The Land Trust Alliance's New Accreditation Program

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The Land Trust Alliance’s New Accreditation Program

Marc Campopiano

The use of conservation easements has risen dramatically over the past twenty years, resulting in the protection of millions of acres of conservation land and historic properties. The land trust community—a diverse collection of thousands of individual land trusts, big and small—has helped drive this success.

Unfortunately, a wave of scandals threatens to jeopardize these accomplishments. A recent series of articles by the Washington Post exposed abuses by the world's largest land trust, The Nature Conservancy (TNC), including the apparent exploitation of tax benefits garnered from donation of conservation easements that involved excessive easement appraisals or land with dubious conservation value. Subsequent investigations by Congress and the Internal Revenue Service revealed additional problems, including insufficient monitoring and enforcement of conservation easements, and sounded calls for broad legislative and regulatory reform. The Congressional Joint Committee on Taxation proposed draconian restrictions on tax deductions for gifts of land that could lead to a sharp reduction in donated conservation easements.

In an effort to ameliorate these concerns and avoid federal intervention, the Land Trust Alliance (LTA)—the umbrella organization for the nation's land trusts—launched a new accreditation program for individual land trusts. The accreditation program aims to restore the public confidence, assure long-term protection of conservation easements, and deter governmental intrusion. This Comment discusses the concern among some in the land trust community that top-down oversight will drive smaller land trusts out of existence and erode or

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destroy the grassroots nature of land trusts that has led to much of their success.

Nevertheless, a strong accreditation program by LTA is essential to stem current abuses and further erosion of the public trust, and to prevent severe regulatory backlash. As the use of conservation easements becomes more common, and more actors outside the environmental mainstream become involved, institutional protections that were not required in the past may become necessary. To that end, this Comment provides options for refining the accreditation program to help LTA achieve its goals.

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INTRODUCTION

The rise of conservation easements over the past twenty years has been a spectacular success story resulting in the protection of millions of acres of conservation land and historic properties.\(^1\) The land trust community—a diverse collection of thousands of individual land trusts,  

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big and small—has driven this success.\(^2\) As a group, land trust organizations have matured into a powerful force; combined, they hold interest in millions of acres of land, control a net worth of billions, and command respect at the table of conservation politics at the local, state and federal level.\(^3\)

In the past twenty years, the number and geographic scope of land trusts, and the total area protected by conservation easements have increased dramatically. The successful preservation of land through conservation easements has been aided, at least in part, by the enactment of myriad federal and state tax incentives to encourage conservation easement donations.\(^4\) Typically, a donor is eligible for a federal charitable income tax deduction along with potential transfer tax and estate tax benefits.\(^5\)

Unfortunately, a wave of scandals threatens to derail the success story. A recent series of high-profile articles by the *Washington Post* exposed an array of abuses by the world's largest land trust, The Nature Conservancy (TNC).\(^6\) Many of the revelations focused on the apparent exploitation of tax benefits garnered from donated conservation easements that involved excessive easement appraisals or land with dubious conservation value.

In the wake of the *Washington Post* articles, TNC and other land trusts performed internal audits and initiated various reforms.\(^7\) Academics and land trust veterans responded by detailing a wide swath of potential concerns and offering a range of solutions in an effort to extricate land trusts from the controversy.\(^8\) Soon thereafter, Congress and

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the Internal Revenue Service (IRS) launched investigations into TNC's practices that highlighted additional problems, including insufficient monitoring and enforcement of conservation easements, and sounded calls for broad legislative and regulatory reform.9

The stakes are high. A recent report from the Congressional Joint Committee on Taxation proposed draconian restrictions on deductions for gifts of land and other appreciated property that could lead to a sharp reduction in donated conservation easements.10 The IRS11 and Senate Finance Committee12 also initiated investigations and signaled a need for change. Regardless of the ultimate extent of reform, the Land Trust Alliance (LTA)—the umbrella organization for the nation's land trusts—has acknowledged that Congress will at the very least demand greater accountability of individual land trusts.13 The only question remaining is whether land trusts can regulate themselves or if federal control is inevitable.14

In an effort to ameliorate these concerns and avoid federal intervention, LTA launched a new accreditation program to give a "seal of approval" to individual land trusts.15 The goals of the accreditation program include restoring the public confidence, assuring long-term

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10. JOINT COMMITTEE ON TAXATION, supra note 9; see also Land Trust Alliance, Background Information on Conservation Tax Benefits, http://www.lta.org/publicpolicy/ppc_background.htm (last visited Aug. 19, 2006).


12. SENATE FINANCE COMMITTEE, supra note 9.


14. See id.

protection of conservation easements, and deterring governmental intrusion.  

Not everyone in the land trust community is happy with the accreditation program. Critics fear that top-down oversight will drive smaller land trusts out of existence and will erode or destroy the grassroots nature of land trusts that has led to much of their success.

Despite the concerns of critics, a strong accreditation program by LTA is essential. In the absence of such a program, current abuses may continue, the regulatory backlash may be even more severe, and the public trust may erode even further. Certain characteristics of conservation easement donations make the transactions susceptible to abuse. A strong accreditation program can provide important safeguards against abuse—safeguards that would help ensure that valuations are reasonable, the public benefit is commensurate with the public subsidy, and that conservation benefits are preserved over the long term. As the use of conservation easements becomes more common, and more actors outside the environmental mainstream become involved, institutional protections that were not required in the past may become necessary.

Part I of this Comment provides an overview of land trusts and conservation easements, followed by Part II with an outline of the current controversy. Part III describes how the controversy exposed certain characteristics of conservation easement transactions that may be susceptible to abuse or at least may not properly protect the public's long-term interest. These issues include concerns over easement valuation techniques, monitoring and enforcement practices, and the conservational benefits received for each donated easement. Part IV summarizes LTA's accreditation program and Part V summarizes options for refining the accreditation program.

I. OVERVIEW: THE RISE OF LAND TRUSTS AND CONSERVATION EASEMENTS

A conservation easement is a legally binding agreement between the landowner and the easement holder that restricts land use and development in order to achieve certain conservation goals, such as the preservation of habitat, scenic views, or agricultural land. A landowner creates an easement by conveying a deed to a qualified easement holder. 

