’r, IRS, Remarks at the Greater Washington Society of CPAs (Dec. 14, 2005).

180. Lindstrom, *supra* note 7, at 57.

181. *Charities and Charitable Giving: Proposals for Reform: Hearing Before the Senate Comm. on Finance*, 109th Cong. (2005) (testimony of George K. Yin, Chief of Staff, Joint Committee on Taxation), available at <http://www.house.gov/jct/x-14-05r.pdf> [hereinafter Yin Testimony].

182. *Id.*

183. See Pidot, *supra* note 27, at 29.

184. Steven T. Miller, Comm’r, IRS, Tax-Exempt and Gov’t Entities Div., Remarks at the Spring Public Lands Conference (Mar. 28, 2006), available at [http://www.irs.gov/pub/irs-tege/miller\\_speech\\_3\\_28\\_06.pdf](http://www.irs.gov/pub/irs-tege/miller_speech_3_28_06.pdf).

185. *Id.*

186. UNIFORM APPRAISAL STANDARDS, *supra* note 133.

187. *Id.* at 1.

188. *Id.* at 19.

189. *Id.*

190. *Id.* at 45. The evidence includes intra alia a detailed development plan for the property, a time lag estimate between the date of appraisal and the date the subdivision would be approved, an estimate of the developer’s expected profit, and the appropriate discount rate. *Id.* The development approach is used to determine the value of undeveloped land by determining the total number of lots into which the property could best be divided and deducting all costs of development, including developer’s profit. *Id.* at 44.



make the appraisal process more uniform, the IRS should create a sliding Appraisal Scale. The Appraisal Scale would list the conservation purposes that the easement seeks to preserve in a grid-like format; it would account for both geographic differences and differences in the unique nature of the property. The series of grids would be separated by geographic region, by nature of the property, and by the conservation purpose a landowner seeks to conserve. The values within the Appraisal Scale would be the value of the conservation easement, which is also the amount that the landowner may claim as a charitable contribution deduction.

For example, consider two landowners who wish to donate conservation easements on their 200-acre properties in Montana; both properties are pastureland and are similar in nature. One landowner will allow ranching whereas the other landowner will only allow one residential structure on the property. Both landowners hire a qualified appraiser to value their property. The appraiser would use the Appraisal Scale's grid for 200-acre properties of pastureland in Montana. The grid, subdivided by conservation purpose, would provide a range of values for conservation easements that allow ranching and those that only allow residential development.

The Appraisal Scale would also account for the differences between landowners who live in coastal Maine and donate conservation easements on their properties; both landowners seek to preserve wildlife habitat, but one landowner's property is on the hillside whereas the other landowner's property is comprised of rolling pastures. Both landowners hire a qualified appraiser to value their easement-encumbered property. Similar to the example above, the appraiser would use the Appraisal Scale's grid that values coastal Maine properties with a conservation purpose of preserving wildlife habitat. The appraiser would then determine the range of values for properties located on hillsides and for properties of rolling pastures.

Federal agencies, particularly the IRS, and land trusts would work together to create the initial Appraisal Scale, subject to public comment. The agencies and land trusts would use the Federal Uniform Standards, the Real Estate Appraisal Standards and Guidance, and the Federal Real Property Appraisal Standards as guidance documents for creating the Appraisal Scale.<sup>191</sup> The Appraisal Scale would have a built-in flexibility mechanism to enable the appraisals to change in response to unforeseen circumstances.

This new program requires an individual to manage and direct it. Therefore, a national Attorney General for charity and a conservation easement appraisal committee would have primary oversight of the sliding Appraisal Scale program. The program also would provide landowners with a list of qualified appraisers located throughout the country. The qualified appraisers would report to, and be subject to training or continuous education or certification by this national Attorney General for charity. Because the IRS has typically not audited conservation easement do-

nations,<sup>192</sup> both the national Attorney General and the oversight committee should be located within the DOJ. This scale would provide greater uniformity in appraising conservation easements.

### *B. Greater Oversight Authority*

The Appraisal Scale is the first step toward discouraging abuse of the tax laws through valuation of conservation easements. In addition to more uniform appraisal standards, greater oversight of the appraisal process is also necessary to curb potential abuse and ensure the continuation of the charitable contribution deduction program. Just as the Federal Uniform Standards can be used as a model for the Appraisal Scale, they also can be used as a model for better oversight and review of appraisals once qualified appraisers value the donor's property.

