Anticipating the Future of Conservation Easements

in South Carolina and Nationwide

I. Introduction

The concept behind conservation easements has been described as "the most active and forward-looking element in the national effort for environmental preservation" that we currently have.[1] By providing a tax incentive for private landowners to promote conservation at their own discretion, conservation easements blend positive aspects of both traditional regulation and private transactions, and are a vehicle for parties with various conservation objectives to ultimately achieve the common goal of environmental preservation.

In § 170(h) of the Internal Revenue Code, the federal government allows a tax deduction for conservation easement donors equal to the difference between the value of the highest and best use for the land and the value of the land with the conservation easement. Furthermore, when land is passed through an estate, the land's value with the conservation easement on it will be what is considered for federal estate tax purposes. In addition to deductions in property tax for land burdened by conservation easements, some states, including South Carolina, have created a system of transferable tax credits for conservation easement donors. Collectively, these incentives provide a financial benefit for land stewards who have opted to forgo more traditional methods of financial gain via the real estate market.

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[1] Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1077 (1996).

A recent series of stories revealing wrongdoing and fraud not only by real estate developers looking for a tax shelter, but also by the reputable international environmental group The Nature Conservancy, led to an investigation by the federal government and a proposal to drastically cut the tax benefits currently in place for conservation easements. The South Carolina Department of Revenue followed suit, conducting its own desk audit to assess the level of abuse of the system within the state. Like many programs that operate to provide a monetary incentive, there are those who abuse the privileges and stand to ruin it for all the participants if permitted to continue.

The threat of limiting the tax benefits for conservation easement donors has initiated a backlash from environmental groups, land trusts and land stewards nationwide. These groups are focusing on the positive aspects of conservation easements to persuade state and federal governments to retain this largely successful system of environmental preservation. South Carolina itself has a number of success stories (discussed below) that demonstrate the cooperation of landowners, developers and land trusts alike in promoting environmental welfare through conservation easements.

The state and federal investigations reveal that the problems with the conservation easement system seem to lie largely with improper land appraisals, conservation purposes that do not comply with Internal Revenue Code requirements, and illegitimate land trusts that accept questionable easements. Defenders of the conservation easement system are considering solutions that would keep the current system of tax deductions in place while minimizing its manipulation by wrongdoers. Strict review of land appraisals by the donee organization and the IRS, fines and penalties for noncompliance, and a uniform outreach program are some of the broad principles applied in designing solutions.

Because the abuse is estimated to be minimal, but the success widespread, supporters of conservation easements are in a position to make a convincing argument for maintaining current levels of tax incentives for conservation, but with stricter enforcement of the rules governing them.

II. What is a Conservation Easement?

A conservation easement is a recorded agreement between a landowner and an eligible charitable organization or government agency that designates what activities are permitted on the landowner's property in the future.[2] Unlike traditional "easements", a conservation easement does not allow someone else to use the property, but rather restricts the use of the land for the current landowner and all future landowners.[3] A typical conservation easement extinguishes all, or most, of the development potential, but still allows the landowner to exercise most of the rights in the "bundle of sticks" inherent in property ownership: he may farm, harvest timber, build some houses, hunt, mortgage it, sell it, devise it, enforce his own trespassing rules, etc.[4] The characteristics of a conservation easement make it a unique tool for accomplishing both public policy and landowner objectives.

III. Conservation Easements and Taxation

A. Federal Income Tax Benefits

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[2] STEPHEN J. SMALL, PRESERVING FAMILY LANDS: BOOK III 29 (2002).
[3] *See id.* at 29-30.
[4] *See id*. at 101-102; *see also* Burnet R. Maybank, III *Tax Implications of Conservation Easements in South Carolina* 7 S.C. ENV. L. J. 1, 1 (1998).

Section 170(h) of the Internal Revenue Code became law in 1980.[5] It provides for a deduction for the value of a "qualified conservation contribution," defined in §170(h)(1) as a contribution of a "qualified property interest" to a "qualified organization" exclusively for "conservation purposes."[6]

A "qualified property interest" includes "perpetual conservation restrictions," defined by the Treasury Regulations as "a restriction granted in perpetuity on the use which may be made of real property – including, an easement."[7] The key to this provision is perpetuity. While the landowner can stipulate in the agreement that the conservation easement is to end on a certain date, he will not receive all the potential benefits of the federal income tax provision as he would by donating a perpetual easement.[8]

Generally speaking, a "qualified organization" is a publicly supported charitable organization (i.e. a land trust) or a governmental entity. Documentary evidence of the donee organization's qualifications as well as its Letter of Determination of tax-exempt status must be provided by the landowner to the IRS.[9] Additionally, the donee organization must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions."[10]

The most subjective aspect of § 170(h) is the requirement that the easement be for "conservation purposes."[11] Conservation purposes are listed in § 170(h) as:

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[5] Stephen J. Small, *Proper – and Improper – Deductions for Conservation Easement Donations, Including Developer Donations,* TAX NOTES, October 11, 2004, at 217, 217-218 [hereinafter Small, *Proper Deductions*].
[6] I.R.C. §170(h)(1)(2000).
[7] Treas. Reg. §1.170A-14(b)(2) (2004).
[8] SMALL, *supra* note 2, at 31.
[9] Maybank, *supra* note 4, at 5.
[10] Treas. Reg. 1.170A-14(c)(1)(2004); *see* SMALL, *supra* note 2, at 31.
[11] Small, *Proper Deductions, supra* note 5, at 220.

1. The preservation of land areas for public outdoor recreation and education

2. The protection of a significant relatively natural habitat for fish, wildlife or plants.

3. The preservation of open space for the scenic enjoyment of the general public.

4. The preservation of open space pursuant to a clearly delineated Federal, State or local governmental conservation policy.

5. Preservation of open space that will yield a significant public benefit

6. The preservation of a historically important land area or certified historic structure.[12]

Generally speaking, qualification of a conservation easement for an income tax deduction under the present tax law structure must fit three criteria: it must be a perpetual restriction on land, it must be given to a land trust or government agency (which receives the right to enforce the restriction under state law against the landowner and any future landowner), and it must protect a significant conservation objective.[13] The income tax deduction will be the fair market value of the property *before* the conservation easement minus the fair market value of the property *after* the conservation easement.[14] The value of the deduction may be taken up to 30% of the landowner's income in the

[12] I.R.C. §170(h)(4)(A)(2000).
[13] *See* SMALL, *supra* note 2, at 30-31.
[14] Small, *Proper Deductions*, *supra* note 5, at 218. Fair market value is typically defined as what the knowledgeable and willing buyer would pay for the property on the market. *Id.*

year he made the gift and he may carry forward any unused amount of the deduction for up to five more years.[15]

B. Federal Estate Tax Benefits

Because a conservation easement reduces the value of a piece of property, it may also be attractive for estate tax purposes. The reduction not only affects the basis on which the estate is taxed, but under I.R.C. § 2031(c), enacted in 1997, a § 170(h) conservation easement that is located in the United States, is owned by the decedent or a member of the decedent's family during the three years prior to the decedent's death, and prohibits all but a de minimis commercial recreational use of the land is subject to an additional estate tax exclusion worth 40% of the land value.[16] The § 2031(c) deduction is capped at $500,000. Section 2031 also allows a deduction for a post-mortem conservation easement, so long as it is recorded by the due date for the estate tax return.[17]

C. South Carolina Tax Incentives

South Carolina officially recognized conservation easements with passage of the Conservation Easement Act of 1991.[18] In addition to outlining the legal implications of conservation easements, the Act created state property tax incentives for conservation easements by specifying that property burdened by a conservation easement "must be assessed and taxed on a basis that reflects the existence of the easement."[19]

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[15] I.R.C.§170(b)(B)(i)(2000); *see* SMALL, *supra* note 2, at 39.
[16] I.R.C. §2031(c)(8) (2000).
[17] *See* SMALL, *supra* note 2, at 40-43. The estate tax return is due nine months after the decedent's death, with a six-month extension available. *Id.* at 43.
[18] S.C. CODE ANN. §27-8-10 to -120 (West Supp. 2004).
[19] S.C. CODE ANN. §27-8-70 (West Supp. 2004).

