

# The Evolution of Land Trust Responsibilities in Reviewing Conservation Easement Appraisals

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## Abstract

More than 37.9 million acres of land in the United States are protected by conservation easements. This is an area greater than the combined size of New Hampshire, Vermont, Massachusetts, and Connecticut. Much of that acreage has been protected through the charitable donation of the conservation easement to a land trust or a public agency and supported by a “qualified appraisal” signed by a “qualified appraiser” in compliance with Internal Revenue Service (IRS) regulations. This article explores the evolution of land trust standards for the review of those supporting appraisal reports in light of IRS and US Senate concerns related to overvaluation of conservation easements and abusive tax shelter transactions. The article concludes with a checklist of the questions land trusts could ask when reviewing the appraisals to ensure the appraisals meet the minimum information and content required by IRS regulations and appraisal profession standards.

## Introduction: Conservation Easements and the Land Trust Movement

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Land trusts and public agencies in the United States hold more than 220,000 conservation easements protecting about 37.9 million acres of land.<sup>1</sup> Most, but not all, of that protection has resulted from the charitable donation of the partial interest in real property represented by the components of the bundle of rights transferred from the fee owner to the land trust in the recorded conservation easement document. The acreage protected by those conservation easements is greater than the combined land and water area of the states of New Hampshire, Ver-

mont, Massachusetts, and Connecticut. In some states—Virginia, for example—almost 5% of the entire land area of the state is now protected by conservation easements.

Acreage protected by conservation easements has grown exponentially since the late 1970s, when Congress first enacted legislation allowing a charitable deduction for the donation of partial interests in land to qualifying governmental agencies and qualifying nonprofit organizations when the donation is intended to protect lands with significant conservation, open space, or scenic character.<sup>2</sup> Much of that land is protected by conservation easements held by state and local land trusts. By 1988, acreage protected by

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1. National Conservation Easement Database, Ducks Unlimited, and The Trust for Public Lands, accessed September 8, 2023, [www.conservationaleasement.us/](http://www.conservationaleasement.us/).

2. Prior to 1976, federal tax laws made it difficult to donate an easement and receive a deduction for a charitable contribution. Amendments to the Internal Revenue Code in 1969 limited the charitable deduction involving real property—with only a few exceptions—to situations in which the donation involved the taxpayer’s entire interest in the property. The Tax Reform Act of 1976 contained a provision that modified the charitable donation rules to allow a charitable contribution deduction for a “lease ..., option to purchase, or easement” to a qualifying organization “exclusively for conservation purposes.” IRC § 170(f)(3)(B)(iii).

conservation easements held by local and regional land trusts had grown to 300,000 acres. By the year 2000, land trust easements were in place protecting 2.5 million acres and by 2015 had increased to 16.7 million acres.<sup>3</sup> The most recent 2020 analysis indicates that more than 20.2 million acres of land are protected by conservation easements held by the more than 1,280 active state and local land trusts.<sup>4</sup>

### Appraisals and Conservation Easements

The real estate appraisal profession has long played a critical role in the history of the land trust movement to protect significant scenic land, natural habitat, and open space. A charitable donation of a conservation easement must be supported by an appraisal of the easement value. A limited number of appraisers were involved in the 1930s in the valuation of less-than-fee interests acquired by the National Park Service to protect the scenic character of the Blue Ridge Parkway and the Natchez Trace Parkway, and in the 1950s and 1960s in conservation easement acquisition programs in Wisconsin to protect the Great River Road, in Minnesota and the Dakotas to protect wetlands important to migratory waterfowl flyways, and in New York State to protect

fishing streams.<sup>5</sup> However, little was published between the 1930s and 1970s in the appraisal literature related to the appropriate techniques for the appraisal of such easements.

That changed dramatically in the late 1970s and early to mid 1980s in the wake of a series of changes to the Internal Revenue Code resulting from congressional legislation authorizing charitable deductions for the donation of partial interests in properties including conservation easements donated in perpetuity.<sup>6</sup> Articles began to appear on a regular basis in *The Appraisal Journal*,<sup>7</sup> and conservation and historic preservation groups joined with the American Bar Association to hold annual legal continuing education programs focused (in part) on appraisal issues involved in supporting conservation easement donations. In addition, the US Fish and Wildlife Service published a report on the effect of wetland conservation easements on land values in the Dakotas and Minnesota,<sup>8</sup> and the appraisal profession and the land trust movement jointly published a booklet titled *Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements*.<sup>9</sup>

Despite this increasing attention of the appraisal profession on how to value conservation ease-

3. Land Trust Alliance, *2015 National Land Trust Census Report* (November 2016), 5, available at <https://bit.ly/3ZkFxJs>.

4. "Gaining Ground," Demographics, Land Trust Alliance website, accessed September 15, 2023, <https://bit.ly/3ZkykZT>. The information collected by the Land Trust Alliance does not include the number of historic buildings protected by historic preservation easements. Donation of conservation easements on historic buildings individually listed in the National Register of Historic Places or within districts listed in the National Register also qualifies for a charitable donation under the income tax code. When conservation easements held by governmental entities, as distinct from nonprofit land trusts, are also counted, the total protected acreage exceeds 37 million acres as discussed earlier.

5. For more information on these early easement acquisition programs, see Richard J. Roddewig and Charles T. Brigden, *Appraising Conservation and Historic Preservation Easements*, 2nd ed. (Chicago: The Appraisal Institute, 2020), 9, citing William H. Whyte's seminal book, *The Last Landscape*.

6. The sequence of legislation resulting in this change included the Tax Reform Act of 1976, additional legislation in 1977, and the Tax Treatment Extension Act of 1980. The latter required that conservation easements be donated in perpetuity to be deductible.

7. See, for example, Judith Reynolds, "Preservation Easements," *The Appraisal Journal* 44, no. 3 (July 1976): 355; Ralph Brown and Jerome Schmitz, "Appraising Wetland Easements," *The Appraisal Journal* 46, no. 2 (April 1978): 175; Jared Shlaes and Richard J. Roddewig, "Appraising the Best Tax Shelter in History," *The Appraisal Journal* 50, no. 1 (January 1982): 25; Lawrence J. Golicz, "Historical Façade Easements: The Impact of Future Costs," *The Appraisal Journal* 51, no. 1 (January 1984): 9; Richard J. Roddewig and Jared Shlaes, "Preservation Easements Reconsidered: An Alternative Approach to Value," *The Appraisal Journal* 52, no. 3 (July 1984): 325; and Max J. Derbes Jr., "Façade Easement Valuation Methodology," *The Appraisal Journal* 56, no. 1 (January 1988): 60. One earlier *Appraisal Journal* article appeared in the 1960s that was also influential: Howard Williams and W. D. Davis, "Effect of Scenic Easements on the Market Value of Real Property," *The Appraisal Journal* 36, no. 1 (January 1968): 15. See also William F. Cantrell, "Scenic Easements: Evaluation Considerations," *The Real Estate Appraiser and Analyst* 49, no. 2 (Summer 1983): 61.

8. Ralph J. Brown, *Measuring the Impact of Wetland Easements on Land Values in North Dakota, South Dakota and Minnesota* (internal report prepared for the US Fish and Wildlife Service by Economic Analysts and Associates, Vermillion, SD, 1984).

9. National Trust for Historic Preservation in the United States and the Land Trust Exchange, *Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements* (Washington, DC: Preservation Press, 1984).

ments, and perhaps because of that attention, the Internal Revenue Service (IRS) became concerned with the quality of the appraisal reports it was seeing in its reviews of tax returns showing a charitable deduction for the donation of a conservation restriction. The IRS filed a series of challenges to the values in conservation easement appraisals beginning in the late 1970s.<sup>10</sup> To better ensure the quality and essential content of such appraisal reports, the Tax Reform Act of 1984 included language requiring every charitable donation of a conservation easement with a value in excess of \$5,000 to be supported by a “qualified appraisal” report completed by a “qualified appraiser.”<sup>11</sup>

The 2020 text *Appraising Conservation and Historic Preservation Easements*, published by the Appraisal Institute in conjunction with the Land Trust Alliance, summarizes the qualified appraisal content requirements as follows:

#### The Qualified Appraisal

For an appraisal report to be “qualified,” it must at a minimum contain the following content:

- A description of the property in sufficient detail,
- A description of the physical condition of the property,
- The date or expected date of the charitable donation,
- A summary of the terms of any agreement between donor and donee relating to the use, sale, or disposition of the property,
- The name, address, and taxpayer identification number of the qualified appraiser and of the appraiser’s employer,

- A summary of the appraiser’s qualifications including background, experience, education, and any membership in professional appraisal organizations,
- A statement that the appraisal was prepared for income tax purposes,
- The date on which the property was appraised,
- The appraised fair market value of the easement on the date of donation,
- The method of valuation used to determine fair market value of the easement,
- The specific basis for the valuation, e.g., comparable sales used, “before and after” method, statistical sampling, subdivision development analysis, and
- A description of the fee arrangement between the donor and appraiser.<sup>12</sup>

Despite the addition of those requirements, the IRS continued to have concerns about the quality of the qualified appraisal reports it was receiving and continued to file lawsuits between the mid-1980s and the late 1990s challenging the valuation conclusions in those reports.<sup>13</sup> However, potential easement valuation abuse was not a significant topic in the news media during the 1980s and 1990s; it was a significant topic of concern only among those involved in the conservation and historic preservation easement field.<sup>14</sup>

Public interest in conservation easements and their possible overvaluation surged in the early 2000s as a result of a series of investigative journalism articles in the *Philadelphia Inquirer*, *Washington Post*, *Denver Post*, and other media outlets alleging abuses in various conservation easement

10. See, for example, *Thayer v. Commissioner*, T.C. Memo 1977-370; *Akers v. Commissioner*, T.C. Memo 1984-490; and *Todd v. United States*, 617 F. Supp. 253 (D.C. Pa. 1985).

11. Although the terms *qualified appraisal* and *qualified appraiser* were added to the tax code in 1984, it was not until the Treasury Department later issued implementing regulations that the minimum content of a “qualified appraisal” was clearly set forth. The regulations related to those terms could be found at Treas. Reg. §1.170A-13(c) (3) and (c)(5) until July 30, 2018, and are now at §1.170A-17(a) and (b).

