

# CONSERVATION EASEMENTS AND ETHICS

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## I. INTRODUCTION

A conservation easement is a “legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values.”<sup>1</sup> When most of us think of the field of conservation easements, the issue of ethics is not at the top of our list of concerns. Since work in this area ostensibly advances the public good, and the vast majority of participants in the field strive toward that end, questions of morality and right and wrong rarely seem relevant.

However, financial incentives, in the form of income tax, estate tax and other benefits, provide potential motives for unethical behavior. Landowners with more interest in financial gain than the public good may dishonestly inflate the conservation values of their easements. Appraisers seeking the business of those landowners may be encouraged to inflate easement values. Land trusts, motivated by noble purposes, may nonetheless diverge from the path of ethical conduct by accepting easements of questionable value.

In May 2003, a series of investigative articles by the Washington Post concerning The Nature Conservancy (“TNC”) put ethical concerns at the forefront of land trust concerns.<sup>2</sup> The articles focused, in part, on so-called “conservation buyer” deals.<sup>3</sup> In these deals, TNC purchased property for its fair market value and placed a conservation easement on the

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<sup>1</sup> ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK 1* (Laura Jorstad et al. eds., 2d ed. 2005) (1988).

<sup>2</sup> See David B. Ottoway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST, May 4, 2003, at A1; and David B. Ottoway & Joe Stephens, *On Eastern Shore, For-Profit ‘Flagship’ Hits Shoals*, WASH. POST, May 5, 2003, at A11; and Joe Stephens, *Charity’s Land Deals to be Scrutinized: Senators Send Letter to Conservancy*, WASH. POST, May 10, 2003, at A2; and Joe Stephens & David B. Ottoway, *Nature Conservancy Suspends Land Sales*, WASH. POST, May 13, 2003, at A3; and Joe Stephens & David B. Ottoway, *Charity Hiring Lawyers to Try to Prevent Hill Probe*, WASH. POST, May 16, 2003, at A27 [hereinafter WASH. POST].

<sup>3</sup> WASH. POST, *supra* note 2.

property.<sup>4</sup> TNC then sold the property, often to a board member or insider for a price reflecting a diminution in value due to the easement.<sup>5</sup> The buyer then “donated” an amount equal to the discount to TNC.<sup>6</sup> The articles prompted a Congressional investigation and considerable controversy within and without the land trust community.<sup>7</sup>

This Article explores the neglected area of ethics as it relates to conservation easements. Scenarios, drawn from personal experience and published court opinions, as well as discussions with attorneys, appraisers, land trust officials and landowners, provide a vehicle for exploration of ethical standards as they might apply to one of the various actors in the conservation easement process. This Article examines situations involving attorneys, appraisers, land trust officials, and landowners. The scenarios presented illustrate commonly occurring situations in conservation easement practice.

Although the Article divides the discussion based upon the different professions involved in the conservation easement process, many of the scenarios involve ethical dilemmas for more than one person. For example, a situation may implicate ethical concerns for an attorney and the land trust. The scenarios raise significant ethical issues whose resolution is left to the reader, although the author raises some possible answers.

## II. A FOCUS ON ETHICS

Ethics is defined here in its broadest sense as “a system of moral principles . . . that branch of philosophy dealing with values relating to human conduct, with respect to the rightness and wrongness of certain actions and to the goodness and badness of the motives and the ends of such actions.”<sup>8</sup> *Webster’s* defines “moral” as “founded on the fundamental principles of right conduct rather than on legalities, enactment, or custom.”<sup>9</sup> The American Bar Association Model Rules of Professional Conduct<sup>10</sup> (“MRPC” or “Model Rules”) and the Uniform Standards of Professional Appraisal Practice<sup>11</sup> are also used as measuring sticks in

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 489 (1989) [hereinafter WEBSTER’S].

<sup>9</sup> *Id.* at 930.

<sup>10</sup> ANNOTATED MODEL RULES OF PROF’L CONDUCT (2003).

<sup>11</sup> UNIFORM STANDARDS OF PROF’L APPRAISAL PRACTICE (The Appraisal Foundation 2006), available at <http://commerce.appraisalfoundation.org/html/2006%20USPAP/toc.htm>.

some instances. Overall however, the notion of right and wrong forms the linchpin of the analysis.

This Article involves applied ethics, as opposed to ethics as a branch of philosophy. Many tenets or principles could be brought to bear upon this topic, including:

- the end does not justify the means;
- act so that the principle of your action can become a universal law for all mankind;
- never treat another person simply as a means;
- always choose the action that will promote the greatest good for the greatest number in the long run;
- always choose the mean between two extremes; and
- good is to be done and evil is to be avoided.<sup>12</sup>

These principles may at times come into conflict with each other. When conflict arises, a balancing must occur and reasonableness must form part of the balance.<sup>13</sup> Another issue involves the extent to which intention should matter.<sup>14</sup>

This Article focuses mainly on the ethical principle of avoiding conflicts of interest. The Land Trust Alliance<sup>15</sup> refers to self-dealing as a conflict of interest and defines self-dealing as a director or staff member financially benefitting from his position with the trust.<sup>16</sup> At the very least, conflicts of interest raise the appearance of impropriety, which land trusts should seek to avoid.

Land trusts hold a special place in ethics. It would be easy for a land trust representative to rationalize that the trust does good work, therefore the ends justify the means. However, "doing good is not the standard against which accountable organizations hold themselves."<sup>17</sup> High standards of behavior and strict discipline in the stewardship of resources

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<sup>12</sup> E-mail from Dr. John A. Rohr, Professor, Center for Public Administration and Policy, Virginia Tech, to Jesse J. Richardson, Jr. (May 21, 2005) (on file with author).

<sup>13</sup> E-mail from Dr. Max O. Stephenson, Professor, Urban Affairs and Planning, Virginia Tech, to Jesse J. Richardson, Jr. (Jun. 4, 2005) (on file with author).

<sup>14</sup> *Id.*

<sup>15</sup> Land Trust Alliance, <http://www.ltanet.org/>, (last visited Feb. 20, 2008). The Land Trust Alliance is a national organization "that promotes voluntary private land conservation to benefit communities and natural systems." They are "the national convener, strategist and representative of more than 1,600 land trusts across America." Land Trust Alliance, <http://www.lta.org/accreditation/factsheets/AbouttheSeal.html>, (last visited Feb. 20, 2008). The Land Trust Alliance also administers a voluntary accreditation program for land trusts, initiated in 2006.

<sup>16</sup> THE STANDARDS AND PRACTICES GUIDEBOOK 3-2 (Land Trust Alliance 1997).