In 2001, South Carolina became one of only three states[20] to issue transferable tax credits for conservation easement donors by adopting the South Carolina Conservation Incentives Act.[21] Taxpayers who claim a tax deduction under § 170(h) after May 31, 2001 may claim a state income tax credit equal to 25% of the deduction. The credit is further limited to $250 per acre of conserved land, and the total tax credit may not exceed $52,500 per year. The credits may be carried forward until they are used, or may be donated or sold to another taxpayer with approval by the South Carolina Department of Revenue.[22]

These tax incentives have consequently created their own market niche in South Carolina. The South Carolina Conservation Credit Exchange, LLC is the state's first business devoted exclusively to brokering conservation tax credits.[23] It purchases the credits from conservation easement donors for at least 75% of their face value, and then allows taxpayers in need of tax savings to bid on the credits for a minimum of 85% of the face value. Additionally, the Conservation Credit Exchange donates 15% of its gross profits from the transaction to the charitable organization to which the easement generating the credits was donated.[24] The financial incentives created by the General Assembly, and the business sector's utilization of the incentive to generate *more* incentive implies that South Carolina and its residents are committed to conservation.

IV. The State of Conservation Easements Today

[20] Interview with Dr. Harry E. Shealy, President, Aiken County Open Land Trust, in Aiken, SC (March 5, 2005). The two other states are Colorado and Virginia. SMALL, *supra* note 2, at 40.
[21] S.C. CODE ANN. §12-6-3515 (West Supp. 2004).
[22] Carlton N. Owen, *Conservation Easements – SC Tax Credits* (March 1, 2005), *at* http://www.palmettoconservation.org
[23] *Id.*
[24] South Carolina Conservation Credit Exchange, LLC, *Transactions*, *at* http://www.conservesc.com (last visited April 26, 2005).

A. National Trend

The driving forces behind the conservation easement movement are twofold: love of the land and tax breaks. When § 170(h) became law in 1980, the primary participants in the conservation easement program were those with a desire to preserve the family farm, forestland or ranch land.[25] As the U.S. Government developed conservation easement law in the 1970s and 1980s, it had no way of predicting the significant rise in land values that were to come with the new millennium.[26] As a result, the traditional conservation-minded landowners were joined by real estate developers and tax advisers in the desire to donate conservation easements and benefit from the tax breaks offered by § 170(h).[27] What began as a conservation movement in the 1970s seemed to have become a conservation sham by the year 2000.

Federal concern arose in 2003 when *The Washington Post* wrote a series of articles highlighting the abuse of conservation easement incentives.[28] The *Post* revealed that The Nature Conservancy, the world's largest environmental group, had bought scenic properties, placed conservation easements on them and then sold them to its supporters and trustees for reduced prices (the value of the land minus the value of the conservation easement) in exchange for cash donations to the Nature Conservancy approximately equal to the value of the conservation easement. The donations yielded huge tax write-offs for the wealthy supporters.[29] From there, the stories on abuse

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[25] Small, *Proper Deductions, supra* note 5, at 217-218.
[26] Interview with Dr. Harry E. Shealy, *supra* note 20.
[27] Small, *Proper Deductions*, *supra* note 5, at 218
[28] *Id.*, at 218-219.
[29] *See id.*, at 219; *see also* Joe Stephens and David B. Ottaway, *Developers Find Payoff in Preservation,* THE WASH. POST, Dec. 21, 2003, at A1.

multiplied. The *Post* reported conservation easements (i.e. tax write-offs) on golf courses, vacation resorts, dude ranches, unused portions of subdivisions and large residential lots. A December 2003 *Post* article reported a subdivision in Asheville, North Carolina where 3000 of its 4400 acres were placed in a conservation easement. The remaining 1400 acres consisted of 350 home sites and a golf course – and a reported $20 million tax write-off for the developers. The same article reported that conservation easement donors were overvaluing their land at an average of 220% when calculating their tax deductions.[30]

On January 27, 2005, the congressional Joint Committee on Taxation issued a report proposing changes to various parts of the Internal Revenue Code in an effort to save the U.S. Treasury nearly $400 billion.[31] It called for decreasing the conservation easement deduction from 100% of its value to 33% of its value on open land not used as a home site, and completely eliminating tax deductions for easements on open land used as personal residences and for easements on buildings (historic preservation easements). Other recommendations included qualification of a conservation easement *only if* the restrictions clearly benefited a specific government conservation program, and ethics training for land appraisers. The report cited conservation easements as providing "questionable or limited public benefits" and a "windfall to those taxpayers who grant an easement." Tax reforms on conservation easements alone, it concluded, would produce a savings of $1 billion for the U.S. Treasury.[32]

The report has fueled a backlash from conservation and land trust groups. Spearheaded by the Land Trust Alliance (LTA), a Washington-based non-profit

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[30] Stephens and Ottaway, *supra* note 29.
[31] *See id.*
[32] *Id*

organization, the efforts include letters to Congress from local activists, phone calls and meetings with members of Congress by land trust board members, recruiting tax lobbyists and political consultants, and urging supporters nationwide to promote favorable press for conservation easements. The coalition includes such influential organizations as The Nature Conservancy, the Farm Bureau, Ducks Unlimited, and the American Farmland Trust.[33] Additionally, in 2003, the LTA revised *Land Trust Standards and Practices*, touting them as the appropriate ethical and technical guidelines for land trusts.[34] The idea behind the campaign is to show the overwhelming success of conservation easements in promoting environmental preservation, and to demonstrate the land trust industry's commitment to addressing the problems in order to maintain the program in the future.[35]

B. Conservation Easements in South Carolina

The South Carolina Department of Revenue initiated its own investigation into conservation easement abuse in July 2004. In a letter sent to 51 land trusts who had accepted conservation easements in South Carolina totaling 32,000 acres,[36] Department of Revenue Director Burnet R. Maybank, III requested information from the years 1999 to 2003 about the land trust organizations themselves, their conservation easements, enforcement practices, potential conflicts of interest with board members and similarly related persons, and other miscellaneous questions on selected types of land