12. Roddewig and Brigden, *Appraising Conservation and Historic Preservation Easements*, 2nd ed., 39–40.

13. See, for example, *Symington v. Commissioner*, 87 T.C. No. 59 (1986); *The Stanley Works and Subsidiaries v. Commissioner*, 87 T.C. No. 22 (1986); *Chester Fannon v. Commissioner*, T.C. Memo 1986-572, modified and remanded on appeal, 842 F.2d 1290 (4th Cir., March 11, 1988); *Stotler v. Commissioner*, T.C. Memo 1987-275; *David Fannon v. Commissioner*, T.C. Memo 1989-136; *Higgins v. Commissioner*, T.C. Memo 1990-602; *Schapiro v. Commissioner*, T.C. Memo 1991-128; *Dennis v. United States*, 1992 WL 330398 (E.D. Va 1992), 92-2 USTC ¶50,948; *McLennan v. United States*, [91-1 USTC ¶50,230], 23 Cl. Ct. 99 (1991) and [91-2 USTC ¶50,447], 24 Cl. Ct. 102 (1991), *aff’d*, [93-1 USTC ¶50,345], 994 F.2d 839 (Fed. Cir. 1993); *Clemens v. Commissioner*, T.C. Memo 1992-436; *Schwab v. Commissioner*, T.C. Memo 1994-232; *Johnston v. Commissioner*, T.C. Memo 1997-475, 74 TCM 968 (1997); and *Browning v. Commissioner*, 109 T.C. No. 16 (1997).

14. For example, some in the land use law field argued that protecting land through perpetual conservation easements in the absence of some type of coordinated state or local plan for what lands should and should not be protected is a “serious” problem that results in “dumb growth” rather than “smart growth” in the right places, and that nonprofit land trusts face “daunting enforcement challenges” due to the perpetuity requirement that will inevitably get worse over time. John D. Echeverria, *Skeptic’s Perspective on Voluntary Conservation Easements*, Georgetown Environmental Law & Policy Institute (August 31, 2005): 1–4, available at <https://bit.ly/3PUGmEP>.

programs. The alleged abuses included board member conflicts of interest, faulty appraisals, and inappropriate use of the charitable donation of easement deduction by members of Congress.<sup>15</sup> Those news stories resulted in investigations into alleged easement program abuses by congressional committees and by state legislative committees in Colorado and South Carolina. Those investigations in turn led to additional news stories and enforcement actions by the IRS<sup>16</sup> as well as to new legislation and additional regulations by the US Department of the Treasury.

The results were easement provisions in the Pension Protection Act of 2006 and new regulatory guidance from the IRS related to the required content of a “qualified appraisal” and who could be considered a “qualified appraiser.” The appraisal requirements added by notice and regulation included the following:

- A requirement that the appraisals be prepared in accordance with generally accepted appraisal standards and in accordance with any regulations or other guidance issued by the Secretary of the Treasury.<sup>17</sup>
- Inclusion in the appraisal of a declaration that “because of the appraiser’s background, experience, education, and membership in professional associations, the appraiser is qualified to make appraisals of the type of property being valued.”<sup>18</sup>
- Inclusion of a statement in the appraisal acknowledging that a “substantial or gross valuation misstatement” may subject the appraiser to a civil penalty.<sup>19</sup>

Also added by regulation were requirements for the timing of the appraisal report completion.<sup>20</sup> To be a “qualified appraisal,” the report could not be prepared *any earlier* than 60 days *before* the date of donation of the conservation or historic preservation easement, nor any later than the date on which the taxpayer filed the federal

income tax return (with extensions) for the year in which the charitable donation was made.

### **Land Trust Appraisal Review Standards Prior to 2015**

Even before the media reports in the early 2000s, some in the land trust community had developed standards and practices related to a review of “draft” and final easement appraisals as part of the process for accepting conservation easement donations. The Land Trust Alliance, the umbrella educational and public policy organization for the land trust community with more than 950 land trust members, adopted its first set of standards and guidelines for responsible operation of its member organizations in 1989 and updated and revised those guidelines in 1993, 2001, and 2004. Standard 10 of the 2004 version was titled “Tax Benefits,” and paragraph B dealt with land trust responsibilities related to easement appraisals as follows:

B. Appraisals. The land trust informs potential land or easement donors (preferably in writing) of the following: IRC appraisal requirements for a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than \$5,000, including information on the timing of the appraisal; that the donor is responsible for any determination of the value of the donation; that the donor should use a qualified appraiser who follows Uniform Standards of Professional Appraisal Practice; that the land trust will request a copy of the completed appraisal; and that the land trust will not knowingly participate in projects where it has significant concerns about the tax deduction.<sup>21</sup>

Paragraph C of the 2004 Standard 10 then warned that the review by the land trust of the transaction and the appraisal supporting it “does not make assurances as to whether a particular land or easement donation will be deductible, what monetary value of the gift the IRS and/or

15. For a detailed discussion of these newspaper investigations, see Roddewig and Brigden, *supra*, 18–22.

16. See Roddewig and Brigden, *Appraising Conservation and Historic Preservation Easements*, 2nd ed., 22–23, for a discussion of the state, federal, and IRS investigations.

17. See IRC §170(f)(11)(E)(i) and IRS Notice 2006-96.

18. See IRS Notice 2006-96, Section 3.03(2).

19. IRS Notice 2006-96, Section 3.04(2).

20. Treas. Reg. §1.170A-17(a)(5)(ii).

21. Land Trust Alliance, *Land Trust Standards and Practices* (Washington DC: Land Trust Alliance, 2004), 12, available at <https://bit.ly/3EXM3MQ>.

state will accept, what the resulting tax benefits of the deduction will be, or whether the donor's appraisal is accurate."<sup>22</sup> However, paragraph D went on to state that "if the land trust has significant reservations about the value of the gift, particularly as it may impact the credibility of the land trust, it may seek additional substantiation of value or may disclose its reservations to the donor."<sup>23</sup> That language meant land trusts had a responsibility to somehow review the appraisal and its conclusions.

But that language created a potential dilemma for many land trusts. How far should a land trust go in reviewing the appraisal? Should it simply have a checklist to make sure that the various technical qualified appraisal requirements (summarized earlier in this article) were met? Or should it also somehow check the accuracy of the valuation conclusion itself? If so, how? Should it actually have an experienced real estate professional, preferably an appraiser, review the appraisal report and somehow sign off on its accuracy?

As a result of those issues, land trust practices related to appraisal reviews have varied widely. Most require that the easement appraisal be submitted well before the date when the easement was to be recorded. Some land trusts added real estate appraisers to their board of trustees and tasked them with reviewing the appraisals. Other land trusts retained appraisers as necessary to review the appraisal reports and respond to the appraiser hired by the landowner with any comments and concerns. Other land trusts developed their own lists of real estate appraisers whom they considered to have the education, experience, and competency to meet the tax code definition of a *qualified appraiser* experienced in preparing such appraisal reports. A key consideration in making a list of approved appraisers was whether their prior conservation easement appraisal reports had been accepted by the IRS. Land trusts

with such lists of appraisers would provide the list to the prospective donee and let the landowner/taxpayer select the one to undertake the work.

So at a minimum, land trusts attempting to comply with the 2004 Standard 10 appraisal language simply checked whether the appraisal report had the language indicating compliance with the qualified appraisal and qualified appraiser requirements in the tax code. If the report did not, the land trust would ask the appraiser to amend the report before the donation was accepted by the land trust and the easement document recorded.

Whether that minimum level of appraisal review was enough, however, came into question within the land trust community as a result of actions by the IRS after 2015 related to syndicated conservation easements and the appraisals supporting them.

### **Syndicated Conservation Easement Donations and Material Advisors in Listed Transactions**

In 2016, the IRS noticed a significant increase in the number of individual tax returns claiming a charitable deduction for the donation of a conservation easement. An IRS review of 2015 tax-year returns identified 169 syndicated partnerships in which the partners were claiming a share of a charitable deduction of the value of a conservation easement.<sup>24</sup> In tax year 2016, the IRS identified an additional 249 conservation-related syndicated partnerships. IRS staff review appraisers became concerned about the content of many of the appraisal reports supporting those syndications.

As a result of those concerns, the Treasury Department issued IRS Notice 2017-10 in December 2016.<sup>25</sup> The notice described easement syndications as "tax avoidance transactions" and classified conservation easement syndications as

22. Land Trust Alliance, *Land Trust Standards and Practices*, 12.

23. Land Trust Alliance, *Land Trust Standards and Practices*, 12.

24. Committee on Finance, US Senate, *Syndicated Conservation-Easement Transactions: Bipartisan Investigative Report as Submitted by Chairman Grassley and Ranking Member Wyden* (August 2020, 116th Congress, 2nd Sess., S. Rpt. 116-44), 3, available at <https://bit.ly/456S2da>.

25. In November 2022, the US Tax Court set aside Notice 2017-10 because, in the court's opinion, the IRS had not complied with proper administrative procedures before issuing the notice. See *Green Valley Investors, LLC v. Commissioner*, 59 T.C. No. 5. The IRS has responded with proposed regulations that restate the essence of Notice 2017-10 and are being proposed in accordance with the Administrative Procedure Act.



