

LOGISTICAL AND TAX-RELATED OBSTACLES TO
COORDINATING CONSERVATION LAND
ASSEMBLAGES

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Assembling large tracts of property in the for-profit and non-profit sectors can offer a bigger opportunity than any one parcel could offer on its own. But even though for-profit developers regularly aggregate plots over short periods of time, conservation groups almost never succeed in aggregating property over the short term. Conservation assemblages, if they happen at all, tend to take many years or even decades. This Article will summarize the opportunities and challenges presented by conservation assemblages, including the logistical and tax-related obstacles faced by conservation groups. The Article includes two case studies of successful conservation assemblages which illustrate the complexity involved and the opportunity available to professionals able to bring these projects together.

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I. INTRODUCTION

A whole is often more valuable than the sum of its parts. This concept holds true in a host of business and organizational contexts, and it is certainly true in the context of environmental conservation. Because ecosystems interact and impact one another, control of a large natural expanse can offer a much higher conservation value than the value offered by each of the parts held separately.¹ As well, the benefits offered

¹ See Treas. Reg. § 1.170A-14(d)(3)(ii) (2020). The regulations dealing with donations of conservation easements (discussed below) take notice of the interconnectedness of ecosystems. When a donor of a certain property interest seeks a tax deduction, one of the qualifying “conservation purposes” is the protection of “significant habitats and ecosystems,” a phrase defined not only as “natural areas which are included in” areas designated for preservation but also those “which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.” *Id.*

by large parks and open spaces for education and recreation far exceed those offered by smaller tracts of land. While the benefits of a long hiking trail, a quiet lake, and a well-preserved ecosystem or natural resource are clear, the creation of these large projects is not inevitable. And to the extent government agencies, conservation groups, and landowners succeed in forming such projects, the aggregation of space tends to be a long-term effort, sometimes taking decades or longer until key lands are designated for conservation.²

In theory, coordinated aggregations of land should happen in conservation contexts just like in the private sector. An individual or group should be able to target a set of properties whose value together can far exceed the current use of the land and use whatever tools and funds available to gain control over the properties within a number of years. But to the extent that assemblages happen in the conservation context, they usually take at least several decades. Limited access to capital plays a central role in making assemblages less common and more logistically difficult in the conservation context.³ Unlike private sector developers, conservation groups do not have access to profit-oriented capital, a pool of funding which far exceeds the funds available to the conservation community. Even if owners of lands with great conservation value were open to selling or donating their cherished property, they might only consider a disposition if the financial rewards were better than the economics currently offered by conservation groups.

Moreover, private sector developers often obtain control of multiple properties through the use of coordinated agreements with multiple landowners to ensure that a sufficiently large parcel is controlled before putting large amounts of money at risk.⁴ But conservation groups can be limited in their ability to coordinate sale or donation agreements with the necessary landowners.⁵ The possibility of funding the non-refundable deposits often used to generate landowner interest may be prohibited by law or policy.⁶

Finally, coordinating contingent property donations can be complicated from a tax perspective. In several ways, the coordinated conservation effort itself might undermine the financial goals of certain landowners participating in the process by causing a reduction or denial of federal tax deductions. It is only property *donors* who face these tax law pitfalls. Because private sector firms do not receive property donations in the course of assembling land, they do not face the regulatory

Lands could qualify despite being outside of a preservation area since despite being a distance away, their ecological viability might be intertwined with that of a significant habitat or ecosystem. *See also id.* § 1.170A-14(f) (Example 2).

² *See* discussion *infra* Part IV.

³ *See* Susan C. Walls, *Coping with Constraints: Achieving Effective Conservation with Limited Resources*, FRONTIERS IN ECOLOGY & EVOLUTION, Mar. 16, 2018, at 1 (discussing solutions for the apparent problems of limited capital in conservation efforts).

⁴ *See infra* Part II.C.

⁵ *See infra* Part II.

⁶ *Id.*

burden involved in helping donors qualify for property donation deductions.

This Article outlines opportunities and challenges presented by conservation assemblages, tax law obstacles to their realization, and solutions to several of these logistics and tax pitfalls. Part II describes the logistical obstacles conservation groups face when aggregating property and some of the ways these groups can overcome the obstacles. Part III describes tax obstacles that could arise in the course of pursuing a conservation assemblage. The Part will focus on obstacles to obtaining charitable donation deductions in coordinated conservation efforts, a concern which could make donating property less attractive to landowners in these contexts. It also includes potential solutions to the deductibility issues that could arise. Finally, Part IV presents two case studies which illustrate the facts that make conservation assemblages so rare. While the facts of the case studies are very different, there are common themes. They both involve multiple landowners, multiple governmental and non-governmental groups, and multiple funding sources. The first case involves donations of land interests and federal and state tax incentives. The second case involves the purchase of fee simple interests in land and no tax incentives. Despite the absence of tax issues in the second case, there was significant complexity involved in the successful realization of the conservation project. To reach its goal, the lead conservation group had to overcome many common obstacles facing conversation assemblage projects.

II. LOGISTICAL OBSTACLES TO ASSEMBLING MULTIPLE BLOCKS OF PROPERTY FOR CONSERVATION PURPOSES

Creating important conservation projects can take significant resources such as public and private funds, donations of land, and increased government regulation. Conserving natural ecosystems, natural resources, or open space can be complex and expensive because of the challenges of coordination and enforcement. Conservation efforts occurring on one piece of land can be offset or even undone by a long list of activities on contiguous—or even non-contiguous—properties. Pesticide use in one area, for example, can harm ecosystems a distance away if substances applied in one location travel to another location via air, water, or living organisms. One of the ways to achieve conservation goals, then, is to coordinate efforts among multiple landowners, government entities, and private organizations such that use restrictions can be enforced over sufficient amounts of property.

Conservation assemblage efforts often face a host of challenges relating to a lack of resources to pay for property, a lack of landowner willingness to dispose of property, and coordination issues. A fourth category, tax considerations, will be discussed in depth in Part III. These factors explain why coordinated conservation assemblages are rarely

achieved over short time horizons, if ever, despite the promise of a large environmental benefit.

A. In General, Conservation Groups Have Limited Resources, Hindering Their Ability to Successfully Assemble Property

Conservation groups rarely have access to large and recurring sources of financial support.⁷ As a result, they rely on donations of property and property interests, cash donations, and grants from public and private organizations.⁸ Fortunately, conservation groups do not need to purchase every piece of land they want to influence. Donations of property, whether fee simple interests or otherwise, allow conservation groups to leverage their cash for bigger impact. Donors can enjoy tax deductions and, depending on the state, tax credits might also be available.⁹ Bargain sales, transactions which function as a partial sale or exchange and partial charitable contribution, also allow groups to leverage their limited resources while providing more financial benefit to landowners than a simple donation.¹⁰

A numerical example can help illustrate the differences among these options. Smith is open to the possibility of selling or donating Greenacre, a working farm owned by his family for sixty years. Greenacre produces income for Smith and his children who work with him on the farm so he will only part with the property if the transaction comes with a large economic benefit. Greenacre's fair market value is \$80 and Smith's basis in the property is \$60. A conservation group interested in restricting development at the property or building a network of hiking trails inside of it will have several options. First, Smith can donate Greenacre and receive \$80 in deductions. If his marginal tax rate is 25%, he will benefit

⁷ Nowella Anyango-van Zwieten et al., *Funding for Nature Conservation: A Study of Public Finance Networks at World Wide Fund for Nature (WWF)*, 28 BIODIVERSITY & CONSERVATION 3749, 3750, 3754 (2019).

⁸ See BAIRD STRAUGHAN & TOM POLLAK, THE URBAN INST., THE BROADER MOVEMENT: NONPROFIT ENVIRONMENTAL AND CONSERVATION ORGANIZATIONS, 1989–2005, at 17 (Dec. 1, 2018), <https://perma.cc/6NX8-A3MG> (providing a graph of the revenue sources for 2005, including individual contributions and grants). See also Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach*, 31 ECOLOGY L.Q. 1, 19–22, 24 (2004) (noting the increase in conservation easement donations and corresponding increase in “easement projects undertaken by the Virginia Outdoors Foundation”). It is not surprising that both case studies featured in Part IV involve conservation assemblages facilitated by large grants (each over \$1 million), one state and one federal.

⁹ *State Land Conservation Tax Incentives as of April, 2019*, LAND TR. ALLIANCE, <https://perma.cc/XLW3-6YM7> (last visited Jan. 20, 2021) [hereinafter *April 2019 Tax Incentives*].

¹⁰ The property transferred in a bargain sale could be real property or even an interest in real property, like a conservation easement. Mark Robinson et al., *Charitable (or Bargain) Sales for Land Conservation*, MASSLAND (Jan. 1, 2000), <https://perma.cc/SB9V-5Z4U>. Donations of property and property interests are valued based on a fair market value assessment. For example, a property interest worth \$70 and sold for \$25 to a conservation group could result in a \$45 tax deduction for the donation component of the transaction.

from \$20 in value for the donation.¹¹ The conservation group's only costs will be future operating expenses and any transaction fees that it pays to facilitate the transaction.¹² Alternatively, the conservation group can purchase Greenacre, but Smith may think \$80 is too low a price to justify parting with such an important property. However, the conservation group might be restricted by policy or by the terms of grant funding to paying fair market value as determined by an appraisal. If the purchase for fair market value were agreeable, Smith would receive \$75 in post-tax benefit¹³ and the conservation group would have to pay \$80. If a bargain sale were to be negotiated at a \$50 price—implying a \$30 deduction—Smith's total benefit would be \$54.38.¹⁴

A partial interest could also be sold or donated. Smith could offer a perpetual restriction¹⁵ on his ability to develop or use the land to ensure the protection of the environmental benefits sought by the conservation group.¹⁶ Such a restriction is valued for deduction purposes according to the value reduction caused by the restriction.¹⁷ For example, if Smith's property, worth \$80, were to be worth only \$56 after such a restriction were put into place, he could obtain a \$24 deduction, or \$6 of benefit,¹⁸ without giving up ownership or control of the farm. Again, the conservation group would only need to pay for any costs or fees to the extent that it agreed to do so, allowing it to preserve its cash. Alternatively, Smith could sell the restriction for \$24, resulting in a much larger financial benefit for him and a much larger cost to the conservation group.

Sometimes state tax credits can make a transaction more financially rewarding to a landowner. For example, in the first case study presented in Part IV, donors could enjoy state tax credits for up to 50% of the value

¹¹ For simplicity's sake, this analysis will assume that tax deductions can all be enjoyed in the tax year of the donation. In reality, a taxpayer's ability to use deductions is capped each year, with the unused deductions available for use for a period of years thereafter. See I.R.C. §170(b) (2018). This analysis, like the donation and bargain sale analyses below, ignores any state income tax deductions Smith might enjoy. It also assumes that Smith has met his state and local tax (SALT) deduction cap and that state tax credits do not reduce Smith's ability to receive SALT deductions.

¹² THE MASS. LAND TR. COAL., LAND CONSERVATION OPTIONS: A GUIDE FOR MASSACHUSETTS LANDOWNERS 15–16 (Oct. 2001), <https://perma.cc/ATZ3-2NE2>.

¹³ The 25% tax rate would be applied to the gain of \$20, resulting in a \$5 tax liability.

¹⁴ The tax applied to gain on a pro rata basis (25% x 12.5) is \$3.125, resulting in post-tax sale proceeds of \$46.875. The \$30 deduction is worth (25% x 30) \$7.50. Thus, the total benefit is \$54.375.

¹⁵ Discussed at length below, the restrictions must create limitations on usage not already in place from any separate law or agreement. See, for example, *Kaufman v. Commissioner*, T.C. Memo. [2014-52] in which an easement donor in Boston had her deduction denied because her property was already subject to restrictions by the South End Landmark Commission.

¹⁶ Conservation easements will be discussed at length below.

¹⁷ Charles J. Reichert, CPA, *Tax Court Denies Deduction for Conservation Easement*, J. ACCOUNTANCY (Aug. 1, 2020), <https://perma.cc/SSH3-YFNF>.

¹⁸ The \$24 deduction (resulting from a donation of a restriction worth \$80 – \$56 = \$24) is worth \$6 for Smith because he has a 25% marginal tax rate. \$24 x 25% = \$6.

of donated property. If Smith agreed to a bargain sale, for example, and had access to a similar state tax credit, his economic benefit would be improved, getting closer to the fair market value sale benefit of \$75 and significantly above the bargain sale benefit of \$54.38.¹⁹ If Smith sold for \$50, the benefit on the sale portion would be the same \$46.88. But the value of the \$30 donation would be at least \$18.75 for a total benefit of \$73.13, very close to the \$75 Smith would receive in a normal sales process. In this case, the conservation group would need to pay \$50 rather than the \$80 needed for a fair market value sale.

Thus, there are several avenues for obtaining control of property, even at a low cost to conservation groups. But these options generally provide less financial benefit to sellers than fair market value sales, reducing the ability of conservation groups to compete with other buyers in most cases. Of course, the availability of funds for acquiring property at fair market value is not enough. A landowner must be willing to sell or at least willing to consider arrangements other than a typical sale of the fee simple interest. Indeed, the more complex a sale offer is, the less likely a landowner will trust that the process will be smooth and successful.

B. Landowners Are Often Unwilling to Sell or Donate Their Property

Land is property that often has a special place in a family's estate and lore. A family might be reluctant to part with a piece of property for the duration of a certain person's lifetime or beyond and for purely emotional reasons. There might also be tax considerations that inform a decision not to sell before a certain event²⁰ or even thereafter.²¹ Finally, families each face their own internal dynamics and might be subject to the interests of certain minority shareholders or influential family members. While a generous offer of compensation is the main tool property developers use to overcome this reluctance, money is not always

¹⁹ This analysis assumes a taxpayer subject to the alternative minimum tax (AMT) and is illustrated in Table 1 in the Contributions in Exchange for State or Local Tax Credits, 84 Fed. Reg. 27513 (Aug. 12, 2019) (to be codified at 26 C.F.R. pt. 1).