[33] *Accelerating the Pace of Land Conservation,* CONSERVATION LEADERSHIP FOR AMERICA: 2004-2005 (Land Trust Alliance, Washington, D.C.), 2004 [hereinafter *accelerating the Pace of Land Conservation*]; Joe Stephens, *Charities Fight for Easement Donors,* THE WASH. POST, Feb. 26, 2005, at A2.
[34] *Ensuring the Permanence of Conservation,* CONSERVATION LEADERSHIP FOR AMERICA: 2004-2005 (Land Trust Alliance, Washington, D.C.), 2004.
[35] *See Accelerating the Pace of Land Conservation*, *supra* note 33.
[36] John O'Connor and Gina Smith, *Conservation Easements Face Scrutiny*, THE STATE, February 20, 2005, at B1.

transactions.[37] The desk audit found that the easement donors had estimated a total land value of $255 million (although that entire amount was not reported on tax returns). There has been no official word on the extent of fraudulent claims in South Carolina, but the over-valuing of land by dishonest appraisers and "sham" land trusts set up by developers to accept easements seem to be the primary concerns.[38] The simplicity of the process makes it easy to manipulate: essentially all an easement donor has to do is hire an appraiser to estimate the "fair market value" of the land, fill out a form 8283 ("Noncash Charitable Contributions") and send it to the land trust for acceptance and an authorized signature.[39] The form is then filed with the donor's income tax return and the easement is essentially complete.[40]

Supporters of conservation easements maintain that the legitimate easements far exceed the improper ones.[41] And while they do not want to see the conservation easement program under attack and its existence threatened, they also realize the importance of getting to the root of the problem before a few isolated instances of abuse turn into an epidemic.[42] There are already accounts of South Carolina land trusts turning down some easements with high appraisal values that might have been acceptable several years ago, for fear of promoting possible fraud.[43] To allow the questionable practices to

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[37] Letter from Burnet R. Maybank, III, Director, SC Department of Revenue, to all land trusts who accepted conservation easements or deeds to property for conservation purposes in South Carolina (July 8, 2004), *at* http://www.stevesmall.com (reprinted with permission).

[38] John O'Connor and Gina Smith, *supra* note 36.

[39] Interview with Dr. Harry E. Shealy, *supra* note 20. The donee organization is not prohibited from authorizing Form 8283 where no appraisal value is noted. *See* Small, *Proper Deductions*, *supra* note 5, at 224.

[40] *See* Small, *Proper Deductions*, *supra* note 5, at 219.

[41] *See* John O'Connor and Gina Smith, *supra* note 36.

[42] John P. McDermott, *Tax Auditors Scrutinize Land Dealings*, THE POST & COURIER, January 16, 2005, *available at* http://archives.postandcourier.com.

[43] Interview with Dr. Harry E. Shealy, *supra* note 20.

go unchecked now would likely lead to far worse consequences in the future than a desk audit.

V. Conservation Easements in South Carolina: Cases

A. Success on Many Levels

South Carolina itself has a number of conservation easements that are examples of how parties operating in accordance with the rules create individual benefits for the taxpayers and larger benefits for the environment. While the cases below are not a representative sample of the types and distribution of conservation easements in South Carolina, they are mentioned for the purpose of demonstrating approaches to donating, accepting and creating conservation easements from all different angles: the landowner, the developer, and the land trust. They are ideal cases for the proposition that conservation easements in their current form can, and do, provide a greater public benefit in step with the conservation purposes outlined by the federal tax laws.

1. The ACE Basin

The Ashepoo-Combahee-Edisto (ACE) Basin is a 350,000-acre region encompassing the watersheds of the Ashepoo, Combahee and Edisto Rivers. Located between Charleston and Beaufort, it is one of the largest intact coastal ecosystems on the east coast and is home to nine federally endangered species, 500 species of birds, and supports almost 30% of the nesting population of bald eagles in South Carolina.[44]

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[44] Sharon E. Richardson, *Applicability of South Carolina's Conservation Easement legislation to Implementation of Landscape Conservation in the ACE Basin*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE 210-211 (Julie Ann Gustanski & Roderick H. Squires eds.,

Efforts to protect the ACE Basin began in 1988 when a task force of private landowners, government entities and nonprofit conservation organizations responded to the designation of the area as part of the North American Waterfowl Management Plan. Government acquisition and subsequent designation of land as a "preserve" of some kind, as well as land donations from private landowners were the initial methods by which the task force identified and protected critical areas.[45] The passage of the Conservation Easement Act of 1991 laid the legal framework for conservation easements and opened the door for many more preservation opportunities.[46] Ted Turner's donation of a conservation easement on Hope Plantation in 1991 inspired surrounding landowners to follow suit[47] and today, 128,300 acres[48] of the ACE Basin are protected by such organizations as the Lowcountry Open Land Trust, Nemours Plantation Wildlife Foundation, the Beaufort County Open Land Trust, the Edisto Island Open Land Trust, the Nature Conservancy, and Ducks Unlimited.[49] MeadWestvaco has also been actively involved, signing a memorandum of understanding for protection on its corporate holdings.[50]

The ACE Basin has been devoted primarily to agriculture and timber harvesting for centuries. Commercial and recreational fishing have also been important to the economy of the area and the parameters of the conservation easements mirror these

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2000); *see also* Lowcountry Open Land Trust "ACE Basin Focus Area" *at* http://www.lolt.org (last visited March 10, 2005).

[45] Richardson, *supra* note 44, at 220, n.5.

[46] *See id.* at 209, 215.

[47] *Id.* at 215

[48] Lowcountry Open Land Trust "ACE Basin Focus Area" *at* http://www.lolt.org (last visited March 10, 2005).

[49] *See id.*; *see also* Richardson, *supra* note 44, at 217-218.

[50] Richardson, *supra* note 44, at 217

historical uses.[51] While each conservation easement is specifically tailored to each piece of land, the easements generally limit the subdivision of the property, but allow for hunting, fishing, agriculture, wildlife management and timber harvesting.[52]

The success in protecting this valuable resource is attributed to the task force model of managing the ACE Basin. Participation of area landowners and local land trusts provides a level of leadership and personalization that helps recruit new area landowners who desire privacy in their affairs or are skeptical of government involvement.[53] Participation of national conservation organizations such as Ducks Unlimited and The Nature Conservancy provides landowner education and assistance from their experience on the national level, as well as the extensive financial and organizational resources that come with their history and range of service. Government entities such as the U.S. Fish and Wildlife Service provide leadership through their acquisition and designation of land as a "preserve" or "refuge", as well as supplying technical resources for mapping, photography and biological inventories.[54] With an area as large as the ACE Basin, there are many different types of conservation objectives that must be coordinated with the objectives and desires of the many different landowners. The cooperative relationship between the various entities who participate in the ACE Basin task force allows for the various conservation objectives to be satisfied in a manner suitable to each individual landowner so that the ultimate goal of conserving an economically and environmentally valuable area is achieved.[55]

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[51] *See* Lowcountry Open Land Trust "ACE Basin Focus Area" *at* http://www.lolt.org (last visited March 10, 2005).
[52] Richardson, *supra* note 44, at 216.
[53] *Id.* at 216-217
[54] *See id*. at 216-218.
[55] *See id.* at 218.