Under the Federal Uniform Standards described above, a "qualifying reviewing appraiser" must review all appraisals before the government approves or recommends approval of the appraisal as adequate and just compensation for acquiring private lands.<sup>193</sup> The reviewing appraiser determines whether adequate documentation supports the appraisal, whether the appraisal adheres to the Federal Uniform Standards, and whether the appraisal conforms with established appraisal standards and principles.<sup>194</sup>

Because land trusts are publicly supported charitable organizations, the IRS, state regulators, and the public have general oversight authority of their activities.<sup>195</sup> However, such oversight is minimal at best, and rarely are the land trust's activities reviewed.<sup>196</sup> Until federal and state regulatory agencies improve their enforcement presence, increased oversight of the appraisal process should originate within the land trust organization.

Appraisers who know that the federal government will scrutinize and review their valuation techniques may be less likely to overstate the value of a particular property.<sup>197</sup> Some scholars argue that making the amount of tax subsidy the landowner receives publicly available would be beneficial to the political process,<sup>198</sup> and it may discourage abusive easement donations. However, critics fear that making easement appraisals public will discourage landowners from donating easements.<sup>199</sup> To ameliorate this concern, proprietary information would be redacted from the appraisal documents and the holder land trust would keep all documents on file, subject to inspection by appraisers with appropriate credentials and the IRS. The land trust would provide an additional safeguard for the donor landowner.

Because land trusts have the responsibility to monitor and enforce the easements granted to them, if an appraisal value seems unreasonable or overvalued, then the land trust should refuse to accept the easement until the easement is correctly appraised.<sup>200</sup> Although overvaluation directly af-

191. See, e.g., U.S. Fed. Highway Admin., Dep't of Transp., *The Appraisal Guide*, <http://www.fhwa.dot.gov/realestate/oldapprgd.htm> (last modified Dec. 22, 2006); U.S. OFFICE OF THRIFT SUPERVISION, DEP'T OF TREASURY, REAL ESTATE APPRAISAL, EXAMINATION HANDBOOK 208 (2004), available at <http://www.ots.treas.gov/docs/4/422023.pdf>; U.S. Fish & Wildlife Serv., Dep't of Interior, *U.S. Fish and Wildlife Service Manual: Appraisal*, 342 FW 1 (Aug. 18, 1993), available at <http://www.fws.gov/policy/342fw1.html>.

192. Campopiano, *supra* note 169, at 912.

193. UNIFORM APPRAISAL STANDARDS, *supra* note 133, 70.

194. *Id.*

195. McLaughlin, *supra* note 64, at 61.

196. *Id.*

197. *Id.*

198. Pidot, *supra* note 27, at 30.

199. *Id.* at 31.

200. *Id.* at 30.

fects the taxpayer,<sup>201</sup> it directly affects land trusts if it leads the IRS to limit or expunge the conservation easement program from the tax laws. Limiting the conservation easement program may create a disincentive for some landowners to donate conservation easements to land trusts. This, in turn, may result in less land preserved; land preservation is the primary mission of land trusts.<sup>202</sup> However, requiring a land trust to reject a proposed conservation easement donation because of overvaluation may create conflict of interest issues because land trusts fulfill their purpose by accepting easements.<sup>203</sup> Plus, the land trust may not know or have reason to know that an appraisal is unreasonable. Therefore, the land trust should be responsible for reviewing an appraisal before accepting the conservation easement, but it should not be held accountable for the accuracy of the appraisal.<sup>204</sup>

Greater oversight of appraisals could increase the regulatory burden on public charities.<sup>205</sup> This burden may inhibit the activities of small charities that do not have a substantial resource base and discourage the creation of new charitable organizations. Although this is a viable concern, there must be greater oversight of the current practices of land trusts.

Therefore, an independent body should be responsible for oversight of appraisals. Because subjectivity plays a large part in appraising conservation easements, a neutral party should review all appraisals for accuracy<sup>206</sup>; a separate committee within the IRS could comprise this independent body. As a preparatory tool, the IRS must train more agents to assess the value and operation of easements to ensure that the conservation purposes are realized in perpetuity. Because appraiser abuse does exist, the IRS should be responsible for appraising property initially or providing a second appraisal before an easement is attached. These secondary appraisals would be similar to audits that the IRS conducts. Currently, the IRS has 48 appraisers, 20 of whom work completely or in part on §170(h) issues.<sup>207</sup> Resources should be directed to hiring more appraisers within the IRS to either appraise the proposed easement initially or provide a second opinion after a private appraiser values the property. Given an assumed salary of \$38,650 on the federal government pay scale,<sup>208</sup> hiring 100 more appraisers would cost the government \$3.865 million in annual salaries.