“listed transactions,” a designation that creates significant reporting requirements for the syndicators and their material advisors.<sup>26</sup> An essential element of the promotional tax avoidance scheme, according to the IRS in that notice, is an appraisal “that greatly inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property.”<sup>27</sup>

One of the most significant concerns for land trusts was the Treasury Department definition of a *material advisor* in a listed transaction. *Material advisors* are defined as those who “provide any material aid, assistance or advice with respect to the organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction” and who receive at least \$10,000 in compensation for such aid, assistance, or advice.<sup>28</sup>

#### Material Advisor Responsibilities and Penalties

Material advisors are required to file Form 8918 with the IRS in which the advisor discloses it acted as a material advisor in a listed transaction and then includes information about the transaction.<sup>29</sup> The penalty for inadvertently failing to file

as a material advisor in a listed transaction or for reporting inaccurate information is the greater of \$200,000 or 50% of the gross income derived by the material advisor from the transaction. If the failure to file is found by the IRS to be intentional, the penalty increases to the greater of \$200,000 or 75% of the gross income derived by the material advisor.<sup>30</sup> There is also a \$10,000-per-day penalty for a material advisor who fails to provide the IRS with a list of advisees involved in the listed transaction.<sup>31</sup>

#### Land Trusts and the IRS Definition of a Material Advisor

No charitable donation deduction for a conservation easement can be taken unless there is a land trust to accept the donation,<sup>32</sup> to negotiate with the landowner over the content of the easement document, to sign the final easement document as the grantee of the donation, and then to see that the easement document is properly recorded and then monitored. Land trusts typically require a cash contribution from the donor as part of the transaction, and in many if not most conservation easement transactions, that contribution will exceed the \$10,000 threshold required to be

26. All material advisors involved in listed transactions must file an IRS Form 8918 Material Advisor Disclosure Statement. Information to be provided to the IRS and IRS Notice 2017-10 require material advisors involved in conservation easements “to report to the IRS any conservation easement transactions that include (1) promotional materials, (2) pass-through entity attracting investors, and (3) charitable contributions that equal or exceed 250% of the investors’ initial investment as well as (4) the contribution and deduction”; “material advisors” are defined as those who provide ‘material aid, and assistance or advice’ about the transaction and receive at least \$10,000 in compensation.” Roddevig and Brigden, *Appraising Conservation and Historic Preservation Easements*, 2nd ed., 30, citing 26 CFR 301.6111-3(b)(3)(i)(B).

27. Internal Revenue Service, *Listing Notice—Syndicated Conservation Easement Transactions: Notice 2017-10* (2016), 2, available at <https://bit.ly/3PBV8jj>.

28. Internal Revenue Service, Instructions for Form 8918 (06/2017): Material Advisor Disclosure Statement (For use with Form 8918 (Rev. December 2011) or later revision). That form and the instructions for it have been updated since 2017. The subsequent revisions did not change the definition of a *material advisor*. The most recent revision is dated 11/2021 and is simply titled “Instructions for Form 8918 (11/2021).” It is available at [www.irs.gov/instructions/i8918](http://www.irs.gov/instructions/i8918).

29. Internal Revenue Service, 26 CFR § 301.6111-3, Disclosure of Reportable Transactions, which states in part: “To be considered complete, the information provided on the form must describe the expected tax treatment and all potential tax benefits expected to result from the transaction, describe any tax result protection with respect to the transaction, and identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction and the identity of any material advisor(s) whom the material advisor knows or has reason to know acted as a material advisor....”

30. 26 CFR § 301.6707-1. Failure to furnish information regarding reportable transactions.

31. 26 U.S. Code § 6708(a)(1).

32. Land trusts approached by donors inspect the property and review its conservation characteristics to determine if it meets the *conservation purposes* definition in the tax code. Conservation purposes that qualify for protection by a conservation easement include preservation of land areas for outdoor recreation or for public education; protection of natural habitats or ecosystems; open space preservation for scenic enjoyment of the public (but only if in line with a clearly delineated governmental conservation policy or yielding a significant public benefit); and preservation of a historically important parcel of land or a certified historic structure. IRC 170(h)(4)(A) and Treas. Reg. § 1.170A-14(d).

considered a material advisor.<sup>33</sup> Does that make a land trust a “material advisor” if the conservation easement donation is syndicated?

In the wake of the issuance of IRS Notice 2017-10, the land trust community has asked itself that question. A presentation at the 2017 national “rally” sponsored by the Land Trust Alliance summarized the definition of a *material advisor* in the tax code and stated that “(g)enerally speaking, land trusts are not a ‘material advisor’ to a transaction for purposes of this Notice [IRS Notice 2017-10]”<sup>34</sup> and then asked the following questions:

But what about negotiating an easement? Or signing Form 8283? Or any of the many other tasks land trusts must complete to facilitate a donation? Does any of that work make a land trust a “material advisor”?<sup>35</sup>

The presentation then answered the questions as follows:

No. Under normal circumstances, the usual and customary tasks associated with conservation easement transactions will not make a land trust a “material advisor” for purposes of this Notice.... The IRS isn’t trying to trick land trusts. The Service knows what being a donee involves, and the Service wouldn’t have specifically provided an exclusion for accepting a donation if the donee’s usual and customary tasks would require the donee reporting itself as a “material advisor.”<sup>36</sup>

The 2017 Land Trust Alliance Rally presentation did not cite any explicit IRS exclusion of non-syndicated conservation easements from the definition of *material advisor* and simply concluded by analogy that the language in the listed transaction Notice 2017-10 related to conservation easements was quite different from the language in other, similar notices in which “charities and nonprofits that received donations were specifically included by being made parties to the [listed] transaction.”<sup>37</sup> Later, the Land Trust Alliance claimed that additional IRS Notice 2017-29 generally exempted charitable donees from being considered a material advisor, but that claim of such a broad exemption for land trusts is called into question by recent IRS proposed regulations.<sup>38</sup> Subsequent court cases ruled that “the IRS lacks the authority to identify listed transactions by notices, such as Notice 2017-10, and must instead identify such transactions by following the notice and public comment procedures that apply to regulation.”<sup>39</sup> The IRS in December 2022 proposed regulations incorporating most but not all of the requirements in Notice 2017-10 and Notice 2017-29. Those proposed regulations have been put into the regular public comment process and are not yet final.<sup>40</sup>

The most significant difference between the earlier notices and the proposed rules, at least from the point of view of land trusts that accept conservation easements, is the absence of a clear exclu-

33. The cash contribution covers the cost of inspecting the property to determine if it has the necessary conservation characteristics, negotiating the protections and wording in the conservation easement document, and preparing a “baseline conditions report” against which future actions affecting the conservation character of the protected property can be measured, and contributes to the legal defense fund that the larger land trusts set aside to monitor the easement and enforce the protections. While smaller land trusts accepting easements on smaller properties may require a donation of less than \$10,000, most donations involving larger properties such as those involved in syndicated conservation easement transactions are accompanied by donations that exceed the regulatory material advisor \$10,000 threshold, and land trust studies have supported the appropriateness of cash donations as high as \$85,000 to \$150,000. See, for example, Pennsylvania Land Trust Association, “Costs of Conservation Easement Stewardship,” Draft new edition in process May 19, 2020, available at <https://bit.ly/48umocm>; and Ben Guillon, “Conservation Easements,” Western Landowners Alliance, June 20, 2018.

34. Land Trust Alliance, *IRS Notice 2017-10: What Land Trusts Need to Know* (2017), 36, available at <https://bit.ly/3LFoZGK>.

35. Land Trust Alliance, *IRS Notice 2017-10: What Land Trusts Need to Know*, 36.

36. Land Trust Alliance, *IRS Notice 2017-10: What Land Trusts Need to Know*, 36–37.

37. The 2017 presentation went on to state: “In short, if the IRS wanted information from land trusts, it had the power to demand it.” Land Trust Alliance, *IRS Notice 2017-10: What Land Trusts Need to Know* (2017), 37, available at <https://bit.ly/3LFoZGK>.

38. The Land Trust Alliance points to IRS Notice 2017-29 as creating a “complete carve-out for donee organizations” from being considered either “material advisors” or “parties” to syndicated conservation easement transactions. Land Trust Alliance Comments on IRS and REG-106134 Notice of Proposed Rulemaking “Syndicated Conservation Easement Transactions as Listed Transactions” under 97 Fed. Reg. 235 (Dec. 8, 2022) Document Number: 2022-206675, letter to Internal Revenue Service, February 5, 2023.

39. Internal Revenue Service, “Treasury and IRS Propose Regulations Identifying Syndicated Conservation Easement Transactions As Abusive Tax Transactions,” IR-2022-214, December 6, 2022, <https://bit.ly/3PAwEXN>.

40. The proposed regulation appeared in the Federal Register on December 8, 2022; see <https://bit.ly/3PsskK0>.

sion from the material advisor regulations for the easement recipient organizations.<sup>41</sup> The proposed regulations include some additional penalty and tax provisions on material advisors that do not comply with the reporting regulations.<sup>42</sup> As a result, the question of whether a land trust that accepts a conservation easement donation is or is not a material advisor continues to be an open one.

### The 2017 Changes to Land Trust Alliance Appraisal Review Standards

Despite, or perhaps because of, the uncertainty as to whether land trusts can be considered material advisors, the Land Trust Alliance between 2015 and 2017 undertook a comprehensive updating of its Standards and Practices for land trust operation after the announcement of IRS Notice 2017-10. The Land Trust Alliance's updated 2017 Standard 10, titled "Tax Benefits and Appraisals," contained three subsections. The general paragraph of the 2004 Standard (quoted earlier in this article) was substantially modified, and separate standard practices were shown for appraisals in general and specifically related to syndicated conservation easements. Standard 10 paragraph C, "Avoiding Fraudulent or Abusive Transactions," states land trusts

1. Review, on the land trust's own behalf, each transaction for consistency with federal and state income tax deduction or credit requirements
2. Evaluate the Form 8283 and any appraisal to determine whether the land trust has substantial concerns about the appraised value or the appraisal
3. Discuss substantial concerns about the appraisal, the appraised value or other terms of the transaction with legal counsel and take appropriate action, such as:
  - a. Documenting that the land trust has shared those concerns with the donor
  - b. Seeking additional substantiation of value

- c. Withdrawing from the transaction prior to closing
  - d. Or refusing to sign the Form 8283<sup>43</sup>
4. When engaging in transactions with pass-through entities of unrelated parties, particularly those offered or assembled by a third party or described as a syndication by the IRS [syndicated conservation easements],
    - a. Require a copy of the appraisal prior to closing
    - b. Decline to participate in the transaction if the appraisal indicates an increase in value of more than 2.5 times the basis in the property within 36 months of the pass-through entity's acquisition of the property, the value of the donation is \$1 million or greater and the terms of the transaction do not satisfy the Land Trust Alliance Tax Shelter Advisory.<sup>44</sup>

In language somewhat similar to language in 2004 Standard 10, revised 2017 Standard 10 paragraph A "Landowner Notification" states that the "donor is responsible for any determination of the value of the donation" and then warned land trusts not to make any assurances related to:

- a. Whether a particular land or conservation easement donation will be deductible
- b. What monetary value of the gift the IRS and/or state will accept
- c. What the resulting tax benefits of the deduction or credit will be, if any."<sup>45</sup>

However, paragraph D of the 2004 Standard 10, which had stated "if the land trust has significant reservations about the value of the gift, particularly as it may impact the credibility of the land trust, it may seek additional substantiation of value or may disclose its reservations to the donor,"<sup>46</sup> does not appear in the revised 2017 version of the Land Trust Alliance Standards. But the 2016 *Accreditation Requirements Manual* of the Land Trust Alliance continues the more detailed

41. The Land Trust Alliance letter sent to the IRS on February 5, 2023, expressed concerns that the proposed regulations "do not include an exclusion for donee organizations as material advisors." Land Trust Alliance Comments on IRS and REG-106134.

