

Land Trust Ethics



Mark S. Weston, principal in the real estate consulting and appraisal firm of Hunsperger & Weston, Ltd., in Greenwood Village, Colorado, answers ethics questions about appraisals. Weston has 18 years of experience as an independent real estate appraiser, with special focus on valuation of and counseling related to conservation easements on private land, mostly in the western U.S. He is a board member of the Colorado Coalition of Land Trusts and a frequent speaker and instructor at LTA Rallies and Southwest Regional Conferences.

Readers of *Exchange* are aware of the increasingly public discussions about land trusts, conservation easements and related advisor/consultant professional responsibilities. Over the past several months, we all have seen national and local media reports referencing easements with limited or even no conservation value, bad or fraudulent appraisals, and perceived conflicts of interest among land trust principals or advisory boards. In this column, I discuss appraisers and appraisals in this context.

Tempting as it is to lead off with a joke, it is indeed a fact that “most” appraisers must comply with ethical rules. The explanation of why only “most” calls for a brief history lesson.

In the 1980s, too many savings & loan associations and other federally insured lenders chose to take advantage of lax to non-existent regulatory oversight. There were some extremely bad lending decisions, and a number of those decisions were supported by bad or fraudulent real estate appraisals favoring the position of the lenders or developers who needed these appraisals to get their deals done. These appraisals were made by a variety of practitioners, ranging from apparently qualified, highly experienced appraisers possessing respected private professional designations, to complete hacks operating under the radar.

Thanks to market, regulatory and other forces, this house of cards came tumbling down, taking with it many savings & loans, banks, private investors

and land developers. Congress, determined to “fix the appraisal problem,” enacted major legislation in 1989 that required the states to license or certify appraisers. Congress also mandated appraiser independence, at least in the context of appraisals that were made for “federally related transactions” (most residential and commercial real estate mortgages).

Part of Congress’ efforts resulted in the adoption of the *Uniform Standards of Professional Appraisal Practice* (USPAP). By law, the Appraisal Standards Board of the Appraisal Foundation promotes its use, understanding and enforcement. USPAP also is where the appraiser’s “Ethics Rule” and “Competency Rule” are found, along with all the other Standards Rules. [You can find the current edition of USPAP at www.appraisalfoundation.org.]

Congress, however, did *not* require states to regulate appraisers performing non-federally related assignments, including conservation contributions as well as condemnation, property tax protests and estate valuations. Still, many states seized the opportunity and did require all appraisers to qualify for some level of licensure, hoping, no doubt, to protect the public.

Today, all appraisers who perform appraisals for *mortgage* purposes must be licensed or certified by each and every state where they ply their trade. However, only 27 states as well as Puerto Rico, Northern Mariana and the Virgin Islands have mandatory licensing for appraisers preparing any other type of appraisals (such as appraisals of

conservation donations). As a result, there are many appraisers practicing today in states including California, Colorado and Massachusetts [the complete list is available at the Appraisal Subcommittee’s site, www.asc.gov] who answer neither to a state licensing board nor to any of the five major private appraisal designation-granting associations. These are the American Society of Farm Managers and Rural Appraisers, the American Society of Appraisers, the Appraisal Institute, the National Association of Independent Fee Appraisers, and the National Association of Master Appraisers.

This is why only “most” and not all appraisers must comply with ethical rules. This also is why I believe neither land trusts nor landowners should work with appraisers who do not possess the appropriate level of licensure or certification issued by one of the state licensing authorities.

While candidacy or full membership in one of the private designation-granting organizations listed above requires an appraiser to follow ethical rules, neither a private designation nor a state-issued license or certification means that an appraiser is competent to appraise conservation easements. This is most important!

Before an appraiser can accept any assignment, he or she must properly identify the valuation problem and have the necessary knowledge and experience to complete the assignment competently. In the alternative, an appraiser can accept an assignment he or she is

not yet competent to perform by disclosing to the client this lack of experience and taking steps to gain the necessary competency. An appraiser who violates this Competency Rule likely has also violated the Ethics Rule.

What are appraisal ethics? As set forth in USPAP, the Ethics Rule has four sections: Conduct, Management, Confidentiality and Record Keeping. All are extremely important, but there are a few provisions I want to highlight.

- An appraiser must perform assignments ethically and competently.
- An appraiser must not accept an assignment that includes the reporting of predetermined opinions or conclusions.
- An appraiser (in the context of appraisal practice) must not perform as an advocate for any party or issue.
- It is unethical for an appraiser to accept an assignment, or to have a compensation arrangement for an assignment, that is contingent on reporting a pre-determined value, an assignment direction favoring the client's cause, the amount of a value opinion, the attainment of a stipulated result, or the attainment of a subsequent event directly related to the appraiser's opinion and purpose of the assignment.

Here are answers to a few questions that illustrate some of the practical issues associated with appraisers and appraisals:

1. I have discovered an IRS Summary of Appraisal, Form 8283, signed on behalf of our land trust a couple of years ago. An easement on six acres of farmland was donated, and the appraised value of the easement was \$326,000 (over \$50,000 per acre), a value that on its face appears extremely high. The more obvious problem, however, is that the donor's basis in the property is listed at \$916,500, which is misleading. Two years before the easement was donated, the owner bought the six acres, plus another 14 acres, plus a house in good condition, all for \$440,000, and later added some buildings on the 14 acres at a cost

(I assume) of \$476,500, the cost of all this property apparently explaining the \$916,500 figure.