<sup>17</sup> SUSAN U. RAYMOND, THE FUTURE OF PHILANTHROPY: ECONOMICS, ETHICS AND MANAGEMENT 68 (2004).

should be expected, regardless of media attention.<sup>18</sup> “What is right is not a function of who is looking.”<sup>19</sup>

### III. TAX FRAUD

While the question of whether conduct qualifies as “ethical” depends on more than statutory provisions, the legal construct of fraud applies to some ethical issues involving conservation easements.<sup>20</sup> *Webster’s* defines fraud as “deceit, trickery, sharp practice, or breach of confidence, used to gain some unfair or dishonest advantage.”<sup>21</sup>

While this Article addresses ethics rather than fraud, the specter of criminal tax fraud hangs over many questionable conservation easement transactions. Tax benefits provide the incentive and fraud proves to be the temptation. This section presents a general overview of how federal law defines and treats tax fraud. No known cases address tax fraud in the context of conservation easements. The published cases all deal with excessive appraisals.<sup>22</sup>

The types of tax fraud most likely to occur related to conservation easements involve overstating and claiming false deductions. For individuals, attempting to evade or defeat a tax amounts to a felony that carries up to five years in jail and up to \$250,000 in fines.<sup>23</sup> One who subscribes to a false statement on a tax return is subject to criminal penalties of up to three years in jail and a \$250,000 fine for individuals.<sup>24</sup> A landowner who knowingly overstates the value of a conservation easement on a tax return would violate both statutes.

In addition, one who aids or assists in, or procures, counsels, or advises the preparation of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter is guilty of a felony, which may result in up to three years in jail and a \$100,000 fine (\$500,000 in the case of a corporation).<sup>25</sup> Conspiring either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, coupled with an

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.,* Falby v. New England Forestry Foundation, 15 Mass.L.Rep. 681, 3 (2003), *aff’d* 63 Mass.App.Ct., 823 N.E.2d 823 (2005) for an example of litigation where a landowner alleged fraud against a land trust. The court held in favor of the land trust.

<sup>21</sup> WEBSTER’S, *supra* note 8 at 564.

<sup>22</sup> Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easements: A Responsible Approach*, 31 *Ecology L.Q.* 1 (2004).

<sup>23</sup> 26 U.S.C. § 7201 (Thompson/West 2008).

<sup>24</sup> 26 U.S.C. § 7206(1) (Thompson/West 2008).

<sup>25</sup> 26 U.S.C. § 7206(2) (Thompson/West 2008).

act by one of the co-conspirators in furtherance of the plan, entails criminal liability and may result in imprisonment for up to five years and a fine of up to \$250,000.<sup>26</sup>

These provisions subject attorneys, land trusts, and land trust personnel, accountants, appraisers, and others in the conservation easement process to severe criminal penalties if they act to further a landowner's effort to receive more tax benefits than legally permissible.

#### IV. ATTORNEYS

##### A. Introduction

Since attorneys draft the conservation easement and often participate in the process of its consideration at many stages, many ethical quandaries involving these instruments affect attorneys. Note that attorneys hold a special role in this process. Attorneys must represent their clients within ethical and legal boundaries.

Although traditional moral principles remain applicable, the Rules set out in the MRPC for attorneys constitute useful guidelines for ethical professional conduct.<sup>27</sup> The Comments appended to the Rules may also be used to evaluate the morality of an action.

These provisions apply only to licensed attorneys. However, they are crafted to avoid even the appearance of impropriety. The Model Rules and the scenarios presented here may inform ethical decisions by land trusts and individuals not licensed to practice law as well as attorneys.

##### B. Dishonesty, Fraud, Deceit, or Misrepresentation

Rule 1.2(d) of the MRPC provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but the lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>28</sup> “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”<sup>29</sup> Comment [5] to Rule 1.0 provides that negligent misrepresentation or negligent failure to apprise another of relevant information is neither “fraud”

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<sup>26</sup> 18 U.S.C. § 371 (Thompson/West 2008).

<sup>27</sup> ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 10 at preamble, ¶ 9.

<sup>28</sup> *Id.* R. 1.2(d).

<sup>29</sup> *Id.* R. 1.0(d).

nor “fraudulent.”<sup>30</sup> At the same time, neither reliance nor damages are required for conduct to be fraudulent.<sup>31</sup>

Rule 4.1 also admonishes the attorney to not make any “false statement of material law or fact to a third person” or “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information].”<sup>32</sup> This rule could also apply with respect to the issues addressed in this subsection.

Boston attorney Steven J. Small has suggested that one of the biggest ethical issues facing the land trust community today involves “very aggressive” appraisals.<sup>33</sup> An attorney’s knowledge of or participation in such an appraisal implicates the prohibition against assisting a client in fraudulent conduct. Use of some particularly egregious appraisals may constitute criminal conduct.

If an attorney knows that an appraisal misrepresents the value of an easement, or participates in the appropriation of a misleading appraisal, that individual arguably criminally defrauds the nation’s government and thereby the taxpaying public. Scenario one addresses the situation where the attorney knows facts that would negatively impact an appraisal, but fails to disclose this information.

#### *Scenario One*

Devious Developer purchases a parcel of agricultural land for development but the governing authority denies development of the land. Devious consults with Dewey Cheatum, Esquire, about donating a conservation easement on the property. Cheatum also represented Devious with respect to the unsuccessful development permit. Devious and Cheatum retain an appraiser, Lazy Funtime, to value a donation of the conservation easement, but do not inform her about the denial of the permit. She fails to uncover the permit denial and values the easement based on the assumption of its potential for intense development. The attorney says nothing. Has the attorney participated in or assisted a client in fraudulent or dishonest conduct?

<sup>30</sup> *Id.* R. 1.0, cmt. 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* R. 4.1.

<sup>33</sup> E-mail from Steven Small, Esquire to Jesse J. Richardson, Jr. (Feb. 3, 2003) (on file with author).

Although an attorney must zealously represent his client, few would condone Cheatum's conduct in this scenario as ethical. His failure to disclose pertinent facts to the appraiser allows a grossly overstated, and incorrect, deduction for his client. Although negligent failure to disclose relevant information to the appraiser does not violate the Rules, fraudulent action may include silence.<sup>34</sup>

### C. Aiding a Non-Lawyer in the Unauthorized Practice of Law

Rule 5.5(a) prohibits a lawyer from aiding a non-lawyer in the practice of law.<sup>35</sup> Although the definition of "the practice of law" varies from state to state, the preparation of legal documents, such as conservation easements, for another would typically meet the unauthorized practice standards.<sup>36</sup> The unauthorized practice of law is a crime in most states, but many small land trusts lack the resources to retain full time counsel and may be unable to afford legal advice. Similarly, cash poor but land rich donors may also lack the resources to hire a lawyer. Given these realities, attorneys for larger conservation groups may feel pressure to provide "boiler plate" documents to their smaller sister organizations knowing that third parties will alter the documents. This activity results in the unauthorized practice of law by personnel of the smaller land trust where the documents are prepared on behalf of the potential donor.

Many states make the unauthorized practice of law a criminal act.<sup>37</sup> Scenario Two presents an innocent situation that may evolve into the unauthorized practice of law. Although the attorney wants to help, can being too helpful equate to aiding the unlawful practice of law?

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<sup>34</sup> ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 10 at R. 1.0, cmt.5.

