

**Remarks of Steven T. Miller
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Conservation Easements

It is a pleasure to be here. I appreciate the opportunity to speak with all of you this morning, to give you our perspective and hopefully get a better understanding on your perspective conservation easements.

We, at the Service, need to learn more about how land trusts work, and about how to tell a good transaction from a suspect one.

Let me start my discussion with two things that I know to be true. The first is that conservation easements serve a vital role in American society. I ask you to consider all that follows in my comments with this in mind.

When conservation easements are appropriately used, they bring real and enduring benefits to the American public. They can safeguard, and have safeguarded, fragile ecosystems, critical watersheds, lands bordering national parks, and stunning views. We value this use of conservation easements, and we at the IRS want to do nothing to hinder the continued and appropriate donation of conservation easements to provide these gifts to the public.

But let me temper my exuberance with a quote. I was not invited here just to sing the praises of land trusts. I am here to sound an alarm. Thus, let me state the second thing I know to be true. And this has been expressed best by my boss, Mark Everson, the Commissioner of Internal Revenue. He has said publicly:

We have uncovered instances where the tax benefits of preserving open space and historic buildings have been twisted for inappropriate individual benefit. Taxpayers who want to game the system and the charities that assist them will be called to account.

Pretty tough words – but before I am accused of being too much of a drag on the proceedings, let me continue.

It is true, as I will discuss, that we have found problems, and Congress is rather interested. But I can also say that with what we are doing, with what the Land Trust Alliance is doing, and even with what Congress may do, I believe at the end of the day the land conservation sector will be better informed, better policed and even healthier than it is today.

But the last word about land trusts and conservation easements has not yet been spoken. To some degree it is up for grabs. That is why I am here. You and I need to act to shore up this sector. And I need partners, not adversaries. I need your help and I believe you truly can help during this very delicate time.

I think this is an important discussion and an important meeting. You are key players in whether we have a conservation easement program that serves its intended, and laudable, purposes or whether, in the alternative, we have a program that is marked by abuse, disallowed deductions, and even prosecutions.

So if I have your attention, let's begin —

I will start by creating a context. I want to discuss the current interest of Congress and the Service. Why are conservation easements a hot topic now?

Second, I will discuss what the Service has found and outline our current activities.

Finally, I will close with what I believe needs to happen.

So first, let's build a context for why I am here and why the Service is spending considerable resources in this area.

Conservation easements are a part of the rising concern about the nonprofit sector. I want to talk a little about this because to truly understand the service's concerns in this area, one must go back to the emphasis that Commissioner Everson has placed on abuses in the nonprofit sector generally.

The Commissioner has been talking for more than two years, as I have, about problems in the nonprofit sector. Two are of particular interest here. First, we are concerned with can be called lapses in corporate governance. Second, we are concerned with the misuse of our regulated tax-exempt community to generate unwarranted or hyper-inflated deductions, or otherwise for use in tax abusive transactions.

Over the same period, articles on easements came out indicating that these two problems may exist in your sector as well. Conservation easements, both open space and façade easements, began to become prominent in certain media articles. You will recall the allegations of sweetheart land deals. This clearly involves corporate governance issues. Moreover, stories on the gifting of façade easements indicated that hyper-inflated deductions might well be present in certain deals.

Not surprisingly, Congress also grew interested. The Senate Finance Committee began its own investigation of a well regarded conservation organization. And over time Congress has only grown more interested.

In June, Senate Finance conducted a hearing exclusively on the subject of conservation easements, focusing mostly on open space. Three weeks later, the House Ways and Means Committee conducted a hearing on façade easements, The Joint Committee on Taxation, a congressional think-tank, has issued proposals in this area that would limit the utility of easements.

So it should be no surprise that we at the Service have also been concerned.

What are we doing and what have we found? You have heard the Commissioner's view, and this is supported in light of some preliminary findings in this area.

Let me outline what we are doing in the area of conservation easements. First I will talk about guidance and reporting; second, the design and implementation of a comprehensive compliance program; and third, our emphasis on practitioners in this area — in particular, appraisers.

First, let's talk about guidance and reporting. One can begin to see the outline of our program for conservation easements in our publication of Notice 2004-41.

We sometimes refer to this Notice as a "yellow light notice." The "yellow light" means that these notices are intended as warnings — warnings to taxpayers that we have begun looking closely at improperly claimed charitable deductions, and that we intend to disallow such deductions, where they have been wrongly taken, and may impose penalties and excise taxes. The notice also outlines some concerns we have in this area including the application of certain general rules, valuation issues, and a discussion of so-called conservation buyer programs.

Finally, the notice outlines the penalties, excise taxes and consequences to exempt organizations that will arise if improper deductions are taken as part of the granting of a conservation easement.

These include accuracy related penalties and, as appropriate, the excise tax for excess benefit transactions against disqualified persons who receive more than they should from the charity, who knowingly participate in the transaction. The notice also details our intent in appropriate cases, to challenge the tax-exempt status of the organization.

In addition to this notice, we have taken steps to improve reporting. We modified Form 1023, the application for tax-exempt status, to identify organizations with conservation easement donation programs. We added a checkbox to the Form 990, the annual information return for exempt organizations, to identify organizations that receive conservation easement donations during the year. We are considering changes to the Form 8283, on which donors list donated property, to better identify donors of such easements, and we amended the instructions of that form to better describe what is permissible.