But isn't the IRS looking instead for the cost basis of the six acres of vacant land put under easement, which cost clearly would be a figure substantially less than \$440,000? It would appear to me that the donor was either mistaken about the cost basis information Form 8283 was designed to elicit, or put the misleading \$916,500 cost figure on the form to minimize the chance of an audit. Do I, as the responsible officer, have any obligation to request the landowner to submit an amended Form 8283 removing the values of the house, of the 14 non-eased acres, and of the subsequent buildings on those 14 acres, or does the land trust have any ethical obligation to notify the IRS of the misleading nature of the \$916,500 figure?

This is a question that I, as an appraiser, am unqualified to answer in full. However, it seems to me that you may want to consult with your attorney about writing a letter to the donor to articulate your concerns. Based solely on the Form 8283, it is probably impossible to discern exactly how the taxpayer reported this transaction to the IRS. As a result, I would urge caution about blowing the whistle on this individual. A land trust should not blow the whistle without clear and documented facts and an informed legal opinion.

This is, however, a good example of a situation that an appraiser might encounter. Unlike a land trust or other recipient of a qualified conservation contribution, when an appraiser signs a Form 8283, he or she is actually preparing a formal summary of the conservation easement appraisal. The part of this summary that the appraiser is responsible for is, of course, an accurate statement of the value of the conservation easement itself. All of the other information related to the donor's cost basis, date and manner of acquisition, etc. is unlikely to be known to the appraiser, particularly in the event the

property was acquired through inheritance or as a tax deferred exchange. In my view, an appraiser's ethical obligation here is to be certain that the value of the conservation easement is properly set forth on the Form 8283, and that any other obvious discrepancies are brought to the attention of the donor and/or the donor's accountant, prior to the time the appraiser signs the form.

In a technical sense, as was covered in the last *Exchange* column on ethics by Bill Silberstein, the easement recipient is not required to agree or disagree with the value of the easement. However, the easement donee certainly will want to consider the possible impact on the donee's reputation of any incorrect or even fraudulent information that might be found on the Form 8283. Some land trusts routinely request a copy of the appraisal—both to document the value of the donation for their records and to confirm that the appraisal is reasonable. The land trust should be careful, however, that reviewing an appraisal prior to signing the 8283 does not imply to the landowner that the land trust certifies the value of the easement.

2. Should appraisers involve themselves in easement drafting?

Yes, in a word. Frequently, especially with more complicated properties and conservation easements, the drafting of an easement involves a series of iterative steps. Sometimes part of the donor's decision-making process relates to the effect of easement provisions on the value of the donation, especially in cases where the donor does not want to gift substantially more in value than can be used as a charitable contribution.

However, appraisers that assist in the easement creation process, perhaps as part of a "team" involving attorneys, accountants, land planners and the like, need to constantly remind themselves of their independent valuation role and *never* fall into the trap of advocating the position of a particular client or project.

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3. What are “preliminary” appraisals, and are they a good idea?

In the world of “qualified appraisals,” a preliminary appraisal sometimes is requested by a potential easement grantor for use in planning purposes. Normally, such an appraisal product will differ from a final appraisal in several ways; it can be prepared with less depth of analysis, subject to USPAP’s Departure Rule [see www.appraisalfoundation.org/html/uspap2004/departure.htm]; it is not suitable for submission to the IRS; often, its conclusions will change materially as it evolves into a qualified appraisal, and it is a lot shorter!

Still, whether an appraisal is Complete or subject to the Departure Rule, and whether it is written or oral, it needs to be developed and reported in compliance with USPAP. For these reasons, appraisal users often are surprised at the relatively high cost associated with the preparation of a preliminary study. Believe it or not, some people want to know the value of an easement without expecting an appraiser to conduct any research or analysis, and they think that a preliminary appraisal will be the result. This may be why many appraisers prefer not to prepare them, as they tend to create unrealistic expectations in the minds of their users.

In a case where a donor wants a fairly accurate estimate of the potential value of a conservation easement prior to committing absolutely to the gift, a preliminary appraisal can be a good product. In my practice, I frequently will report preliminary appraisal conclusions in the form of a “Restricted Use Appraisal Report.” As defined in USPAP, such a report is intended to be very brief, contain little description or analysis, and be of limited use, *but only to the client*. Such a report, by definition, cannot contain adequate information about the property or the appraisal problem to be understandable by a party who does not already possess detailed

Our next ethics columnists will be **Konrad Liegel** and **Stefan Nagel**, who will be presenting a workshop titled “Legal and Ethical Aspects of Managing a Nonprofit Organization” for the tenth year at Rally 2004 on October 28-31. Liegel is a partner with Preston Gates & Ellis in Seattle, Wash., with a concentration in conservation transactions and environmental, land use, real estate, and nonprofit law. Nagel is of counsel to the Law Office of Stephen J. Small in Boston, Mass. His areas of concentration are complex real estate transactions, conservation and preservation easements and the law of nonprofits. Send your ethics questions concerning fundraising and gifts to ethics@lta.org, or fax to (202) 638-4730, “Attention Chris Soto.”

knowledge about the property.

As you can see, preliminary appraisals, while useful in the proper context, are not a shortcut to a thorough understanding of the value of a conservation easement.

Resource: The Land Trust Alliance's publication, Appraising Easements, offers detailed guidelines for appraisal reports for charitable gifts. For more information, go to www.lta.org. 