²⁰ This was the case in the Blackfoot River Valley conservation efforts in western Montana. Efforts to conserve a large swath of property ultimately reached great success, but the effort took decades.

At first, the idea was to complete several easements at the same time. Each would be negotiated, prepared, held by an escrow agent, and then filed on the same day so neighbors could be sure everyone was fully committed. Some ranchers figured, "I'll only do it when everyone else does." The escrow system would cover everyone's back. It didn't turn out that way. Since every family confronts estate tax obligations and financial ups and downs at different times, the easements ended up coming in one by one.

ANTHONY ANELLA & JOHN B. WRIGHT, SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST 113 (2004).

²¹ *Id.* In contrast, some landowners might need to make a sale or donation before a certain event—for example, the end of a tax year—to maximize their tax benefits. I.R.C. § 441 (2018).

enough. Even well-funded developers often need years of patience before a valuable assemblage comes together, and other strategies might also need to be employed—such as working through secret partnerships—to reach a successful outcome.²²

Land can also be an essential component of a family business, such as cattle ranching or farming. A landowner might depend on the business profits to pay for basic living expenses and might dream of arranging for descendants to one day own and operate the business as well. Selling or donating the land might also leave the family with some cash or tax breaks²³ but without employment. Moreover, many landowners are not wealthy. Donating all or part of the nest egg might trigger a financial crisis within the family.

Inheritor incentives also matter. Those who stand to inherit property may have a vote in the choice of whether to dispose of the property and might decline any offer that reduces the value of a future inheritance.²⁴ Conservation easements can sometimes provide a solution, allowing cash-poor and asset-rich landowners to realize some benefits without selling their property: owners can sell or donate a partial interest,²⁵ a restriction on certain uses of the property, while retaining the fee simple interest. Subject to the easement restrictions, property owners can still sell, mortgage, bequest, and collect various kinds of income streams from the property.

Conservation easements are referred to in the tax regulations as “qualified conservation contributions,” defined as “the contribution of a qualified real property interest²⁶ to a qualified organization exclusively

²² Harvard University has pursued this strategy to succeed in assemblage efforts (and to reduce costs). *See, e.g.*, Tina Cassidy & Don Aucoin, *Harvard Reveals Secret Purchases of 52 Acres Worth \$88m in Allston*, BOSTON GLOBE, June 10, 1997, at A1, available at <https://perma.cc/YWU2-T5YN> (“Community activists and other residents also were stunned by news that the purchases—made from 1988 to 1994, many in the trough of the real estate recession—had been made at the behest of Harvard, one of the richest universities in the world Beal said his company did the same thing many years ago for the trustees of the Boston Public Library when they wanted to expand the facility behind the McKim building in Copley Square. The Beal Cos. purchased the buildings on the site without the owners knowing it was to be used for the library.”).

²³ I.R.C. § 170(a)(1), (b)(1)(E), (h).

²⁴ *See, e.g.*, Stephanie L. Sandre, *Conservation Easements: Minimizing Taxes and Maximizing Land*, 4 DRAKE J. AGRIC. L. 357, 370–71 (1999).

²⁵ Treas. Reg. § 1.170A-14(a) (2020). Normally, the donation of a donor’s partial interest in property does not qualify for a deduction. However, there are three exceptions to this rule described in I.R.C. § 170(f)(3)(B), including a conservation easement and “a contribution of an undivided portion of the taxpayer’s entire interest in property,” *id.* § 170(f)(3)(B)(ii), such as a contribution of 50 acres of land out of 100 acres owned by the taxpayer. *See* Treas. Reg. § 1.170A-7(b)(1)(i) (giving an example of a contribution of an undivided portion of a taxpayer’s entire interest in property).

²⁶ Instead of using the legal term “qualified real property interest,” this piece will use the more common “conservation easement” or “conservation restriction.” These terms as well as “restrictive covenants” and “equitable servitudes” are synonymous under the regulations. *See id.* § 1.170A-14(b)(2).

for conservation purposes.”²⁷ The regulations present four types of qualifying conservation purposes. i) “The preservation of land areas for outdoor recreation by, or the education of, the general public . . . for example, the preservation of a water area for the use of the public for boating or fishing, or a nature or hiking trail²⁸ for the use of the public.”²⁹ ii) “[T]o protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives”³⁰ such as the preservation of a man-made lake that serves as “a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.”³¹ iii) “[T]o preserve open space (including farmland and forest land)”³² which yields significant public benefit³³ and complies with several requirements. Finally, iv) “to preserve an historically important land area or a certified historic structure.”³⁴ Conservation easements must also be perpetual and run with the land.³⁵

Although there is some complexity in qualifying the conservation contributions, donors can enjoy a rare benefit: tax incentives from imposing restrictions that the donors may have planned to abide by anyway.³⁶ Property that had no planned development—for example, a

²⁷ *Id.* § 1.170A-14(a).

²⁸ Hiking trail conservation is one example that project conservation assemblages can be useful. For example:

[t]wo recent land purchases by the Open Space Institute will link the Bashakill Wildlife Management Area in Wurtsboro to Wurtsboro Ridge, Roosa Gap and Shawangunk Ridge state forests. The acquisitions also are important steps toward unifying the 71-mile Shawangunk Ridge Trail, from Rosendale in Ulster County to High Point State Park in New Jersey, so hikers never have to walk on private property or roads. “It takes long-term dedicated perseverance and a real vision to unite these trails,” said Bob Anderberg, senior vice president and general counsel of the Open Space Institute. . . . Currently, hikers walking the Shawangunk Ridge from Port Jervis to New Paltz go through miles of state forest. But when they reach the Bashakill in Wurtsboro, they must leave the trail and walk over two miles of public roads in the municipality.

Daniel Axelrod, *Preservation Group Buys Land to Expand Bashakill Area*, CATSKILL MOUNTAINKEEPER (May 21, 2018), <https://perma.cc/R7NQ-XAK7>.

²⁹ Treas. Reg. § 1.170A-14(d)(1)(i), (d)(2)(i).

³⁰ *Id.* § 1.170A-14(d)(3)(i).

³¹ *Id.*

³² *Id.* § 1.170A-14(d)(4)(i). Interestingly, complete physical access or even complete visual access by the public is not always required to qualify under the open space preservation conservation purpose. *See id.* § 1.170A-14(d)(4)(ii)(B).

³³ *Id.* § 1.70A-14(b)(4)(A).

³⁴ *Id.* § 1.170A-14(d)(5)(i).

³⁵ INTERNAL REVENUE SERVICE, CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE 7 (Rev. 1/24/18). “To be deductible, donated conservation easements must be legally binding, permanent restrictions on the use, modification and development of property such as parks, wetlands, farmland, forest land, scenic areas, historic land or historic structures.” *Id.*

³⁶ The restrictions on property from conservation easements vary considerably. For example, public physical access or even visual access is not required of all qualifying conservation easements. Treas. Reg. § 1.170A-14(d)(4)(ii)(B). However, this criticism might be overstated. Although a landowner may have no future development plans, conservation restrictions are perpetual, preventing development *forever*.

working cattle ranch or an organic produce farm—can still qualify for tax deductions when those restrictions are made binding.³⁷ As well, a donated conservation easement can reduce property values for property tax purposes, furthering the financial benefits to the property owners.³⁸ All of these benefits make conservation easement donations a favorable option for many landowners, even when selling or donating the underlying property is not feasible for the owners. Moreover, while values and emotions may lead some landowners to refuse to sell or donate land, many others donate partial interests in property to advance conservation causes. The opportunity to contribute to the environmental or recreational resources of a cherished part of the country can be meaningful to some donors.

C. Assembling Land Involves Coordination with Multiple Landowners

The Sixth Circuit, in a case upholding the deductibility of two relatively small conservation easements donations (each under one acre), acknowledged the value in combining lots for conservation purposes.³⁹ In that case, *Glass v. Commissioner*, the IRS argued that a taxpayer's conservation easement donation should not be deductible because, among other things, neighboring properties did not have development restrictions.⁴⁰ The court disagreed with the IRS, explaining that:

Congress likely recognized the common sense truth that Taxpayers/Donors cannot realistically limit building on property outside of their control. Adoption of the Commissioner's position would unnecessarily preclude conservation donations permitted under the Tax Code. It would also preclude larger conservation benefits achieved by aggregate donations of relatively small conservation easements, each serving their own stated conservation purpose.⁴¹

³⁷ For more on conservation easement donations restricting organic farms, see Daniel Pessar, *A Tax Benefit for Organic Farmers*, PACE U. SCH. OF L.: GREENLAW BLOG (Feb. 14, 2020), <https://perma.cc/97UX-2B4R>.

³⁸ Property taxes are calculated by applying a tax rate to an assessed value. Tonya Moreno, CPA, *The Best and Worst Property Taxes by State*, BALANCE (Nov. 8, 2020), <https://perma.cc/65UX-8U2R>. If the value of property is reduced because the development potential is restricted by easement, property taxes could also be impacted. Some jurisdictions explicitly provide for conservation easement donors to enjoy significant property tax benefits. For example, donating a conservation easement in Maryland to the Maryland Environmental Trust or to the Department of Natural Resources can result in “no property tax on land that is subject to a donated Maryland Environmental Trust easement for 15 years from date of donation. The tax credit, however, will not apply to any residential improvements, or to a minimum of one acre around these improvements.” *Tax Benefits of Conservation Easement Donations*, MD. DEP'T NAT. RESOURCES, <https://perma.cc/TYF7-ACPK> (last visited Jan. 26, 2021).

³⁹ *Glass v. Comm'r*, 471 F.3d 698, 712 (6th Cir. 2006).

⁴⁰ *Id.* at 707–08, 711.

⁴¹ *Id.* at 712.

Assembling multiple properties or property interests into larger projects has long been an essential tool for real estate developers. Building skyscrapers, housing projects, and energy pipelines usually requires control of multiple contiguous parcels which often need to be acquired one at a time.⁴² Of course, developers negotiating agreements with multiple parties face the holdout problem: a property owner can refuse to sell until a very large price is paid.⁴³ This refusal can make development projects quite risky because the actions of one holdout can foil projects already pursued with large amounts of time and money.⁴⁴ One solution is entering into acquisition agreements quietly—or even secretly—binding sellers with confidentiality agreements. But with the transparency requirements and reputational-political realities of government entities and many non-profit organizations, many of these strategies are precluded by law or policy.⁴⁵ Moreover, for tax and legal reasons, parties to the sale or donation often seek swift and transparent memorialization of agreements in the public land records.⁴⁶

Another tool for assembling property is the use of conditional contract regimes. Under this structure, buyers are only required to acquire property under contract if a certain number of other sellers enter into agreements as well.⁴⁷ This approach can avoid many of the costs of the holdout problem because the buyer does not need to tie up significant capital until a sufficient quantity of sellers enter into purchase and sale agreements.⁴⁸ With conservation funds in short supply, this approach would ensure that acquisitions are made only when the necessary

⁴² Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem 2* (Va. Polytechnic Inst. & State Univ., Working Paper No. e07-8, 2007).

⁴³ *Id.* Still, well-funded projects can result in large tracts being aggregated over time. See, for example, the priority projects that New York State will pay to acquire:

In 2012, Governor Cuomo announced plans to acquire 69,000 acres of the former Finch Pruyn and other Nature Conservancy lands throughout the Adirondacks—the largest single addition to the Adirondack Forest Preserve in more than a century. From 2012 to 2016, important acquisitions in such areas as the Essex Chain of Lakes and Boreas Ponds brought first-time public access to streams, waterfalls, lakes, forests, wildlife habitats and trails offering exceptional recreational opportunities.

N.Y. DEP'T ENV'T CONSERVATION ET AL., NEW YORK STATE OPEN SPACE CONSERVATION PLAN SUMMARY 6 (2016), <https://perma.cc/S9HE-ZWLS>.

⁴⁴ See, e.g., Spencer Rasmussen, *The Holdout Problem, Urban Sprawl, and Eminent Domain*, URBAN ECONS. (Mar. 31, 2014), <https://perma.cc/A667-CYY6>.

⁴⁵ See, e.g., *Protect*, TR. FOR PUB. LAND, <https://perma.cc/CP3U-Q3CG> (last visited Jan. 24, 2021) (providing an example of how private conservation organizations aid governmental entities in acquiring properties for conservation purposes).

⁴⁶ See, e.g., Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237 (2009) (discussing, briefly, the law requiring parties to record real property acquisitions).

⁴⁷ See Christopher S. Elmendorf, *Securing Ecological Investment on Other People's Land: A Transaction-Costs Perspective*, 44 NAT. RESOURCES J. 529, 555 (2004) (discussing conditional or “all-or-nothing” contracts).

⁴⁸ *Id.*

properties are under contract. This can prevent a situation in which a conservation effort is undermined by a holdout property with an ecosystem intertwined with the subject property's own ecosystem.

Conditional contracting can also be used as a “springing” provision within an existing sale or donation document. For example, one large land trust has put conditional trail easements in conservation easement documents.⁴⁹ The conservation easement imposes a set of restrictions on the subject property, but if the land trust is able to get control of certain contiguous parcels to extend or develop a trail, the land trust can trigger the springing provision and obtain control of the portion of the trail running through the subject property.⁵⁰ Alternatively, option contracts can be structured at low or no cost which gives the buyer a certain amount of time to decide whether to purchase the property.⁵¹ If the option is exercised within the allotted time frame, the seller would be required to sell according to the terms spelled out in the option contract.⁵²

There are also non-binding tools for improving assemblage success. The lead conservation group in the Leyden case study presented in Part IV, Mount Grace Land Conservation Trust, used non-binding letters of intent (LOIs) in its dealings with more than ten landowners involved in the conservation assemblage.⁵³ By laying out the key terms of the agreement in a signed letter—even if non-binding—parties feel more invested in the project being discussed, increasing the chance of close. Moreover, the LOI adds significant clarity to the process and reduces the misunderstandings and emotional issues that can foil potential deals.