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18. Id. at 4.
19. While conservation easements can be for a specified number of years, the vast majority are granted in perpetuity because most recipient conservation organizations will only accept perpetual easements, and donated easements must be perpetual to be eligible for various federal tax incentives. Id.
holder, such as a government agency or qualified land trust.\textsuperscript{20} A land trust is a non-profit organization that, as all or part of its mission, actively works to acquire land or conservation easements for the purpose of conserving natural, recreational, scenic, historical or other productive resources.\textsuperscript{21}

Conservation easements are a "revolutionary departure" from the common law that protected future landowners from being perpetually bound by the "dead hand" of a prior owner.\textsuperscript{22} In the early 1980s, the National Conference of Commissioners on Uniform State Laws (NCCUSL) developed the Uniform Conservation Easement Act (UCEA) with the purpose of putting conservation easements beyond the reach of the common law defenses against enforcement.\textsuperscript{23} UCEA created a private ordering system, treating conservation easements as an element of private property.\textsuperscript{24} To complete the "revolutionary departure," states adopted enabling legislation to circumvent the traditional common law defenses.\textsuperscript{25}

Along with enabling legislation, state and federal governments initiated tax incentives encouraging the donation of conservation easements in the 1980s and have continually strengthened these incentives. Under Internal Revenue Code (I.R.C.) section 170,\textsuperscript{26} a conservation easement donor is eligible for a charitable income tax deduction generally equal to the value of the easement.\textsuperscript{27} Moreover, the donor of a qualifying conservation easement may be able to remove the easement's value from the donor's estate free of transfer tax under section 2522(d), and exclude up to forty percent of the value of encumbered land for estate tax purposes under section 2031(c).\textsuperscript{28} Additionally, most states now offer tax breaks to encourage conservation easements donations.\textsuperscript{29} Several states, such as Colorado and Vermont,

\begin{itemize}
\item \textsuperscript{22} PIDOT, \textit{supra} note 8, at 5.
\item \textsuperscript{23} Fairfax & King, \textit{supra} note 8, at 2.
\item \textsuperscript{24} \textit{Id.} at 3.
\item \textsuperscript{25} Ellen Edge Katz, \textit{Conserving the Nation’s Heritage Using the Uniform Conservation Easement Act}, 43 WASH. & LEE L. REV. 369, 382–84 (1986).
\item \textsuperscript{26} The Internal Revenue Code is title 26 of the United States Code. Subsequent cites are to the I.R.C. unless otherwise noted.
\item \textsuperscript{27} McLaughlin, \textit{Questionable Conservation Easement Donations}, \textit{supra} note 4, at 40.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} See McLaughlin, \textit{Increasing the Tax Incentives for Conservation Easements}, \textit{supra} note 2, at 23–24 (describing Virginia’s income tax incentives).
\end{itemize}
offer extremely generous tax incentives that could conceivably reimburse the donor for the entire amount of the "donation."30

Conservation easements have become a tremendously popular tool for the protection of conservation land and historic property.31 Following the development of the UCEA and the various tax incentives32 in the early 1980s, the land trust movement really "took off,"33 with the number of land trusts and easement-encumbered acres rising dramatically. Prior to 1985 there were fewer than 500 land trusts in the United States.34 Between 1998 to 2003, however, the number of local and regional land trusts increased from 1200 to more than 1500.35 Moreover, national organizations such as TNC hold thousands of easements and government agencies hold "untold thousands" more.36

The growing ranks of land trusts corresponded with a sharp jump in the acres encumbered by conservation easements. Prior to 1985, the total of encumbered acres was less than 300,000 acres.37 But between 1998 and 2003, the number jumped from 1.4 million to more than 5 million acres.38 Similarly, the average amount of land newly encumbered each year has soared from less than 50,000 acres in the early 1980s to over 800,000 acres today.39

Land trusts have also broadened the geographic range of their influence. Today, every state has at least one land trust, while several have more than a hundred.40 Internationally, land trusts have purchased an extraordinary quantity of land.41 TNC, the largest land trust in the world, has recently called for further research into the legal foundations for the use of easements outside the United States, with the purpose of creating regional land trusts and an international easement certification program.42

30. Id. at 22.
31. LIND, supra note 1, at 1.
32. See McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 49; Fairfax & King, supra note 8, at 47–49.
33. Fairfax & King, supra note 8, at 48.
34. McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 21.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 7.
40. Id.
42. TNC WORKING GROUP REPORT, supra note 7, at 23.
In sum, conservation easements have become a powerful tool for the conservation of wildlife habitat, scenic resources, and historic properties. Land trusts—as the holders of a huge number of conservation easements—have grown as a group into important and powerful players in the conservation movement.

II. THE WASHINGTON POST ARTICLES: SCANDAL ENSNARLS THE NATURE CONSERVANCY AND THE LAND TRUST COMMUNITY

In May 2003, the Washington Post "spoiled the party" by publishing a series of articles that raised serious questions about some of TNC's policies and practices. The Washington Post articles focused on a number of alleged abuses, including easement donations that seemed to provide erroneously large tax benefits to donors because of appraisals that appeared "wildly exaggerated," easement donations by developers over lands with doubtful conservational benefits such as golf courses, and insider transactions by senior members of TNC.

A typical example in the articles described a development in the Great Smoky Mountains near Asheville, North Carolina, where investors bought 4400 acres, placed an easement on 3000 acres and then developed 350 home sites and an 18-hole golf course on the remaining property. The easement, called the Balsam Mountain Preserve, was broken up by the fairways and home sites "which spot[ted] the land like mushrooms on a pizza." According to the Washington Post, investors paid about $10 million for the land and shared in a tax write-off close to $20 million. This deduction was based in part on an untrustworthy appraisal of how much the land would have been worth had they filled the acreage with 1400 homes.

The Washington Post articles were not entirely negative, acknowledging that conservation easements have "done much good" and have made land conservation the "fastest growing arm of the environmental movement." The articles quoted Rand Wentworth, president of LTA, for the proposition that "ninety-nine percent of these transactions are good, solid conservation."

Nevertheless, the Washington Post articles focused on the problems and abuses that have
arisen within the land trust community as the use and complexity of conservation easements have increased.\(^{51}\)

In addition to the concerns voiced in the *Washington Post* articles, land trust veterans also have recently signaled their unease over the growing frequency of questionable conservation easement transactions.\(^{52}\) Steven J. Small, a recognized expert in conservation easements and an original drafter of I.R.C. section 170(h), sounded perhaps the most prominent call for concern.\(^{53}\) Small feared that some land trusts outside the mainstream environmental community were being formed to facilitate transactions that allowed too much development while providing little if any conservational benefit.\(^{54}\)

To illustrate his concerns, Small described a case in which one of his clients, a major real estate developer, held an option to buy 3000 acres for $15 million in the direct path of development.\(^{55}\) A consultant approached Small's client and offered to "package a conservation easement deal" for a flat fee plus a "kicker" based on the size of the deduction. The consultant promised to develop 75% of the property, put a conservation easement on the remaining 750 acres, and get a $25 million deduction for the easement.\(^{56}\) In the client's words: "it sounded too good to be true."\(^{57}\) It was.