<sup>35</sup> *Id.* R. 5.5(a).

<sup>36</sup> *See, e.g.,* RULES OF THE SUP. CT. OF VIRGINIA, Part 6, §1(B)(2), defining the practice of law, *inter alia*, as where "[o]ne, other than as a regular employee acting on behalf of his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business."

<sup>37</sup> Legal News, *Unauthorized Practice: New ABA Survey of UPL Enforcement Finds Varied Funding, Predicts Increased Activity*, 73 U.S.L. Wkly. 2403, 2403 (2005). As of 2004, twenty-five jurisdictions reported to impose criminal fines. Of those, twenty-two imposed prison sentences.

*Scenario Two*

Newkid Land Trust embarks on its first easement. However, the landowner has little income and does not trust attorneys. Newkid has been unable to secure grant funding at this early stage. Newkid's director calls the staff attorney for Mega Land Trust, explains the situation, and asks for a "model" conservation easement form. The staff attorney provides it. Has the attorney aided Newkid and its director in the unauthorized practice of law?

Arguably, if the attorney knows or should know that the document supplied will be used in the unauthorized practice of law, his conduct violates the Model Rules. Perhaps this action is merely a technical violation, but does it violate basic ethical principles? Unauthorized practice of law rules seek to protect the consumer from unqualified assistance. By breaching his duty to the public at large, the attorney likely violates ethical mores. Does it matter what the attorney intended? Can the attorney argue that the ends (protecting land, helping a colleague) justify the means?

Note also the severe conflict of interest involved where a land trust prepares, for example, a deed of easement for a potential donor. The interests of the land trust in obtaining the strictest conservation easement possible may clash with a landowner's interest in retaining rights in the land.

*D. Refusing Employment when Personal Interests May Impair  
Professional Judgment*

Rule 2.1 requires the lawyer to "exercise independent professional judgment and render candid advice."<sup>38</sup> This duty underlies the conflict of interest rules (for example, Rules 1.7, 1.8, 1.9, 1.18, and 5.4).<sup>39</sup> Rule 1.7(a)(1) prohibits a lawyer from representing a client where "the representation of one client will be directly adverse to another client."<sup>40</sup> Rule 1.7(a)(2) provides that a lawyer may not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."<sup>41</sup> Rule 1.7(b) allows exceptions to these prohibitions if the client gives informed

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<sup>38</sup> ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 10 at R. 2.1.

<sup>39</sup> *See Id. generally.*

<sup>40</sup> *Id.* R. 1.7(a)(1).

<sup>41</sup> *Id.* R. 1.7(a)(2).



consent, the lawyer can provide competent and diligent representation to each client, the representation is lawful and the clients will not be asserting claims against each other in a proceeding.<sup>42</sup> These provisions apply to conflicts of interest. Comment [10] to Rule 1.7 amplifies the obligation: "The lawyer's own interest should not be permitted to have an adverse effect on the representation of the client."<sup>43</sup>

Relatively few attorneys possess expertise concerning conservation easements, particularly in rural areas. Conservation easement work involves tax, real estate, environmental, and other complex areas of law.

Scenarios Three and Four present possible conflicts of interest. An attorney's personal views and affiliations should not affect his representation of a client. Would they in the following scenarios? What obligations does the attorney have in each case with respect to the possible conflict?

*Scenario Three*

Ima Swellguy, Esquire, is very active in community affairs. He is concerned about the environment, has donated a conservation easement on his property, and serves on the Board of Directors of Rural Views Land Trust. Fran Farmer consults with Swellguy about donating an easement on her property to Rural Views. Should Swellguy represent Fran?

*Scenario Four*

Wally Wealthy, Esquire, owns a country estate in Scenic County, Nirvana. Wally is very active in local environmental groups and wants to maintain the rural quality of the area. Delilah Dirtfarmer owns a farm adjacent to Wealthy's estate. Delilah consults with Wally about donating an easement on her property. Knowing that the donation of the easement will likely increase the value of his property significantly, should Wally represent Delilah?

At a minimum, Swellguy must disclose the fact that he serves on the Rural Views board and obtain informed consent. In addition, if Swellguy feels that his personal views and service on the board will prevent him from zealously representing Farmer, he should decline the representation. Ethically, Swellguy stands on firmer ground if he declines the representation in any case. If questions arise later, Swellguy may be

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<sup>42</sup> *Id.* R. 1.7(b).

<sup>43</sup> *Id.* R. 1.7, cmt. 10.

unable to show how his views and board position did not interfere with his representation of the client. Swellguy owes a fiduciary duty to the Rural Views Land Trust. This duty may conflict with his duty to Farmer. Declining the representation avoids this potential conflict.

Wealthy holds a personal interest in having Dirtfarmer donate the interest. Wealthy must, at a minimum, disclose this potential conflict with Dirtfarmer's interests and obtain informed consent. However, disclosure and informed consent may not be enough. A real possibility exists that negotiation of the easement provisions will present one or more situations where Wealthy's best interest would dictate a different result than pursuit of Dirtfarmer's interests. To avoid these possibilities, Wealthy should decline the representation.

In both Scenarios Three and Four, if the attorney had been a member of a property rights group that opposes conservation easements, the ethical obligations remain the same. At a minimum, the attorney must disclose the potential conflict and obtain informed consent. Best practice dictates that the attorney decline the representation unless chances are extremely small that the attorney's interest will not adversely compromise the attorney's representation of the client.

In addition, attorneys drafting conservation easements may be pulled in several directions to the detriment of their clients. When an attorney serves on a land trust board, his loyalties may be mixed if he attempts to represent a landowner donating an easement to the land trust. If the board and the landowner disagree on particular easement provisions, the attorney may wind up confronting a conflict of interest situation.

#### *E. Avoiding Influence by Persons Other than the Client*

Rule 5.4 (c) prohibits a lawyer from permitting "a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."<sup>44</sup> Rule 1.8(f) places explicit conditions on an attorney accepting compensation for representing a client from one other than the client.<sup>45</sup> Specifically, the client must give informed consent, the arrangement must not interfere with the independent exercise of the lawyer's professional judgment or the attorney-client relationship, and the confidentiality of information must be protected pursuant to Rule 1.6.<sup>46</sup>

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<sup>44</sup> *Id.* R. 5.4(c).

<sup>45</sup> *Id.* R. 1.8(f).

<sup>46</sup> *Id.*

Sometimes informed consent with regard to the payment and identity of the payer will allow the arrangement to move forward.<sup>47</sup> However, as discussed in Section IV.D., *supra*, if the third-party payment creates a conflict of interest, Rule 1.7 must be complied with.<sup>48</sup>

Land trusts that pay the legal fees of a donor may cause ethical quandaries for the attorney, particularly if negotiations become heated. The land trust may wish to consider reimbursing the donor for legal fees as an alternative, if the donor can advance the fees.