42. For a discussion of these potential additional reporting and penalties, see Erin R. Hines, "Land Trusts Should Be Aware of Proposed Easements Regulations," *Tax Insights & Commentary*, Bloomberg Tax, <https://bit.ly/3PVYrTW>.

43. Land Trust Alliance, *Standards and Practices: Ethical and Technical Guidelines for the Responsible Operation of a Land Trust* (Washington, DC: Land Trust Alliance, 2017), 17, available at <https://bit.ly/45blkag>.

44. Land Trust Alliance, *Standards and Practices*, 17.

45. Land Trust Alliance, *Standards and Practices*, 16.

46. Land Trust Alliance, *Land Trust Standards and Practices* (2004), 12.



practice standard of the 2004 standards.<sup>47</sup> The 2016 update to the manual states that an accredited land trust must evaluate the appraisal that supports the conservation easement donation and “determine whether it [the land trust] has significant concerns about a landowner’s tax deduction” and then states that “one or more of the following may trigger the organization to have significant concerns:”

- The appraised value does not appear to be defensible in light of the organization’s knowledge of local land values
- The deduction claimed is significantly in excess of the donor’s cost or adjusted basis (if recent)
- Multiple unrelated parties are owners of the property using a pass-through entity and may be passing through deductions disproportionate to their respective interests in the property
- The land has been recently acquired by a pass-through entity
- Donors are being advised or managed by a “promoter” (A “promoter” is a person or entity that is being paid to help facilitate the proposed contribution and/or is being paid to otherwise promote, organize or secure the transaction (other than the entity’s formal legal counsel).)<sup>48</sup>

The 2016 *Accreditation Requirements Manual* went on to state that if the land trust has concerns about the appraisal, it must take appropriate actions to resolve those concerns. Among the appropriate actions required are “sharing the concerns regarding the appraisal in writing with the landowner” and “seeking additional substantiation of value.” Then the manual offers a “check-

list” that includes the required elements of a “qualified appraisal” as stipulated by IRS regulation and listed earlier in this article. Five of the twelve items in the checklist, however, are asterisked in the manual with the notation that for those elements the manual “does not expect the organization will assess whether the data presented in the appraisal are accurate and/or valid.”<sup>49</sup> Sections 10C2 and 10C3 of the 2021 *Accreditation Requirements Manual* is less detailed in its requirement related to appraisals; it simply states that the land trust must “evaluate” the appraisal to determine if “the land trust has substantial concerns about the appraised value or the appraisal” and if it does, it should discuss those substantial concerns with its legal counsel and then take “appropriate action,” which could include “seeking additional substantiation of value.”<sup>50</sup>

#### **Senate Committee on Finance 2020 Report on Inflated Appraisals in Syndicated Conservation Easement Donations**

In March 2019, the Senate Committee on Finance launched its own investigation into syndicated conservation easements and issued its report in August 2020. The report states that “an inflated appraisal” is the “engine of every syndicated conservation-easement transaction.”<sup>51</sup> Actual conservation easement appraisal reports were critiqued in detail by the committee. The most common red flag in those appraisals—indicating a likely overvaluation—was “a consistent pattern of land (or interest in a partnership holding land) sold in an arm’s length transaction, followed shortly thereafter by an appraisal asserting land values multiple times higher than the value established in that

47. The Land Trust Alliance has a program to review the quality of state and local land trust conservation easement programs and practices. Land trusts that comply with the Land Trust Standards and Practices developed by the Land Trust Alliance can be “accredited.” According to the Land Trust Alliance, the “accreditation seal is a mark of distinction in land conservation” and “is awarded to land trusts meeting the highest national standards for excellence and conservation permanence.” Land Trust Accreditation Commission, *Accreditation Requirements Manual* (Saratoga Springs, NY: March 2018), 2, available at <https://bit.ly/3RCg7oQ>.

48. Land Trust Accreditation Commission, *Accreditation Requirements Manual* (Saratoga Springs, NY: April 2016), 37, available at <https://bit.ly/3PQZdkZ>.

49. Land Trust Accreditation Commission, *Accreditation Requirements Manual* (2016), 39. The five items are as follows: (1) the qualifications of the appraiser signing the report; (2) the method of valuation used to determine the value of the easement; (3) the “specific basis for the valuation, such as inclusion of comparable sales transactions”; (4) the statement in the appraisal related to whether it deals with all contiguous property owned by the donor or a family member; and (5) the statement in the appraisal as to whether any “non-easement property” has been enhanced in value.

50. Land Trust Accreditation Commission, *Accreditation Requirements Manual* (Saratoga Springs, NY: March 2021), 17, available at <https://bit.ly/48phxci>.

51. Committee on Finance, 6.

prior arm's length transaction." That, according to the Senate Committee on Finance, "clearly calls into question the accuracy of these appraisals."<sup>52</sup>

The Senate Committee on Finance report pointed to the following three components of the faulty appraisals it reviewed as driving the overvaluations: (1) failure to properly summarize and analyze the recent purchase price of the land; (2) an improper claim that some type of land development was the highest and best use; and (3) supporting the value for development with a faulty discounted cash flow (DCF) analysis. Included in the Committee on Finance report were excerpts from an actual appraisal report in a syndicated conservation easement transaction in Alabama. The report listed various problems with the highest and best use analysis and DCF analysis in that appraisal and also identified various problems in its sales comparison approach section as follows:

- Overstating value by not deducting costs associated with the time necessary to approve, construct, market, and sell developed homes...
- Failing to include evidence of market demand for developed homes...
- Failing to include data on economic, jobs, population, and household growth...
- Falsely stating that no comparable sales could be found to help value the property before granting easement but then incorporating comparable sales for valuing property after granting easement, including sales from other states...
- Assuming economic feasibility of building extensive access roads to support non-contiguous development while possibly crossing wetlands and floodlands...
- Failing to consider availability and costs associated with extending sewers and public utilities to the property...
- Failing to consider wet-soil issues...
- Failing to support claims that developments have necessary approvals...
- Falsely claiming property is accessible from multiple public roads....<sup>53</sup>

### Implications of IRS Actions and 2020 Senate Finance Committee Report for Land Trust Appraisal Review Responsibilities

What are the implications for land trusts of the recent pronouncements by the IRS and the Senate Committee on Finance regarding appraisal abuses related to conservation easement donations?

While the potential penalties associated with failing to register as a material advisor or properly disclose information on Form 8918 are significant, they may or may not be specifically applicable to the typical conservation easement donation situation in which a land trust is involved given the uncertainty created by the proposed IRS regulations issued in December 2022 and the Land Trust Alliance response. However, there are other financial penalties and financial risks to land trusts that can result simply from the IRS determining that a land trust has been involved in a syndicated conservation easement or even been involved in an overvalued conservation easement donation. First, the IRS has filed actions against those involved in what it describes as "abusive transactions" involving syndicated conservation easement donations. Some of those actions have included not only promoters and organizers but also land trusts and the appraisers who prepared the conservation easement appraisals. Second, some investors in conservation easement donations supported by allegedly inflated appraisals have filed class action lawsuits to recover unspecified monetary damages from the accountants, attorneys, appraisers, environmental consultants, and land trusts involved in the donations.<sup>54</sup> Third, there have been other actions involving conservation easements not involved in syndications in which the values reported in the supporting appraisals have been challenged.<sup>55</sup>

So, what are the implications for land trusts from these challenges to the quality of appraisals

52. Committee on Finance, 12.

53. Committee on Finance, 48.

54. See, for example, *Andrew Lechter, et al. v. Aprio LLP, et al.*, United States District Court for the Northern District of Georgia, No. 1:20-CV-01325, filed March 26, 2020.

55. For example, in a lawsuit filed by the State of New York against the Donald J. Trump Revocable Trust and members of the Trump family and Trump employees, *People of the State of New York v. Donald J. Trump, et al.*, Supreme Court of the State of New York, County of New York, Complaint Filed 9/21/2022, the attorney general of the State of New York alleged that inflated easement appraisals resulted in loss of tax revenues to the state.

supporting conservation easement donations? How should land trusts respond?

As stated earlier in this article, land trusts are potentially caught in a bind. On the one hand, they rely on information provided by the landowner as to whether the donation is somehow part of a syndicated conservation easement, and land trust standards of practice emphasize that the donor, not the land trust, is responsible for determining the value of the easement donation. But at the same time, Standard 10 of the Land Trust Alliance Standards and Practices advises land trusts to evaluate the appraisal report before accepting the conservation easement donation and, if it has reservations about the values in the appraisal, take steps to check the accuracy of the report.

Land trusts should continue to check the appraisal reports to make sure they include the language required by the IRS to be included in a “qualified appraisal” report. They should also check to make sure that the appraiser signing the report has included in the appraisal the required statements concerning the appraiser’s qualifications and experience and is therefore a “qualified appraiser” under Treasury Department regulations.

Checking for the other telltale signs of an abusive transaction, such as a “before” easement donation value of the property that is more than 2.5 times the price recently paid for the property, is another critical review step. So, appraisals should be checked to see if the most recent purchase price paid for the property is discussed in the report.<sup>56</sup> That prior purchase price should then be compared to the pre-easement “before” value of the property as stated in the report. But even an appraised pre-easement value that is less than 2.5 times a recent purchase price could be part of an inflated and improperly supported easement appraisal.

As discussed earlier in this article, the Senate Committee on Finance focused on several additional elements that indicate a potentially abusive appraisal and an inflated conservation easement value. The Committee’s concerns, in addition to the comparison of the pre-easement value to a recent purchase price, can be recategorized as related to three primary elements of every appraisal report: (1) the market analysis indicating the demand for land in the area; (2) the highest and

best use analysis that often tests a claimed development potential through a discounted cash flow analysis; and (3) the selection of the comparable sales supporting the pre-easement “before” value.