While complex structuring can facilitate agreements between otherwise unwilling buyers and sellers, complexity can also discourage sellers and add transaction costs in the form of legal expenses and extensive delays. The tools available to private sector developers are often unavailable to conservation professionals, especially the given that a developer's access to financial resources is usually the main driver of

⁴⁹ Telephone Interview with an anonymous executive at a large land trust (Jan. 22, 2020) (notes on file with the author).

⁵⁰ See Christopher S. Elmendorf, *Securing Ecological Investment on Other People's Land: A Transaction-Costs Perspective*, 44 NAT. RESOURCES J. 529, 555 (2004) (discussing conditional or “all-or-nothing” contracts).

⁵¹ Avery Wiener Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2194 (2004) (describing how nominal consideration can make option contracts legally enforceable).

⁵² For an example of a conservation group which used purchase options in its successful assemblage effort, see the discussion of the Popes Creek case study *infra* Part IV.B. While private sector uses of options might involve large, non-refundable payments, government and non-profit groups might be barred by law or policy from using such tools. One senior conservation professional working for a county government who spoke on condition of anonymity said that she cannot buy purchase options as a matter of policy. That these options could help facilitate successful projects was irrelevant—the government did not want to spend money on an option that would not get executed and then have nothing to show for the money. Telephone Interview with an anonymous executive at a large land trust (Jan. 22, 2020) (notes on file with the author).

⁵³ See *infra* notes 154–56 and accompanying text.

success. And because conservation groups often rely on donated property interests—and tax code provisions providing financial benefits to donors—there is an additional challenge facing conservation professionals: helping donors qualify for tax benefits.

III. TAX OBSTACLES TO SUCCESSFUL CONSERVATION ASSEMBLAGE EFFORTS

Successful conservation assemblages often face more than just logistical obstacles. While donations of land and conservation easements offer an excellent way to add necessary properties to a conservation assemblage at a low cost to conservation groups,⁵⁴ the assemblage coordination process can frustrate efforts to qualify for the federal tax benefits available to donors.⁵⁵ Fee simple purchases are the simplest and most complete way for a conservation group to obtain control of target lands, but they are also the most expensive way to make the acquisition.⁵⁶ As well, limiting the purchase price to fair market value makes the purchase of property interests less achievable when a landowner is reluctant to sell. As a result, conservation easements have proven to be a powerful tool for bringing together landowners and conservation groups. Because landowners might be interested in maintaining fee ownership of property over the long term—economic, lifestyle, or family priorities might all play a part—conservation restrictions can provide the necessary environmental protection while allowing landowners to keep their properties. At the same time, the fact that conservation groups often do not have the funding to make purchases of conservation restrictions means that accepting donations of conservation easements⁵⁷ tends to be

⁵⁴ A single assemblage might include some combination of donated property and purchased property as well as a combination of fee simple interests and conservation easements. For example, a New York State assemblage recently enhanced by two properties acquired by the Open Space Institute (OSI) extended the reach of New York State trail systems, benefits far exceeding those offered by the small properties in isolation. While these were fee simple purchases, control of a contiguous property exists thanks to a conservation easement. See *OSI Protects Two Columbia County Future Additions to Hand Hollow State Forest*, OPEN SPACE INST. (Sept. 14, 2016) <https://perma.cc/9SUC-3BK8>.

⁵⁵ For a checklist of the main tax issues reviewed in Part III, see Appendix 1.

⁵⁶ See, e.g., Elizabeth Evensen, *Open Space Preservation in Utah: Techniques, Tools, and First “Quality Growth” Steps*, 19 J. LAND RESOURCES & ENV’T L. 267, 269 (1999) (describing Park City’s success in employing fee simple acquisitions to maintain around 1,700 acres as open space). See also WASH. CTY., WIS., FARMLAND AND OPEN SPACE PRESERVATION TOOLS 50 (2005) (describing the implementation of fee simple purchases of agricultural land as an incentive-based tool for conservation).

⁵⁷ Even simply accepting these donations is something conservation groups might not be able to afford. Donations of conservation easements are grants that come with work for the donee. Monitoring and enforcement of the property restrictions is costly and, as a result, it is common for conservation groups to request or even require a cash donation alongside a conservation easement grant. McLaughlin, *supra* note 8, at 26. The general non-deductibility of those cash donations is discussed below.

the conservation tool of choice for vast amounts of property each year.⁵⁸ According to the National Conservation Easement Database, over 32 million acres have been conserved using conservation easements as of early 2021.⁵⁹

Carefully preparing easement donations has become more important in recent years as conservation easement donations have been subjected to increased scrutiny by the media,⁶⁰ Congress,⁶¹ and the IRS.⁶² Part of the criticism of conservation easement donations arises out of the central role that appraisers play in valuing conservation easements and the questionable valuations used in many cases (more on this below).⁶³ However, most of the criticism in the media and in government stems from fraudulent scams involving syndicated conservation easements.⁶⁴ These scams involve a promoter raising money from investors and promising that for each dollar invested, the investor will receive several

⁵⁸ The pace of conservation easement donation deductions has risen quickly, with deductions rising “from \$971 million in 2012 to \$1.1 billion in 2013 to \$3.2 billion in 2014, according to preliminary IRS tabulations.” ADAM LOONEY, BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3 (2017), <https://perma.cc/B7N3-29J4>; “[Conservation easements] are the number one tool available for protecting privately owned land.” *Questions*, LAND TR. ALLIANCE, <https://perma.cc/P657-KRBH> (last visited Jan. 27, 2021).

⁵⁹ *Total Acres Conserved*, NAT’L CONSERVATION EASEMENT DATABASE, <https://perma.cc/8JUY-EXU3> (last visited Jan. 21, 2021).

⁶⁰ For example:

[i]n May of 2003, the Washington Post published a three part series criticizing The Nature Conservancy on a variety of grounds, including The Nature Conservancy’s involvement in conservation easement transactions that allegedly resulted in abuse of the federal tax incentives The Senate Finance Committee responded by launching an investigation of The Nature Conservancy’s practices[.]

Mclaughlin, *supra* note 8, at 7 n.15. For one of many recent articles on this topic, see Richard Rubin, *IRS Pursues Criminal Cases on Land-Tax Donation Deals*, WALL ST. J. (Nov. 12, 2019), <https://perma.cc/WTT3-2GWC>.

⁶¹ Most of the negative attention directed at conservation easements is focused on syndicated conservation easements, schemes organized by a promoter which promise very high tax deductions to investors by using fraudulent appraisals or other methods to support inflated claims of value. In early 2019, in response to reports of abuse by promoters of conservation easements, Senator Steve Daines (R-Mont.) and Representative Mike Thompson (D-Calif.) introduced bills in the Senate and in the House of Representatives seeking to limit the deductions that can be claimed by conservation easement donors. S. 170, 116th Cong. § 2 (2019); H.R. 1992, 116th Cong. (2019).

⁶² *IRS Increases Enforcement Action on Syndicated Conservation Easements*, U.S. INTERNAL REVENUE SERV. (Nov. 12, 2019), <https://perma.cc/PBL5-GJYB>.

⁶³ See, e.g., Peter Elkind, *The Billion-Dollar Loophole*, PROPUBLICA (Dec. 20, 2017), <https://perma.cc/Y4GZ-G5LQ> (noting that “[t]he appraiser is free to assert that the donated land is actually worth many times what investors paid for it”).

⁶⁴ See, e.g., *Justice Department Sues to Shut Down Promoters of Conservation Easement Tax Scheme Operating Out of Georgia*, U.S. DEP’T OF JUST.: OFF. PUB. AFF. (Dec. 19, 2018), <https://perma.cc/7FG9-NCEC> (noting “at least 96 conservation easement syndicates” that “lack economic substance and are shams. They only serve as a conduit to transfer overvalued and otherwise improper federal tax deductions”).

dollars in tax deductions.⁶⁵ The promoters then fraudulently inflate property values to support a large claimed easement donation deduction.⁶⁶ In response to the proliferation of these transactions, the IRS in December 2016 listed Syndicated Conservation Easement Transactions on the list of tax avoidance transactions requiring special reporting and justification.⁶⁷ As well, the IRS more recently published a revised conservation easement audit guide⁶⁸ for investigative staff use and announced that it is allocating new resources to investigating and enforcing rules relating to conservation easements.⁶⁹ In parallel, Justice Department enforcement activity has also increased.⁷⁰

Although conservation assemblages are not the target of these audit efforts, conservation easement advisors are aware that the chances of audit and challenge are higher with increased enforcement resources at the IRS.⁷¹ And because conservation assemblages come with more complexity than most single-parcel easement donations, there is more room for error. Ultimately, most pitfalls can be avoided as long as the attorneys and other professionals guiding the conservation easement process view each transaction as distinct and give each one the thorough attention and care that they would give to a standalone transaction. Some questions, such as questions of valuation, however, would not be resolved simply by adopting this approach.

Even though land interest donations, whether fee simple property or conservation restrictions, can qualify donors for tax benefits, there are many regulations that must be satisfied first. And available tax benefits may include not only federal and state tax deductions, but also state tax

⁶⁵ U.S. INTERNAL REVENUE SERV., LISTING NOTICE—SYNDICATED CONSERVATION EASEMENT TRANSACTIONS (NOTICE 2017-10), at 2 (2016), <https://perma.cc/7FG9-NCEC> [hereinafter U.S. INTERNAL REVENUE SERV., LISTING NOTICE]. These scams were listed alongside identity theft and phishing in the IRS's 2019 "Dirty Dozen" list of popular tax scams which it publishes annually. *IRS Concludes "Dirty Dozen" List of Tax Scams for 2019: Agency Encourages Taxpayers to Remain Vigilant Year-Round*, U.S. INTERNAL REVENUE SERV. (Mar. 20, 2019), <https://perma.cc/AFU7-NNEF>.

⁶⁶ U.S. INTERNAL REVENUE SERV., LISTING NOTICE, *supra* note 65, at 2.

⁶⁷ *See id.* The transaction is a listed transaction if the following, or similar, facts apply: "An investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment." *Id.* at 3.

⁶⁸ INTERNAL REVENUE SERVICE, *supra* note 35.

⁶⁹ IRS Commissioner Chuck Rettig has said,

We will not stop in our pursuit of everyone involved in the creation, marketing, promotion and wrongful acquisition of artificial, highly inflated deductions based on these aggressive transactions. Every available enforcement option will be considered, including civil penalties and, where appropriate, criminal investigations that could lead to a criminal prosecution[.]

IRS Increases Enforcement Action on Syndicated Conservation Easements, *supra* note 62.

⁷⁰ U.S. DEP'T OF JUST.: OFF. PUB. AFF., *supra* note 64.

⁷¹ *See IRS Increases Enforcement Action on Syndicated Conservation Easements*, *supra* note 62 (noting that the focus of the increased investigations is on conservation syndicates promoting tax deductions worth more than the investment).

credits available in certain states.⁷² To qualify as a deductible conservation easement donation under the Internal Revenue Code, the easement must be “a contribution . . . of a qualified real property interest . . . to a qualified organization . . . exclusively for conservation purposes.”⁷³ Violations of any of these requirements could result in denial of federal tax deductions, and the complexity of conservation assemblages can make it difficult to ensure full compliance. While several of the potential tax issues are relevant to all property donations, deductions for conservation easement donations—the highly popular conservation method—will be the primary focus of the analysis below.

Tax pitfalls relevant to conservation assemblages can be grouped into three categories: issues relating to circumventing the holdout problem, questions of appropriate valuation raised by the assemblage project, and problems arising from attempts to streamline administrability of multiple donations.

A. Tax Issues Related to Circumventing the Holdout Problem

As mentioned in Part II, the holdout problem is a coordination issue that can increase the cost of assemblages or make them unworkable. Although there are a variety of tools that can be used to mitigate or circumvent this issue, several of them can trigger tax issues, making these valuable tools less available in conservation contexts.

The first tool that can result in tax issues is contingent contracting. Contingent contracts mitigate the holdout problem because they ensure that few resources are spent until all of the necessary properties are controlled under contract.⁷⁴ Contracts are only binding on the buyer once a certain threshold of property owners have entered into contracts.⁷⁵

⁷² April 2019 Tax Incentives, *supra* note 9.

⁷³ I.R.C. §170(h)(1) (2018).

The determination of what specifically meets this conservation purpose test is based on the facts and circumstances of the specific case. In *Glass v. Commissioner*, 124 T.C. 258 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006), the taxpayer donated two easements that restricted the development of a fraction of a 10-acre parcel of residential property. The Tax Court held that the conservation purpose of natural habitat was satisfied where the conservation easements were placed on property that had possible places to create or promote a relatively natural habitat of plants or wildlife. In *Atkinson v. Commissioner*, T.C. Memo 2015-236, involving conservation easements encumbering operating golf courses, the Tax Court distinguished the *Glass* case and held that the easements did not protect a relatively natural habitat. In so holding, the Tax Court reasoned, among other things, that the golf courses' use of pesticides could destroy the ecosystem of the easement property. The Tax Court's reliance on the Service's expert reports and testimony in *Atkinson* demonstrates the importance of expert evidence in “protecting natural habitat” cases.

INTERNAL REVENUE SERVICE, *supra* note 35, at 18.

⁷⁴ Sean M. Collins & R. Mark Isaac, *Holdout: Existence, Information, and Contingent Contracting*, 55 J.L. & ECON. 793, 801 (2012).

⁷⁵ *Id.* at 799.