2. Goodwill Plantation:

The efforts of some South Carolina developers show that land stewardship and the booming real estate market can co-exist. Goodwill Plantation is a proposed 5200-acre development in Richland County, limited to 24 five- to ten-acre homesites. The land is a unique blend of environmental and cultural resources. Wooded areas, ponds, pastures, fields and trails, as well as historic residences, a cemetery, an old corn mill and an old saw mill are all part of the living experience at Goodwill Plantation.[56]

The concepts of property ownership involved are not new. Buyers will purchase the lots and own them in fee simple. When they make that purchase, they become undivided owners of the balance of the property (about 4800 acres) in a separate entity consisting of the other lot owners. Although nothing requires the homeowners' entity to place an easement on the common area, the developers plan to market the property to people who would strongly consider that as an option.[57] The property has elements of almost all the "conservation purposes" of §170(h): natural habitat for fish, wildlife and plants, open space that will create a public benefit through scenic enjoyment and biological diversity, and historic and cultural resources.[58] The seven-figure purchase price for the lots will help finance a $5-million endowment for management of the common area.[59]

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[56] YANCEY A. MCLEOD, GOODWILL PLANTATION (2004).
[57] A conservation easement as consideration for an option to buy a lot on the property would not be eligible for a tax deduction. *See* Small, *Proper Deductions, supra* note 5, at 220-221
[58] Interview with Yancey A. McLeod**,** President, Yancey Environmental Solutions, LLC, in Eastover, SC, (February 25, 2005.)
[59] Joey Holleman, *Project Would Protect Historic Gem on Wateree*, THE STATE, March 17, 2005, at A1.

The development is a financial sacrifice for both the developers and the homeowners.[60] The property's location on the edge of Columbia that is rapidly urbanizing makes it a prime spot for a high-density housing or a shopping center in the next decade or so. Although the lots will probably sell for seven figures, the developers are still passing up a chance for maximum financial gain by structuring Goodwill Plantation as they have. Likewise, the homeowners, if they choose to perpetually encumber the 4800 acres they own in common, will be passing up the same kind of financial windfall by opting for the tax deduction on a conservation easement in place *now* (while the land is not yet ripe for high-density or commercial development) in lieu of a direct sale to the highest bidder when the land maximizes its commercial value in the future.

Speculation and hope are inherent in real estate development, especially when the developers are counting on the "goodwill" of the future lot owners to bring the developers' conservation goals to fruition. The project will require a relatively rapid sale of the homesites available so that the owners of the common area can be determined, and subsequently decide whether they wish to pursue a conservation easement on the jointly owned property. The success of similar developments in South Carolina such as Fairview Farms in the upstate, and Spring Island in the lowcountry indicate that Goodwill Plantation will be no different.[61]

3. Groton Plantation

[60] Interview with Yancey A. McLeod, *supra* note 58.
[61] Joey Holleman, *supra* note 59.

Groton Plantation, established in 1906 as a hunting preserve by Robert Dudley Winthrop of New York City, is a 23,000-acre tract spanning parts of Allendale and Hampton counties. In November 2002, the Groton Land Company, a family company composed of Winthrop's descendants and which now owns Groton Plantation, voted unanimously to donate a conservation easement on 7,438 acres of Groton Plantation to The Nature Conservancy.[62]

The area under the conservation easement, known as Groton Swamp, is part of the Savannah River floodplain and follows the river for 24 miles. It is within the boundary lines of the South Lowcountry Focus Area, an area outlined by the South Carolina Department of Natural Resources with the intent of establishing patterns of environmental protection similar to those in the ACE Basin.[63] Groton Swamp's attributes include ridges, sloughs, oxbow lakes, three different forest classifications and 323 plant species, including 65 tree species.[64]

The terms of the conservation easement prohibit residential and commercial development, although the owners may subdivide the tract into a maximum of five parcels. The easement document also calls for a forest management plan designed to promote the natural ecosystem. While selected timber harvesting is allowed in designated areas totaling 1,024 acres of the swamp, baldcypress trees are protected under the easement's terms. The landowners wished to continue wildlife observation, a traditional recreational use of Groton Swamp. Consequently, they retained the right to

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[62] News Release, The Nature Conservancy, Nature Conservancy Increases Protected Lands in South Lowcountry (November 22, 2002) (on file with author) [hereinafter Nature Conservancy Increases Protected Lands in South Lowcountry].

[63] *See id*. *See also* text accompanying notes 44-55. The task force of the South Lowcountry Focus Area is made up of the Lowcountry Open Land Trust, the Beaufort County Open Land Trust, Ducks Unlimited, U.S. Fish and Wildlife Service, S.C. Department of Natural Resources, The Nature Conservancy and private landowners. Nature Conservancy Increases Protected Lands in South Lowcountry, *supra* note 62.

[64] Nature Conservancy Increases Protected Lands in South Lowcountry, *supra* note 62.

maintain historic or existing wetland impoundments and create green tree reservoirs in order to provide habitat for wetland species such as alligators and wading birds. Hunting and fishing are also permitted.[65]

The size and scope of the conservation easement on Groton Plantation is an example of generosity and land stewardship that goes beyond mere tax incentives. One Winthrop family member declared the Groton Swamp conservation easement "a testimonial of the commitment to preservation the whole family has to this precious resource."[66] If the Winthrop family's sentiments are representative of other landowners in the South Lowcountry Focus Area, then the magnitude of preservation in this region may one day mirror that of the ACE Basin Focus Area.

4. Cook's Mountain

Conservation easements are attractive to landowners even when they are not in a government-endorsed protection area such as the ACE Basin. Cook's Mountain is a 1200-acre tract of land in Eastover, South Carolina. In December 2004, the landowner donated a conservation easement to Ducks Unlimited on approximately 1160 acres, reserving the remaining 40 acres for future construction of homesites or other buildings. The land is adjacent to Goodwill Plantation (mentioned above) and contains similar historical, cultural and environmental resources that make it eligible for a conservation easement. The landowner has also constructed educational facilities to assist interested persons in learning more about the history of the area and its ecological significance. The facilities are not truly "public" because the landowner retains the right to exclude, so

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[65] *Id.*
[66] *Id.* (quoting Robert Winthrop, II).

they do not qualify as a conservation purpose under § 170(h), but they are worth mentioning for the educational value they provide the various school and other groups that schedule outings there.

The landowner spent three years on his decision to place a conservation easement on Cook's Mountain.[67] His decision-making process is representative of the many issues easement donors face. Perpetuity is probably the hardest concept to digest. Because a conservation easement is forever, the landowner felt it was essential to consider *all* the possibilities and potential conflicts *before* making the commitment. As the owner aptly put it, "It's like marriage, except you can't get divorced."[68] He also carefully scrutinized the language in the easement document to be sure that it was consistent with his wishes. Now that all the paper work is done and the easement is in place, the landowner says he is "thrilled with it."[69] Landowners like that of Cook's Mountain, who played by the rules and can speak about their own positive experience with the system, are the best marketing tool for conservation easements.