The *Appraising Conservation and Historic Preservation Easements* text published by the Appraisal Institute contains in-depth discussion of market analysis, highest and best use analysis, discounted cash flow analysis, and proper selection of comparable sales. It includes detailed examples of proper market and highest and best use analysis, proper consideration of all the factors that must be included in a discounted cash flow analysis, and proper selection and analysis of both pre- and post-easement comparable sales supporting a sales comparison approach.

The necessary market analysis in a conservation easement appraisal may sometimes be included as a separate section of the appraisal report, but it can also be included as part of the highest and best use analysis section of the report. The fifteenth edition of *The Appraisal of Real Estate* published by the Appraisal Institute shows the six steps in a market analysis (see Exhibit 1).

The fifteenth edition of *The Appraisal of Real Estate* also makes it clear that proper highest and best use analysis requires considerable experience and skill and proper judgment from an appraiser but is critical to the appraisal process. The 2020 Senate Committee on Finance report focused on the faulty analysis and lack of support for the conclusions in the “before” easement value highest and best use analyses in the abusive appraisals it described. A sidebar from *The Appraisal of Real Estate* shown in Exhibit 2 notes that the highest and best use analysis must be “appropriately supported.”

Highest and best use analysis in both the “before” and “after” easement valuation scenarios involves answering the following four questions:

1. What uses are physically possible?
2. Of the physically possible uses, which ones are legally permissible?
3. Of the physically possible and legally permissible uses, what uses are financially feasible?
4. And, finally, which of the uses that are physically possible, legally permissible, and financially feasible results in the “highest present value”?

56. See Advisory Opinion 1 (AO-1) in *USPAP Advisory Opinions, 2020–2021* (Washington, DC: Appraisal Foundation, 2020) for a detailed discussion of the appraiser’s obligations to report on the recent sales history of the property being appraised.

## Exhibit 1 The Six Steps in a Market Analysis

- Step 1. Property productivity analysis:** analyze competitive characteristics of the subject property
- Step 2. Market delineation:** identify demand sources and competitive area
- Step 3. Demand analysis:** estimate current demand and predict future demand
- Step 4. Supply analysis:** survey existing supply and predict future changes
- Step 5. Residual demand analysis:** analyze the interaction of supply and demand
- Step 6. Subject capture analysis:** determine conclusions of marketability analysis, i.e., predict performance of the subject property

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Source: Figure 15.1 in *The Appraisal of Real Estate*, 15th ed. (Chicago: Appraisal Institute, 2020).

## Exhibit 2 The Difficulty of Defining *Highest and Best Use*

The definition of *highest and best use* has evolved over time to address the common understanding of the topic. Traditionally, the explanation of the term has been more elaborate than the definition introduced in the 14th edition of *The Appraisal of Real Estate*. For example, earlier definitions of the term included ambiguous language that has often been commented on but never defined, as seen in the entry for the term in the fifth edition of *The Dictionary of Real Estate Appraisal*:

### highest and best use

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity. Alternatively the probable use of land or improved property—specific with respect to the user and timing of the use—that is adequately supported and results in the highest present value.

The precise meaning of “appropriately supported” has been debated in the appraisal literature almost since the basic template of this definition of *highest and best use* was developed in the mid-1970s.

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Source: *The Appraisal of Real Estate*, 15th ed. (Chicago: Appraisal Institute, 2020), 306.

That series of questions must be answered sequentially in a highest and best use analysis “before” considering the easement. The result of that analysis is the use that would result in the “most probable” price that a “willing buyer would pay a willing seller.” That most probable price equates to the fair market value of the property before considering the effect of the restrictions contained in the conservation easement document.

Inflated conservation easement appraisals typically involve abuses in the application of the “physically possible” and “legally permissible” elements of that four-part highest and best use analysis requirement. In the abusive appraisals, the significant difference between the “before” easement value conclusion and the actual recent purchase price paid for the land is typically based on a conclusion that some type of land development<sup>57</sup> is both physically possible and legally per-

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57. The Senate Committee on Finance report on page 6 states that mining or residential development is typically the alleged physically possible, legally permissible, and financially feasible use that results in the highest present value.

missible and therefore supports a value that substantially exceeds the price that was paid by the syndicators for the land.<sup>58</sup> The appraisals may ignore or dismiss key physical characteristics of the property such as its topography, shape or size, floodplain location, or lack of connection to appropriate infrastructure such as sewer or water that call into question the appropriateness of the highest and best use conclusion. The abusive appraisal may note that the property is not currently zoned for the stated highest and best use and simply assume, without support, that the necessary zoning for a development project can be obtained.<sup>59</sup>

Once an abusive appraisal arrives at a conclusion that some type of development is both physically possible and legally permissible, the abusive appraisal will frequently then include a faulty discounted cash flow (DCF) analysis<sup>60</sup> to support the conclusion that land development is also “financially feasible.” There is nothing inherently wrong with using DCF analysis in an appraisal report on land that has some development potential<sup>61</sup>—for example, for residential subdivision development—and the Appraisal Institute text *Appraising Conservation and Historic Preservation Easements* recognizes its importance in appropriately supported feasibility analysis.<sup>62</sup>

But every DCF analysis must include consideration of the time to obtain all development approvals, include any necessary infrastructure

extension and site improvement costs to make the development physically possible, include market-supported deductions for developer’s fees and construction costs and appropriate deductions for sales and marketing expenses, and be based on market-supported prices for the type and number of residential lots that would be sold and a market-supported time frame for the absorption of the developed lots. All of those revenues and expenses must then be properly discounted for time at a market-supported discount rate.

Some or all those required elements are typically ignored or based on unsupported numbers in abusive conservation easement appraisals. Time to obtain zoning and planning approval will be understated, the costs (or even the need) to extend utilities underestimated, developer’s fees and other costs either left out of the calculations or also underestimated, the number of lots that can be physically platted and their prices overstated, and the absorption rate time period for the lots understated. The result of such a faulty DCF analysis in the typical abusive conservation easement appraisal is a “before” value conclusion that substantially exceeds not only the actual price recently paid for the property but also the prices paid for other land in the same geographic and market area as the property to be protected by the easement donation.

That is the reason why such abusive appraisals must also include a faulty sales comparison

58. The Senate Committee on Finance report on page 3 describes the typical tax deduction situation in a syndication as follows: “Although the various offerings differ in their specifics, the general outcome is the same: for every dollar a taxpayer pays to a promoter to become an ‘investor’ (or a ‘partner’ or a ‘member’) in a syndicated conservation-easement transaction, he or she commonly purchases a little more than four dollars’ worth of tax deductions” and “[f]or most taxpayers involved, this ultimately means that for every dollar paid to tax-shelter promoters, the taxpayers saved two dollars in taxes they did not pay.” As an example, assume land is purchased for \$250,000 but is appraised for \$1,500,000 “before” the easement and only \$15,000 “after” the easement. The charitable deduction would be \$135,000 and the tax savings to taxpayers at the top current federal income rate of 35% would be \$49,950, almost exactly twice the \$25,000 investment. The investors get their original \$25,000 back plus an additional \$24,950 in tax savings.

59. An appraisal report conclusion that rezoning is reasonably probable must be supported by market evidence such as “rezoning applications, zoning hearings, actions by municipalities, and interviews with planning and zoning officials.” *The Appraisal of Real Estate*, 15th ed., 309.

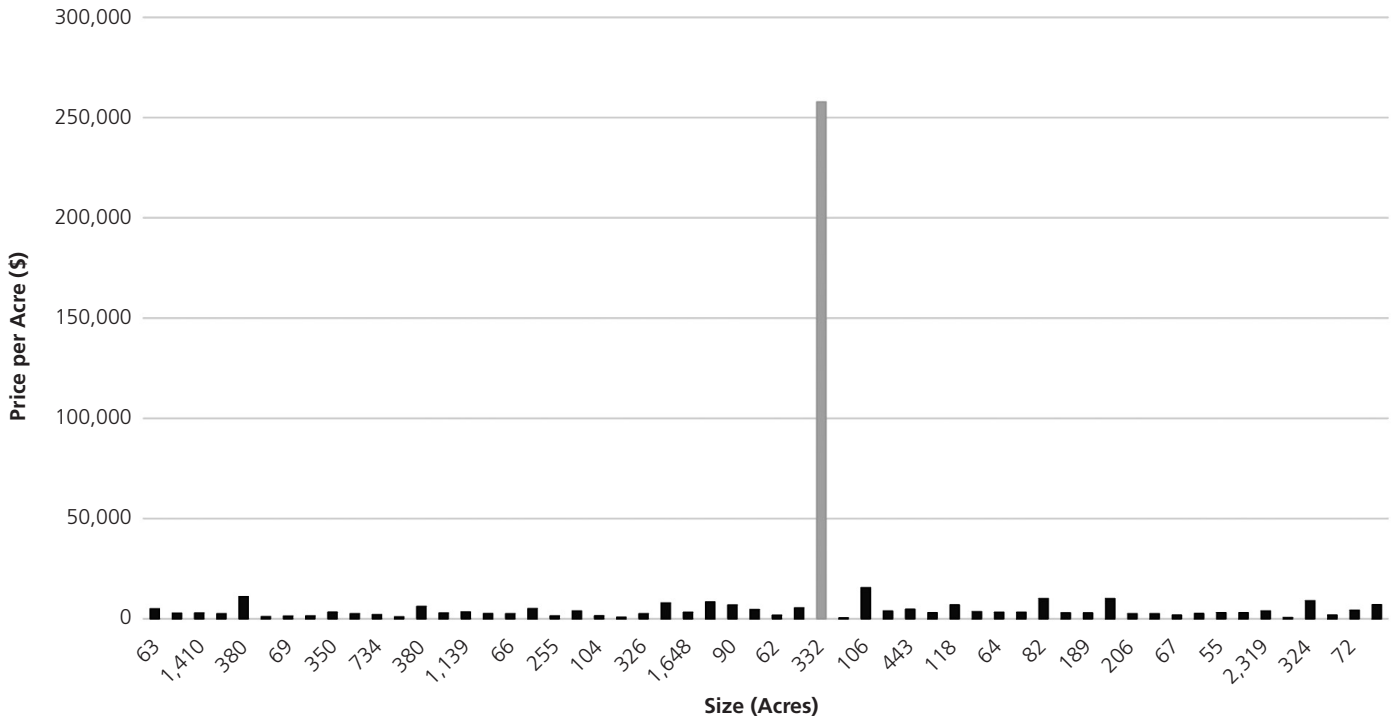
60. *Discounted cash flow analysis* can be defined as “the procedure in which a discount rate is applied to a set of projected income streams and a reversion. The analyst specifies the quantity, variability, timing, and duration of the income streams and the quantity and timing of the reversion, and discounts each to its present value at a specified yield rate.” *The Dictionary of Real Estate Appraisal*, 7th ed. (Chicago: Appraisal Institute, 2022), s.v. “discounted cash flow analysis.”