Unfortunately, conservation easement grants must not be conditional.⁷⁶ Thus, a conservation easement grant only made effective if a sufficient number of landowners agree to the easement terms, would not qualify for federal tax deductions.⁷⁷ This is because contingent easements fail the perpetuity requirement for deductibility.⁷⁸ This was the issue in *Graev v. Commissioner*, a Tax Court case which denied deduction for a conservation easement granted contingent on receiving a tax deduction.⁷⁹ In *Graev*, a donee promised a donor that it would return the contributions if the deduction was disallowed and, as a result of that promise, the IRS denied the deduction.⁸⁰

Technically, this tax issue might be circumvented by entering into contingent contracts with landowners which, once triggered by a certain number of owners entering into contract, required the parties to enter into non-contingent conservation easements. By utilizing a contract contingency outside of the easement document, conservation groups could appear to avoid the related tax issues.⁸¹ However, even if this approach were successful in avoiding the contingent contract issue, it might result in a lower-valued contribution—and thus a lower potential deduction—as discussed below.

Another tool in the arsenal of assemblage professionals is the strategic use of partners and shell companies to try to obscure the true identity of purchasers.⁸² This can also help to mitigate the holdout problem by hiding the fact that there is an assemblage at all. Conservation groups are somewhat limited in their ability to do this. One of the reasons is a tax issue: donee organizations must be qualifying

⁷⁶ Treas. Reg. § 1.170A-1(e) (2020); Treas. Reg. § 1.170A-7(a)(3). But both clarify that if the event that might make the charitable transfer ineffective is so unlikely as to be negligible, the deduction is allowed. *See, e.g.*, Treas. Reg. § 1.170A-1(e) (“[f]or example, A transfers land to a city government for as long as the land is used by the city for a public park. If on the date of the gift the city does plan to use the land for a park and the possibility that the city will not use the land for a public park is so remote as to be negligible, A is entitled to a deduction under section 170 for his charitable contribution.”). *See also* *Graev v. Comm’r*, 140 T.C. No. 17, 1, 52, 53 (2013) (disallowing a deduction for a conditional conservation easement).

⁷⁷ Treas. Reg. § 1.170A-1(e). Because a contingent contract effort is a regime with more than a remote possibility of an unsuccessful conclusion, the contract would not qualify for federal tax deduction. *Id.*

⁷⁸ I.R.C. §§ 170(h)(2)(C), 170(h)(5)(A) (2018).

⁷⁹ *Graev*, 140 T.C. 17, at 52.

⁸⁰ *Id.* at 28. Unfortunately for the donor, even a complete denial of benefits does not undo the binding conservation restriction. *Id.* at 42–43.

⁸¹ In *Graev v. Commissioner*, the promise which resulted in non-deductibility—to return the contributions if the deduction was disallowed—was expressed in a side letter from the donee to the donor. *Id.* at 11. The conservation easement, once entered into, was not perpetual as a result of that promise. *Id.* at 43–44. In contrast with that arrangement, a contingent contracting scheme preceding any conservation easement signing results in perpetual conservation easements or no easements at all, a much better result for the prospective donor. Collins, *supra* note 74, at 799.

⁸² DAVID JANCSICS, GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 1 (A. Farazmand ed., 2018).

organizations under § 170(h)(3) in order for a donor to qualify for a tax deduction.⁸³ While for-profit developers often use a variety of agents, partners, and shell companies to hide the identity of the true owners, non-profit groups are limited by the need to have every donee organization qualified to receive the donation.⁸⁴ Even if the ultimate recipient of the land or conservation restriction is a land trust or government entity that qualifies under the rules, a donor making the contribution to a non-qualifying entity will not qualify for a tax deduction.⁸⁵

The eligible donee requirement can be a pitfall even outside the conservation assemblage context. For example, conservation groups often collaborate with government entities to help them acquire certain conservation properties.⁸⁶ Because government entities are subject to many requirements and tend to move slowly, it can be hard for them to successfully negotiate and acquire strategic properties—like parcels that can serve as extensions to state parks or key properties in a municipality’s soil erosion mitigation efforts.⁸⁷ Certain non-profit groups serve as conduits to acquire strategic lands and then sell them to the government entity.⁸⁸ But for donors interested in donating the land that will be used by a government entity, the donee must be independently eligible in order for the donor to obtain federal tax benefits.⁸⁹ It is not enough that the government entity end-user qualifies.⁹⁰

The holdout problem creates uncertainties not only for the entire conservation assemblage project, but also for the tax positions of individual donors.⁹¹ Some donors anticipate tax benefits that require a larger group of participants to materialize and will not receive the anticipated benefits if others do not follow through with their commitments. For example, in states with tax credit incentives available to conservation donors,⁹² benefits might only be available when donations are made as part of a larger assemblage.⁹³ This issue is compounded by

⁸³ I.R.C. §§ 170(a), (b)(1)(E), (h)(3) (2018).

⁸⁴ *Id.* Shell companies are often part of a complex web of international businesses and subsidiaries used to shield corporations and people from identification and financial responsibility. JANCISCS, *supra* note 82, at 1.

⁸⁵ I.R.C. §§ 170(e) and (h). This issue should be simple to solve. For example, pre-closing assignments of contract rights should solve this issue in most cases.

⁸⁶ *See, e.g., Protect, supra* note 45 (providing an example of how private conservation organizations aid governmental entities in acquiring properties for conservation purposes).

⁸⁷ Harish Hemmige et al., *Five Ways to Speed Up Government Procurement*, BOS. CONSULTING GROUP (Nov. 7, 2018), <https://perma.cc/AP3Y-YLE9>.

⁸⁸ *See Protect, supra* note 45.

⁸⁹ *See* I.R.C. § 170(c)(1) for the eligible donee requirements.

⁹⁰ *See id.* § 170(b)(1)(A).

⁹¹ Not to mention the disappointment to donors who committed to make property donations to support assemblage efforts which never came to fruition.

⁹² *April 2019 Tax Incentives, supra* note 9.

⁹³ *See, for example, the Massachusetts tax credit awarded to the Leyden conservation project donors in Part IV.A. That tax credit required at least 500 acres be involved in the project. Land Partnership Grant Program, MASS.GOV, <https://perma.cc/D9AD-CLKS> (last visited Feb. 8, 2021).*

the fact that donors must make important assumptions in their tax returns about the benefits they might receive because of the anticipated participation of others. New tax regulations⁹⁴ reduce the availability of federal tax deductions to the extent of tax credits anticipated or received,⁹⁵ and as a result a donor makes a decision to forego *current* federal tax deductions, because of the *anticipated* state tax credits. The donor will need to trust that the assemblage will be successful so that the anticipated tax credits materialize. Otherwise, the donor will have missed out on valuable tax deductions for a period of time. At best, the donor will have to file an amended tax return to benefit from the deductions not initially claimed for the donation tax year.

B. Questions of Appropriate Valuation Raised by an Assemblage Effort

The unique facts involved in assemblage projects can give rise to questions about the value of the donated conservation property. It is challenging to appraise property when there are few comparable property sales to use as reference points. No two properties are the same, making this a challenging task in general, but this difficulty is compounded when valuing conservation easements which are all different in terms of contracted restrictions and the nature of the restricted property.⁹⁶ Moreover, conservation easements are purchased and sold much less often than fee simple property interests, making comparable sales data even less available.⁹⁷

Appraisers valuing conservation easements are required to use the “before and after method”⁹⁸ when there are no comparable easement sales that can inform a valuation. This method arrives at a valuation by subtracting the valuation of the property after the conservation easement donation from its value before the donation.⁹⁹ The before and after values are calculated by determining the highest and best use (HBU) of the property in each situation and using appraisal techniques to arrive at a

⁹⁴ For an analysis of these changes, see Daniel Pessar, *Changes to SALT Deductibility Reduce Tax Benefits for Environmental Conservation Donations*, HARV. ENV'T L. REV. BLOG (Apr. 11, 2020), <https://perma.cc/WJ4V-FUFB>.

⁹⁵ See I.R.C. § 1.170A-1(h)(3)(i) (2020). In the Explanation of Provisions and Summary of Comments in the final regulations, the IRS wrote that the “final regulations apply longstanding principles regarding charitable intent and *quid pro quo*, and therefore treat all contributions to entities described in section 170(c) similarly. Those principles apply equally to all charitable contributions, regardless of the charitable purpose or type of donee.” Contributions in Exchange for State or Local Tax Credits, 84 Fed. Reg. 27,513, 27,522 (June 13, 2019).

⁹⁶ See generally Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225 (2016) (discussing some of the difficulties involved in valuing conservation easements).

⁹⁷ The IRS's audit guide for conservation easements informs readers that it is “usually the case” that there is “no substantial record of comparable easement sales.” INTERNAL REVENUE SERVICE, *supra* note 35.

⁹⁸ *Id.*

⁹⁹ *Id.*

valuation with that HBU in mind.¹⁰⁰ Although courts have sometimes allowed valuations that were calculated by applying a flat percentage reduction against the before value,¹⁰¹ the IRS has determined that this is not allowed because it does not comply with the before and after valuation method required in the regulations.¹⁰²

If an easement's post-donation value equals or exceeds the pre-donation value, no deduction is allowed.¹⁰³ Even though restricting the property with an easement most likely reduces property values, that same donation might have effects which offset the value reduction. A property with beautiful landscape views, for example, might lose value by restricting future development and prohibiting the construction of additional homes on the property. There would probably be a value increase which offsets this value reduction, however, stemming from the now-protected status of the beautiful view. These value increases are even more likely to occur in the context of a conservation assemblage which protects the views, or wildlife, or low housing density of several parcels. For example, a landowner who grants an easement to allow access for a hiking trail to run along the edge of the family estate might gain more than the value lost by linking his property to a large network of hiking trails. In that case, no deduction would be allowed under the regulations.¹⁰⁴

Making things more complicated, property values relevant to the before and after analysis are not limited to the value of the servient estate (the property encumbered by the conservation easement) before and after the donation.¹⁰⁵ The conservation easement regulations¹⁰⁶ require consideration of contiguous and non-contiguous parcels owned by the donor and his family members¹⁰⁷ as well. Thus, a landowner with two contiguous parcels who donates a conservation easement that restricts development at one of the properties will not necessarily qualify for a tax deduction for the entire reduction in value at the now-encumbered

¹⁰⁰ *Id.* Ultimately, this exercise is meant to result in a fair market value as defined by the IRS: "The fair market value is 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." Treas. Reg. § 1.170A-1(c)(2).

¹⁰¹ For example, an appraiser might determine using an analysis of comparable properties with conservation easements that property values are generally 36% lower as a result of the easement donations. The appraiser would then determine the after value of the subject property by reducing the before value by 36%. This method is not allowed. Rather, the before and after method must be employed. INTERNAL REVENUE SERVICE, *supra* note 35, at 44.

¹⁰² *Id.* Treas. Reg. § 1.170A-1(h)(3)(i).

¹⁰³ *Id.* § 1.170A-14(h)(3)(i).

¹⁰⁴ *See id.* (explaining that if the donor receives economic or financial benefits that are greater than what the public receives, then the deduction is not allowable).

¹⁰⁵ *See* Treas. Reg. § 1.170A-14(h)(3)(ii) (noting that the before and after values must take into account likelihood property would be developed, effect of zoning, historic preservation, and conservation laws that restrict the property's highest and best use).

¹⁰⁶ *See* Treas. Reg. § 1.170A-14(h)(3)(i) (explaining conservation restrictions generally).

¹⁰⁷ "Family" as defined in Treas. Reg. § 1.267(c)-1(a)(4).

property.¹⁰⁸ The *combined* values before and after the donation must be considered.¹⁰⁹ The regulations also require a reduction in the amount of the deduction according to any resulting increase in value of non-contiguous property owned by the donor or family members.¹¹⁰

Even if a donor can establish that the post-donation value is less than the pre-donation value, there is another valuation issue that can arise: I.R.C. § 170 generally requires deductions for donations to be reduced to the extent of received or anticipated benefit to the donor in consideration for the donation (also known as “quid pro quo”).¹¹¹ There are several valuable benefits a donor might receive as a benefit from donating property as part of a conservation assemblage. One benefit is the logistical support and cooperation of the conservation group, neighbors, and others eager to see a property aggregation succeed.¹¹² This is valuable because the donor may stand to enjoy higher property values as a result of a successful conservation assemblage.¹¹³ Similarly, the donations of neighboring properties could be understood to be a benefit to the donor—if one owner donates a property interest in exchange for neighbors doing the same, the donation value could be reduced or denied.

Conservation easement quid pro quo issues have been dealt with in the courts in relation to the cash donations that are often presented by

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The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor and the donor's family (as defined in section 267(c)(4)) is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction. If the granting of a perpetual conservation restriction after January 14, 1986, has the effect of increasing the value of any other property owned by the donor or a related person, the amount of the deduction for the conservation contribution shall be reduced by the amount of the increase in the value of the other property, whether or not such property is contiguous.

Treas. Reg. § 1.170A-14(h)(3)(i).

¹⁰⁹ See *id.* § 1.170A-14(h)(3)(ii) (discussing how the before and after valuation must take into account restriction that affect the value of the property as well as permit uses that increase the property's value above the current use).

¹¹⁰ *Id.*

¹¹¹ Thus, a \$100 donation to a qualified charity would result in only \$50 in tax deductions if the donor received sports tickets worth \$50 from the donee as a result of the donation. See I.R.C. §§ 170(e)(1)(A)–(B) (stating that an amount of charitable contribution considered is reduced by the sum of the non-capital gain and capital gain if the property were sold at fair market value) and Treas. Reg. § 1.170A-1(h) (explaining that the value of contribution is the fair market value of the surface rights without regard to the mineral rights).

¹¹² See the discussion in the final paragraph of this subpart.