Scenario Five involves a situation familiar to many land trusts. The act of donating an easement reflects much generosity on the part of the donor. Some donors may object to paying additional fees, such as appraisal and legal fees, in addition to the donation. Some donors, land rich but cash poor, may lack capacity to pay these fees. The land trust wants to help the donor and facilitate the donation. May the land trust pay some or all of these fees on behalf of the donor? Should they?

#### *Scenario Five*

Frieda Flatbroke wishes to donate an easement on her farm to the Peaceful Valley Land Trust. In speaking with the land trust's representative, Frieda learns that she will have to pay an attorney for drafting the agreement. That fact suddenly makes her unenthusiastic about the donation. When the representative offers to pay the legal fees, Frieda agrees to the donation. In the course of negotiations, Peaceful Valley Land Trust makes it clear that they wish no more than one subdivided parcel on the subject property. Frieda is equally reluctant to reserve three subdivisions. Frieda's attorney, Yan Youngster, Esquire, fears that the land trust will not pay him if he fails to give in to the land trust's demands and the deal falls through. It has been a tough year for his fledgling law practice. What should he do?

Youngster cannot ponder fee considerations when representing his client. Such outside influences constitute improper influences. The mere fact that the land trust agreed to pay the fees places Yan in an ethically perilous position.

Land trusts should consider reimbursing the donor for fees or structuring the transaction as a bargain sale and paying the donor some amount for the easement. Note that any means of paying the fees of the donor,

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<sup>47</sup> *Id.* cmt.12.

<sup>48</sup> *Id.*

direct or indirect, entails tax consequences for the donor. These tax consequences fall beyond the scope of this Article, but the donor should seek competent tax advice.

#### *F. Representing a Client Zealously*

A lawyer's "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system" form one of the basic principles underlying the Model Rules.<sup>49</sup> This principle is embodied in Rule 1.3's requirement that a lawyer act with reasonable diligence and promptness in representing a client.<sup>50</sup> However, a lawyer is not bound to press for every advantage possible on behalf of his client.<sup>51</sup> For example, the scope of the representation may allow the lawyer to use professional discretion in determining particular means.<sup>52</sup>

This ethical obligation requires, in the judgment of this author, that an attorney explore all alternatives available to achieve the client's goals and share the alternatives, and the ramifications of each, with the client. Full disclosure forms the linchpin of zealous representation.

Most attorneys and laypersons consider this ethical duty in the context of representation of the accused in criminal cases. Particularly in egregious cases where guilt appears clear, the attorney must set aside personal feelings and represent the client as effectively as possible. However, the same issue arises with conservation easements.

Attorneys counseling clients concerning conservation easements must explore alternatives to donating an easement. For example, this author details the advantages and disadvantages of a potential donation with a client, followed by a lengthy letter summarizing each point of the discussion.

Attorneys drafting conservation easements often feel that conservation easements promote the public good. Sometimes, these lawyers perform services at a reduced rate for easement clients, give time and expertise for community education, and promote conservation easements generally. However, personal feelings must be set aside for the good of the client. The attorney must advise the client why the donation of a conservation easement may be disadvantageous to him or her.

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<sup>49</sup> See *id.* generally preamble.

<sup>50</sup> *Id.* R. 1.3.

<sup>51</sup> *Id.* cmt. 1.

<sup>52</sup> *Id.* See also R. 1.2.

Scenario Six involves a situation where full disclosure of the alternatives may prompt a result not favored by the attorney. How should the attorney address these issues?

*Scenario Six*

Earl Environmentalist, Esquire, sincerely and vigorously seeks to protect the environment in every way. He strongly supports and contributes to the local land trust, River Valley Conservation Council. He believes that conservation easements provide one of the few chances to save critical natural areas. Poor Farmer comes to Earl interested in donating a conservation easement to the River Valley Conservation Council. He indicates to Earl that his primary objectives are estate tax avoidance and to ensure the property remains in the family as an active farm. Earl knows that I.R.C. section 2032A (special use valuation) may enable Poor to meet those objectives. Gifting and other alternative strategies also exist. In addition, the estate tax may soon be eliminated. Should Earl simply help Poor execute the easement, or should he make him aware of the alternatives?

Environmentalist must not allow his personal views or feelings to influence his representation of Farmer. Farmer must be apprised of all alternatives, and the advantages and disadvantages of each possible course of action. If the situation was reversed, and the attorney personally disfavored conservation easements, the attorney's duty remains the same. The attorney's loyalty must be to client, without qualification.

*G. Representing a Land Trust*

Rule 1.13 states that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."<sup>53</sup> The remainder of the Rule sets out procedures for dealing with the difficulty in interacting with officers, employees, and other persons associated with the land trust, particularly when those persons may not be acting in the best interest of the land trust.

A lawyer must first ensure that persons associated with an organization are aware that the lawyer represents the land trust and not the individuals, particularly when the interests of the land trust may be adverse to the interests of the individuals.<sup>54</sup> Occasionally, a particular member of

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<sup>53</sup> *Id.* R. 1.13(a).

<sup>54</sup> *Id.* R. 1.13(d).

the land trust board or a key employee may harbor a personal agenda that differs from the aims of the land trust. The attorney must continue to represent the land trust with reasonable diligence.<sup>55</sup> Scenario Seven represents just such a situation.

### *Scenario Seven*

Lana Landowner serves on the board of the Mountain Views Land Trust. Wealthy Developer owns land that forms a lovely view from Lana's home. Lana appears before the local governing body to provide comments on Developer's proposed development of the property. Lana negotiates with Developer on the extent and type of development. She suggests that Developer donate an easement on the portion of the property that forms her view shed. Lana vigorously argues in favor of the easement at the board meeting, despite issues of the value of the easement and unfunded enforcement duties of the land trust. The executive director turns to Irma Inhouse, Esquire, for advice. What should Irma say?

Irma's duty goes to the land trust, not to any individual within the trust. This scenario raises issues for land trusts as well. A conflict of interest policy should outline the boundaries of Landowner's participation, if any, in discussions and votes involving her personal views.

A director who thinks his participation in a board action may be or could be viewed as a conflict should fully disclose the conflict.<sup>56</sup> In addition, the director should neither vote nor be present for discussion on that issue.<sup>57</sup>

## V. APPRAISERS

### A. *Introduction*

The United States Congress passed the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") in 1989.<sup>58</sup> Title XI of FIRREA, the Real Estate Appraisal Reform Amendment, required the licensing of real estate appraisers in each of the fifty states by the end of

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<sup>55</sup> *Id.* R. 1.3.

<sup>56</sup> 1 THE STANDARDS AND PRACTICES GUIDEBOOK standard 4 (Land Trust Alliance 1997).

<sup>57</sup> *Id.*

<sup>58</sup> 12 U.S.C. §§ 3331-3351 (Thompson/West 2008).

1992 and mandated development of the Uniform Standards of Professional Appraisal Practice (“USPAP”).<sup>59</sup>

As developed, the USPAP includes standards for ethical practice.<sup>60</sup> This section focuses on the impact of those provisions for the appraisal of conservation easements.