According to Small, the consultant's advice violated section 170(h) and should be the type of easement a land trust would shun.\(^{58}\) The consultant's appraised value was grossly inflated even for a red-hot real estate market. Even though undeveloped property may "pop" in value when planning approvals are gained, the entire property value would have had to jump to more than $100 million to get the $25 million deduction for the 25% left undeveloped—an astronomical leap from the current market value. Moreover, the "kicker" was suspicious because any deal that tied payment to the size of the income tax deduction gave the consultant an incentive to create an oversized deduction, regardless of whether the value was justified.\(^{59}\) Lastly, the consultant did not ensure

\(\text{\footnotesize 51. See, e.g., id.}\)
\(\text{\footnotesize 52. See, e.g., Small, "Local Land Trust Signed a Fraudulent Tax Form!," supra note 8; Small, The Good and Not-So-Good, supra note 8; McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 64–67; PIDOT, supra note 8, at 1, 13–21.}\)
\(\text{\footnotesize 53. As a self-styled "heads up" to the land trust community, Small published two articles in LTA's journal *Exchange* that outlined his reasons for concern. See Small, The Good and Not-So-Good, supra note 8; Small, "Local Land Trust Signed a Fraudulent Tax Form!," supra note 8.}\)
\(\text{\footnotesize 54. Small, "Local Land Trust Signed a Fraudulent Tax Form!," supra note 8; Small, The Good and Not-So-Good, supra note 8, at 33.}\)
\(\text{\footnotesize 55. Small, "Local Land Trust Signed a Fraudulent Tax Form!," supra note 8.}\)
\(\text{\footnotesize 56. Id.}\)
\(\text{\footnotesize 57. Id.}\)
\(\text{\footnotesize 58. Id.}\)
\(\text{\footnotesize 59. Id.}\)
that the land contained conservation purposes required under section 170(h)(4).60

In direct response to the Washington Post articles, Congress and several federal agencies launched investigations into various aspects of TNC's activities and conservation easement transactions as a whole. The Senate Finance Committee investigation exposed serious flaws in TNC's monitoring and enforcement efforts, leading the Committee to suggest a number of possible legislative changes.61 The IRS also initiated an investigation into abuses of easement transactions by taxpayers, appraisers, and non-profit groups, and has begun actively disallowing improper deductions for easement donations under section 170(h).62 Perhaps the most severe response came from the Congressional Joint Committee on Taxation, which recently recommended drastically curtailing the eligibility of conservation easement donations for federal tax deduction purposes because of uncertainties associated with easement valuation and the public benefits of donations.63

The controversy flowing from the Washington Post articles marked a turning point for the land trust community by widely exposing problems that had not previously garnered significant attention. While the large majority of conservation easement transactions continue to provide significant conservational benefits,64 the land trust community must now grapple with the issues that have been exposed or risk a regulatory backlash and the loss of public confidence.

III. PROBLEMS WITH CONSERVATION EASEMENT DONATIONS HIGHLIGHTED BY THE WASHINGTON POST CONTROVERSY

The Washington Post articles and the subsequent controversies highlighted several areas that are potentially problematic for donated conservation easements. Donated easements raise concerns because the public has an interest in ensuring the conservation benefits it receives from the transaction are roughly commensurate with public subsidy provided in the form of tax incentives. This section explores three areas of concern, including uncertainty over whether a particular donation meets the "public benefits" requirements, incomplete long-term monitoring and enforcement of easements by land trusts, and inaccurate easement valuation techniques.

60. See id.
61. SENATE FINANCE COMMITTEE, supra note 9.
63. See JOINT COMMITTEE ON TAXATION, supra note 9.
64. See Small, "Local Land Trust Signed a Fraudulent Tax Form!," supra note 8; see also Testimony of Rand Wentworth, supra note 15.
A. Uncertain Public Benefits from Conservation Easement Donations

In order for a donor of a conservation easement to qualify for an income tax deduction, the easement must provide public benefits that meet particularized conservation purposes. Under the section 170(h) "public benefit test," a donor must demonstrate that a donated easement has an eligible conservation purpose, such as outdoor recreation, habitat protection, preservation of historic lands and structures, or open space preservation, including farmland and forest land.65

In enacting section 170, Congress wanted to provide a tax deduction for conserving land while still allowing the underlying fee owner to retain the right to "some very limited development" in order to maintain reasonable use of his or her land.66 When the IRS sought to implement section 170(h), it left much of the responsibility for the difficult task of determining how much development is "too much" to the land trust community.67 Thus, while the ultimate responsibility for meeting the public benefit test under section 170(h) rests with the landowner, the IRS made the land trust community the "first line of defense against bad or abusive conservation easement donations."68

Two examples illustrate the role of land trusts as "gatekeepers" against fraudulent easements. First, section 170(h)(4)(A) allows a conservation easement to have the purpose of protecting "open space" for the "scenic enjoyment" of the public.69 IRS regulations interpreting this section state that the deduction will be denied if the donor retains development rights that could interfere with the essential scenic quality of the land.70 However, since the IRS does not have expertise in determining which retained development rights undermine the essential scenic quality of an easement, the responsibility to affix appropriate limits falls in large part to donee organizations, as representatives of the public interest.71

65. I.R.C. § 170(h)(4)(A) (2006). Specifically, under section 170(h)(4)(A) a donor must demonstrate that a donated easement meets one or more of the following qualified conservation purposes: the preservation of land areas for outdoor recreation by, or the education of, the general public; the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; the preservation of an historically important land area or a certified historic structure; or the preservation of open space (including farmland and forest land) where such preservation is either for the scenic enjoyment of the general public and will yield a significant public benefit or pursuant to a clearly delineated federal, state, or local governmental conservation policy and will yield a significant public benefit.
66. Small, The Good and Not-So-Good, supra note 8, at 32–33.
67. Id.
68. See id. at 33.
71. McLaughlin, Questionable Conservation Easement Donations, supra note 4, at 41.
Second, under the "inconsistent use standard," an easement donation must be denied if the donation would accomplish one of the conservation purposes under section 170(h), but would nonetheless permit destruction of other significant conservation purposes. For example, a conservation easement preserving the open space of a farmland may be denied if the use of pesticides on the farm would significantly injure natural habitat near the farm. The heart of this standard is a balancing test. An easement does not satisfy section 170(h) if its conservational benefits come with the price of significant natural harm. Again, in these situations the IRS will often first look to the donee organization, which presumably has expertise in evaluating conservation values, to judge the net conservational worth of an easement.

The risk, of course, with land trusts serving as the "gatekeepers" against fraudulent conservation easement transactions is that some land trusts might not perform the job adequately. The risk is particularly acute with "rogue" land trusts, or land trusts that are outside the environmental mainstream and not motivated by conservation purposes. But as the Washington Post articles demonstrated, even established land trusts with good intentions may sometimes accept conservation easements that have minimal conservational benefits, such as easements over golf courses.