5. *The Aiken County Open Land Trust*

The Aiken County Open Land Trust (ACOLT), the seventh land trust in South Carolina, was created in 1991.[70] Industry growth that proposed to create thousands of new jobs at the Savannah River Site, located just outside of Aiken, spurred rapid development on the city's south side beginning in the late 1970s. Concerned citizens watched as old agricultural fields were converted to strip malls and shopping centers with

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[67] Interview with Yancey A. McLeod, *supra* note 58.
[68] *Id.*
[69] *Id.*
[70] Interview with Dr. Harry E. Shealy, *supra* note 20.

no regard for existing development patterns. These citizens wanted the south side landowners to have an alternative for their land *besides* development. The idea for a land trust came from a resident whose brother was president of the country's first land trust in Massachusetts. Aiken patterned their land trust off of the Beaufort County Open Land Trust, which had the single focus of preserving viewscapes, and the Naturaland Trust in Greenville, which had the single focus of saving the Greenville watershed. The single focus of the ACOLT was to give the south side landowners the option to keep their family farms intact with conservation easements that drove the land value back to that of agricultural farmland for taxation purposes.[71]

The focus of the ACOLT has expanded greatly in the almost 15 years since its inception. Watershed protection for the Upper Three Runs Creek in Aiken County is now a concern as that creek has been determined to be the most insect-diverse creek in the *world*.[72] Most of the land on the creek is privately owned and the ACOLT is interested in acquiring easements in the riparian zone, which primarily consists of jurisdictional wetlands. While building is not permitted anyway on jurisdictional wetlands, timber harvesting is allowed. For landowners on Upper Three Runs Creek, whose tax bracket is so low that the tax benefits of a conservation easement would likely not be an incentive, the financial gain to landowners from timber harvesting is a valid concern for the ACOLT. The land trust is considering partnering with the Department of Natural Resources to buy the land in the riparian zone from the landowners for the price of the timber that they could otherwise harvest and then placing an easement on it itself.[73]

[71] *Id.*
[72] *Id.*
[73] *Id.*

Another watershed project of the ACOLT is the Carolina Bay Park. Found primarily in Georgia and South Carolina, Carolina Bays are elliptical-shaped, isolated wetlands with a northwest to southeast orientation.[74] In the late 1990s, ACOLT bought a Carolina Bay located on the city of Aiken's commercialized south side for $600,000. As soon as they bought it, they gave it to the City, with an agreement in the contract that the City would place it in a conservation easement with the ACOLT. The agreement essentially means that the ACOLT can bring the City to court if city officials do not adhere to the agreement. The City has since turned the Carolina Bay into a park, which it maintains for use by its citizens.[75] Such agreements between land trusts and government entities, where tax incentives are not an issue, reveal the preservation-based origins of the conservation easement. In these cases, the City owns the land, protects it and maintains it and receives the advantage of watershed protection and public space, while the land trust achieves its conservation objectives without the expense of maintaining the land.[76] Like many other South Carolina land trusts, the ACOLT demonstrates a true commitment to conservation.

6. The Hitchcock Woods

In 1939, Thomas and Helen Hitchcock established The Hitchcock Foundation to hold 1191 acres of contiguous forest in trust for the public. Through subsequent land acquisitions, the Foundation's holdings eventually grew to almost 2100 acres of diverse

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[74] Outreach Program of the Savannah River Ecology Laboratory, "Carolina Bays Fact Sheet," *at* http://www.uga.edu/~srel/bays.htm

[75] Interview with Dr. Harry E. Shealy, *supra* note 20.

[76] *Id.* Note that the previous landowner received a charitable contribution deduction by transacting with the land trust rather than selling outright to the City.

forest land located in the middle of the city of Aiken. As the City's population began rapidly growing, the Foundation's board members were concerned that the development potential of the land would endanger its preservation in the future. In 1995, the Heritage Trust Program of South Carolina Department of Natural Resources accepted a conservation easement on the Hitchcock Woods. By placing the conservation easement with the state-run Heritage Trust Program instead of the local land trust, the Foundation placed the deep pockets and the authority of the state between it and anyone who threatened the preservation of the Hitchcock Woods. Previously, in the late 1980s, the Woods had been placed on the National Register of Historic Places under the United States Department of the Interior, creating another layer of protection around this unique resource. The Hitchcock Woods are currently managed for longleaf pine, loblolly pine, wildlife, equestrian and pedestrian use.[77]

VI. Analysis

A. Conservation Easement Issues: Problems

The idea behind giving landowners tax incentives to preserve their land for conservation purposes is a legitimate one. However, when § 170(h) came into effect in 1980, the government had no way of predicting the explosion of land values and the impulse it would create to take advantage of the benefits. Ultimately, the issue to be addressed is not the existence of a system of tax incentives for conservation easements, but in its manipulation by wrongdoers.

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[77] Interview with Dr. Harry E. Shealy, *supra* note 20.

One of the primary problems cited on the national level is appraisers overvaluing the land based on the highest possible level of development under local zoning laws. Valuing farmland 20 miles from the nearest city for a high-density housing development is not its "highest and best use" because no developer would ever propose such a development where the market demand does not exist.[78] Similarly, one South Carolina landowner with land adjacent to a Columbia-area golf course had his land appraised at a value equivalent to land adjacent to the Augusta National.[79] Considering this along with information from the recent desk audit revealing that land totaling $255 million in value had been donated as conservation easements in South Carolina, there is reason to believe that overvaluing is a practice that is alive and well in this state also.[80]

Lack of significant conservation values as required by § 170(h) is also a problem.[81] In theory, the landowner's ulterior motives do not necessarily have to be conservation-oriented. A widow can place a conservation easement on her land because she does not want her children to be able to develop it, or a developer can place a conservation easement on his land in order to get the tax break, but because § 170(h) lists very specific "conservation purposes" that must accompany the tax deduction,[82] the hypothetical widower and developer must protect land for recreation, open space, wildlife, vistas, historical purposes or some other clearly defined public policy above and beyond any personal motives they may have. For developers particularly, this means that putting fewer houses in a development than is permitted by local zoning laws is not a valid "conservation purpose" under § 170(h). Even a green space within a subdivision is

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[78] *See* Small, *Proper Deductions, supra* note 5, at 218.
[79] John O'Connor and Gina Smith, *supra* note 36.
[80] *Id.*
[81] *See* Small, *Proper Deductions, supra* note 5, at 218.
[82] I.R.C. §170(h)(4)(A).

not going to automatically qualify for a conservation easement where it only benefits homeowners on the surrounding lots. This is a problem typically where very small parcels of land within a development are set aside for a conservation easement, and also with larger parcels of land located within a gated community. Landowners and, in particular, developers, must also remember that a basic tenet of charitable contributions law is the *quid pro quo* rule: a contribution is not "charitable" and not deductible if it is part of a business deal. In the context of conservation easement law, this means that a developer cannot put a conservation easement on land he does not develop, even if there is a valid conservation purpose, if the reason for the easement is to secure something in return from the donee organization.[83] The South Carolina Department of Revenue is particularly concerned about violation of the *quid pro quo* rule in South Carolina where developers place an easement on their property to receive preferential zoning from the local municipality.[84]