### *B. Predetermined Opinions/Conclusions and Contingency Fees*

Appraisers “must not accept an assignment that includes the reporting of predetermined opinions and conclusions.”<sup>61</sup> In addition, the USPAP provides that:

It is unethical for an appraiser to accept an assignment, or to have a compensation arrangement for an assignment, that is contingent on any of the following:

- the reporting of a predetermined result (e.g., opinion of value);
- a direction in assignment results that favors the cause of the client;
- the amount of a value opinion;
- the attainment of a stipulated result; or
- the occurrence of a subsequent event directly related to the appraiser’s opinions and specific to the assignment’s purpose.<sup>62</sup>

In general, in easement transactions both the land trust and the landowner desire a high valuation of the conservation easement so that the donation will occur. Appraisal of a conservation easement requires additional research by an appraiser, resulting in higher fees. These higher fees may lead some landowners and land trusts to expect that the appraiser will deliver a higher valuation “in exchange” for these higher fees. In other words, the appraiser may be expected to advocate on behalf of the client instead of delivering an unbiased valuation.

An appraiser may deal with these issues by charging one-half of the fee to inspect the easement and choose some comparable sales or conduct preliminary research. If it appears that the appraisal will not result in a value high enough for the donation to occur, the client may instruct the appraiser to end the job immediately.<sup>63</sup> Regardless, an appraiser valu-

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<sup>59</sup> 12 U.S.C. § 3336; 12 U.S.C. § 3348 (Thompson/West 2008).

<sup>60</sup> STANDARDS OF PROF’L APPRAISAL PRACTICE, Ethics Rule (The Appraisal Foundation 2006), [http://commerce.appraisalfoundation.org/html/2006%20USPAP/ethics\\_rule.htm](http://commerce.appraisalfoundation.org/html/2006%20USPAP/ethics_rule.htm), (last visited Feb. 22, 2008).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> C. Boddy, *Ethics and the Appraiser*, available at <http://www.chet-boddy.com/Pages/ethics.html>.

ing easements fairly may build a reputation as a “deal breaker” and lose referrals from land trusts.<sup>64</sup>

Scenario Eight incorporates several concerns under these ethical considerations. Note the role of the land trust in this scenario.

*Scenario Eight*

Gary Greedy approaches licensed appraiser Erma Ethical and says, “Erma, I hear you are the best. I am donating a conservation easement to Bliss Land Trust. I need it to be worth at least \$500,000 to make this deal go. Whatever your regular fee is, I’ll double it for a good job.” The Land Trust President, sitting beside Gary, nods his head and states “Yes, we really need this one to appraise out well.” What should Erma do?

Elements of this conversation imply that Greedy is asking Ethical to violate portions of the USPAP. First, “I need it to be worth at least \$500,000...” suggests an amount of value opinion, the reporting of a predetermined result or the attainment of a stipulated result. The duty of an appraiser lies in giving a fair and impartial valuation, not one that the client desires.<sup>65</sup> The offer to double the fee sounds suspiciously like a bribe, or at the least that it is contingently up a value of at least \$500,000.

The Land Trust President then exacerbates the situation by making it clear that the Land Trust wants a high value on this easement donation. The appraiser obviously must ignore those implications and give a fair appraisal. Perhaps she should split the job into parts and ask for half her ordinary fee to do preliminary research and give an indication of direction.

Is it ethical for the appraiser to accept a fee twice the normal rate? Such an action gives the appearance of impropriety and should be avoided.

By pressuring Ethical to do other than her professional and moral duty, are the actions of the landowner and the Land Trust President unethical? Since these actions ask for less than the appraiser’s professional and moral obligations, the landowner and Land Trust President likely acted unethically or, at least, unprofessionally.

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<sup>64</sup> *Id.*

<sup>65</sup> STANDARDS OF PROF’L APPRAISAL PRACTICE, Ethics Rule (Conduct) (The Appraisal Foundation 2006), [http://commerce.appraisalfoundation.org/html/2006%20USPAP/ethics\\_rule.htm](http://commerce.appraisalfoundation.org/html/2006%20USPAP/ethics_rule.htm), (last visited Feb. 22, 2008).



### C. Duty of Impartiality, Objectivity, Competence, and Independence

The USPAP requires that assignments be performed competently and ethically.<sup>66</sup> In addition, appraisers must be impartial, objective, and independent.<sup>67</sup> These standards appear to require appraisers to reject assignment offers beyond their abilities. Appraising conservation easements requires specialized knowledge and experience. The temptation to accept a job that offers higher compensation can cause poor decisions.

Scenario Nine shows an appraiser placed in a sensitive situation. Do obligations of friendship or considerations of personal financial gain override professional responsibilities?

#### *Scenario Nine*

Sam Shady approaches Mel Mercenary, a licensed appraiser. “Mel, I know you’ve never done an appraisal of a conservation easement before, but it’s not brain surgery. Do your old high school football teammate a favor and whip me out a good valuation, will ya?” What should Mel do?

This assignment likely exceeds Mercenary’s abilities and should be rejected. Neither the obligation to an old friend nor the promise of a nice paycheck obviate the need to decline assignments when the appraiser lacks the specialized knowledge and experience to complete the job competently. In addition, accepting an assignment under these circumstances likely exposes the appraiser to liability if the job is completed in an incompetent manner.

## VI. LAND TRUSTS

### A. Introduction

Board members, officers, employees, and representatives of land trusts face their own unique ethical challenges with respect to conservation easements. Often, land trust advocates feel pressure to show large numbers of easements donated and acres protected to garner more and bigger grants and receive higher donations to continue their work. If a donor

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<sup>66</sup> *Id.*; see also STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, Competency Rule (The Appraisal Foundation 2006), [http://commerce.appraisalfoundation.org/html/2006%20USPAP/COMPETENCY\\_RULE.htm](http://commerce.appraisalfoundation.org/html/2006%20USPAP/COMPETENCY_RULE.htm), (last visited Feb. 22, 2008).

<sup>67</sup> STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, Ethics Rule (Conduct) (The Appraisal Foundation 2006), [http://commerce.appraisalfoundation.org/html/2006%20USPAP/ethics\\_rule.htm](http://commerce.appraisalfoundation.org/html/2006%20USPAP/ethics_rule.htm), (last visited Feb. 22, 2008).

offers an easement that allows more subdivisions than normal or holds questionable value for any number of reasons, the land trust may be tempted to accept the donation. That is, land trust officials may attempt to place the ends of maximum environmental protection over the means used to achieve that goal. This section discusses a major case involving the Maryland Environmental Trust that illustrates some possible pitfalls and ramifications of overreaching conduct.