Furthermore, the IRS is not equipped to verify a land trust's assessments of the conservational value of an easement. In the words of Professor McLaughlin, "the satisfaction of... [the I.R.C. section 170(h)] requirements is beyond the ken of IRS personnel to evaluate." Because of the lack of expertise, anecdotal evidence suggests that the IRS has rarely challenged easement donations on the issue of satisfaction of the deductibility requirements under section 170(h).

The net result, at least in some cases, is that if a land trust is inadequately interested in ensuring that its easements have genuine conservational value, and the IRS is not well equipped to do so, there will be no meaningful protection of the public benefit for these conservation easements. This uncertainty motivated the Congressional Joint

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73. McLaughlin, Questionable Conservation Easement Donations, supra note 4, at 42 (discussing Treas. Reg. § 1.170A-14(e)(2)).
74. See id. at 43.
75. See id. at 43.
76. See supra notes 46-48.
77. McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 56.
78. Id.
79. Id.; see also Stephens & Ottaway, Developers Find Payoff in Preservation, supra note 6, at A1.
80. See generally McLaughlin, Questionable Conservation Easement Donations, supra note 4, at 40-42.
Committee on Taxation’s recommendation for eliminating the tax deductibility of most conservation easement donations.\(^{81}\) For this reason alone, the land trust community has a significant interest in ensuring the conservational validity of each conservation easement.

\section*{B. Incomplete Monitoring and Enforcement of Easements}

In order for the public to receive its full benefit from a conservation easement donation, the conservational purposes of the easement must be maintained in perpetuity with thorough monitoring and enforcement, or "stewardship."\(^{82}\) Generally speaking, good stewardship requires: clear, legally defensible deed drafting of the easement; regular, documented inspections of the property; a continued working relationship with the property owner and community; strong financial planning, including the funds to monitor and enforce the easement; and a commitment to enforce the easement where necessary.\(^{83}\) These requirements are more than a practical way to ensure conservation easements last—they are an ethical and legal responsibility.\(^{84}\) Failure by a land trust to meet its stewardship obligations jeopardizes its organizational mission and may render the land trust ineligible to receive tax-deductible donations.\(^{85}\) As a result, the "real work" with a conservation easement begins after "the signature ink dries."\(^{86}\)

Monitoring is a central responsibility of a land trust or other easement holder.\(^{87}\) Monitoring by the easement holder is essential in order to build rapport with the property owner by maintaining contact and providing consistent information about her obligations. This enables the easement holder to catch violations as they occur, thereby saving time and money by detecting violations before they become deeply entrenched and the property owner committed to an adversarial position. The easement holder’s monitoring responsibilities also include constructing a record in the case of court action by providing a clear showing of violation and demonstrating that it has fulfilled its own responsibilities under Treasury Regulation 1.170-A-14(c)(1).\(^{88}\) Improper monitoring jeopardizes the public benefit provided by the easement, undermines the public subsidy in the form of tax benefits to the donor because the public

\begin{footnotesize}
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\item \(^{81}\) See Joint Committee on Taxation, supra note 9, at 287-88; see also Land Trust Alliance, Information on Conservation Tax Benefits, http://www.lta.org/publicpolicy/ppc_background.htm (last visited Aug. 19, 2006).
\item \(^{82}\) Lind, supra note 1, at 1-3.
\item \(^{83}\) Id. at 27-28.
\item \(^{84}\) Id. at 4.
\item \(^{85}\) Id.
\item \(^{86}\) PIDOT, supra note 8, at 18.
\item \(^{87}\) See Lind, supra note 1, at 27-28.
\item \(^{88}\) See id.
\end{footnotes}
\end{footnotesize}
does not receive a return commensurate with its investment, and erodes the public confidence in the use of conservation easements as an effective tool for environmental preservation.

Furthermore, a land trust must be ready to enforce any and all violations it uncovers during the monitoring process. Although a land trust will generally treat litigation as an answer of last resort, it must have the resources and will to enforce the easement to sustain the integrity of a conservation easement in perpetuity.  

Unfortunately, many land trusts may struggle with the perpetual nature of their stewardship obligations. An LTA survey indicated that more than eighty percent of land trusts considered it likely that some of their holdings would not be protected in a hundred years, while only eight percent considered that unlikely. These land trusts indicated that the top threat to conservation durability was an inability to provide long-term stewardship.

For example, even the well-funded and well-organized TNC has struggled with its monitoring obligations. The Senate Finance Committee, in a review prompted by the *Washington Post* articles, was highly critical of TNC’s failure to consistently monitor and document its conservation easements. Specifically, the report noted that TNC was “inconsistent in its monitoring efforts,” which resulted in monitoring occurring every third, fourth, or fifth year for a number of easements even though TNC’s procedures called for annual monitoring. Moreover, TNC failed in some instances to follow its own procedures to prepare written reports documenting its monitoring efforts. In sum, the report concluded that TNC’s monitoring efforts ranged from “inadequate” for small conservation easements to “minimally adequate” for larger easements, and in general “fail[ed] to meet the tests established in [LTA’s] *Standards and Practices.*”

Enforcement of easement violations can be another large expense and litigation costs can overwhelm unprepared land trusts. Unfortunately, enforcement problems are expected to become more

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89. See PIDOT, *supra* note 8, at 18–19.
90. See id.
91. Id. at 18 (citing LAND TRUST ALLIANCE, CASE STATEMENT FOR ADVANCING IMPLEMENTATION OF LAND TRUST STANDARDS AND PRACTICES (2005), http://www.lta.org/sp/land_trust_survey_results.doc).
92. Id. Even some governmental organizations have reported a lack of resources to provide adequate easement stewardship for all their holdings. For example, one state official in a recent report on conservation easements reported significant pressure to purchase easements even when monitoring budgets were cut to zero. Id. at 19.
93. SENATE FINANCE COMMITTEE, *supra* note 9, pt. 2 at 3.
94. Id.
95. Id., Executive Summary at 9–10.
96. PIDOT, *supra* note 8, at 19.
acute and common as easements are inherited or purchased from the original donor because the new owner “may have less understanding, appreciation and commitment to the restrictions than the original owners.” To this end, one commentator has predicted a “tidal wave” of lawsuits as less invested owners acquire encumbered property.