¹¹³ Of course, there are assemblages that do not necessarily translate to higher-value property for the donor, such as the conservation of underground sources of clean water which property would not lead a hypothetical buyer to pay more for a piece of property. Although a conservation assemblage with clean water benefits might significantly benefit the community over the long term, there may not be any material “benefit” received by the donor of property in that case.

donors to conservation groups alongside property donations.¹¹⁴ Preservation trusts acting as donees often do not have the resources necessary to monitor and enforce the conservation restrictions that are being entrusted to them.¹¹⁵ As a result, they often request a cash donation from donors.¹¹⁶ Donors have repeatedly tried, and have often failed, to enjoy a tax deduction for that cash donation. Cash donations deemed to be donated in exchange for a valuable benefit—the acceptance of the conservation easement by the land trust that facilitates a tax deduction to the donor—are not deductible to the extent of the benefit.¹¹⁷ To make the deductibility argument stronger for donors, land trusts sometimes make requests or suggestions for cash donations rather than explicitly requiring such a donation.¹¹⁸

Just as charitable groups of all kinds avoid explicit promises of benefit in exchange for donations, conservation groups must be careful to avoid promising benefits to donors whose donations will play a role in a conservation assemblage.¹¹⁹ For example, a solicitation letter from a land trust to a donor with a message describing the benefits the donor might enjoy if the assemblage is successful could trigger issues for any potential tax deduction. An owner contributing conservation restrictions in the hope that other neighboring owners will follow suit, must try to avoid the appearance of a *quid pro quo* to reinforce donation deductibility. A taxpayer making a deduction so that his or her own property becomes more beautiful, quieter, or otherwise more valuable calls tax deductibility into question. Therefore, the more a conservation organization focuses on benefits that will flow from a donation (and the more taxpayers respond positively to such an offer), the greater the risk an IRS auditor may find

¹¹⁴ See McLaughlin, *supra* note 8, at 26 (explaining that, in addition to donating an easement, a landowner may be required or requested to make a cash donation to the land trust to defray the costs associated with the land trust's acceptance).

¹¹⁵ See *id.* at 26–27 (stating that transaction costs associated with an easement donation can be significant).

¹¹⁶ *Id.* at 26.

¹¹⁷ I.R.C. § 170(a) (2018); Treas. Reg. § 1.170A-1(h) (2020). Cash donation in excess of the benefit received can qualify for a partial deduction. See Treas. Reg. § 1.170A-1(h)(ii)(2)(i).

¹¹⁸ See, e.g., *Understanding Conservation Easements*, CAP. REGION LAND CONSERVANCY, <https://perma.cc/HUL2-TJTQ> (last visited Jan. 23, 2021) (“A landowner is responsible for covering all expenses for appraisal, legal, title, and recordation, as well as a Baseline Documentation Report (BDR) and a *suggested donation* to cover perpetual stewardship costs.”) (emphasis added). Despite the conservation group stating that the landowner may provide a “suggested donation,” depending on the facts, a court may find a *quid pro quo* and deny or reduce the tax deduction.

¹¹⁹ DAVID J. DIETRICH, CONSERVATION EASEMENTS: TAX BACKGROUND, STRATEGIES AND CURRENT DEVELOPMENTS (2004), <https://perma.cc/K665-BWA9> (“In the absence of statutory guidance, courts have developed two tests to determine whether donors possess the requisite intent to qualify their contributions for deduction. The first asks whether the transfer is motivated by ‘detached and disinterested generosity’ The second test asks whether the donor received or expected to receive a *quid pro quo* in exchange for the transfer. This inquiry looks to the ‘external features’ of a transaction, thereby ‘obviating the need . . . to conduct imprecise inquiries into the motivations of individual taxpayers.’”).

the donor received something of value in exchange for the conservation easement donation.¹²⁰

To protect a donation deduction from any implied quid pro quo or valuation issues stemming from a conservation assemblage, one might be tempted to focus only on the subject donation and to ignore any other properties.¹²¹ But this approach comes into conflict with the benefits that can come from contextualizing a donated property within its ecosystem and region. Donors must make sure that their donations meet the qualifying conservation purpose requirement in the § 1.170A-14 regulations.¹²² Claiming that the donated property serves as a “critical link”¹²³ within broader conservation efforts could boost the argument that there is a qualifying conservation purpose. On the other hand, calling attention to context might invite scrutiny of any coordination that might have been involved in the donation. If a donor received something in return—the cooperation of neighbors all interested in a more restrictive and thus more valuable landscape, for example—there might be reason to reduce the claimed deduction to the extent of benefit received by the donor.

¹²⁰ In cases such as this, the value of the conservation easement is the “difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction.” Treas. Reg. § 1.170A-14(h)(3)(i). The entire contiguous parcel ownership includes the subject property and all “contiguous property owned by a donor or the donor’s family (as defined in [I.R.C. §] 267(c)(4)).” *Id.*

¹²¹ See discussion *infra* Part II.C.

¹²² Treas. Reg. § 1.170A-14(d)(1)-(5) (defining conservation purposes to include recreational use, educational use, protection of environmental systems, preservation of open space, and historic preservation or land or certified historic structures).

¹²³ Using the phrase “critical link” not only explains the extent of a subject parcel’s conservation value but also helps to satisfy the conservation purpose requirements of Treas. Reg. § 1.170A-14(d)(3)(ii) which can be met if “natural areas . . . contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.” “Critical link” is a phrase used in conservation easement contexts to convey the range of benefits associated with connecting new and existing preserve lands. For example, a recorded conservation restriction for a property restricted as part of the Leyden assemblage discussed in Part III below: “The protection of the Premises contributes to the protection of the scenic and natural character of the Town of Leyden, and provides a critical link within the approximately 800-acre Leyden Working Farms and Forest Conservation Partnership initiative.” PAUL O’NEIL & KAREN O’NEIL, GRANTORS, GRANT OF CONSERVATION RESTRICTION TO MOUNT GRACE LAND CONSERVATION TRUST, INC. 2 (2013), <https://www.masslandrecords.com/Franklin/default.aspx?AspxAutoDetectCookieSupport=1> (search in the book search bar “6469” and in the page number search bar “36”) (title reference Franklin District Registry of Deeds Book 3000 Page 73; Book 3081 Page 213; Book 4425 Page 261; Book 5256 Page 43; Book 5734 Page 54). See *Scenic Gateway to Northwest Arkansas Conserved*, NORTHWEST ARK. LAND TR., <https://perma.cc/J5EU-WQD6> (last visited Jan. 25, 2021) (land donated served as a wildlife corridor to cross under the highway); *315 Acres of Interconnected Open Meadows And Woodlands*, GREENBELT ESSEX COUNTY’S LAND TR., <https://perma.cc/TR94-D46C> (last visited Jan. 23, 2021) (a conservation restriction was donated to the Greenbelt that provided a critical link connecting existing public lands and trails); *Uxbridge (MA) Protects Legg Farm*, TR. FOR PUB. LAND (Mar. 26, 2002), <https://perma.cc/3VRZ-HKYL> (“Legg Farm is a critical link between state and local landholdings and is a most significant acquisition.”).

Moreover, the IRS may try to limit efforts by a donor or donor's appraiser to focus only on the facts pertaining to the donated property without considering area developments that could improve property values. An appraiser valuing a property donated as part of a conservation assemblage might not increase the appraised value simply because neighboring properties might be donating conservation restrictions in the near future. The possibility of an assemblage coming together is speculative, the appraiser might reason, and should not result in an increased post-donation assessment for the subject property. However, the IRS might require such pending facts to be considered. In 2010, the Fifth Circuit in *Whitehouse Hotel Ltd. Partnership v. Commissioner*¹²⁴ vacated and remanded a decision of the tax court, holding that certain pending facts should have been factored into the valuation analysis of a conservation easement.¹²⁵ Hotel developers had purchased several pieces of property, planning to renovate them and reposition them as a Ritz-Carlton Hotel, among other uses.¹²⁶ The developers donated a conservation easement on the "Maison Blanche" building, but the terms of the easement also placed restrictions on the "Kress" building as long as the two buildings were under common ownership.¹²⁷ One day after donating the easement, the developers combined the two properties "into a single, indivisible condominium unit,"¹²⁸ ensuring that a buyer would face restrictions on the Kress building because of the common ownership.¹²⁹

But because the combination had not yet occurred as of the date of the easement grant, the tax court's analysis of the easement's value did not consider the combination of the properties.¹³⁰ The Fifth Circuit disagreed with that approach and insisted that pending facts be factored into a valuation analysis:

the tax court should have considered the easement's effect on fair market value in the light of the imminent legal and functional consolidation of the two buildings. In other words, the tax court was correct that, because, on the day of donation, the condominium regime was not yet in effect, a successor could have purchased the Kress building separately that day and would not have been bound by the easement; but, *as a matter of valuation*, the tax court erred by not considering the effect on market value of the buildings' pending combination. To that end, a hypothetical buyer would have contemplated the pending combination of the buildings in deciding on a purchase price.¹³¹

¹²⁴ 615 F.3d 321 (5th Cir. 2010).

¹²⁵ *Id.* at 338.

¹²⁶ *Id.* at 325.

¹²⁷ *Id.* at 337.

¹²⁸ *Id.* at 325.

¹²⁹ *Id.*

¹³⁰ *Id.* at 327–28.

¹³¹ *Id.* at 338–39.

The Fifth Circuit held that a hypothetical buyer would have contemplated the pending facts and therefore the appraisal should have factored those facts into the easement valuation.¹³² This expansive perspective by the Fifth Circuit is consistent with the definition of fair market value in Treas. Reg. § 1.170A-1(c)(2), which imagines a “price at which the property would change hands between a willing buyer and a willing seller . . . both having reasonable knowledge of relevant facts.”¹³³ However, this perspective also complicates the valuation exercise for donors interested in making a donation of land or property interest. Tax deductions might be affected not only by the increase in value stemming from a conservation assemblage, but also by the *perceived* value increase in the eyes of a hypothetical buyer.

The closer landowners and conservation groups are to explicit coordination and promotion of an assemblage, the more likely it is that the IRS or a court will impute value from a future assemblage to the value of property after a conservation easement is donated. If a conservation group were to advertise publicly its progress towards aggregating lands in a certain area, it would be harder for a donor to argue that a buyer would not factor potential assemblage benefits into a purchase decision. The *Whitehouse* court faced a donor that changed the valuation landscape the day after the conservation easement was donated,¹³⁴ a fact pattern which made it harder for the donor to refute the court’s assumption that a hypothetical buyer would have factored the pending property combination into a fair market value purchase price. *Whitehouse* might therefore be instructive only on the margin. To the extent that donations as part of conservation assemblage efforts are one part of a multi-step process managed by a conservation group that does not promote communication among donors, donors might be able to avoid the expansive approach adopted by the *Whitehouse* court. Although donations will probably not occur one day before a conservation assemblage is completed, it is impossible to predict whether—and to what degree—a court would factor pending facts into a valuation assessment.

C. Problems Arising from Attempts to Streamline Administrability of Multiple Donations

Preparing, carrying out, and monitoring property donations involves a significant administrative burden, especially when the property interests are conservation easements.¹³⁵ This difficulty is compounded when there are several donations happening at the same time and when

¹³² *Id.* at 338.

¹³³ Treas. Reg. § 1.170A-1(c)(2) (2020).

¹³⁴ *Whitehouse*, 615 F.3d at 325–26.

¹³⁵ Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENV'T L. 1, 15–16, 17–18 (outlining the various administrative costs and other burdens of the conservation easement donation, including “the cost of the required appraisal” and “ongoing monitoring costs by the donee organization”).

some steps are time sensitive.¹³⁶ When coordinating several donations at once, it can be tempting for conservation groups to look for ways to accomplish all of the necessary tasks in an efficient manner. For example, batching certain steps in the process to handle similar tasks at the same time can reduce the workload and even make certain tasks less expensive. But blurring the lines separating discrete transactions can also result in costly mistakes.

One example relates to the recording of property interest donations. A conservation group receiving fee simple property donations in addition to conservation restrictions might delay recording transfer documents so that documents can all be recorded at the same time. This might happen if the conservation professionals forget that the tax regulations are different for the two types of donations. While most property donations are deductible in the year legal ownership transfers, conservation restrictions are only deductible in the year of recording.¹³⁷ This is because the regulations require conservation restrictions to be enforceable in perpetuity to qualify for deductions and unrecorded easements are not enforceable in perpetuity.¹³⁸ Donors often make donations with the expectation that they will receive deductions in a particular calendar year and a conservation group which accidentally (or negligently) defers recording of a conservation restriction until the start of the new calendar year could preclude a donor's deduction for the intended tax year.

Another example can result in a donation deduction being denied entirely. Appraisals for each property donation must be made no earlier than sixty days prior to contribution.¹³⁹ Batching appraisals for efficiency or pricing purposes can be beneficial to the conservation donee or to the various donors—and ordering an appraisal a few days or weeks earlier for efficiency purposes might sound like a good idea. But contributing a donation more than sixty days after the appraisal was performed can result in a denial of deduction for the donor.

Yet another example of a task that a donee might try to streamline is the “contemporaneous written acknowledgement” that donors must

¹³⁶ Donors often expect a donation to be consummated by the end of a particular tax year to qualify for a tax deduction within that tax year. See I.R.C. § 170(a)(1) (2018) (“There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year.”). Other examples of time sensitive considerations include contractual requirements—as in an acquisition contract or purchase option—and requirements involved in applying for and receiving grant funds. See, e.g., *The Conservation Easement Process*, CHAMPLAIN AREA TRAILS, <https://perma.cc/EA5U-WSZN> (last visited Jan. 23, 2021) (detailing the 13-step process required to donate a conservation easement to Champlain Area Trails, including the timing of a purchase and sale agreement).

¹³⁷ See INTERNAL REVENUE SERVICE, *supra* note 35, at 58 (“In some cases, taxpayers claim the donation in the wrong tax year.”).

¹³⁸ See Treas. Reg. § 1.170A-14(g)(1) (2020) (“[A]ny interest in the property retained by the donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.”).