61. Advisory Opinion 33 in the USPAP Advisory Opinions states the following about the importance of DCF analysis: “DCF analysis has become a requirement of many real property clients and other intended users. These users of appraisal services favor the inclusion of DCF analysis as a management tool in projecting cash flow and return expectations, capital requirements, refinancing opportunities, and timing of future property dispositions. DCF analysis is regarded as one of the best methods of replicating steps taken to reach investor buy/sell/hold decisions and is often a part of the exercise of due diligence in the evaluation of an asset.” Appraisal Standards Board, Advisory Opinion 33 (AO-33), in *USPAP Advisory Opinions*, 2020–2021 Edition (Washington, DC: Appraisal Foundation, 2020), Lines 14–19.

62. Roddewig and Brigden, *Appraising Conservation and Historic Preservation Easements*, 2nd ed., 165–167.



**Exhibit 3** A Comparison of the Taxpayer Appraisal Value Conclusion to Actual Market Evidence of Prices Paid for Similar Properties in Local Market Area (price per acre)



approach to the “before” value of the easement. The DCF result may indicate a value many times higher than actual land prices in the market area in which the property to be protected by easement is located. So, in order to justify the result of the faulty DCF feasibility, the sales comparison approach may use sale prices from locations in a different geographic market area many miles away (and sometimes even in another state) rather than actual sale prices paid for similar land in the immediate vicinity of the property on which the easement is being donated. Instead of comparing the value that results from the DCF analysis to prices actually paid for land in the same market area, the faulty appraisals typically simply fail to include consideration of actual sale prices paid for similar land in the same market. Exhibit 3 shows an actual analysis of the claimed “before” value of land in a conservation easement appraisal compared to the actual prices paid in 31 other land sale transactions in the local market area where the protected property is located.

**Conclusion: The Importance of an Appraisal Review Checklist in the Appraisal Review Process**

Not every land trust has an appraiser on its board to review proposed conservation easement appraisals. Some type of checklist of factors to review is, at a minimum, necessary to undertake a supportable and appropriate initial appraisal review. Some land trusts, recognizing that need, have developed such an appraisal review checklist. While there is no one generally accepted and recognized checklist—either approved by the Land Trust Alliance or recognized as the legal minimum to meet land trust due diligence related to a conservation easement appraisal—there are basic elements that should be included in an appraisal report, and various red flags are raised if they are missing.

The Appendix at the end of this article presents one such possible checklist, which comprises more items than might be relevant in every conservation easement situation. The checklist

focuses on eleven general elements of a conservation easement appraisal:

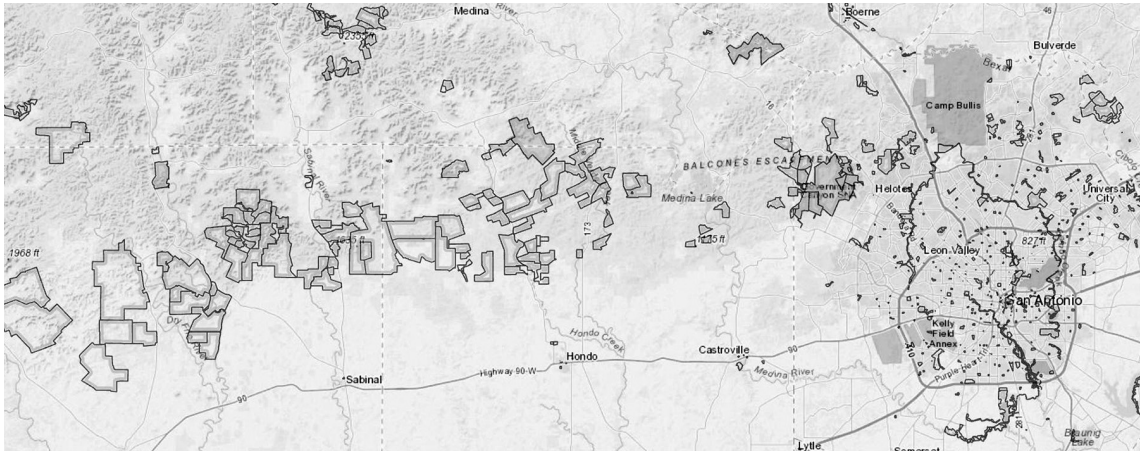
1. General compliance with appraisal standards of practice including the reporting and analysis of any recent purchase price paid for the property;
2. The information required by IRS regulations to make the report a “qualified appraisal” and to confirm that the appraiser is a “qualified appraiser”;
3. Information related to identification of any contiguous property or other property owned by the donor or related parties and analysis of benefits or enhancements;
4. Information in the appraisal related to disclosure of a syndicated conservation easement donation;
5. The elements in a proper highest and best use analysis and in a properly supported discounted cash flow (DCF) analysis included to support a land development market feasibility analysis and “before” easement value;
6. The market area in which the property is located and the comparable sales selected and analyzed in a “before” easement sales comparison approach;
7. Consideration and analysis of any actual prices paid to purchase conservation easements similar to the easement that is being donated;<sup>63</sup>
8. The easement-protected property sale discussion and analysis used to arrive at an “after” easement value;
9. Consideration of the contribution to value of any existing improvements on the property;
10. Consideration of the contribution to value from any income generated by rent, crops, or other sources; and
11. Appraisal Addenda items including a draft or final easement document, important statements related to appraisal based on a draft rather than final easement document, and inclusion of the baseline condition report<sup>64</sup> in the Addenda.

The first five elements listed as well as the seventh element directly or indirectly relate to IRS regulation notices or to concerns about abusive appraisals raised in the 2020 Senate Committee on Finance report. The eighth element relates to the “after” easement analysis of prices paid for land already protected by a conservation easement. Neither the IRS notices nor the Senate Committee on Finance report focuses in any significant way on potential abuses in the “after” easement value analysis, but there are ways in which an abusive conservation easement appraisal report could understate the value “after” easement as a way to increase the difference between the “before” and “after” values and therefore increase the size of the charitable donation deduction. As the questions in the Appendix checklist indicate, the land trust should review the “after” easement section of the appraisal report to determine if the easement-protected comparable sales are in the same general market area and involved protections comparable in scope to those in the conservation easement that is the subject of the appraisal.

One way to check on the appropriateness of the after-easement sales selected by the appraiser is to use the National Conservation Easement

63. There have been thousands of direct purchases of conservation easements on land that has scenic, agricultural, or historic significance. However, many of these purchases have been by various federal, state, and local government entities whose motivations may not be typical of other marketplace participants. Even when easements are purchased by land trusts, there may be difficulties analyzing the sale prices because many such easement acquisitions involve “bargain sales” in which some portion of the purchase price is paid in cash, and the difference between that cash payment and the market value results in a charitable donation deduction for the taxpayer. There may also be difficulties in comparing the easement document in the sale transaction and adjusting the easement purchase price for differences between the protections it provides and the protections to be provided by the conservation easement that is being appraised. For a detailed discussion of some of those issues, see generally, Roddewig and Brigden, *Appraising Conservation and Historic Preservation Easements*, chapter 15, and especially pages 248–249.

64. The land trust accepting the conservation easement typically prepares a “baseline condition report” that describes the condition of the important conservation features of the property to be protected as of the date of acceptance of the conservation easement donation. It typically contains text describing the condition of the protected features, a map or series of maps, and photos. The information in the baseline condition report can then be referenced in later years when monitoring any significant changes to the protected property and its important conservation characteristics.

**Exhibit 4** Sample Map from National Conservation Easement Database

Source: <https://site.tplgis.org/NCED/planningapp/>

Database (NCED)<sup>65</sup> to identify conservation easements in the vicinity of the subject property and to determine if any of them are included as comparable sales in the appraisal report. Exhibit 4 is an example of the type of map generated using the interactive NCED website to locate conservation easements in the Texas hill country west and north of San Antonio. Clicking on the easement-protected property on the map indicates the size of the protected acreage, the holder of the conservation easement, and when the easement was put into effect. The location of the conservation easements utilized in the “after” value analysis can be compared to the easements shown in an NCED map. If the appraisal does not reference any of the conservation easement-protected properties in the local market area, the reason could be that none of those easement-protected properties have sold or it could be because the appraisal simply ignored those sales. In any event, such a discrepancy between conservation easements in the local market area and those listed in the appraisal report could be a reason to request more information from the appraiser related to the sales history, if any, of the local market easement-protected properties.

The checklist in the Appendix is not intended to be an exhaustive list of the questions that could be asked related to a conservation ease-

ment appraisal. There are many other elements of a conservation easement appraisal that could be reviewed and would be part of a formal appraisal review by a licensed appraiser under the Uniform Standards of Professional Appraisal Practice (USPAP). The checklist is also not intended to cover every possible question related to IRS appraisal requirements or to appraisal concerns raised in the Senate Committee on Finance report or in tax court and district court cases involving conservation easement appraisals. Not every question is applicable to every conservation easement appraisal situation. However, the answers to the questions that are included in the checklist can be a good test of whether the appraisal raises any “substantial concerns” that would require the additional “substantiation of value” that Standard 10 of the Land Trust Alliance Standards says accredited land trusts should undertake or demand from the property owner and the appraiser. Many of the elements of a conservation easement appraisal referenced in the questions are not discussed in any detail in this article. Detailed information on every appraisal element listed in the Appendix checklist and why the questions are important can be found in the second edition of the Appraisal Institute’s *Appraising Conservation and Historic Preservation Easements*.