Without greater oversight to help curb the potential for appraisal abuse, the IRS may eliminate the charitable contri-

bution program with respect to donating conservation easements. To ensure that this environmentally and economically beneficial program continues in the future, adoption of these proposals for greater oversight by both land trusts and the IRS is essential.

### C. Education of New Policy

The IRS must continue to educate individual taxpayers, their advisors, appraisal professionals, and charitable organizations, particularly land trusts, with respect to any new policy.<sup>209</sup> Educational outreach may include distributing pamphlets and brochures to land trusts and appraisers. These outreach materials should describe the new sliding Appraisal Scale and outline its methodology. Additionally, the IRS should provide links on its website<sup>210</sup> to the Appraisal Scale so both land trusts and appraisers have easy access to the guidelines.

## VI. Policy Implications and Further Issues

Lenient appraisal standards and lax oversight could lead to stricter IRS standards and diminished charitable contribution deductions. “[W]here the primary motivation is to use the tax benefits relating to conservation easements as a tax shelter without serious concern for land conservation, the IRS has raised the stakes,” and the IRS may “challenge deductions for easements providing marginal public benefit, or where easement values strain credulity.”<sup>211</sup> Appropriate easement valuations ensure that the public receives a social and environmental benefit proportionate to the economic benefit the donor receives.<sup>212</sup>

As stated in Part III, property owners have an incentive to make inflated claims of reduced property values,<sup>213</sup> and land trusts have little incentive to be concerned with the donor’s claimed charitable contribution.<sup>214</sup> Although land trusts currently have no incentive to scrutinize the valuation of a conservation easement, some land trusts have undertaken to require uniformity in the appraisals of the easements they accept. For example, in 2005, the Land Trust Alliance<sup>215</sup> formulated a new accreditation program to certify individual

201. The landowner may be audited and subject to penalties as a result of an overvalued appraisal.

202. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 12 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

203. For greater detail on the role of land trusts, see *supra* Part II.B.

204. See Pidot, *supra* note 27, at 30.

205. OMB Watch, *Update: Senate Finance Committee and Nonprofit Legislation*, <http://www.ombwatch.org/article/articleview/2868/1/84?TopicID=2> (last visited Aug. 22, 2007).

206. See Campopiano, *supra* note 169, at 912.

207. *The Tax Code and Land Conservation: Hearing Before the Senate Comm. on Finance*, 109th Cong. (2005) (statement of Steven T. Miller, Comm’r, IRS, Tax-Exempt and Gov’t Entities Div.), available at <http://www.irs.gov/pub/irs-tege/smtest060805.pdf>.

208. An IRS agent earns an annual salary that is between \$30,747 (on a Grade 5, Step 1) and \$46,552 (on a Grade 7, Step 10). U.S. Office of Personnel Mgmt., *Special Salary Rate Table*, [http://apps.opm.gov/ssr/tables/index.cfm?action=all\\_title\\_5\\_tables](http://apps.opm.gov/ssr/tables/index.cfm?action=all_title_5_tables) (last visited Aug. 22, 2007). A salary of \$38,650 is the average of \$30,747 and \$46,552.

209. The IRS has recognized the need for greater outreach and publication of its practice. Everson Testimony, *supra* note 6.

210. U.S. Dep’t of Treasury, *Internal Revenue Service Homepage*, <http://www.irs.gov/> (last visited Aug. 22, 2007).

211. Lindstrom, *supra* note 7, at 57. One recent congressional report argued for lowering the amount a landowner may deduct when donating a conservation easement to one-third of the easement’s appraised value. See Pidot, *supra* note 27, at 30; Yin Testimony, *supra* note 181. Currently, the appraised value can range from 10% to over 90% of the property’s unrestricted fair market value. BYERS & PONTE, *supra* note 1, at 91.

212. Campopiano, *supra* note 169, at 911.

213. Overvalued conservation easements enable landowners to reap a greater possible charitable contribution deduction under the tax laws.

214. RFF Paper, *supra* note 12, at 26. The potential to preserve property against future development may “outweigh long-term costs associated with increased government scrutiny.” *Id.* at 34.