¹³⁹ *Id.* § 1.170A-17(a)(4).

receive in order for a donation to qualify for a deduction.¹⁴⁰ While donees generally recognize the importance of this requirement, any temptation to issue simultaneously all written acknowledgements arising out of a multi-parcel project would not be a good idea to the extent that the parcels are donated at various times. Violation of this simple requirement has led to denial of deductibility.¹⁴¹

But not all of the potential multi-parcel issues arise from fumbled administrative requirements. There are also important questions of substance that can get lost in a conservation assemblage. For example, the requirement that each piece of property fulfill a conservation purpose can get overlooked when it is clear that a conservation assemblage *as a whole* fulfills a conservation purpose. Consider a conservation group which—consistent with a state agency’s clearly stated objectives¹⁴²—successfully assembles contracts for the acquisition of conservation easements on open space lands alongside a major highway.¹⁴³ If landowners with holdings next to the current donors’ holdings also expressed interest in donating, the conservation group needs to check each property’s qualifications before adding these projects to the conservation assemblage plan.¹⁴⁴ The abutting properties might not qualify for the anticipated deductions if they do not share important characteristics with the parcels bordering the highway. For example, if the abutting properties are not visible from the highway.¹⁴⁵ Unless the

¹⁴⁰ See I.R.C. § 170(f)(8)(A) (“No deduction shall be allowed under subsection (a) for any contribution of \$250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the [statutory] requirements . . .”). See also Treas. Reg. § 1.170A-13(f)(3) (noting that written acknowledgement must be contemporaneous).

¹⁴¹ See, e.g., *Bruzewicz v. United States*, 604 F. Supp. 2d 1197, 1204–05 (N.D. Ill. 2009) (“[Taxpayers’] total failure to comply with the [contemporaneous written acknowledgment] statutory requirement is alone fatal to their claimed deduction of the preservation facade easement.”).

¹⁴² See Treas. Reg. § 1.170A-14(d)(4)(i)(A) (“The donation of a qualified real property interest to preserve open space (including farmland and forest land) will meet the conservation purposes test of this section if such preservation is . . . [p]ursuant to a clearly delineated Federal, state, or local governmental conservation policy and will yield a significant public benefit . . .”).

¹⁴³

The required access to the land by the general public depends on the conservation purpose of the conservation easement. If the claimed conservation purpose is for the preservation of open space under IRC § 170(h)(4)(A)(iii), the contribution must yield a significant public benefit which is usually by visual access from a public highway.

INTERNAL REVENUE SERVICE, *supra* note 35, at 17. Several contiguous parcels that, as combined, would satisfy the regulations do not necessarily qualify separately. For example, if all but one of the properties are visible from a highway, the one that is not visible might not qualify.

¹⁴⁴ See *infra* Part III.

¹⁴⁵ This situation implicates “scenic enjoyment” assessment factors 1, 2, 3, 5, 6, 7, 8, and 11 outlined in Treas. Reg. § 1.170A-14(d)(4)(iv)(A) and could also implicate section 1.170A-14(d)(2)(ii) which requires public access in certain cases. Treas. Reg. § 1.170A-14(d)(4)(iv)(A) (2020); *id.* § 1.170A-14(d)(2)(ii).

conservation group is vigilant enough to confirm that each parcel qualifies for deduction, the abutting landowners could end up being surprised when they find out that their contributions do not qualify for a tax deduction.¹⁴⁶

One question that must be asked about the tax issues explored in this section is whether the issues are merely academic. Land trusts and conservation groups often go through rigorous accreditation processes, benefit from the experience of experts on staff, and collaborate with others in the field to make sure that issues like the ones described do not materialize.¹⁴⁷ As well, some states—Massachusetts, for example—require every conservation restriction to be reviewed by the government for factors including demonstrated public benefit, contract terms, and grantee qualifications.¹⁴⁸ Moreover, the kinds of expert groups that can accomplish large conservation assemblages are likely to have the checklists, staff, and habits which ensure that the necessary skill is brought to every project. Time-sensitive, multi-donation projects, however, can put unusual pressures on conservation groups and additional vigilance might be necessary in those cases. As well, conservation assemblages offer the promise of a larger environmental impact, even in “aggregate donations of relatively small conservation easements”¹⁴⁹ handled by less-famous, less-sophisticated conservation groups. The tax pitfalls presented in this Article are organized with these groups in mind.

While there are several tax law pitfalls facing landowners and conservation professionals working on conservation assemblages, the primary way to overcome them is for conservation professionals to administer each donation separately. Each transaction should be coordinated as if there are no other pending transactions so that the detailed regulations surrounding donations generally, and conservation easements in particular, are followed for each project. However, sometimes this approach stands in tension with the need to demonstrate a property’s conservation value within its natural context. Careful communication among conservation groups and landowners is important because suggestions of benefits from a coordinated assemblage could

¹⁴⁶ See, for example, *Atkinson v. Comm’r*, in which the Tax Court denied a deduction for an easement contributed over a golf course. *Atkinson v. Comm’r*, T.C. Memo [2015-236] at 59. Despite the taxpayers’ contention that the easement covered a “natural area” which contributed to the “ecological viability” of the nearby conservation areas, the Court held that the golf course was not a “natural area” and that taxpayers did not establish that the subject property contributed to the viability of any conservation area nearby. *Id.* at 40–41.

¹⁴⁷ *Land Trust Accreditation: Conservation Tools*, PA. LAND TR. ASS’N, <https://perma.cc/X2G4-BYWW> (last visited Jan. 26, 2021).

¹⁴⁸ “The Conservation Restriction Review Program reviews CRs for the Secretary of Energy and Environmental Affairs, who must approve of the CR in the public interest in order for it to be a permanent restriction, pursuant to the requirements of Massachusetts General Laws (Ch. 184 Sec. 31-33).” *Conservation Restriction Review Program*, COMMONWEALTH OF MASS.: DIVISION OF CONSERVATION SERVS., <https://perma.cc/XH2C-X97U> (last visited Jan. 20, 2021).

¹⁴⁹ *Glass*, 471 F.3d 698, 712 (6th Cir. 2006).

result in the reduction or denial of tax deductions, a possibility that would be unacceptable to most donors. On the other hand, coordination is important to help donors understand which tax benefits they can anticipate receiving for their donation. While there might have been more room for error in the past, increased scrutiny of conservation easements makes precise compliance with the rules more important than ever. And that means that the balancing act between coordination and separation could have consequences for the deductibility of conservation donations.

IV. TWO CASE STUDIES ILLUSTRATING OPPORTUNITIES AND CHALLENGES OF CONSERVATION ASSEMBLAGE PROJECTS¹⁵⁰

Although successful conservation assemblages that come together over short periods of time are rare, the two case studies detailed below demonstrate that they are possible. When enterprising conservation groups find well-located projects, interested landowners, and rich sources of capital in the form of grants or willing donors, they have the raw material to create a large, coordinated conservation project. As discussed above, financing considerations, landowner incentives, coordination issues, and tax issues all serve as obstacles to increased conservation assemblage activity. Each one of these issues might be difficult to overcome but taken together they are daunting for even sophisticated and active conservation groups. The two projects featured below certainly faced obstacles that could have blocked successful assemblage efforts, but a combination of ripe conditions and capable conservation professionals led to successful results.

The two featured projects were successfully coordinated within the last ten years.¹⁵¹ The first one, completed in Massachusetts in 2013 and facilitated by a state grant, involved donations of property interests from twelve landowners, totaling over 900 acres of land.¹⁵² Donors received valuable tax incentives including from tax credits that were available to projects involving large tracts of land. As a result, the economics for landowners improved as long as a sufficient number of donors participated in the assemblage effort. Basically, the funding created a financially advantageous contingency scheme which incentivized a sufficient number of donations. The second assemblage, completed in

¹⁵⁰ The information represented in the following case studies was obtained through interviews the author personally conducted with both named and confidential sources. All notes are on file with the author. Thank you to Leigh Youngblood, Executive Director of the Mount Grace Land Conservation Trust and Kent Whitehead, State Director at The Trust for Public Land, for providing me with the insights and materials that made these case studies possible.

¹⁵¹ Although the assemblages were completed in recent years and came together over a relatively short period of time, some of the relationships that facilitated these case studies—with landowners, government contacts, and conservation professionals—began many years before.

¹⁵² *Landscape-Scale Conservation History (1995-2019)*, MOUNT GRACE LAND CONSERVATION TR., <https://perma.cc/VR9U-C645> (last visited Jan. 26, 2021).

Maryland in 2014 and facilitated by a federal grant, involved the purchase of property interests from three sellers and totaled over 200 acres of land.¹⁵³ The sellers did not receive tax incentives. Rather, they agreed to enter into option agreements that facilitated the assemblage transaction. Although this project did not involve donations of property, the conservation group coordinating the assemblage project faced many of the same challenges involved in the first case study.

*A. Case Study 1: Leyden Working Farms & Forests Project*¹⁵⁴

On June 6, 2012, Mount Grace Land Conservation Trust (Mount Grace)¹⁵⁵ organized a meeting with owners of land in and around Leyden, Massachusetts and presented an opportunity. The Massachusetts Landscape Partnership Grant Program (LPP), launched in 2010,¹⁵⁶ “seeks to protect large blocks of conservation land. Local, state, and federal government agencies and non-profit groups can use this grant to work together to protect at least 500 acres of land.”¹⁵⁷ Eligible projects include “Purchase of land in fee simple for conservation, forestry, agriculture, or water supply purposes” and “Purchase of a Conservation Restriction.”¹⁵⁸ If control of enough land could be obtained in a single effort, Massachusetts would pay 50% of the value of the land purchased as well

¹⁵³ *Secretary Jewell, Director Ashe Announce \$16.5 Million in Grants to Conserve Coastal Wetlands*, U.S. FISH & WILDLIFE SERV. (Jan. 23, 2014), <https://perma.cc/C4UF-GZDK> [hereinafter *\$16.5 Million in Grants to Conserve Coastal Wetlands*] (“The Maryland Department of Natural Resources (MD DNR) was awarded an \$1 million grant to permanently protect 220 acres of marsh, wetlands, and forested land on Popes Creek. The creation of a biking/walking trail along an abandoned railway bed is also planned for the site. MD DNR was also awarded a \$630,000 grant to permanently protect 150 acres of wetlands, forested uplands, and cleared fields at the village of Port Tobacco. The protection of the Port Tobacco wetlands will protect habitat at the boundary of the freshwater and Estuarine wetlands, offer new public access, and allow restoration of upland forest to further enhance filtration and buffering of wetlands and the river.”).

¹⁵⁴ Telephone Interview with Leigh Youngblood, Executive Director of the Mount Grace Land Conservation Trust (Jan. 2020) (notes on file with the author). See also *Grant to Help Neighbors Conserve Leyden’s Last Dairy Farm*, MOUNT GRACE LAND CONSERVATION TR. (Nov. 29, 2013), <https://perma.cc/D622-8MQF>.

¹⁵⁵ Mount Grace did not plan and implement this project alone. The Town of Leyden, Franklin Land Trust, New England Forestry Foundation, and the Massachusetts Department of Agricultural Resources all contributed significantly and all hold interests in the project. As well, the project benefitted from grants from the Open Space Institute, The 1772 Foundation, and Fields Pond Foundation. Finally, the Commonwealth of Massachusetts made the project possible by providing the Massachusetts Landscape Partnership Grant Program (LPP) and The Conservation Fund facilitated the project by providing bridge financing to Mount Grace, utilized until the LPP funds were received to pay back the debt. This case study centers around Mount Grace because it was the lead conservation group for the project.

¹⁵⁶ *Massachusetts Conservation Programs*, CONSERVATION ALMANAC, <https://perma.cc/8UPG-4AYP> (last visited Jan. 9, 2020).

¹⁵⁷ *Landscape Partnership Grant Program*, COMMONWEALTH OF MASS.: DIVISION OF CONSERVATION SERVS., <https://perma.cc/8FY5-8AAV> (last visited Jan. 9, 2020).

¹⁵⁸ *Id.*

as eligible project costs.¹⁵⁹ Mount Grace proposed a bargain sale arrangement—Landowners would receive half of the property value in cash from Massachusetts and would be able to claim as a federal tax deduction the other 50% of the value. Moreover, the Massachusetts Conservation Land Tax Credit, available since 2011, made refundable tax credits¹⁶⁰ available up to 50% of the donated value with a maximum of \$50,000¹⁶¹ per landowner.¹⁶²

Massachusetts designed its LPP Program with an awareness of the value of large conservation projects. The grant’s “purpose is to facilitate complex large-acreage projects”¹⁶³ and, to that end, the Executive Office of Energy and Environmental Affairs seeks proposals for the “[a]cquisition of property interests in large, unique, unfragmented conservation and working lands, in single or multiple parcels.”¹⁶⁴ The grant application requires that applications “include the acquisition of real property interests in a minimum of 500 acres of land. This requirement can be met by acquiring interests in one or more parcels of land that are contiguous, or that are directly linked by other permanently protected open space, including that held by 501(c)(3) non-profit land trusts.”¹⁶⁵ Indeed, even the 100-point rating system of the Grant

¹⁵⁹ 100% of the transaction could be structured as a purchase—with some other source of funds used alongside the Massachusetts grant program—or a smaller percentage could be organized as a purchase as part of a bargain sale in which the property would be sold in part and donated in part.

¹⁶⁰ *Regulation 830 CMR 62.6.4: Conservation Land Tax Credit*, COMMONWEALTH OF MASS.: DEP’T OF REVENUE, <https://perma.cc/K5VF-DEU2> (last visited Jan. 24, 2021); Julia Kagan, *Refundable Credit*, INVESTOPEDIA, <https://perma.cc/5C3X-BCTR> (last updated Nov. 11, 2020). A refundable tax credit can reduce a taxpayer’s liability below zero and result in a taxpayer receiving a check in the mail. For example, a taxpayer with a \$10 tax liability who receives a \$50 tax credit would normally have its tax liability reduced to zero and potentially receive the remaining benefits in future years. A refundable tax credit, however, would result in a \$40 payment from the government.