C. Inaccurate Easement Appraisal Techniques

Grossly overvalued donations result in windfall tax benefits to some donors and represent a major obstacle to ensuring the public benefit intended by federal and state tax laws. Pressure to overvalue easements results from the desire of some landowners to seek the largest possible valuation for tax purposes. Furthermore, the minimal regulation of the appraisal system enables appraisers to apply selective and subjective judgments in an arena where they may have professional incentives to exaggerate. Without a proper easement valuation, there is no way to ensure that the public benefit received for the easement is commensurate with the tax reduction benefits received by the donor. In other words, if an easement donation is grossly overvalued, the public (as taxpayers) overpays for the benefits received.

To properly value conservation easements, IRS regulations typically call for the “before and after” appraisal method, which uses the difference between the fair market value immediately before and after the donation. This test sounds clear-cut, but the ambiguity of fair market value makes the results murky. The IRS defines fair market value as “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.” The rub, of course, is that often it is very difficult to know what the price should be for a particular area of land because of a lack of market comparables. Given ambiguities associated with fair market value, Professor McLaughlin notes that conservation easement values can be easily inflated by (1) exaggerating the value of the land immediately before the donation, which would produce an unreasonably high “before-easement”

97. TNC WORKING GROUP REPORT, supra note 7, at 3.
98. PIDOT, supra note 8, at 19.
100. See id. at 6.
101. Id. at 3–5.
102. McLaughlin, Questionable Conservation Easement Donations, supra note 4, at 44.
105. See McLaughlin, Questionable Conservation Easement Donations, supra note 4, at 44 ("Determining the after-easement value of land can be a difficult undertaking because few real estate markets exist in which a substantial number of easement-encumbered properties have been bought and sold.").
value, (2) overstating the extent to which the easement would reduce the land's value, resulting in an unreasonably low "after-easement" value, or (3) employing some combination of the two foregoing techniques.\textsuperscript{106}

A complex appraisal technique known as subdivision development analysis has been increasingly used to embellish the "before" value of land and maximize the value of the donation.\textsuperscript{107} The subdivision development analysis, which is highly speculative and subject to manipulation, is well-suited to the task of exaggerating values because it calculates the "before" value of the land assuming that it would be developed as a profitable subdivision, with only minimal regard to economic, regulatory, or political realities.\textsuperscript{108}

Given the incentives for promoters, appraisers and donors to inflate the value of the donation, objective review of these valuations by a neutral party is essential. However, anecdotal evidence suggests that the IRS traditionally has not focused on auditing conservation easement donations.\textsuperscript{109} However, times are likely changing. On June 30, 2004, the IRS warned that it will scrutinize improper charitable deductions claims for easement donations under section 170(h) and that it intends to disallow such deductions and impose penalties and excise taxes where appropriate.\textsuperscript{110} The IRS also warned that it intends to review promotions of improper easement donations and to impose penalties on the promoters, appraisers, and other people involved in such transactions.\textsuperscript{111}

IV. LTA'S RESPONSE: THE ACCREDITATION PROGRAM

In response, at least in part, to the fallout from the \textit{Washington Post} controversy, LTA formally announced a new accreditation program that would certify land trusts on an individual basis.\textsuperscript{112} LTA has the experience, qualifications, and resources to successfully implement an effective accreditation program.\textsuperscript{113} In fact, many sources have recognized LTA's expertise in the field and have called for LTA to initiate an accreditation program to address problems confronting land trusts today.\textsuperscript{114}

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 44–45.
\textsuperscript{109} See id. at 43; McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 55–56.
\textsuperscript{110} McLaughlin, Questionable Conservation Easement Donations, supra note 4, at 41 (discussing IRS Notice 2004-41, supra note 11).
\textsuperscript{111} Id.
\textsuperscript{112} See supra note 15 and accompanying text.
\textsuperscript{113} See Testimony of Rand Wentworth, supra note 15, at 4.
\textsuperscript{114} See TNC's PROPOSED LEGISLATIVE CHANGES, supra note 7, at 5; SENATE FINANCE COMMITTEE, supra note 9, at 10; supra note 8 and accompanying text.
The accreditation program does not address every ill facing the land trust community, but it does seek to prevent a number of abuses while elevating the ethical and operational standards of certified land trusts. Specifically, LTA states that the goals of the accreditation program are to "address the challenges facing land trusts" by (i) demonstrating to the public that land trusts are doing a credible, responsible job; (ii) assuring the public that conserved land will be protected far into the future; (iii) building strong land trusts; (iv) publicly recognizing that land trusts must meet accepted standards; and (v) deterring governmental efforts to intervene in land trust work or withdraw important tax incentives.

To meet these goals, the program requires that a land trust meet two types of requirements to become certified. First, a land trust must have been incorporated for at least two years, and must have completed at least two land conservation projects. Second, the land trust must adopt and demonstrate "substantial compliance" with forty-two "indicator" practices from the Land Trust Standards and Practices ("Standards and Practices").

The Standards and Practices are the "ethical and technical guidelines for the responsible operation of a land trust." Twelve "Standards" cover topics ranging from compliance with laws to financial and asset management. Each Standard further incorporates a number of "Practices" that are the guidelines for implementing the goals and policies of the Standard. In general, the guidelines contained within the Standards and Practices are flexible so that land trusts that differ in size and scope can implement them in a manner that best fits their organization. Because of this flexibility, however, the Standards and Practices do not establish many firm requirements for land trusts, leading at least one commentator to refer to them as "aspirational" in nature.

116. Id.
117. LTA, AN INTRODUCTION TO THE NEW VOLUNTARY LAND TRUST ACCREDITATION PROGRAM, supra note 15, at 3. The term "projects" is not defined.
118. Id. at 2-3.
120. Id. at 2, 6. A complete summary of the Standards and Practices is beyond the scope of this Comment because the Standards and Practices contain many provisions that are in turn supported by a number of other guidelines and policies.
121. Id. at Introduction.
122. Id.
123. McLaughlin, supra note 2, writes:

[LTA's Standards and Practices] are an evolving set of fifteen standards that articulate guidelines for the responsible and professional operation of land trusts . . . . [A]s of October 2003, approximately 90 percent of the LTA's sponsor member land trusts had formerly adopted the Standards and Practices . . . . However, voluntary adoption of largely aspirational standards does not necessarily a paragon of easement selection.
The accreditation commission—an independent subsidiary of LTA—is charged with granting certification and ensuring compliance with these standards. The commission both reviews submitted applications and conducts random inspections. Certification is valid for five years at a time. The accreditation commission will discipline accredited land trusts that fail to demonstrate ongoing compliance with the "indicator practices." However, LTA has yet to specify certain characteristics of the accreditation program, including the frequency of inspections, the indicia that will trigger review of "poorly performing" land trusts, and requirements necessary to achieve the "substantial compliance" standard.