### B. *Maryland Environmental Trust v. Gaynor*

*Maryland Environmental Trust v. Gaynor*, 370 Md. 89, 803 A.2d 512 (2002), involved an easement donation by Kevin and Cathy Cook Gaynor.<sup>68</sup> Ironically, Kevin Gaynor is an attorney with “substantial experience in environmental matters.”<sup>69</sup> The Gaynors sought information concerning the donation of an easement and the Maryland Environmental Trust (“MET”), a state agency, advised them that it normally only accepts easements on properties of fifty acres or more.<sup>70</sup> The Gaynors successfully persuaded several neighbors to join them in order to meet this guideline.<sup>71</sup>

Jim Highsaw served as MET’s liaison and Mr. Gaynor served as the lead contact for the neighbors.<sup>72</sup> At a meeting of the MET board on September 11, 1989, the board accepted the easements with conditions.<sup>73</sup> The minutes included the following statement: “...3.) Staff should *ask* for a “no subdivision” provision in the Servary deed, and also in the Gaynor and Schumacher deeds...However, the Board will accept the easements without this provision if necessary.”<sup>74</sup> Highsaw telephoned Gaynor on September 12, 1989, to relay the results of the meeting.<sup>75</sup> Gaynor “got the impression from the conversation that the board would not accept the easements unless the property owners agreed to the subdivision restriction.”<sup>76</sup>

In a letter dated September 15, 1989, Highsaw suggested to Gaynor that “[t]he board requests that the owners consider adding a ‘no subdivision’ provision to the Gaynor, Schumacher/Parker, and Servary deeds to

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<sup>68</sup> *Maryland Environmental Trust v. Gaynor*, 803 A.2d 512, 513 (2002).

<sup>69</sup> *Id.* at 514, fn. 3.

<sup>70</sup> *Id.* at 514.

<sup>71</sup> *Id.* at 514.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 514.

ensure that the properties remain intact under one ownership.”<sup>77</sup> The landowners granted the easements, with Gaynor including the “no subdivision” clause.<sup>78</sup> At least one neighbor, unbeknownst to Gaynor, refused to include the provision.<sup>79</sup>

Kevin Gaynor joined the MET board in 1994.<sup>80</sup> In December of 1997, Gaynor discovered that Schumacher/Parker intended to subdivide their property and that their easement did not include the “no subdivision” provision.<sup>81</sup> Gaynor filed suit against MET, alleging fraud in the inducement; negligent misrepresentation; deceit, containment, and nondisclosure; and seeking a declaratory judgment for ultra vires action.<sup>82</sup> The trial court found in favor of the Gaynors with respect to the fraud count and rescinded the conservation easement donated by the Gaynors.<sup>83</sup>

The MET appealed the decision and the Court of Special Appeals of Maryland held that the trial court did not err in finding that the MET obtained the easement through fraud.<sup>84</sup> The Land Trust Alliance filed an amicus brief in the case, predicting dire circumstances if the deed were overturned.<sup>85</sup>

The MET again appealed the matter, this time to the Court of Appeals of Maryland.<sup>86</sup> The Court of Appeals found that the Gaynors “failed to produce clear and convincing evidence that the MET committed fraud in inducing them to donate the easement at issue in this case.”<sup>87</sup> Therefore, the MET prevailed in the end.<sup>88</sup>

This case raises several key concerns that often arise in conservation easement deals. Although few would accuse Mr. Highsaw of malicious conduct, he merely had to add the phrase, “however, the board will accept the easements without this provision if necessary” to his phone conversation and letter to avoid the conflict.

Does it matter ethically what motivated Mr. Highsaw? One may speculate that Mr. Highsaw’s motive in omitting the phrase was to obtain the easement that, in his view, provided the best protection for the envi-

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<sup>77</sup> *Id.* at 514-515.

<sup>78</sup> *Id.* at 515.

<sup>79</sup> *Id.*

<sup>80</sup> *Maryland Environmental Trust v. Gaynor*, 780 A.2d 1193, 1196 (2001).

<sup>81</sup> *Id.*

<sup>82</sup> *Maryland Environmental Trust v. Gaynor*, 803 A.2d 512, 515 (2002).

<sup>83</sup> *Gaynor v. Maryland Environmental Trust*, 2000 WL 35500592 (Trial Order) (Md.Cir.Ct. Sep 12, 2000) (NO. C-1998-44598AA).

<sup>84</sup> *Maryland Environmental Trust v. Gaynor*, 780 A.2d 1193, 1194 (2001).

<sup>85</sup> *Id.*

<sup>86</sup> *Maryland Environmental Trust v. Gaynor*, 803 A.2d 512, 512 (2002).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

ronment. By disclosing MET's willingness to take the easement without the provision, he would have compromised the organization's negotiating position. However, it could be argued that as a land trust official, he should have fully disclosed all information to the landowners in this situation, regardless of the nature of that information.

Mr. Highsaw omitted certain information in this instance. If Mr. Hightower had lied, would that have made the conduct more culpable?<sup>89</sup>

Two courts held that Mr. Highsaw had committed fraud.<sup>90</sup> Although the Maryland Court of Appeals ultimately vindicated Mr. Highsaw on the issue of fraud, whether his conduct was ethical remains open to interpretation.<sup>91</sup>

In addition, Shaun Fenlon, Senior Counsel for the Maryland Department of Natural Resources, estimates that the department spent roughly \$100,000 in attorney time litigating the case.<sup>92</sup> The MET is a state agency; therefore state taxpayers footed the bill.<sup>93</sup> In addition, the attorney time was calculated based on the salaries of the state attorneys, which is not the much higher hourly rate charged by private attorneys.<sup>94</sup> How many private land trusts could survive the costs of litigation of this nature?

### C. Signing Form 8283

If a person makes a noncash charitable contribution greater than \$5,000, he or she must include Form 8283 with his or her tax return.<sup>95</sup> Beginning in 2006, in response to abuses in conservation easement donations, donations of more than \$500,000 were required to attach the appraisal to the Form 8283; the appraisal also had to meet certain requirements and the appraiser was required to sign the appraisal declaration portion of the form to certify certain facts with respect to the appraisal.<sup>96</sup>

The land trust or other entity that holds an easement must sign IRS Form 8283 acknowledging the gift to allow donors to take an income tax

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<sup>89</sup> See, e.g., Raymond, *supra* note 17 at 77 (discussing nonprofit organizations lying to further their cause).

<sup>90</sup> Gaynor v. Maryland Environmental Trust, 2000 WL 35500592 (Trial Order) (Md.Cir.Ct. Sep 12, 2000) (NO. C-1998-44598A.A); see generally Maryland Environmental Trust v. Gaynor, 780 A.2d 1193, 1197-1199 (2001).

<sup>91</sup> Maryland Environmental Trust v. Gaynor, 803 A.2d 512, 515 (2002).

<sup>92</sup> E-mail from Shaun Fenlon, to Jesse J. Richardson, Jr. (Feb. 5, 2003 EST) (on file with author).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 26 C.F.R. § 1.170A-13(c) (2008).

<sup>96</sup> *Id.*

deduction for their gift.<sup>97</sup> Although signing the form does not signify agreement with the valuation stated on the form, should land trust representatives sign Form 8283's where the stated value grossly exceeds any reasonable estimate? In such cases, does the signature make the land trust a co-conspirator to fraud?