65. The NCED is a database of privately and publicly held conservation easements compiled from both land trusts and public agencies; see “Explore” at [www.conservationeasement.us/](http://www.conservationeasement.us/).

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**Disclosure:** JLL Valuation & Advisory Services works on conservation easement assignments for both taxpayers as well as federal government agencies including the Internal Revenue Service and the U.S. Department of Justice.

SEE NEXT PAGE FOR APPENDIX >

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### Additional Resources

Suggested by the Y. T. and Louise Lee Lum Library

#### Appraisal Institute

- **Education**
  - *Advanced Land Valuation: Real Solutions to Complex Issues*
  - *Community Land Trust Appraisal Training*
  - *Valuation of Conservation Easements*
  - *Valuation of Conservation Easements and Taxes* [webinar]
- **Lum Library, Knowledge Base [Login required]**
  - Conservation—preservation—scenic easements
- **Publications**
  - *Appraising Conservation and Historic Preservation Easements, Second Edition*
  - *Land Valuation: Real Solutions to Complex Issues*

#### US Department of Agriculture—Agricultural Conservation Easement Program

<https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program>

**Appendix** Conservation Easement Appraisal: Land Trust Review Checklist

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
<b>Element 1: Compliance with General USPAP Requirements</b>				
1.A	Is there a "Certification" signed by the appraiser?			
1.B	Is there a "Statement of Assumptions and Limiting Conditions"?			
1.C	Is the appraiser's state license number shown under the signature line?			
1.D	Are those who provided "significant appraisal assistance" listed in the Certification?			
1.E	Is there a description of the "significant appraisal assistance" provided somewhere in the report?			
1.F	Is there a "Scope of Work" description?			
1.G	Does the appraisal include a detailed description of the appraiser's qualifications?			
1.H	Is there a description of the appraiser's "competency" to undertake an appraisal of this type of property?			
1.I	Is there a date of inspection listed or a statement that the property was not personally inspected?			
1.J	Is there a clear description of the property appraised?			
1.K	Is there a discussion of any recent (within the prior three years) leases, offers, or sales of the property?			
1.L	Does the appraisal state it was prepared in accordance with USPAP?			
1.M	Does the appraisal (and the Statement of Assumptions and Limiting Conditions) contain a statement that a hypothetical condition has or has not been used in arriving at the opinions of value in the report?			
1.N	If the appraisal states that it is based on a hypothetical condition, does the appraisal explain the reason for including a hypothetical condition and a statement that the opinion of value could be significantly different if the hypothetical condition was not used?			
1.O	If more than one approach to value is used, is there a discussion of the differences in the results of each approach and a reconciliation of the differences that support the appraiser's final conclusion of value?			
1.P	If more weight is given to the results of one of the approaches to value than to another, is there reasoning and support for that weighting in the reconciliation of the approaches?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
<b>Element 2: Compliance with IRS Qualified Appraisal and Qualified Appraiser Requirements</b>				
2.A	Does the report state it was prepared “for income tax purposes” to support the charitable donation of a conservation easement?			
2.B	Is the appraiser’s name, address, and taxpayer identification number included?			
2.C	If the appraiser’s taxpayer ID number is not included, is the name, address, and taxpayer ID number of the appraiser’s employer included?			
2.D	Is the date of the charitable donation or expected date of donation included?			
2.E	Does the date of donation match the date of easement recording?			
2.F	Does the date of value match the date of donation or expected donation?			
2.G	Is the date that the appraisal was signed/prepared included in both the text and the Certification?			
2.H	Is the date of the signed appraisal no earlier than 60 days before the date of donation/recording?			
2.I	Is there a description of the appraiser’s qualifications/competency to appraise a conservation easement?			
2.J	Is there a “declaration” that because of the appraiser’s experience, education, and membership in professional organizations, the appraiser is qualified to appraise the conservation easement on this particular property?			
2.K	Is there a statement acknowledging the “substantial or gross valuation misstatement” penalties?			
2.L	Does the summary of the appraiser’s qualifications include background, experience, education, and any membership in professional appraisal organizations?			
2.M	Is there a detailed description of the “property” including its “physical condition”?			
2.N	Is there a statement that the purpose of the appraisal is to determine the “fair market value” of the conservation easement?			
2.O	Is there a definition of <i>fair market value</i> and/or <i>market value</i> and a statement as to whether the two terms are assumed to have the same meaning?			
2.P	Is there a summary of the terms and restrictions in the easement agreement including any restrictions on use, sale, or disposition of the property?			
2.Q	Is there a description of the “fee arrangement” between the appraiser and the donor of the easement?			
2.R	Is there a description of the “method of valuation” used?			
2.S	Does the appraisal arrive at a conclusion concerning the “fair market value” of the conservation easement?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
<b>Element 3: Compliance with IRS Contiguous Property and "Other Property" Enhancement/Benefit Rules</b>				
3.A	Does the appraisal describe the inquiries made or research conducted to identify all "contiguous property" owned by the donor or the donor's family?			
3.B	Does the appraisal "describe" all contiguous property owned by the donor or the donor's family?			
3.C	Does the appraisal then value the entirety of the contiguous property owned by the donor or the donor's family?			
3.D	Does the appraisal consider the value of the "contiguous property" both "before" as well as "after" considering the effect of the conservation easement?			
3.E	Does the appraisal describe the inquiries made or research conducted to identify "other property" owned by the donor or a related person?			
3.F	If "other property" is identified, does the appraisal summarize why it was, or was not, included in the value analysis "before and after" considering the conservation easement?			
3.G	If no "contiguous property" or "other property" is identified in the appraisal, does the appraisal state that inquiries were made and the appraiser is relying on representations made by others that are reasonably believed to be accurate?			
3.H	Does the appraisal consider "other benefits" such as cash received in a bargain sale transaction involving the charitable donation of the easement?			
3.I	Does the final "fair market value" reported in the appraisal reflect any offsetting effects on value from any benefits received?			
3.J	If the appraisal "identifies" but does not consider the value of all "contiguous" or "other property," is there a clear statement of assumptions or limiting conditions related to the exclusion of consideration of their value in the appraisal assignment?			
<b>Element 4: Compliance with IRS Syndicated Conservation Easement Rules</b>				
4.A	Does the appraisal contain a statement concerning the involvement of syndicated tax benefits or donation of a syndicated conservation easement?			
4.B	Does the appraisal include a discussion/analysis of any recent purchase transactions involving the subject property within the 36 months "before" the donation of the conservation easement?			
4.C	Is the appraised value of the property "before" considering the conservation easement more than 2.5 times the purchase price paid within 36 months prior to the donation of the conservation easement?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
4.D	Does the appraisal report contain a statement that inquiries were made to the donor concerning the taxpayer's purchase price "basis" in the property and whether the conservation easement has been (or is planned to be) "syndicated" to investors?			
4.E	Does the appraisal report indicate the results of the inquiries to the donor related to syndication of the conservation easement to investors?			
<b>Element 5: Compliance with Generally Recognized Appraisal Methods for Highest and Best Use and Discounted Cash Flow (DCF) Analysis</b>				
5.A	Does the appraisal contain a definition of <i>highest and best use</i> ?			
5.B	Does the appraisal separately consider the highest and best use of the entire property (including any contiguous property) both "before" as well as "after" considering the conservation easement?			
5.C	Does the appraisal separately discuss and analyze the highest and best use of the property "as improved" and the highest and best use of the land "as if vacant" on the date of value?			
5.D	Are each of the four prongs of highest and best use analysis (i.e., physically possible uses, legally permissible uses, financially feasible uses, and maximally productive use) discussed in detail both "before" and "after" considering the conservation easement?			
5.E	Is there a clear and detailed discussion of any physical limitations on use of the property (e.g., slope issues, soil conditions, vegetation, road access and frontage, property shape or size, water quality, water rights or utility availability issues, etc.) in considering the highest and best use of the property "before" considering the conservation easement?			
5.F	Is there a discussion of any existing restrictions of record (e.g., other easements, covenants, long-term leases, mineral rights, etc.) on the legally permissible uses of the property "before" considering the conservation easement?			
5.G	Is there a discussion and analysis of any existing land use restrictions imposed by zoning, planning, wetland, slope, environmental, etc. regulations on the property "before" considering the restrictions imposed by the conservation easement?			
5.H	If the appraisal assumes a zoning change, is there information and analysis included to support a conclusion that a change in zoning or subdivision approval is "reasonably probable" in the near future and would be approved by the local zoning and planning authorities?			
5.I	If some type of subdivision of the property is considered "legally permissible" and "physically possible" before considering the easement, is there any comparison of alternative possible discounted cash flow analyses showing supportable variations in potential lot numbers, lot sizes, lot prices, development costs, and absorption periods included as part of the analysis of "financial feasibility"?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
5.J	Does the appraisal contain a detailed description and analysis of the market area in which the property is located?			
5.K	Is the described market area focused on the actual geographic area where the subject property is located?			
5.L	Does the described market area include areas outside the state in which the subject property is located?			
5.M	Is there a map in the report showing the defined market area?			
5.N	Does the report contain a discussion and analysis of how the market area for the subject property was selected?			
5.O	Is there a discounted cash flow (DCF) analysis included in the report either as part of the highest and best use analysis or as a separate approach to value?			
5.P	Is there market support (i.e., supply and demand analysis) in the appraisal for any lot or subdivided parcel pricing included in the highest and best use analysis or in a DCF analysis?			
5.Q	Is there market support (i.e., supply and demand analysis) in the appraisal for any absorption rate of subdivided lots or parcels included in the highest and best use analysis or in a DCF analysis?			
5.R	Is there support in the appraisal for development costs used in any DCF analysis?			
5.S	Does any DCF analysis included in either the highest and best use section or in the valuation section of the appraisal include a delay for the time needed to obtain any zoning, planning, or other development approvals?			
5.T	Does any DCF analysis included in either the highest and best use section or in the valuation section of the appraisal include a delay for the time needed to extend utilities and infrastructure to the entire property or to sections of the property?			
5.U	Does any DCF analysis include as a development cost a developer's fee or management expense?			
5.V	Does any DCF analysis include an expense related to legal and title fees and broker's commissions associated with selling individual lots or subdivided parcels?			
5.W	Does the DCF analysis indicate how the discount rate was selected and indicate the source of that data?			
5.X	Is there a clear and compelling discussion of the effect, if any, of the provisions of the conservation easement on the "before" highest and best use?			
5.Y	Does the appraisal utilize a DCF analysis to arrive at the "after" easement highest and best use and/or the "after" easement value of the property?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
<b>Element 6: The Sales Comparison Approach—“Before” Considering the Conservation Easement</b>				
6.A	Does the appraisal identify the “market area” within which a search was conducted for possible comparable sales?			
6.B	If the sales used to value the property “before” the easement are located at a considerable distance from the subject property, is there an explanation in the appraisal for why sales closer in proximity to the subject property were not used?			
6.C	Is there a map showing the location of the comparable sales used?			
6.D	Is there an “adjustment” grid indicating how the prices indicated by the comparable sales were compared to the subject property and analyzed?			
6.E	Are the comparisons between the comparable sales and the subject in the adjustment grid shown as “qualitative” in nature (e.g., inferior, superior, similar, etc.)?			
6.F	If “qualitative” adjustments are made in the adjustment grid, is there a discussion of the basis for each of the qualitative comparisons and how the appraiser arrived at the final conclusion concerning the superiority, inferiority, or similarity of the comparable (as adjusted) to the subject property “before” considering the conservation easement?			
6.G	Are the comparisons between the comparable sales and the subject in the adjustment grid shown as “quantitative” in nature (e.g., 10% inferior, 5% superior, similar, etc.)?			
6.H	If “quantitative” adjustments are made in the adjustment grid, is there a discussion of the basis for each of the quantitative adjustments and how the appraiser arrived at the final conclusion concerning the percentage superior, percentage inferior, or similarity of the comparable (as adjusted) to the subject property “before” considering the conservation easement?			
6.I	Does the appraisal discuss and analyze any needed adjustments for differences between the dates when the comparable sales sold and the date of value of the subject property?			
6.J	If the comparable sales are significantly different from the subject property in size, is there a discussion and analysis of any adjustments to the comparable sales needed to account for those differences?			
6.K	Is the zoning of the comparable sales indicated, and is there a discussion and analysis of any adjustments to the comparable sales needed to account for the differences between the zoning of the comparable sales and the zoning of the subject property on the date of value?			
6.L	Has the appraiser “weighted” the comparable sales by giving more “weight” to one or more of the comparable sales than to others?			
6.M	Has the appraiser given more “weight” to the comparable sales requiring the least number or level of adjustment as recommended in IRS Publication 561?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
6.N	Does the summary of the comparable sales used include the names of buyers and sellers, deed book and page number, date of sale and selling price, amount and terms of any mortgage, assessed value, etc. as discussed in IRS Publication 561?			
<b>Element 7: The Sales Comparison Approach—Consideration and Analysis of Actual Easement Sales</b>				
7.A	Does the appraisal discuss whether there are actual easement purchases that can be used to directly value the subject conservation easement?			
7.B	If the use of actual easement sales is rejected, is the support for that conclusion provided in the report sufficient to indicate that no “meaningful or valid comparison” to the subject easement can be made?			
7.C	If actual sales are used to value the conservation easement, does the appraisal compare and contrast the protections and provisions in those other easement documents to the protections and provisions in the subject easement being appraised?			
7.D	If the easement purchases used as comparable sales were made by a unit of federal, state, or local government, is there analysis and support for a conclusion that they were negotiated arm’s-length transactions?			
<b>Element 8: The Sales Comparison Approach—“After” Considering the Conservation Easement</b>				
8.A	If the appraisal does not utilize actual prices paid by purchasers of conservation easements, does the appraisal utilize prices paid for properties encumbered by conservation easements as evidence of the “after” value of the entire contiguous property that is the subject of the appraisal?			
8.B	Does the appraisal identify the “market area” within which a search was conducted for possible “after easement” comparable sales?			
8.C	If the sales used to value the property “after” the easement are located at a considerable distance from the subject property, is there an explanation in the appraisal for why sales closer in proximity to the subject property were not used?			
8.D	Is there a map showing the location of the “after” comparable sales used?			
8.E	Is there a comparison of the terms, restrictions, and protections in the conservation easements protecting the “after” easement comparable sales with the terms and restrictions in the conservation easement on the property that is the subject of the appraisal report?			
8.F	Do the terms, restrictions, and protections in the conservation easements on the comparable “after” easement sales appear to be sufficiently comparable to those in the easement on the subject property to justify their use as comparable sales?			
8.G	Is there an “adjustment” grid indicating how the prices indicated by the comparable easement encumbered sales were compared to the subject property and analyzed?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
8.H	Are the comparisons between the "after" easement comparable sales and the subject property "after" considering the easement in the adjustment grid shown as "qualitative" in nature (e.g., inferior, superior, similar, etc.)?			
8.I	If "qualitative" adjustments are made in the adjustment grid, is there a discussion of the basis for each of the qualitative comparisons and how the appraiser arrived at the final conclusion concerning the superiority, inferiority, or similarity of the comparable (as adjusted) to the subject property "after" considering the conservation easement?			
8.J	Are the comparisons between the comparable sales and the subject in the adjustment grid shown as "quantitative" in nature (e.g., 10% inferior, 5% superior, similar, etc.)?			
8.K	If "quantitative" adjustments are made in the adjustment grid, is there a discussion of the basis for each of the quantitative adjustments and how the appraiser arrived at the final conclusion concerning the percentage superior, percentage inferior, or similarity of the comparable (as adjusted) to the subject property "after" considering the conservation easement?			
8.L	Has the appraiser "weighted" the comparable sales by giving more "weight" to one or more of the "after" easement comparable sales than to others?			
8.M	Has the appraiser given more "weight" to the "after" easement comparable sales requiring the least number or level of adjustment as recommended in IRS Publication 561?			
8.N	Does the summary of the "after" easement comparable sales used include the names of buyers and sellers, deed book and page number, date of sale and selling price, amount and terms of any mortgage, assessed value, etc. as discussed in IRS Publication 561?			
<b>Element 9: Consideration of the Contributory Value of Any Improvements</b>				
9.A	Are there any improvements on the subject property?			
9.B	Does the appraisal include a description of those improvements on the land and consideration and analysis of their contribution, if any, to the "before" value of the entire contiguous property by the conservation easement?			
9.C	Does the appraisal consider and discuss the effect, if any, of the conservation easement on the value of any improvements on the property?			
9.D	Is the contributory value, if any, of the improvements "before" considering the conservation easement discussed and analyzed as part of the sales comparison approach to the value of the contiguous property? ( <i>This can be especially important in the valuation of easement-encumbered ranch properties with improvements.</i> )			
9.E	Do the adjustments to improved comparable sales used in the "before" easement valuation analysis consider the contribution to value due to any differences between the improvements on the comparable sale property and the improvements on the subject property?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
9.F	Do the adjustments to improved comparable sales used in the “after” easement valuation analysis consider the contribution to value due to any differences between the improvements on the comparable “after” easement sale properties and the improvements on the subject property?			
9.G	Does the appraisal include a cost approach to value of the improvements?			
9.H	If a cost approach to the value of the improvements is included, does the appraisal include an analysis of the remaining useful life of the improvements and a discussion and analysis of the appropriate physical, functional, and external obsolescence factors affecting the “before” easement value of the improvements?			
9.I	If a cost approach to the value of the improvements is included, does the appraisal include discussion and analysis of the effect, if any, of the conservation easement on the remaining useful life of the improvements and a discussion and analysis of the effect, if any, of the conservation easement on the appropriate physical, functional, and external obsolescence factors affecting the “after” easement value of the improvements?			
<b>Element 10: Analysis of Contribution to Value from Existing Income from Rent, Crops, or Other Sources</b>				
10.A	Does the existing property generate income from rent, crops, or other sources?			
10.B	Does the appraisal include a discussion and analysis of recent income from rent, crops, or other sources and expenses, if any, associated with producing that income?			
10.C	Does the appraisal arrive at a contribution of any net income from rent, crops, or other sources to the value “before” considering the conservation easement by capitalizing that net income?			
10.D	Is the net income used to arrive at a capitalized “before” easement value section of the report significantly different from the actual net income generated from rent, crops, or other sources in recent years?			
10.E	If the net income considered and capitalized in the “before” easement appraisal is significantly different from actual net income generated in recent years, is there a discussion and analysis of why a different net income was used in estimating the “before” value of the property?			
10.F	If the existing or potential income of the subject property has been “capitalized” into a direct estimate of “before” easement value, is there discussion of capitalization rates and support provided for the selection of the capitalization rate used?			
10.G	Has the income productivity of the entire contiguous subject property been considered and compared to the income-generating potential, if any, of comparable sales used in the sales comparison approach to arrive at the “before” easement value of the subject property?			
10.H	Has the effect, if any, of the conservation easement on that income productivity potential been considered and discussed in the “after” easement value section of the appraisal report?			