V. OPTIONS FOR REFINING LTA'S ACCREDITATION PROGRAM

In formulating its accreditation program, LTA has balanced competing interests. Ideally the program would retain the flexible autonomy of individual land trusts while ensuring compliance with appropriate standards. On one hand, LTA has specifically stated that its accreditation program is intended to "make it harder for bad actors to succeed." But on the other hand, LTA does not want to undermine the success and strength of the land trust movement. As Professor McLaughlin succinctly describes this tension:

In developing the accreditation program, the LTA will likely wrestle with the difficulty of balancing meaningful enforceable standards with the dangers of top-down micro-management. Accreditation standards will have to be crafted to carefully avoid adversely impacting the grassroots nature and resulting unique strengths of land trusts—namely their ability to respond quickly and creatively to land protection challenges; their ability to gain 'kitchen table' access to and credibility with private landowners; and their often superior knowledge of local landscapes.

Thus, under a well-struck balance, the accreditation program would be rigorous enough to restore the public trust and remove the threat of congressional reprisal, while retaining the flexible, grassroots nature of land trusts that has fueled their success.

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and stewardship make. Indeed, serious concerns would remain even if all of the land trusts in the nation adopted the Standards and Practices.

McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 65.

124. LTA, AN INTRODUCTION TO THE NEW VOLUNTARY LAND TRUST ACCREDITATION PROGRAM, supra note 15, at 4–5.

125. LTA, ACCREDITATION FAQs, supra note 15.

126. LTA, AN INTRODUCTION TO THE NEW VOLUNTARY LAND TRUST ACCREDITATION PROGRAM, supra note 15, at 5. As of the date of this writing, LTA has not specified what disciplinary measures would be established, other than revocation of certification.

127. LTA, A MESSAGE ON LAND TRUST ACCREDITATION, supra note 7, at 5.

This Part considers methods by which LTA can refine its accreditation program to address some of the concerns discussed above. The goal of these changes would be to bolster the objectives of the accreditation program itself, namely, to help stop current misuse and prevent future abuses, restore the public confidence, lessen the risk of governmental interference, and increase the long term viability of conservation easements. Specifically, the remainder of this section addresses: (1) securing the public benefit for each conservation easement transaction by prohibiting easements over certain suspect land uses and improving public involvement; (2) ensuring the viability of land trusts and their easements long into the future by setting minimum stewardship funding requirements; (3) protecting against easement valuation abuses by limiting the use of the “subdivision development” appraisal technique; and (4) strengthening the Standards and Practices by learning from an analogous accreditation program by the National Association of Insurance Commissioners.

A. Secure the Public Benefit

As discussed above, land trusts play a central role in ensuring that public benefits are commensurate with public subsidies (i.e., tax benefits) for donated conservation easements. Far from being mere passive receptors of the easement, the IRS expects land trusts to help guard against abusive or ineffective easement donations. In order to help ensure that each conservation easement held by a certified land trust provides the appropriate level of public benefit, LTA could condition certification on the following two requirements.

1. Prohibit Acceptance of Conservation Easements Donations Over Suspect Land Uses

Some conservation easement donations simply do not pass the smell test. With the proliferation of conservation easements, a few “fly-by-night” land trusts have sought to use easements and related tax incentives to maximize financial benefits while serving few if any conservation purposes. Whether because the easement covers land with too much development, or land that does not meet the spirit or letter of section 170(h), some lands lack any significant conservation purpose or public benefit.

129. TNC’s PROPOSED LEGISLATIVE CHANGES, supra note 7, at 5.
130. Small, “Local Land Trust Signed a Fraudulent Tax Form!,” supra note 8, at 5.
131. TNC’s PROPOSED LEGISLATIVE CHANGES, supra note 7, at 5.
To encourage legitimate conservation transactions, TNC and some commentators have recommended that certain types of easements should be excluded from obtaining tax benefits for donations. LTA could incorporate this concept into its accreditation program by prohibiting the acceptance of donations for conservation easement transactions over certain questionable land uses for the purpose of the donor receiving tax benefits. Land uses with dubious conservational value could be categorized in two ways: (1) "prohibited land uses," and (2) "suspect land uses." Prohibited land uses would be land uses that categorically lack the conservational value required under section 170(h) for tax benefit purposes, including: (i) golf courses, (ii) small backyards, (iii) land that was required as part of the approval process of a subdevelopment to be set aside, and (iv) any other land uses that LTA identifies as uniformly inconsistent with the spirit of a conservation easement.

Alternatively, "suspect land uses" would be land uses that are presumed to have inadequate conservational value. For example, small greenways surrounded by a subdevelopment would fall into this type of category. In order for a land trust to accept a conservation easement over a "suspect land use," the land trust would have to meet more stringent procedural requirements, such as detailing why the easement should be allowed in that particular case, and what conservational purposes will be served by the transaction, considering the fact that similar transactions have been identified as suspect.

Prohibiting the worst types of donated easements from receiving tax benefits would help eliminate the risk of embarrassing public relations disasters like the scandal unearthed in the Washington Post articles. The number of excluded conservation easements would likely be very small, but the credibility gained by the land trust community could be very large.

2. Increase Public Involvement

Involving the public in a meaningful way could ameliorate harms and protect stakeholders from IRS inquiry into whether the public benefit of a conservation easement was commensurate with its subsidy. Specifically, public involvement would create a record demonstrating the value received by the transaction.

Public involvement could be incorporated into the conservation easement process at either the individual transaction level or the organizational level. At an individual transaction level, the land trust

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132. Id.
133. See, e.g., PIDOT, supra note 8, at 30.
134. See, e.g., TNC'S PROPOSED LEGISLATIVE CHANGES, supra note 7, at 5.
135. PIDOT, supra note 8, at 13, 17; see also Fairfax & King, supra note 8.
would be required to request and consider public comments for each transaction. Alternatively, at an organizational level, land trusts would not need to incorporate public review for individual transactions but would be required to engage in public, long-term planning and more thoroughly disclose the nature of their holdings.

It would be most appropriate for the LTA accreditation program to require land trusts to increase public involvement at an organizational level. Because conservation easement transactions in the United States have historically been treated as entirely private transactions, requiring public participation in all individual transactions may undermine some of the key benefits of the conservation easement process. Public involvement at an organizational level could be implemented in the following two ways.

First, every land trust would adopt a long-term strategic plan that would incorporate public input and would conform to publicly adopted land use plans. The strategic plan would define the general type and location of easements that the land trust would pursue over the period of the plan. The land trust would then consider public input in defining its goals and establishing priorities. In other words, the land trust would engage the public in its long-term planning process and would take careful steps to ensure that its transactions support the conservation efforts of local non-profit groups and government agencies. Such long-term planning would be a powerful step towards ensuring that the land trust accepts easements that provide concrete, cognizable public benefits as approved not only by the land trust, but also by the public at large and other conservational entities in the region.