The mere signature likely fails to equate to criminal or civil liability. However, ethical claims may require the land trust officer to refuse to sign until the valuation is made more reasonable.<sup>98</sup> One could also sign and attach a statement.<sup>99</sup>

One position is that to refuse to sign one Form 8283, however, implies the endorsement of all Forms 8283 signed. A land trust could also sign all Forms 8283 presented regardless of value or even if the form is blank.<sup>100</sup> Does this position shirk any ethical responsibilities?

## VII. LANDOWNERS

### A. Introduction

Ethical issues with conservation easements often start with the landowner. Most landowners harbor motives worthy of praise with respect to the gifting of conservation easements. However, income tax and other financial rewards of donations create incentives for landowners to maximize the value of the easement, or to distort or conceal other benefits received from the donation.

As in earlier situations, the main questions for landowners involve whether their conduct in desiring the highest appraised value for their easement amounts to fraud or unethical behavior. Some anecdotes from the field indicate that the government could prove fraud in some cases. Two typical scenarios follow.

### B. Unbuildable Property

One common situation involves property that either cannot be built upon or the cost of development makes the prospects unprofitable. The

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<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.*, Stephen J. Small, Attorney, Ethics Plenary Speech, Land Trust Alliance Rally 2003, Sacramento, California, Oct. 19, 2003; accessed at [www.ltanet.org](http://www.ltanet.org) (password required); (last visited Feb. 20, 2008) (copy on file with author).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* *But see*, 2 THE STANDARDS AND PRACTICES GUIDEBOOK Standard 10, practice 10D (Land Trust Alliance 1997), *recommending, inter alia*, that the land trust refrain from signing a Form 8283 that doesn't have the sections related to "Information on the Donated Property" and "Declaration of Appraisal" completed.

issues include both the “donation” of a valueless or low value easement and the withholding of information or the dissemination of misleading information. The property may be unbuildable due to environmental factors (wetlands, steep slopes, etc.) or decisions of the local governing body that prohibit or limit development. In either case, diligence by land trusts, attorneys and appraisers can limit this behavior. Scenario Ten addresses a situation where the development of property would entail expensive engineering and other costs.<sup>101</sup>

*Scenario Ten*

Lana Landowner inherited a beautiful 300-acre parcel of land in Hill County. The views are incredible and the land trust wants to protect it for its views and environmental amenities. While planning a residential subdivision on the property, Lana discovers that the cost of building a road up the mountain to the subdivision makes the project infeasible. She decides to donate an easement on the property. Should she expect the easement to be valued as if full development of the land was economically feasible? If the appraiser fails to investigate the cost of building a road, can Lana ethically take the full value of the deduction?

This scenario raises issues for the landowner, land trust, and appraiser, among others. The landowner likely owes an ethical duty to at least disclose these facts to the appraiser. However, under the facts presented the appraiser should be on notice and make diligent inquiry into development costs and feasibility.

Let us assume that the local newspaper quotes the landowner as saying that he at first wanted to develop the property but after he found out that development would be infeasible, he decided to donate an easement. Do these public statements place additional ethical obligations upon the land trust to ensure that the landowner does not attempt to take an unreasonably high deduction? Alternatively, does the fact that the land contains incredibly rich conservation values obviate the need for the land trust to investigate auxiliary matters?<sup>102</sup>

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<sup>101</sup> Scenario Ten is derived from statements made by a landowner and quoted in a local newspaper after the donation.

<sup>102</sup> This question could be phrased as to whether the ends justify the means.

*C. The Enhancement Rule, the Quid Pro Quo Rule and the Step Transaction Doctrine*

Developers sometimes dedicate open space in residential or mixed-use developments. Sometimes local governments require such dedications. Increasingly, developers seek to donate open space parcels to land trusts and take an income tax deduction for an asserted “value” of the easement. However, where the developer voluntarily dedicates the open space, the value of the easement must be reduced by the increase in value of the adjacent parcels owned by the developer under the enhancement rule.<sup>103</sup>

When the local government requires dedication of the open space, the developer “gives” nothing to the land trust. In essence, the landowner gave the easement in exchange for the granting of development permission, a quid pro quo. The quid pro quo nature of the transaction negates the value of the “donation.”<sup>104</sup>

Often, landowners, in concert with legal advisors and others, develop elaborate mechanisms in an attempt to structure their transaction to deliver favorable tax treatment. The step transaction doctrine thwarts these attempts by placing substance above form. The basic judicial test is that the tax results of a series of steps in a transaction should be determined based on the overall transaction.

In each case, the developer often expects a charitable deduction based upon the value of land if full build-out were to have occurred. Again, land trusts and attorneys can help police this unethical behavior.

Scenario Eleven raises the sometimes contentious issue of easements that form part of a development project. These facts raise issues for land trusts as well as owners.

*Scenario Eleven*

Dirty Developer decides to develop a lovely mountain site using conservation development techniques. A layout that features unobstructed views results in an undeveloped 100-acre parcel between the road and the lots. The front yard of each home will abut this dedicated undeveloped acreage. Dirty decides to donate the 100

<sup>103</sup> See, e.g., James H. Boykin & James A. McLaughlin, *Addressing enhancement in conservation easement appraisals*, APPRAISAL JOURNAL (Summer 2006), [http://www.entrepreneur.com/tradejournals/article/151275477\\_1.html](http://www.entrepreneur.com/tradejournals/article/151275477_1.html) (last visited Feb. 26, 2008).

<sup>104</sup> See, e.g., Stephen J. Small, *Proper- and Improper- Deductions for Conservation Easement Donations, Including Developer Donations* (2004), <http://www.private.landownernetwork.org/plnpro/improperdeductions.asp> (last visited Feb. 26, 2008).

acres as a conservation easement, to be held and managed by a local land trust. Dirty figures he could have gotten twenty lots of five-acres each from the dedicated space had he fully developed the property. At \$50,000 per lot, he expects to deduct \$1 million as a charitable contribution. Should he expect this type of valuation? Should the land trust involve itself in this situation and take an easement on the parcel?

Developer holds a duty to educate himself, or hire competent appraisers and advisors, to ensure that his easement valuation takes into account all relevant factors. Certainly basic moral principles dictate the donor not take a deduction for \$1,000,000 if, for example, the net reduction in value amounts to a much lesser amount after the increase in value to residual lots is considered.

Does an environmental ethic or higher calling mandate that the land trust refuse to accept an easement that arguably facilitates development? Does the land trust have an ethical duty to urge the donor to seek competent tax and appraisal advice, or does the duty rise to a higher level?

#### *Scenario Twelve*

The facts here are the same as appear in Scenario Eleven, but the developer sells the 100-acre parcel to the land trust at a price lower than market value. The developer takes the difference between the sales price and fair market value as a charitable deduction. The land trust donates an easement on the property. The developer ends up with the same tax deduction as in Scenario 11. Should the developer be entitled to the deduction? Should the land trust participate in this process?