¹⁶¹ COMMONWEALTH OF MASS.: DEP’T OF REVENUE, *supra* note 160; *Commonwealth Conservation Land Tax Credit (CLTC)*, COMMONWEALTH OF MASS.: EXECUTIVE OFF. OF ENERGY AND ENV’T AFFS., <https://perma.cc/8PYA-CKWL> (last visited Jan. 24, 2021). The program now offers a higher cap, offering “a tax credit of 50% of the donation value, up to the \$75,000 max.”

¹⁶² The tax landscape has changed since this project was completed. Final regulations effective August 12, 2019 stipulate that “the amount of the taxpayer’s charitable contribution deduction under section 170(a) is reduced by the amount of any state or local tax credit that the taxpayer receives or expects to receive in consideration for the taxpayer’s payment or transfer.” Treas. Reg. § 1.170A-1(h)(3)(i) (2020). This restriction does not apply if credits received or expected to be received constitute 15% or less of the taxpayer’s payment. *Id.* § 1.170A-1(h)(3)(vi).

¹⁶³ *Landscape Partnership Grant FY 2021*, COMMONWEALTH OF MASS.: EXECUTIVE OFF. OF ENERGY AND ENV’T AFFS. 1 (2021), <https://perma.cc/P4XU-CB4T>.

¹⁶⁴ *Id.*

¹⁶⁵ *Landscape Partnership Grant FY 2013*, COMMONWEALTH OF MASS.: EXECUTIVE OFF. OF ENERGY AND ENV’T AFFS. 1 (2013) (on file with author). The FY 2020 version of the application adds to the list of qualifying lands any “land that is currently or will be effectively reconnected through the construction of a wildlife passage structure as part of, or concurrent with, the acquisition project. *Landscape Partnership Grant FY 2020*, COMMONWEALTH OF

Application provides points in the Project Quality section based on the size of the assemblage.¹⁶⁶ The rating system demonstrates the value premium placed by Massachusetts on projects that contribute large swaths of contiguous or almost-contiguous property whether by bringing significant areas under conservation control or by obtaining control of areas adjacent to protected spaces or waters. This value exists in part because the fates of ecosystems, open spaces, and natural resources are often intertwined with those of their neighbors.

Following the Leyden assemblage meeting, not all of the landowners who attended decided to work with Mount Grace. However, by August 30, 2012, enough land located in the right places had been committed to qualify for the 500 acres required by the Massachusetts grant program. As word spread, additional owners decided to participate.¹⁶⁷ In the end, twelve owners participated with lands covering over 900 acres.¹⁶⁸ Most¹⁶⁹ of these landowners entered into conservation easements, co-held by the Town of Leyden and Mount Grace Land Conservation Trust. On average, landowners received 50% of the value of their property interests in cash and donated the other 50% of the value. The LPP contributed \$1,079,300 in cash to fund land interest purchases and eligible transaction costs.¹⁷⁰ To meet the LPP dollar-for-dollar match requirement, Mount Grace received land interests from donors, through outright donations or bargain sales, as well as donations from other income sources—from other conservation groups, for example.¹⁷¹ Landowners contributed tracts as small as thirteen acres and as large as 221 acres in a coordinated effort

MASS.: EXECUTIVE OFF. OF ENERGY AND ENV'T AFFS. 3 (2020) (on file with author). The reference to a “wildlife passage structure” refers to structures that allow for the crossing of wildlife through developed areas that seeks to ensure continuity between the conditions on either side of the development. *Id.* “While projects may include parcels on both sides of a major road or highway, they will not be considered as part of the minimum 500 acres, unless the project currently has, or includes the installation of, a wildlife passage structure(s) suitable to the site and sufficient to facilitate good movement of target wildlife species.” *Id.* at 4. For more information on wildlife crossing structures, see U.S. DEPT OF TRANSP., FED. HIGHWAY ADMIN., WILDLIFE CROSSING STRUCTURE HANDBOOK: DESIGN AND EVALUATION IN NORTH AMERICA (Mar. 2011), <https://perma.cc/S3BK-5452>.

¹⁶⁶ Total project acreage under 600 acres translates to no points; 600-699 acres translates to 1 point; 700-899 acres translates to 3 points; and 900+ acres translates to 5 points. As well, the proposed project can obtain more points from abutting protected open space that is 100+ acres, 2 points for 100+ qualifying acres, 3 points for 100-500 qualifying acres, and 5 points for 500+ qualifying acres. Finally, project areas within 500 feet of ocean, lake, pond, river, stream, or wetland can earn up to 5 additional points (and 5 more if the project is in a drinking water supply area). *FY 2020*, EXECUTIVE OFF. OF ENERGY AND ENV'T AFFS., *supra* note 165, at 32.

¹⁶⁷ *Landscape-scale Conservation History (1996-2019)*, MOUNT GRACE LAND CONSERVATION TR., <https://perma.cc/W9WH-LVFM>.

¹⁶⁸ *Id.*

¹⁶⁹ A portion of the land was acquired by fee simple purchase.

¹⁷⁰ *Grant to Help Neighbors Conserve Leyden's Last Dairy Farm*, *supra* note 154. The cost of acquiring the conservation easements was funded with loans and paid back by the Landscape Partnership Program grant. Richie Davis, *\$1M Grant Helps Protect 800 Acres in Leyden*, GREENFIELD RECORDER (Mar. 19, 2013), <https://perma.cc/3D2S-E6Q2>.

¹⁷¹ *Grant to Help Neighbors Conserve Leyden's Last Dairy Farm*, *supra* note 154.

without the need for any contingent contracting by Mount Grace.¹⁷² This successful assemblage was a relatively simple negotiation because the strict terms of the state grant program gave Mount Grace the ability to present the project as binary: the project can get funded only if there will be a qualifying assemblage of 500 contiguous acres. As well, the bargain sale structure and the availability of a refundable state tax credit made the incentives much sweeter than the benefits offered to most conservation easement donors, usually limited to tax deductions.¹⁷³

The Leyden assemblage was coordinated successfully due to the skilled use by Mount Grace of several available incentives.¹⁷⁴ As a result of the project, the broader community received benefits,¹⁷⁵ Mount Grace and the State of Massachusetts advanced their conservation missions, and the landowners retained fee simple ownership over their land and received cash, state tax benefits, and federal tax benefits. Because Mount

¹⁷² All of the conservation easements were recorded between November 2013 and June 2014. See *infra*, Appendix 2 for a map of the Leyden Working Farms and Forest Conservation Partnership.

¹⁷³ Assuming a federal marginal income tax rate of 30%, the donation of a conservation easement worth \$100 would yield \$30 in federal tax breaks. If instead the conservation easement were sold in a bargain sale for \$50 and the landowner claimed a \$50 deduction—the deduction being worth \$15—the landowner would receive \$65 in benefits, more than double the benefit received solely from a federal tax deduction. Moreover, the state tax credit available for half of the amount donated meant an additional \$25 in value per \$50 donation (subject to a maximum credit per taxpayer of \$50,000). The total benefit received in this case study, then, could be \$90 per \$100 in land value, an impressive sum three times the benefit from a simple tax deduction. As mentioned above, the change in federal tax regulations (the recent addition of § 1.170A-1(h)(3)(i)) means that the benefit received would be \$82.50 instead of \$90 because this taxpayer's qualifying donation of \$50 would be reduced by the \$25 received in state tax credits for the purposes of calculating federal tax deductions. See Treas. Reg. § 1.170A-1(h)(3)(i) (2020). This analysis assumes a taxpayer is subject to the alternative minimum tax (AMT) and is illustrated in Table 1 in the IRS Final Regulation on Contributions in Exchange for State or Local Tax Credits, effective August 12, 2019. Contributions in Exchange for State or Local Tax Credits, 84 Fed. Reg. 27,513, 27,529 (June 13, 2019) (to be codified at 26 C.F.R. pt. 1).

¹⁷⁴ Mount Grace also advanced certain expenses, such as appraisal fees, to be reimbursed by landowners upon a decision to move forward with the proposed conservation project. See Davis, *supra* note 170 (stating that Mount Grace provided help bringing landowners together with appraisers). As well, some fees were paid by Mount Grace—for consulting services, for example—that were not reimbursed, paid to facilitate a project with great potential. See *id.* (stating that Mount Grace provided help bringing landowners together with tax advisors and land conservationists and Mount Grace did not receive grant funding for these fees).

¹⁷⁵ As a result of the conservation easements negotiated with the landowners in this project, certain public access was granted, allowing additional areas for passive recreation, hunting, fishing, and trapping. See *infra* Appendix 2. The project is also partially mapped as a Scenic Landscape Resource by the Massachusetts Scenic Landscape Inventory. THE FRANKLIN LAND TR., DRAFT CONSERVATION RESTRICTION AND RIVER CORRIDOR EASEMENT 1, 5 (2019), <https://perma.cc/Q3DE-KE9Z>. Other benefits of the donation include preserving water quality and natural habitats for species including Jefferson Salamander and Eastern Brook Trout. See MASS. DIV. OF FISHERIES & WILDLIFE, 2019 ANNUAL REPORT 7–8, 90 (2019), <https://perma.cc/5ZZK-UX2P> (stating that recent land use changes have altered freshwater habitats in Massachusetts for Eastern Brook Trout and stating that there are 10 local populations of Jefferson Salamander throughout Massachusetts).

Grace had a generous and useful state grant available, it was less necessary to utilize a conditional conservation easement form which would have rendered the conservation easement contribution nondeductible.¹⁷⁶

And Mount Grace was able to avoid many of the conservation pitfalls that face assemblage efforts. Because benefits available to donors almost reached the benefits offered by a fair market sale, Mount Grace did not need to market the benefits of the assemblage to convince landowners to donate their properties, an effort that could have indicated a quid pro quo. As well, the terms of the Massachusetts programs helped to ensure that Mount Grace would examine the conservation value of each property as well as the whole—the application process required extensive examination of many facets of the project, insulating the project from certain valuation issues discussed above. Finally, the Massachusetts programs essentially pre-screened the project and put a stamp of approval on the assemblage. Being awarded the grant demonstrated that the easement contributions advanced a state government priority and significant public benefit.¹⁷⁷ As well, for those conservation groups without the resources and experience of Mount Grace, a state grant framework like the one used in the Leyden assemblage could serve as an important source of administrative support. And following the requirements involved in obtaining the grant could help any conservation group ensure that the tax and logistical requirements for a successful conservation assemblage are met.

B. Case Study 2: Popes Creek Coastal Wetlands Project¹⁷⁸

When coal is transported by CSX railroad to the Morgantown Generating Station in Newburg, Maryland, it travels down the Popes Creek Subdivision line beginning in Bowie, Maryland.¹⁷⁹ As the train passes through Faulker, just a few miles north of its final destination, it passes an abandoned “Popes Creek Branch” rail line which used to service Popes Creek.¹⁸⁰ Although this 2.7-mile line was abandoned when the new line servicing the power plant was completed, conservation efforts in recent years are breathing new life into the abandoned rail line site.

¹⁷⁶ Treas. Reg. §§ 1.170A-1(e), 1.170A-7(a)(3) (2020).

¹⁷⁷ See *id.* § 1.170A-14(d)(4)(iii)(A). See also *id.* § 1.170A-14(d)(4)(iv)(B) (“The following are other examples of contributions which would, absent countervailing factors, yield a significant public benefit: The preservation of farmland pursuant to a state program for flood prevention and control[.]”). As well, environmental resiliency benefits accrue in projects with the rich natural resources of the Leyden assemblage. See *Farm Neighbors Come Together to Protect Habitat*, OPEN SPACE INSTITUTE (June 23, 2014), <https://perma.cc/MT3L-KXDU>.

¹⁷⁸ Telephone Interview with Kent Whitehead, State Director at The Trust for Public Land (Jan. 2020) (notes on file with the author).

¹⁷⁹ CSX System Map, CSX, <https://perma.cc/73XH-TBG9> (last visited Jan. 25, 2021).

¹⁸⁰ *The Popes Creek Branch*, ABANDONED RAILS, <https://perma.cc/46QL-93FT> (last visited Jan. 25, 2021).

Located within the Chesapeake Bay watershed and featuring approximately one acre located on the Potomac River itself, the site is an opportune location for recreation and conservation initiatives, including coastal wetlands preservation. Charles County allocated funds in 2007 to acquire forty-one acres of the abandoned Pope's Creek Rail Line¹⁸¹ to create a hiking and biking trail, but delays, including title issues stemming from a pending foreclosure on the site, stretched for years.¹⁸² By the time conservation professionals finally succeeded in putting together a successful project, the rail line site was just one piece of a larger conservation assemblage.

Because the abandoned rail line site is located within important ecosystems (including the Chesapeake Bay Critical Area¹⁸³), the site, along with other sites in the area, has been on the radar of the Trust for Public Land (TPL) and its local acquisition staff, Kent Whitehead, for many years.¹⁸⁴ But although the narrow rail line site is well-located, it did not offer the potential for major impact that many TPL projects often create. Two adjacent sites were familiar to TPL, a large, 1,000-acre site owned for around 100 years by a local family, as well as a thirty-acre wetland site owned by another local landowner.¹⁸⁵ As always, however, it could not be taken for granted that the landowners would be willing to part with their properties. Financial and emotional issues play key roles in the decision-making process, especially when property has been owned by a family for decades or longer.

¹⁸¹ *State Approves \$146.5K for Pope's Creek Rail Trail*, SOUTHERN MD. HEADLINE NEWS (Jan. 4, 2007), <https://perma.cc/YJ57-2NLK>.