Second, land trusts would be required to disclose certain non-confidential information about their holdings. LTA would determine the type of information to be disclosed. For example, TNC has recently suggested that it would publicly list (i) an annual summary of easements it has received for which tax benefits had been claimed, (ii) the location of the properties, (iii) the acreage of the properties, (iv) the conservation purpose of the easements, and (v) whether there have been any

136. PIDOT, supra note 8, at 17. For example, an "informal" public review process would require a land trust to post the terms of the transaction online and seek and consider public comments. As Pidot notes, "this process would not constitute public approval, but it would expose concerns ... and give the parties a chance to consider them." Id.

137. See McLaughlin, Increasing the Tax Incentives for Conservation Easements, supra note 2, at 67 (discussing the "grassroots nature and resulting unique strengths of land trusts—namely their ability to respond quickly and creatively to land protection challenges; their ability to gain 'kitchen table' access to and credibility with private landowners; and their often superior knowledge of local landscapes and the needs of the communities in which they operate.").

138. PIDOT, supra note 8, at 13, 17.

139. See id.
modifications to the easements (and if so the terms of the modifications).\textsuperscript{140}

These disclosure requirements would benefit the land trust community as a whole because currently conservation easements are not systematically registered at a state or local level.\textsuperscript{141} For example, a 1999 report by the Bay Area Open Space Council showed that nearly one-third of the land trusts surveyed did not have a systematic list of their own easements.\textsuperscript{142} While local deed records are sufficient to put future owners of easement-encumbered property on notice, they are ineffective for keeping the public informed of easements in their community.\textsuperscript{143}

While some may argue that disclosures of this nature should not be required in a "private" transaction, it is important to keep in mind that Congress has allowed donors to take tax benefits for private donations specifically because it believed the public directly benefits from the transaction.\textsuperscript{144} In other words, without an expectation of the public receiving benefits from conservation easements, Congress probably would not have enacted a public subsidy for a private conservation easement donation.\textsuperscript{145} Because the tax deductibility of conservation easements benefits participating land owners and likely increases the amount of conservation easements donated overall, it is not unreasonable for the public to expect donors and land trusts to increase the transparency of the existing private ordering system.

\textbf{B. Ensure Adequate Stewardship Funding}

To ensure that the conservational benefits received from a conservation easement donation are preserved in perpetuity, a land trust must have a steady stream of income for each conservation easement to meet its monitoring and enforcement obligations. Currently, LTA's \textit{Standards and Practices} do not require specific levels of funding per easement holding or other financial proxies. Rather, the \textit{Standards and Practices} broadly require a land trust to ascertain its funding requirements and to secure, or form a plan to secure, the funds needed to meet those obligations.\textsuperscript{146}

\textsuperscript{140} TNC'S PROPOSED LEGISLATIVE CHANGES, supra note 7, at 4.
\textsuperscript{141} See PIDOT, supra note 8, at 12.
\textsuperscript{142} Id. (discussing BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS: REPORT ON THE USE AND MANAGEMENT OF CONSERVATION BY SAN FRANCISCO BAY AREA ORGANIZATIONS (1999)).
\textsuperscript{143} See id.
\textsuperscript{144} See Small, The Good and Not-So-Good, supra note 8, at 32–33.
\textsuperscript{145} See id.
\textsuperscript{146} LTA, supra note 119, at 6. This provision mirrors the fact that currently the IRS does not require easement holders to maintain a stewardship fund. See PIDOT, supra note 8, at 18.
However, because the requirement of stewardship by a land trust is critical in order to maintain the conservational purposes of an easement in perpetuity, and because such stewardship can only occur with adequate funding, the accreditation program would benefit from minimum baseline funding requirements. Such baseline requirements may streamline the administrative review by the LTA accreditation committee, an improvement upon the current case-by-case determination of whether land trusts have met their obligations under the Standards and Practices. Second, baseline requirements may help screen out land trusts that are chronically underfunded or mismanaged, or are outside the mainstream environmental movement (i.e., “rogue” land trusts) and therefore have no true intention or ability to fulfill their conservation obligations.

LTA could establish baseline funding requirements in several ways. LTA could require minimum stewardship funding levels as a prerequisite for accreditation based on some measurement of the land trust’s holdings. For example, using a formula established by TNC’s “Stewardship Funding” policy, LTA could require stewardship funds equal to twenty percent of a land trust’s interests in land.\(^{147}\) Alternatively, LTA’s guidelines could set a floor for minimum funding requirements based on certain sizes or types of easements. For example, based on costs established by the Vermont Land Trust for its easements, LTA could require that an easement under 500 acres have a minimum stewardship fund of at least $3000.\(^{148}\) This option would allow land trusts to better tailor their funding obligations while still adding a layer of uniformity to the stewardship funding obligations of certified land trusts. Smaller land trusts, which may have a more difficult time maintaining the required stewardship fund, could team up with larger, more established land trusts until they secure the resources necessary to fulfill their stewardship obligations in perpetuity.

One of the key goals of LTA’s accreditation program is to provide certainty to the public that easements will be protected into the future.\(^{149}\) Requiring a minimum stewardship fund as a part of the accreditation program would go a long way toward ensuring that land trusts have the resources to meet the difficult task of long term monitoring and enforcement.\(^{150}\)

\(^{147}\) TNC WORKING GROUP REPORT, supra note 7, at 20.


\(^{149}\) See supra Part IV.

\(^{150}\) See generally PIDOT, supra note 8, at 18–21.
C. Protect Against Easement Valuation Abuses

In order to ensure that the public does not overpay for conservational benefits in the form of tax incentives for a donated conservation easement, an appraisal must accurately determine the value of the donated property. If the value of the property is grossly inflated, the donor will receive a disproportionately large tax write-off in comparison to the conservational benefits received by the public.