Common misconceptions also lead to rumors of abuse. A developer who inquires about putting a conservation easement on a wetland since he cannot build there anyway, thinking that he will enjoy a tax deduction will be told by the honest appraiser that the "highest and best use" value of land that cannot be developed anyway (under federal law) will generate a tax deduction that is de minimis.[85] Another byproduct of misinformation are land trusts set up as private foundations by developers who cannot find a legitimate land trust to accept their land. What they do not realize is that private foundations are not

[83] Small, *Proper Deductions, supra* note 5, at 220-221.
[84] John P. McDermott, *supra* note 42.
[85] Interview with Yancey A. McLeod., *supra* note 58. Since timber harvesting is allowed on wetlands, the only real potential for deduction is if the owner forgoes his timber rights forever. Even then, the deduction is contingent on the quality and amount of merchantable timber on the property. *Id.*

eligible donees for a deductible conservation easement.[86] Assuming the presence of knowledgeable parties to the process (e.g. appraiser, environmental consultant, attorney, land trust organization) acting in good faith, landowners and developers who possess this misinformation are stopped before they ever get started. *Actual* abuse in these areas, therefore, may not be as common as the misinformation itself.

An area of particular concern in South Carolina is the sham land trust created by developers themselves to accept land.[87] These land trusts on paper appear to be a "qualified organizations" under § 170(h), but their intentions may not be legitimate. While the South Carolina Department of Revenue has remained silent on the specifics of its suspicions about such operations,[88] one can logically assume that there is evidence of their existence, or the July 2004 desk audit would not have been conducted.

One of the most shocking aspects of conservation easement abuse to many are the so-called "golf course easements", where conservation easements with debatable conservation purposes are set up on golf-course fairways. Most golf course easements never come to fruition because the practical consultant will advise that they are not natural environments or do not provide a public benefit, and therefore do not qualify for a § 170(h) deduction.[89] At the same time, some conservationists defend golf course easements where they are set up according to the rules. In developments where the golf course land is owned by the developer, nothing except a conservation easement is guaranteed to stop her if she decides to build more houses on that land, or sell the land to

[86] Small, *Proper Deductions, supra* note 5, at 220.
[87] John O'Connor and Gina Smith, *supra* note 36**;** *see also* Small, *Proper Deductions, supra* note 5, at 220.
[88] John O'Connor and Gina Smith, *supra* note 36
[89] *Id.*

a commercial developer to build, for example, a Wal-Mart.[90] Another argument in defense of golf course easements is that in spite of all the fertilizer, pesticides and other manipulation of the land, they are still ecologically healthier than agricultural land, which typically meets no opposition when proposed for an easement.[91] Ultimately, the validity of golf course easements depends on the good faith of the parties involved. While the generally negative reaction to the concept of golf course easements is probably well-placed for the most part, there are two sides to every story and the entire future of conservation easements should not hinge on the fact that a few golf course easements exist (whether because they slipped through the cracks, or because they are legitimate).

B. Conservation Easement Issues: Solutions

Estimates are that only a very small proportion of conservation easement transactions are improper or fraudulent,[92] but judging from the response by the South Carolina Department of Revenue and the federal government, these transactions threaten to upset the entire system if they are allowed to persist. With its rules for charitable contributions and the terms of art relating to conservation easements clearly defined, the Internal Revenue Code provides sufficient parameters for a valid conservation easement deduction. The problems to be addressed lie mainly in the enforcement of those rules.

Most often the problem is "[n]ot a bad conservation easement, but a bad appraisal."[93] Based on the obvious proliferation of bad appraisals at both the national

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[90] Interview with Dr. Harry E. Shealy, *supra* note 20.
[91] Interview with Yancey A. McLeod, *supra* note 58.
[92] *See* Small, *Proper Deductions, supra* note 5, at 219; *see also* John O'Connor and Gina Smith**,** *supra* note 36.
[93] E-mail from Stephen J. Small, Attorney-at-Law, to letters@washpost.com (Dec. 22, 2003), *at* http://www.stevesmall.com [hereinafter Stephen J. Small letter]

level and in South Carolina, perhaps the most important remedy is to implement standards and review processes for land appraisers that are rigidly enforced. Standards are already in place through the work of the Land Trust Alliance and its publication *Land Trust Standards and Practices*. However, they need to be promulgated in some sort of "official" format that is recognized as the standard across the board.

The first step to enforcement of the standards should lie with the donee organization. It should be their responsibility to exercise due diligence in performing an initial inspection of the appraisal value listed on Form 8283 and follow up on any suspicious valuations.[94] Such an exercise of review would bar the obviously improper appraisals from making it past the first step in creating a conservation easement. A second tier of review by the IRS would provide a check on the donee organization's review to catch any overvaluations that may have slipped through the cracks. The IRS should also be responsible for being sure that the donee organization is itself legitimate (i.e. a true "qualified organization" under §170(h)), and that it is doing its part to screen out bad appraisals.[95] In order to have any meaning, the standards must be enforced. Time, cost and practical considerations dictate that the donee organizations and the IRS are the best candidates for the task.

Fines and penalties are another way to enforce compliance with the tax law. Since the motivation behind improper conservation easements is typically money-based, the imposition of penalties from the IRS for appraisers, attorneys, financial advisers and donee organizations who knowingly take part in these improper transactions would be a

[94] As mentioned in note 39 above, charitable organizations can, and do, sign off on Form 8283 even where no appraisal value has been listed. Small, *Proper Deductions, supra* note 5, at 224. Therefore, in order to exercise due diligence, the donee organization must require that an appraisal value be listed in order to evaluate its validity.
[95] *See* Small, *Proper Deductions, supra* note 5, at 219.

fitting deterrent.[96] Fines and penalties equal to or greater than the value of the improper tax deduction would be severe enough to deter intentional abuse, and if applied to parties regardless of fraudulent intent, would also probably give well-meaning donors and their consultants an incentive to double check their work to prevent inadvertently improper easements. Along these same lines, improper easements, once discovered, would obviously be denied any tax benefits under § 170(h), and any improper easements that had already benefited in some way from the provisions in § 170(h) should be assessed back taxes.

Perhaps the most simple of the suggestions is that of education and outreach for land trust boards and staff, the general public, attorneys, appraisers and other technical advisors.[97] Efforts should be coordinated at the national level to ensure uniformity of information and good organization. However the principles and polices should be adequately communicated to actors at the state level where realistically, the problems facing the future of conservation easements are best addressed. Landowners and developers are more likely to seek out and take advantage of advice on how to do things the "right" way when they can call a local number and talk to a knowledgeable *person* (as opposed to an automated answering service), and possibly set up an on-site meeting to address questions and/or concerns. Providing education and outreach to interested parties on the local level is in keeping with the community aspect of the conservation easement system that has been part of its success. Furthermore, it tends to be more easily accessible and is therefore attractive to those for whom speed and efficiency are particularly important (i.e. real estate developers).

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[96] *Id*.
[97] Stephen J. Small letter, *supra* note 93.