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**Appendix** (continued)

Checklist Item No.	Checklist Item	Applicability		
		Yes	No	NA
<b>Element 11: Contents of Any Appraisal Addenda and Consideration of Draft and Final Conservation Easement Language</b>				
11.A	Does the appraisal contain an Addenda?			
11.B	Does the Addenda contain a copy of the signed and recorded conservation easement?			
11.C	If the appraisal was prepared before the acceptance and recording of the final conservation easement, does it contain a copy of the latest draft of the easement as of the date the appraisal was submitted?			
11.D	If the appraisal is based on only a "draft" conservation easement document, does the appraisal clearly state that it is based on a draft rather than the final recorded conservation easement?			
11.E	If the appraisal is based on only a "draft" conservation easement document, does the appraisal report clearly state that the appraised value of the conservation easement could be substantially different if the terms, restrictions, and protections in the final recorded easement are substantially different from the terms, restrictions, and protections in the draft conservation easement on which the appraisal is based?			
11.F	If the appraisal is based on only a "draft" conservation easement document, does the appraisal include a clear statement that the appraiser is assuming that the terms, restrictions, and protections in the final recorded conservation easement will be substantially the same as the draft easement on which the appraisal is based?			
11.G	If the appraisal was prepared based on a draft easement, are the terms, restrictions, and protections in the final signed and recorded easement sufficiently similar to those in the draft easement?			
11.H	Does the appraisal Addenda include a copy of the baseline condition report?			