LTA has taken three steps towards improving easement valuation techniques. First, it has pushed for regulatory reform with an emphasis on strengthening appraisal regulations.\textsuperscript{151} Second, LTA has initiated a partnership with the Appraisal Institute to develop specific appraisal standards around conservation easements.\textsuperscript{152} Third, the revised \textit{Standards and Practices} encourage land trusts to take responsibility for awareness of the range of reasonable land values in their region and for clearly informing landowners that the land trust will not involve itself with projects based on inflated values.\textsuperscript{153}

While these are important steps, the accreditation program would benefit from specifically limiting the use of appraisal techniques that are known to be susceptible to abuse. For example, the subdivision development analysis discussed above has been used to exaggerate easement valuations because of its subjective and speculative nature.\textsuperscript{154} Professor McLaughlin recently offered several recommendations for how a donor’s attorney should guard against potential abuses arising from the subdivision development analysis.\textsuperscript{155} Specifically, she recommended:

If the appraiser employs the subdivision development analysis to determine the before-easement value of the donor’s land, the attorney should ensure that either (1) the appraiser also has employed a less speculative method, such as the sales comparison approach, to determine the before-easement value of the land, and the subdivision development analysis is employed merely to confirm the value obtained under the less-speculative method, or (2) the appraiser makes a fully supported and compelling case in the appraisal report as to why the subdivision development analysis is the appropriate appraisal method. Furthermore, the attorney should object if the appraised value of the easement appears patently abusive (for example, if the property was purchased for $1 million and one year later an easement is donated with a purported value of $10 million).\textsuperscript{156}

\textsuperscript{151} LTA, ACCREDITATION FAQs, supra note 15.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} See McLaughlin, \textit{Questionable Conservation Easement Donations}, supra note 4, at 44–45 (citing Akers v. Comm’r, 48 T.C.M. (CCH) 1113 (1984), aff’d, 799 F.2d 243 (6th Cir. 1986)).
\textsuperscript{155} See id.
\textsuperscript{156} Id.
Professor McLaughlin's recommendations could be implemented using any of the three techniques discussed above: changing IRS requirements, working with the appraisal community, or informing land trusts and donors. While the first two techniques will likely help address the problem over the long term, incorporating Professor McLaughlin's recommendations or similar methods into LTA *Standards and Practices* may help stop abuses right away.

**D. Strengthen Requirements in the Standards and Practices**

In order for LTA to ensure that certified land trusts are meeting "accepted standards," the *Standards and Practices* should be strengthened. While the accreditation program currently requires "substantial compliance" with the *Standards and Practices*, LTA should establish mandatory criteria. This would lower the risk that land trusts could be certified despite having glaring deficiencies in some key areas because they received strong marks in other areas. The LTA accreditation program could also establish certain activities or types of transactions that would trigger additional review. For example, the donation of easements by interested parties such as board members of the land trust could trigger a heightened review by the accreditation commission. Additionally, the accreditation program could identify certain omissions that would require heightened scrutiny. For example, if a land trust fails to monitor each of its easements annually, the accreditation commission would scrutinize the land trust's activities more closely until compliance is demonstrated.

Support for strong accreditation requirements can be found in reviewing an analogous accreditation program by the National Association of Insurance Commissioners (NAIC), which has also been recently embroiled in controversy and is bracing against the threat of federal control.

NAIC was formed when state insurance commissioners convened in 1871 in an effort to achieve uniformity in state laws and practices. In the 1980s and early 1990s, state insurance regulators and the NAIC came under intense fire when a flood of insolvencies shook the industry. The crisis quickly captured federal attention and speculation raged that a federal takeover was imminent. In an effort to fend off federal control,

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158. See supra notes 117-18.
161. See *id.* at 33.
the NAIC established a voluntary accreditation program in June 1990.\footnote{162} The goal was to improve state oversight of insurers’ solvency by achieving “a consistent, state-based system of solvency regulation throughout the country.”\footnote{163} NAIC’s strategy worked and the federal pressure waned.

But within a decade more trouble bubbled to the surface—in part because NAIC’s accreditation program was not rigorous enough.\footnote{164} Weaknesses in the program allowed a $200 million insurance fraud to occur in Tennessee and Mississippi during the same period in which the NAIC reviewed and reaccredited the commissions in those states.\footnote{165} In response, the General Accounting Office (GAO) launched an investigation into NAIC’s accreditation program.

The GAO identified a number of areas where NAIC’s accreditation program was lacking.\footnote{166} Weaknesses in the scoring system of the accreditation program diluted the role of professional judgment and caused misleading or questionable results by assigning equal weight to all the scoring categories without consideration of whether some categories are indispensable.\footnote{167} This allowed a “netting” process to take place by allowing an above average score on one element to offset a below average score on another element.

Additionally, the GAO found that accreditation reviews were inadequate and usually limited to one week or less even for very large insurance departments or those for which significant problems had been identified.\footnote{168} As a result, the GAO concluded that “[t]oo little compliance testing can have serious consequences for the effectiveness of the review process.”\footnote{169} Lastly, the accreditation program did not provide adequate analysis of high-risk transactions that should have triggered additional

\footnote{162} Under NAIC’s state accreditation program, an independent review team assesses a particular state’s compliance with the NAIC’s Financial Regulation Standards and ability to regulate its insurance industry. The program uses a scoring system that examines insurance departments in three categories: laws and regulations, regulatory practices and procedures, and organizational and personnel practices. Based on the categories, states are scored based on whether: (1) state legislatures adopted all of NAIC’s eighteen model laws (or versions that are substantially similar) and have authorized the state insurance regulators to implement appropriate regulations; (2) the state has the necessary resources and capabilities to conduct financial analyses and examinations of firms operating within its jurisdiction; and (3) the staff of state insurance departments have the appropriate skills and training to promote effective regulatory practices. \textit{See id.} at 4-5.

\footnote{163} \textit{Id.} at 3.

\footnote{164} \textit{See generally id.}

\footnote{165} \textit{Id.} at 2.

\footnote{166} \textit{See generally id. But see id.} at 41 (in a response letter appended to the GAO Report, NAIC refutes some of the GAO’s allegations).

\footnote{167} \textit{Id.} at 16-17.

\footnote{168} \textit{Id.} at 18.

\footnote{169} \textit{Id.} at 19.
scrutiny and it failed to provide extra review for highly unusual investment activities.\textsuperscript{170}

Many of the problems with the NAIC accreditation program resulted from testing and scoring systems that were too flexible, allowing state insurance agencies to retain their accreditation despite the existence of significant shortcomings.\textsuperscript{171} Building on these lessons, LTA may wish to strengthen its \textit{Standards and Practices} to implement certain indispensable criteria that every land trust must meet, as well as identify certain activities and omissions that trigger a heightened review process.

\section*{CONCLUSION}

LTA's new accreditation program represents an important step towards addressing the concerns raised by the \textit{Washington Post} articles and the ensuing controversy. To further strengthen the accreditation program, LTA could secure the public benefit by prohibiting conservation easements over certain suspect land uses and increasing public involvement, ensure long-term monitoring and enforcement by requiring minimum levels of stewardship funding, protect against tax abuses by tightening appraisal requirements, and strengthen the \textit{Standards and Practices} by defining indispensable criteria and establishing triggers for heightened levels of review.

While the accreditation program will not solve every problem facing the land trust community, it can go a long way towards restoring the public trust. An effective accreditation program will also reassure decision makers that the land trust community can actively protect against fraudulent transactions and fulfill its obligations to uphold the public benefit.

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\textsuperscript{170} \textit{Id.} at 2, 31.
\textsuperscript{171} \textit{See id.} at 11-24.
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