South Carolina has already taken steps in providing its own outreach program. In March 2005, the Department of Revenue released the second edition of *Local, State and Federal Tax Incentives for Conservation Easements*,[98] a publication also endorsed by the Department of Natural Resources. A preface by Governor Mark Sanford declares the handbook a publication designed to "assist private landowners, land trusts, attorneys, appraisers, real estate agents and other conservation professionals in understanding the requirements and implications of the tax incentives for conservation easements in South Carolina."[99] The handbook is designed for a variety of users, with detailed examples for professionals and more elementary explanations of the basic information, and organized for quick reference.[100] It is a good example for other states who wish to maintain the conservation easement system, but recognize the need for better information and communication.

Other suggested remedies for the system are administrative in nature. Collecting more information on Form 8283[101] so that the IRS and the donee organization can better assess the nature of a conservation easement mirrors precisely what the South Carolina Department of Revenue did in its desk audit. The difference is that by providing similar information on the Form 8283 (instead of a desk audit after the fact), the IRS can in theory stop the problem before it starts. Similarly, a summary of conservation values protected on a particular easement should be made available in a public document providing the opportunity for public scrutiny to supplement the donee organization's

[98] BURNET R. MAYBANK, III and DAVID J. HARMON, LOCAL, STATE AND FEDERAL TAX INCNETIVES FOR CONSERVATION EASMENTS (Burnet R. Maybank, III, ed., 2d ed. 2005), *available at* http://www.sctax.org
[99] *Id.*
[100] *See id.*
[101] Small, *Proper Deductions, supra* note 5, at 219.

evaluation of the easements' legitimacy.[102] Such administrative remedies may provide insight into a donor's true intentions by forcing them to reveal material information that was previously neither requested nor required.

The prevailing theme of most of the suggested remedies is stricter review and enforcement of the requirements set forth in § 170(h). While no system is foolproof, the lack of strict review and enforcement during a period of skyrocketing land values and rapid urban development is the most likely source of the abuse that takes place today. Given the relative infancy of § 170(h), the problems have been detected early enough so that long term degradation may be prevented. Those wishing to create proper conservation easements outnumber those that do not.[103] Their desire to see the system prevail provides a strong foundation from which to build.

C. Why Bother Saving the System?

1. Failure of governmental regulation to provide protection for the environment

The reason for the conservation easement and land trust boom beginning in the 1970s was to fill the void created by inadequacies and dissatisfaction with governmental land use regulation. The unpredictable nature of zoning laws, which could zone land agricultural one year and commercial the next left landowners unsatisfied that the laws could meet their desires for open space, wildlife habitat, farmland and forests.[104] Government regulation for environmental protection on the local, state and federal level also created burdens on property rights which fostered ill-will to the environmental

[102] Stephen J. Small letter, *supra* note 93.
[103] *Id.*; *see also* Small, *Proper Deductions*, *supra* note 5, at 219.
[104] Stephen J. Small letter, *supra* note 93.

movement in general. Landowners were divested of certain property rights when they were told they could not fill wetlands or build a certain density of houses on their land, thereby decreasing the value of their land for certain uses.[105] Conservation easements on individual tracts of land fill the gap in zoning laws by providing perpetual protection and a conservation plan specific to the characteristics of the land and the landowner.[106] Furthermore, instead of limiting the landowner's property rights like government environmental regulations, they essentially create a property right in conservation itself – the right to prevent development.[107] Conservation easements, therefore, fulfill the same purposes underlying government land use regulation, but in a manner that generates the desired results in a more positive light.

2. Positive effects on the environment

At today's rapid pace of urbanization, particularly in coastal areas, the environmental implications in giving landowner's an alternative to development with conservation easements are obvious. South Carolina's population is expected to grow by 1 million people between 2000 and 2015, a 25% increase. With that growth, there stands to be a significant amount of development in a state that already ranks fourth among other states in conversion of agricultural lands to development. [108] With these figures, it is important to have a system that functions to promote healthy development which takes environmental concerns into account, but also allows for the growth of the state's economy.

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[105] Cheever**,** *supra* note 1, at 1086.
[106] *See id.*, at 1085-1086
[107] *Id.,* at 1086.
[108] South Carolina Department of Natural Resources**,** *The South Carolina Conservation Bank Act: Statistic, at* http://www.dnr.state.sc.us (last visited April 26, 2005).

South Carolina has shown its commitment to smart development through its passage of the South Carolina Conservation Easement Act of 1991 and the South Carolina Conservation Incentives Act, which recognize and create benefits for conservation easements, yet do not require the total elimination of development potential.[109] Additionally, these laws make conservation a viable option for people that would otherwise be pressured to sell valuable land to the highest bidder. One need look no further than the ACE Basin to see the positive environmental effects of these laws: in a part of the state that is under enormous development pressure, it largely remains a haven for a rich array of trees, wildlife, aquatic species, and arguably one of the most threatened species of all, the human being who is a steward of the land.

3. Positive effects on the economy

In addition to the environmental benefits, conservation easements can also have positive economic implications on local markets. Perhaps most easily lost in the conservation easement debate is the enormous value of open space in today's real estate market.[110] While "golf course easements" are viewed with skepticism, one must consider that many people who live around golf courses do not play golf.[111] They purchase a home on the golf course because they would rather look out their window and see green space than other houses. Where the local market of homebuyers prefers open space (as opposed to high-density preferences), a conservation easement might not provide as much of a tax break (because the "highest and best use" is not high-density), but its

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[109] *See* S.C. Code §12-6-3515 (West Supp. 2004); S.C. Code §27-8-10 et. seq. (West Supp. 2004).
[110] Interview with Dr. Harry E. Shealy, *supra* note 20.
[111] *Id*.

permanence will keep property values high which is something that wise homebuyers will consider when making the investment.

Conversely, the developer who wants to create a high-density housing development with no open space in order to get the maximum number of houses and generate the maximum amount of money should think twice about a conservation easement for his own economic purposes. Where the local market is dominated by homebuyers who prefer high-density (thereby making it the "highest and best use" for valuation purposes), a developer could still potentially maximize his earnings by creating a low-density housing development with a conservation easement on the open land that allows for a significant tax deduction of the difference between the land's value as high-density and low-density development.[112] While determining how to maximize one's gain always depends on the facts and circumstances of each situation, a conservation easement can provide value for environmentally-driven developers in an otherwise commercially-driven market.

4. The landowner's perspective

Above all, conservation easements and land trusts are important in offering the landowner alternatives[113] and the right to exercise the control over his land that he normally would. It starts with making the choice whether to keep the land in fee simple with all its inherent rights, place a conservation easement on it or sell to the highest bidder. If he chooses the conservation easement, then he alone decides "how much" conservation. Timber rights or no timber rights? A reservation for houses or not?

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[112] Small, *Proper Deductions, supra* note 5, at 221.
[113] Interview with Dr. Harry E. Shealy, *supra* note 20.

Obviously, the tax deduction is affected by what rights he chooses to retain, but the choice is still his. Once he outlines the conservation values, he again chooses what charitable organization he wishes to donate the easement to: a government organization (such as U.S. Fish and Wildlife), a national conservation group (such as The Nature Conservancy) or a local land trust. Deciding what organization to use is based on the landowner's conservation objectives, his experience with any of the groups, and other personal values that govern whether he wishes a large or small, government or private organization to be the beneficiary.