215. The LTA is the umbrella organization for land trusts whose purpose is to support land trusts and strive to improve “the quality and pace of land conservation by land trusts and their partners.” LAND TR. ALLIANCE, *STRATEGIC PLAN 2004-2008* (2003), available at [http://www.lta.org/aboutlta/strategic\\_plan.doc](http://www.lta.org/aboutlta/strategic_plan.doc); see also Campopiano, *supra* note 169, at 897.

land trusts.<sup>216</sup> Under this program, an accreditation commission grants land trusts certifications and ensures compliance with the program.<sup>217</sup> Although the accreditation program strives to bring accountability and uniformity within the operation and practices of land trusts themselves, it does little, if anything, with respect to appraisal methods for valuing conservation easements. Additionally, the accreditation program does not have mandatory compliance criteria; rather, it only requires “substantial compliance.”<sup>218</sup>

Some safeguards against overvaluation of conservation easements do exist in the law. For example, the Pension Protection Act of 2006<sup>219</sup> imposes accuracy-related penalties on a taxpayer who claims a deduction for donated property for which a qualified appraisal is required. The reform package doubles the amount of excise taxes applicable to certain activities by charities, social welfare organizations, private foundations, and exempt organization managers regarding, *inter alia*, charitable contributions. The reform package also lowers the threshold for imposing accuracy-related penalties on a taxpayer who claims a deduction for donated property for which a qualified appraisal is required.<sup>220</sup>

Additionally, appraisers must be certified and may not base their fees contingent upon the value of the conservation easement.<sup>221</sup>

## VII. Conclusion

Society as a whole benefits when individual landowners donate conservation easements to land trusts. Without the con-

servation easement program, nearly 1,000 acres in the town of Durham, New York, located in the northern Catskill Mountains, would be ripe for development. However, because of the efforts of the Durham Valley Land Trust, The Catskill Center for Conservation and Development, the Albany County Land Conservancy, and the Cornwallville Conservation Corporation, which a group of landowners formed in the 1960s, the pastoral fields, hay fields, streams, scenic ridgeline, and associated wetlands will be protected in perpetuity.<sup>222</sup>

Tax incentives encourage landowners to donate conservation easements on environmentally significant property. The more land under easement, the fewer acres subject to development and the pressures of sprawl. The outdoor recreation and conservation community<sup>223</sup> reached out to Congress to express its adamant support of conservation easements as a voluntary land preservation tool.<sup>224</sup> These conservation organizations recognized that the U.S. Senate Finance Committee should stop potential abuse of tax law but implored the committee to keep the tax incentives because such incentives encourage landowners to protect and preserve public environmental purposes that Congress intended to protect.<sup>225</sup> By creating an Appraisal Scale and providing greater oversight of the appraisal process, the IRS can help curb potential abuse of the tax laws and ensure that landowners continue to donate conservation easements on their properties in perpetuity.

216. See generally Campopiano, *supra* note 169; see also LTA, A MESSAGE ON LAND TRUST ACCREDITATION AND TRAINING (2005), available at [http://www.landtrusts.org/sp/acc\\_lta\\_brochure.pdf](http://www.landtrusts.org/sp/acc_lta_brochure.pdf).

217. Campopiano, *supra* note 169, at 914. The goals of the program include: (1) showing the public that “land trusts are doing a credible, responsible job”; (2) ensuring that land held by land trusts will be preserved in perpetuity; (3) “building strong land trusts”; (4) publicly stating that “land trusts must meet accepted standards”; and (5) preventing government from withdrawing tax incentives or interfering with land trust work. *Id.* at 913.

218. *Id.* at 921 (internal quotations omitted).

219. Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

220. *Id.* An extensive discussion of the Pension Protection Act and its provisions is beyond the scope of this Article.

221. RFF Paper, *supra* note 12, at 34.

222. LTA, *Land Trust Success Stories: Northeast*, [http://www.lta.org/regionallta/s\\_ne.htm](http://www.lta.org/regionallta/s_ne.htm) (last visited Aug. 22, 2007).

223. The Conservation Organizations included the following: American Farmland Trust; American Fisheries Society; American Fly Fishing Trade Association; American Land Conservancy; American Rivers; BASS/ESPN Outdoors; Berkeley Conservation Institution; Campfire Club of America; Ducks Unlimited; International Association of Fish and Wildlife Agencies; International Hunter Education Association; Izaak Walton League of America; LTA; National Trappers Association; National Wildlife Federation; Outdoor Industry Association; Pope & Young Club; Rocky Mountain Elk Foundation; The Nature Conservancy; The Theodore Roosevelt Conservation Partnership; Trout Unlimited; Trust for Public Land; Wildlife Forever; and The Wildlife Society.

224. See Letter from Conservation Organizations, to Sen. Charles Grassley (R-Iowa), Chairman, Senate Comm. on Finance and Sen. Max Baucus (D-Mont.), Ranking Member, Senate Comm. on Finance (June 20, 2005), available at [http://www.nature.org/pressroom/files/owaa\\_letter.pdf](http://www.nature.org/pressroom/files/owaa_letter.pdf).

225. *Id.*