That is guidance and reporting. I next want to discuss our development of a comprehensive examination program. To do this, we created a service-wide team to attack all aspects of conservation easements. Certain members of that team, Karin Gross, Jeffrey Schutzman and Nancy Todd, will be speaking on a panel here, and I hope you will be able to sit in this afternoon.

And this team has initiated a robust examination program, investigating promoters, appraisers, contributors and, yes, recipient charities. Of course, we are looking at such issues as whether a gift has really been made and whether an appropriate value has been assigned to that gift. But we are also asking some questions that are especially important for this group.

- Have there been amendments to conservation easements and are they problematic?
- Has the charity monitored the easements that it holds?
- Does the charity have the commitment and resources to enforce an easement?

In our examinations, we have looked at more than 25 promoters, and have referred several for further investigation. We are examining more than 10 recipient charities for involvement in particular abuses, and several charity officials for unduly profiting from their positions with the charity. And we are examining around 250 easement donors, a limited number of which involve donations of façades and the balance being open space easements. We have many more cases under review so the activity in this area is unprecedented. As we proceed, we are prepared to use every civil and criminal tool at our disposal.

What we are seeing gives us pause in both the open space and façade areas. Some of these problems impact on whether the gift has been made. For example, has too much authority been vested in the donor? There are cases in which the donor takes an action inconsistent with the easement without adverse consequences. Does the document creating the easement allow a use inconsistent with the ostensible purpose of the easement? In other cases we are questioning whether there is sufficient public benefit in open space cases. Is it, for example appropriate to donate easements for property sitting between houses or between golf holes?

Most often we are seeing real valuation problems. Is the value of the donated easement being reasonably determined? Is the contributor truly forgoing single home development where there are no water rights? That is, are the development assumptions reasonable? The nature of the issues in façade easements differs somewhat but most still revolve around valuation.

So we have worked on guidance, and we have a robust examination program. The third area I want to touch on involves the regulation of appraisers. There are those that see this as key to curtailing some of the problems in the area of conservation easements.

Circular 230 regulates the practice of appraisers before the Internal Revenue Service. And it provides that we may disqualify any appraiser against whom a penalty has been assessed under Section 6701 of the Code. Section 6701 imposes a penalty for aiding and abetting an understatement of tax liability.

A disqualified appraiser is barred from presenting evidence or testimony in any administrative proceeding before the IRS, and any appraisal made by such an appraiser has no probative effect in administrative

proceedings. One of Commissioner Everson's strategic goals is to increase our review of professional standards – and this area is directly impacted. So we are looking at appraisals and appraisers very carefully. Out of our examination activities to date, we have several appraisers who we are referring to the Office of Professional Responsibility for possible disbarment.

Let me close.

What we see today is a real concern – across the Service and Congress, and throughout the great majority of the tax and tax-exempt community – about the misuse, the distortion, by some, of important provisions of the Code intended to foster and promote the philanthropic and charitable impulses of the American people.

Conservation easements have not escaped this concern, and no one should expect them to escape increased scrutiny in the future. In this new environment, I think each of you can play an important role in ensuring that conservation easements are appropriately used and thereby preserved.

You have heard me talk about valuation being an issue. I hear all the time from charities that I should not hold them accountable for the misconduct of their donors. I believe that is nonsense. Sorry, but I do. Charities cannot sit idly by while donors poison the charitable environment. A donor's aggressive act brings discredit on your section and brings the IRS and Congress to your door. Please exercise prudence. If you perceive there is something out of whack with a transaction – walk away -

A vibrant nonprofit sector is key to our way of life. Media reports of greed and inefficiency damage that vibrancy. You and I need to see that that does not happen.

We can do that by establishing for the public that the nonprofit sector is tax compliant. The prudence I just mentioned is the first step in that direction. Let me suggest three more steps that I believe are necessary to protect the integrity and ultimate solvency not only of the conservation easement community but of the entire tax-exempt sector:

First, we at the IRS must maintain a strong enforcement presence. We are doing that. Indeed, we have considerably strengthened our enforcement presence in the last couple of years, moving into areas like the one we are discussing today.

Second, the sector must be governed by reasoned and rational rules. Generally speaking, it is, although some standards, including possibly those governing appraisals, may need to be modified. Congress and the Service are in the process of this review, and it is a positive step.

Third, the tax-exempt sector must elevate its own standards and practices through education and self-regulation.

With that last point in mind, I think you in this room can take justifiable pride that the Land Trust Alliance is serving as a role model for the nonprofit sector. Its sponsorship of this type of program, its promulgation of land trust standards and practices, and ultimate establishment of a private sector accreditation program for land trusts, are exactly the sorts of actions that will help prevent abuse in the conservation easement area. The establishment of standards and the prevention of abuse are essential to the preservation of the tax privileges that land trusts and other tax-exempts enjoy. To all of you here who are engaged in these important initiatives, you have my thanks and my respect.

In my opening, I talked about the delicate balance we face. Ultimately, there is no inconsistency between appreciating conservation easements, while also being aware that they can be misused. What we have to recognize is that if we are to preserve the benefit of conservation easements for the public into the future, we all have a solemn and continuing obligation to see that the conservation easement program stays within its lawful and intended boundaries.

I therefore solicit your cooperation, to help preserve a viable, appropriately disciplined program.

Thank you for your attention; thank you for your professionalism; and thank you for your contribution to a sound, fair, and smoothly functioning tax system.