A conservation easement can provide more than just tax benefits depending on the landowner's situation. A landowner who all the sudden finds his land has increased in value to the point where the property taxes are beyond his financial capabilities may be able to avoid having to sell his land to pay taxes by putting an easement on it and thereby decreasing its value. Similarly, valuable land received by bequest may still be part of an estate for which the estate taxes are too burdensome for the receiving party. Whether the conservation easement is placed on the land before or after the grantor's death, by decreasing the value of the property, it may keep him from having to sell the land in order to pay the estate taxes.[114] For landowners in these types of situations, the value of the conservation easement is not so much in the tax deduction itself, but in being able to hold on to their land.

Furthermore, a conservation easement is the most permanent method available today to ensure protection of property forever.[115] Conservation easements are perpetual

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[114] *See generally* SMALL, *supra* note 2.
[115] Interview with Yancey A. McLeod, *supra* note 58.

and are protected by the law.[116] Even the controversial golf course easement ensures that the golf course land will never be developed when there is otherwise nothing stopping the owner/developer from doing just that, much to the chagrin of surrounding homeowners. For any landowner fearful of what future generations may do with their land, or the surrounding land (e.g. a golf course), this is the most important reason of all for placing the easement.

5. Demonstrated success in growth of the land trust movement

The successful combination of voluntary private transactions and traditional regulation that the conservation easement embodies is reflected in the statistics on the growth of private land trusts in the last decade. In 1998, a national survey of private land trusts conducted by The Land Trust Alliance estimated there to be approximately 4.7 million acres of land in the United States protected by land trusts through either conservation easements or direct ownership.[117] A 2003 LTA survey revealed that number had doubled to approximately 9.4 million acres,[118] in addition to another 25 million acres protected by national land trusts (e.g. The Nature Conservancy).[119] Compared to the 190 million plus acres of the United States National Forest System,[120] the amount of land protected by land trusts seems insignificant. However, unlike the

[116] *See* S.C. Code Ann. §27-8-10 to -120 (West Supp. 2004)**.**
[117] Land Trust Alliance, "2003 Land Trust Alliance Census Addendum," *at* http://www.lta.org (November 18, 2004) [hereinafter "LTA Addendum"]. Some landowners opt to sell their land to land trusts in a "bargain sale" at a price below its fair market value. The receive cash for the sale in addition to a tax deduction for their charitable contribution in the amount of the difference between fair market value and the sale price. *See* SMALL, *supra* note 2, at 54-55.
[118] LTA Addendum, *supra* note 117.
[119] Land Trust Alliance, "2003 Land Trust Alliance Census Press Release," *at* http://www.lta.org (November 18, 2004).
[120] UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICUTLUTRE, LAND AREAS OF THE NATIONAL FOREST SYSTEM, *available at* http://www.fs.fed.us. (September 30, 2004). All National Forest System statistics include National Forests, Purchase Units, National Grasslands, Land Utilization Projects, Research and Experimental Areas, National Preserves and "other" areas. See *id*.

National Forest System, when land is put into a conservation easement, it is on a voluntary basis by the landowner, and not the public policy decision of a government agency.[121] Furthermore, unlike the National Forest System, land under conservation easements typically does not include land above 9000 feet, north of the 60th parallel, or other land under rocks and glaciers and basically non-navigable by the average human being.[122] The higher concentrations of land trusts in the population-dense Northeast, mid-Atlantic, and Pacific coast regions,[123] show that landowners are opting to conserve the land in these more populous regions, and are willing to work through a system of voluntary private transactions, with federal tax incentives, to achieve their goals.[124]

South Carolina has 22 private land trusts which either own or have conservation easements on nearly 104,000 acres in the state.[125] An additional 225,000 acres are protected by The Nature Conservancy alone (either through direct ownership or conservation easements).[126] These figures are equal to over half of the roughly 625,000 acres of land in South Carolina included in the National Forest System.[127] The scope of the land trust industry in South Carolina, particularly the cooperative efforts of the nationally recognized ACE Basin project,[128] demonstrates the success of conservation

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[121] Cheever, *supra* note 1, at 1087.
[122] *See id.*
[123] LTA Addendum, *supra* note 117.
[124] *See generally* Cheever, *supra* note 1, at 1087.
[125] LTA Addendum, *supra* note 117.
[126] E-mail from Joseph Hamilton, Project Director, The Nature Conservancy, to the author (April 27, 2005) (on file with author). The author found no direct authority for the amount of land protected under other national land trusts, but Joe Hamilton, a Project Director for the Nature Conservancy's ACE Basin and South Lowcountry projects estimates that the total land protected in South Carolina through land trusts, state-owned property and federally-owned property is approximately 1 million acres. There is a total of 20 million acres of land in the state of South Carolina. *Id.*
[127] UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, LAND AREAS OF THE NATIONAL FOREST SYSTEM, *available at* http://www.fs.fed.us. (September 30, 2004).
[128] Nature Conservancy Increases Protected Lands in South Lowcountry, *supra* note 62.

easements in achieving the state's conservation objectives through a system of private transactions.

V. Conclusion

In light of the recent federal and state investigations, the future of conservation easements is uncertain. Reported abuses by landowners, appraisers and land trusts alike have brought the conservation easement system under close scrutiny by both our state and federal government. However, elimination of the entire program of incentives is probably not the answer. Promoters of the system need to demonstrate the success of conservation easements in achieving public policy goals and suggest tighter enforcement of the rule, a set of established standards and an outreach program.[129]

South Carolina itself has shown a commitment to promoting conservation. With its most recent law allowing for transferable tax credits for conservation, the South Carolina legislature has shown that it supports protecting the environment, and that it believes conservation easements are a good way to do that.[130] The desk audit by the South Carolina Department of Revenue is the first step in assessing what problems, if any, belie conservation easements in our own state. From there, it may begin its efforts to eliminate wrongdoing so that future generations may reap the same benefits the current one has.[131] With its progressive legislation and the continued cooperation between its public and private entities, South Carolina stands to help lead the way into the future of environmental preservation through conservation easements.

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[129] *See* text accompanying notes 93-102.
[130] *See* S.C. Code §12-6-3515 (West Supp. 2004); S.C. Code §27-8-10 et. seq. (West Supp. 2004).
[131] *See* John P. McDermott, *supra* note 42.

The United States is a society that has historically frowned upon government intervention in the private sector. However, conservation easements are able to avert the label of "government regulation" through their existence as a unique blend of government-endorsed rules for environmental protection that function through a series of private transactions between a landowner and a donee organization, at the heart of which is the landowner's retained ability to exercise his property rights.[132] Like the cooperative effort between public and private parties inherent in the system of conservation easements, hopefully, the federal government, land trusts and landowners nationwide can join forces to maintain and enforce the current system so that future generations may continue to benefit from the many successes of the conservation easement system in promoting the nation's conservation objectives.[133]

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[132] *See generally* Cheever, *supra* note 1, at 1077.
[133] *See* I.R.C. §170(h)(4)(A) (2000) (listing the "conservation purposes" for which easements may be created).