#### *D. Accepting Easement Donations from Directors*

The members of a land trust's board of directors often include past donors as well as potential future donors. When a board member offers to donate an easement, difficult ethical issues arise. To what extent should the donating board member participate in discussions and votes involving his donation? Scenario Thirteen raises these issues.

#### *Scenario Thirteen*

Dana Director serves on the Board of Directors for Pleasant Valley Land Trust. She has served in that capacity for several years and provides outstanding input into board discussions. Director has made



numerous large monetary donations to Pleasant Valley Land Trust in the past. Director has always wanted to donate a conservation easement but, until now, was not able to do so. She now proceeds to offer the donation to Pleasant Valley Land Trust. Director's parcel consists of only 10 acres, however, and offers few conservation values. The Board has considered similar offers in the past and has denied them, sometimes based on reasoning proffered by Director. Should the Board accept the donation? To what extent should Director be allowed to participate in the consideration?

Director's participation in the Board's consideration likely constitutes self-dealing.<sup>105</sup> At a minimum Director should recuse herself from any discussion and vote on the matter. Is that enough, however? Should director discuss this matter at all with other board members or staff, even in personal settings? Could such discussions be perceived as attempting to influence the other board members?

This proffered donation puts the other board members in a difficult situation. If the board declines the donation, the action may upset Director and cause her to cut off support for the land trust. However, if the board accepts the donation, is it breaching an ethical duty to accept only "good" easements? What if the board accepts an easement that promotes public good, but accepts it for the wrong reason (i.e., future financial support from the donor)?

*The Standards and Practices* advise great caution when using professional services from board members.<sup>106</sup> This situation seems analogous but may raise even greater concerns. The donation, whether proper or not, may raise the appearance of impropriety. Land trusts should, therefore, use great caution when entertaining donations of easements from board members and should consider suggesting that the donation be made to another, "neutral" land trust. If the land trust entertains the offer, the donor/director should have no involvement whatsoever in the deliberations.

#### E. Conservation Buyer Transactions

The Washington Post series on The Nature Conservancy in May of 2003 raised concerns about so-called conservation buyer transactions.<sup>107</sup>

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<sup>105</sup> See 1 THE STANDARDS AND PRACTICES GUIDEBOOK standard 4, practice 4A (Land Trust Alliance 1997).

<sup>106</sup> *Id.*

<sup>107</sup> WASH. POST, *supra* note 2.

In these transactions, the land trust purchased property for its fair market value and places a conservation easement on the property.<sup>108</sup> The land trust then sold the property for a price reflecting a diminution in value due to the easement. The buyer then “donated” an amount equal to the discount to the land trust.

Does such a “donation” reflect a voluntary gift or a required payment for the property? Directors or insiders as buyers heighten these concerns. Scenario Fourteen involves a conservation buyer transaction.

#### *Scenario Fourteen*

Carl and Carleen Conservation have always dreamed of owning a large parcel of protected property. Bald Mountain Land Trust purchases a large parcel of mountainside property with incredible views and conservation values for a total price of \$1.8 million to protect the land from impending development. The land trust promptly places a conservation easement on the property. An appraiser values the easement at \$600,000. Carl and Carleen are not board members of Bald Mountain Trust, but often make significant donations of a few thousand dollars per year. Bald Mountain Trust, knowing of the Conservations’ interest in protected property, approaches them about purchasing the property. The Conservations purchase the property for \$1.3 million. Immediately after the closing, the Conservations donate \$600,000 to Bald Mountain Land Trust.

This scenario raises numerous issues. First, the failure to list the property or solicit offers widely raises the specter of an “inside deal.” Did the land trust have a duty to attempt to get the highest offer for the property? Alternatively, did the land trust fulfill its duty to find the “best” buyer, one that would properly care for the property?

Secondly, is the donation really a donation? Was the \$600,000 additional payment a condition of the deal? If so, then the payment is really part of the purchase price.

Protected properties often command a premium price in the market. If another, disinterested party would have offered \$1.4 million for the protected property, is the land trust obligated to accept the higher offer? Can the land trust consider the forthcoming donation and demand a price of more than \$1.9 million prior to selling the property to another?

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<sup>108</sup> *Id.*

In June 2003, the TNC's governing board announced restriction or termination of three practices related to conservation buyer transactions that had been suspended immediately after the Washington Post series.<sup>109</sup> TNC no longer buys land from or sells land to national board members, trustees, employees or their immediate family.<sup>110</sup> In addition, all charitable gifts associated with a conservation buyer transaction must be legally documented as a part of each such deal.<sup>111</sup> Finally, the Conservancy no longer loans money to employees.<sup>112</sup>

These changes make the conservation buyer transactions, at least involving TNC, more transparent and thereby remove some of the appearance of impropriety. The question remains as to whether these changes are enough.

### VIII. CONCLUSION

Some argue that the lack of clarity within the law or new and differing interpretations of the law caused the controversy surrounding TNC and its conservation buyer transactions.<sup>113</sup> Regardless, the Washington Post's series on TNC brought ethical issues touching upon conservation easements to the forefront of public thought.

Income and estate tax deductions, along with other financial benefits, provide significant incentive to landowners to donate conservation easements. However, these incentives also hold the potential to induce a landowner with questionable motives to attempt to create easement value when none exists or to inflate an easement's true value. Anecdotal evidence indicates a small but increasing number of abuses.

Attorneys, appraisers, and land trusts also face pressure to create or inflate the value of easements. This pressure may be in the form of financial incentives or the desire to conserve land in the public interest. Regardless of their motives, individuals operating within the land trust community must exercise vigilance in ensuring that donated easements promote the worthy motives of the land trust and advance the public good.

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<sup>109</sup> THE NATURE CONSERVANCY, SUMMARY OF ACTIONS TAKEN TO STRENGTHEN GOVERNANCE, POLICY AND PROCEDURES: JUNE 2003 - MAY 13, 2005, <http://www.nature.org/aboutus/leadership/art15473.html> (last visited Feb. 26, 2008).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See generally Max. O. Stephenson & Elisabeth Chaves, *The Nature Conservancy, the Press and the Social Construction of Accountability*, 35 NONPROFIT AND VOLUNTARY SECTOR QUARTERLY no. 3, at 345 (2006).

No easy answers exist to many of the scenarios presented in this chapter. Indeed, this Article raises as many new questions as it answers. However, merely raising the issues and asking the questions serves a useful purpose by allowing the participants in conservation easement process time to reflect.

In light of the heightened scrutiny on conservation easement transactions, the land trust community should maintain ethical standards beyond reproach by fully advising landowners of both the foreseeable beneficial and adverse effects of donating an easement. Ends must not dictate means. Conflicts of interest must be avoided within reason. If the participants in the conservation easement process vigilantly police themselves and their transaction partners, legislative and judicial intervention will remain unnecessary. Without this vigilance, a future of increased regulatory oversight and adjudication appears likely.