¹⁸² *See Action Agenda*, MD. BOARD OF PUB. WORKS (Oct. 29, 2014), <https://perma.cc/7NSG-NUL6> (showing that the project was not ultimately approved until October 2014).

¹⁸³ The Chesapeake Bay Critical Area Protection Act was enacted by the Maryland General Assembly in 1984 to foster more sensitive development activity along the shoreline of the Chesapeake Bay so as to minimize damage to water quality and wildlife habitats. The Critical Area was defined by the Act as a strip of land along the tidal shoreline extending 1,000 feet landward from the water's edge, or from the landward boundary of any adjacent tidal wetland. BAY SMART: A CITIZEN'S GUIDE TO MARYLAND'S CRITICAL AREA PROGRAM 3, 6, 14 (MARY R. OWENS ED., 2008), <https://perma.cc/C7FN-DV9X>.

¹⁸⁴ TPL is a conservation group that works with a broad range of partners on a variety of projects, seeking to maximize conservation impact through collaborative and creative approaches to conservation. In 2019, TPL conveyed land valued at over \$211 million to public agencies and other nonprofit organizations and was paid around \$150 million in consideration. TR. FOR PUB. LAND & AFFILIATE, INDEPENDENT AUDITOR'S REPORT, CONSOLIDATED FINANCIAL STATEMENTS AND SUPPLEMENTAL INFORMATION 1, 4 (2019), <https://perma.cc/6Y6P-TAD2>. TPL conveyed similarly valued lands in both 2017 and 2016 as well, and all this in addition to many other conservation projects and services. TR. FOR PUB. LAND & AFFILIATES, INDEPENDENT AUDITOR'S REPORT, CONSOLIDATED FINANCIAL STATEMENTS AND SUPPLEMENTAL INFORMATION (2017), <https://perma.cc/T9JR-JZR5>; TR. FOR PUB. LAND & AFFILIATES, INDEPENDENT AUDITOR'S REPORT, CONSOLIDATED FINANCIAL STATEMENTS AND SUPPLEMENTAL INFORMATION (2016), <https://perma.cc/JWD6-K89B>.

¹⁸⁵ *See infra* Appendix 5 for a map of the three parcels, each in different shades of maroon. The space shaded in orange constitutes the majority of the 1,000-acre site (aside from the part sold as part of this transaction). That site was the subject of a follow-up conservation project coordinated by Kent Whitehead and TPL and financed in part by another FWS grant.

The railroad site was the key piece of land as it was adjacent to the other sites and had acreage on the Potomac River. But the County could not move forward with an acquisition because the site was stuck in litigation between the site's owner and a foreclosing lender. Things changed in 2012 when County officials notified Whitehead that the lender on the rail line site had completed the foreclosure and the site now had a clean title. Whitehead reached out to the larger site's owners, a group of six or so family members whose family had owned the property for over a century. Luckily, they agreed to explore a sale of a portion of their acreage. The family members were not sure what the next generation—over twenty family members—would want to do with the land and they wanted to make a financially-beneficial conservation impact while there was consensus in the family. As the property continued to be passed down through the generations, the landowner representative explained, more and more descendants would have an ownership stake and a voice in the matter. It would be less and less clear that a consensus would form around a result that made sense. Whitehead hoped that the owner of the smaller contiguous property would also be interested in a sale. Since the property was wetland and would probably not be developed, there was probably little reason to hold onto it. Thankfully, in a meeting at the owner's home, Whitehead learned that the owner was ready to sell.

Whitehead moved quickly, eager to coordinate a project plan that could qualify for a grant to fund the acquisitions. TPL, represented by Whitehead, entered into option contracts with the owners of each of the three sites. As long as TPL could obtain funding to purchase the properties, it would close on the project. However, because applying for and winning government grants can take years, Whitehead negotiated option contracts that gave sufficient time to put all of the pieces in place.

The three sites controlled by the option contracts totaled 220 acres and a large enough space to catch the attention of large grant award administrators.¹⁸⁶ After months of work preparing the application, TPL applied on June 28, 2013, to the National Coastal Wetlands Conservation Grant Program administered by the United States Fish and Wildlife Service (USFWS).¹⁸⁷ Through the grant program, the Fish and Wildlife Service “awards grants of up to \$1 million to states based on a national

¹⁸⁶ The proposed project would conserve

400 feet of shoreline on the Potomac River . . . 128 acres of nationally decreasing wetlands types . . . 92 acres of forested upland . . . [a] wetland community that supports the . . . globally-rare sensitive joint vetch . . . [f]orage and nesting habitat for the bald eagle . . . [h]abitat for breeding and wintering waterfowl . . . [s]pawning, nursery, and forage habitat for a multitude of finfish species[.]

MD. DEP'T OF NAT. RES., NATIONAL COASTAL WETLANDS CONSERVATION GRANT PROPOSAL: POPES CREEK COASTAL WETLAND CONSERVATION 3 (2013). The Popes Creek watershed wetland complex is among the best examples of its kind in Maryland. *Id.* at 2. It lies within the Zekiah Swamp area and watershed, which has been identified by several agencies and organizations as being a critical conservation priority. *Id.*

¹⁸⁷ *Id.* at 1.

competition, which allows states to determine and address their highest conservation priorities in coastal areas.”¹⁸⁸ Because the grant program was structured as a grant to state government applicants, TPL worked with the Maryland Department of Natural Resources (DNR) on the application.¹⁸⁹ The DNR collaborated with TPL and the County on all aspects of the application and planned to transfer any funds received to the project.¹⁹⁰ To meet the funds matching requirements of the grant,¹⁹¹ Charles County allocated approximately \$500,000 for the project. In January 2014, TPL received notice that the application had been successful, qualifying for \$1 million in grant funding to “permanently protect 220 acres of marsh, wetlands, and forested land on Popes Creek.”¹⁹²

Part of the reason the application was strong was the location. The subject area was designated by the DNR “as both a Targeted Ecological Area and a Natural Heritage Area. It lies within the Zekiah Swamp area, which is a protection priority for the USFWS Chesapeake Bay Program, DNR, and Charles County.”¹⁹³ The fact that the funds obtained from outside sources exceeded the percentage required under the grant program also improved the project scoring.¹⁹⁴ TPL predicted that the project would score well using the factors considered by the Fish and Wildlife Service when evaluating applications, but in a competitive process with a variety of projects around the country, success could not be predicted.

Even after TPL was notified that the grant application was successful, there were six more months of administrative work until the funds were released. Yet by the end of 2014, TPL had successfully orchestrated the purchase of all three properties with the grant funds.¹⁹⁵ Ownership of the properties was ultimately vested in the Charles County Department of Parks and Recreation, the most natural long-term owner

¹⁸⁸ *\$16.5 Million in Grants to Conserve Coastal Wetlands*, *supra* note 153. The National Coastal Grants Wetlands Conservation Grants Program can be applied for to acquire lands (as in the Popes Creek project) or to engage in other conservation efforts. However, an application involving land acquisition is usually considered a higher priority as compared to non-acquisition applications. Telephone Interview with a U.S. Fish & Wildlife Service Regional Coordinator (Feb. 5, 2020) (notes on file with the author).

¹⁸⁹ See *National Coastal Wetlands Conservation Grants*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/3P7U-TYN3> (last visited Jan. 22, 2021); MD. DEPT OF NAT. RES., *supra* note 186, at 7.

¹⁹⁰ MD. DEPT OF NAT. RES., *supra* note 186 at 7.

¹⁹¹ National Coastal Wetlands Conservation Grant Program, 60 Fed. Reg. 49,264 (Jan. 30, 2002) (to be codified at 7 C.F.R. pt. 84). The grant program requires that a certain percentage of total project costs must be funded by other sources.

¹⁹² *Hoyer Announces \$1.6 Million in Grants to Support Conservation in Charles County*, U.S. CONGRESSMAN STENY HOYER (Jan. 24, 2014), <https://perma.cc/22SM-7U55>. See *infra*, Appendix 9 for an Area Map of Popes Creek.

¹⁹³ *\$16.5 Million in Grants to Conserve Coastal Wetlands*, *supra* note 153.

¹⁹⁴ See DEP’T OF INTERIOR, NATIONAL COASTAL WETLANDS CONSERVATION GRANT PROGRAM: FISCAL YEAR 2019 NOTICE OF FUNDING OPPORTUNITY 21 (2019).

¹⁹⁵ MD. DEPT OF NAT. RES., *supra* note 186, at 2, 7.

for the site because of its resources.¹⁹⁶ The Parks Department's multimillion dollar budget and dozens of staff would enable it to conserve the site and develop recreational infrastructure. The County was thrilled to participate in the conservation of important lands near the Potomac River and to benefit from grant funds that could be used for conservation as well as for a park on the abandoned rail line site.¹⁹⁷ The recreational component is years away from completion,¹⁹⁸ but the promise of a tranquil park inside a remote nature preserve is exciting.

Even though the existence of the large USFWS grant facilitated this conservation assemblage, the success of this project was far from inevitable. The marketability of key lots like the abandoned rail line site, the willingness of landowners to sell, and significant coordination efforts among local, state, and federal agencies were all necessary elements that had the potential to hinder or prevent the successful outcome. And the expertise necessary to carry out such a project meant that not everyone would be able to realize the potential even if the opportunity did present itself. Popes Creek demonstrates that conservation assemblages, those rare projects at the intersection of talent and opportunity, offer the promise of great benefits to ecosystems, natural resources, and society.

V. CONCLUSION

The benefits offered by conservation assemblages far exceed the gains offered by the sum of the aggregated parts. In the same way that grand development projects in the private sector may require control over multiple parcels, assemblages in the conservation context can protect, cultivate, and inspire in ways that smaller parcels cannot. Although land parcels are regularly assembled in the private sector, and sometimes quickly, coordinated conservation assemblages rarely occur and when they do they take a long time. A variety of logistical and tax law factors contribute to this state of affairs, but the central cause is financial: private-sector entrepreneurs can pay much higher sums for property in the pursuit of profit. In contrast, financing is much more limited for conservation projects and, depending on the structure of the conservation agreement, landowners may only be able to receive a fraction of market value for turning over a measure of control to conservation professionals.

But even though conservation assemblages are rare, the case studies discussed above demonstrate that they are possible and offer great promise. Although the two projects detailed in Part IV were led by sophisticated professionals with sizeable grants at their disposal, assemblages can be accomplished by smaller conservation groups as well. By anticipating and avoiding the logistical and legal pitfalls described in Parts II and III, these groups can leverage the limited resources they have

¹⁹⁶ *See id.* at 7.

¹⁹⁷ *See infra* Appendix 8.

¹⁹⁸ Telephone Interview with Charles County Department of Parks and Recreation (Feb. 4, 2020) (notes on file with the author).

to produce a greater impact. With proper preparation, these groups can identify and act on opportunities for valuable assemblage, taking advantage of unique opportunities to bring parcels together for a higher conservation impact.

VI. APPENDICES

Appendix 1: Section 170 Tax Law Guidelines for Conservation Assemblages

Conservation easements must not be conditional gifts (for example, contingent on other parcels being purchased at the same time).¹⁹⁹

Donee organizations must be qualifying organizations under 26 U.S.C. § 170(h)(3).²⁰⁰ Even if the ultimate recipient of the donation qualifies, the donee must qualify.²⁰¹

An offer or advertisement of an anticipated post-assemblage benefit could result in a cancelled—or reduced—valuation of a grant of land or conservation restriction by increasing the post-donation value (or “after value”) of the restricted land and/or other property holdings of the donor and family members.²⁰²

Gifts of land or conservation easements must not be deemed to be in exchange for a benefit (for example, for aggregation services or for restrictions on other properties in the vicinity).²⁰³ In the event of a quid pro quo determination, deductions may be reduced or denied.²⁰⁴

Federal tax deductions available to a donor are reduced to the extent that state tax credits are received or expected in consideration.²⁰⁵ But landowners anticipating state tax credits granted to larger conservation assemblages (such as the credits granted in the Leyden assemblage described above) might claim valuable deductions and then find that the tax credits are not available because of decisions made by others.²⁰⁶ An amended return might correct such a situation, but even the delay in tax benefits might be costly to the taxpayer.²⁰⁷

Conservation easement donations do not qualify for deduction until they are recorded because unrecorded easements are not enforceable in perpetuity.²⁰⁸ However, donations of fee simple interests qualify for deductions according to the date of transfer.²⁰⁹ When both kinds of

¹⁹⁹ Treas. Reg. §§ 1.170A-1(e), 1.170A-7(a)(3) (2020).

²⁰⁰ *Id.* § 1.170A-14(c)(1); I.R.C. § 170(h)(3) (2018).

²⁰¹ *See* Treas. Reg. § 1.170A-14(c).

²⁰² *See id.* § 1.170A-14(h)(3)(i).

²⁰³ *See id.* § 1.170A-1(h).

²⁰⁴ *See* I.R.C. § 170(a); Treas. Reg. § 1.170A-1(h).

²⁰⁵ *Id.* § 1.170A-1(h)(3)(i).

²⁰⁶ Treas. Reg. § 1.170A-1(h)(3)(i); *see* discussion *supra* Part III.A.

²⁰⁷ *See* discussion *supra* Part III.A.

²⁰⁸ Treas. Reg. § 1.170A-14(g).

²⁰⁹ *Id.* § 1.170A-1(b).

property donations are involved in an assemblage effort, confusing this important detail could be costly to donors.

Appraisals for each property donated must be made no earlier than sixty days prior to contribution.²¹⁰ Batching several appraisals to be efficient might result in a violation of this requirement, depending on the date of donation of each property.

A taxpayer must receive “contemporaneous written acknowledgement” of the donation.²¹¹

Each property must, on its own, fulfill the “conservation purpose” criteria required under the conservation easement rules.²¹² For example, in the case of an open space preservation grant, each property must fulfill the requirements of 26 C.F.R. § 1.170A-14(d)(4).²¹³

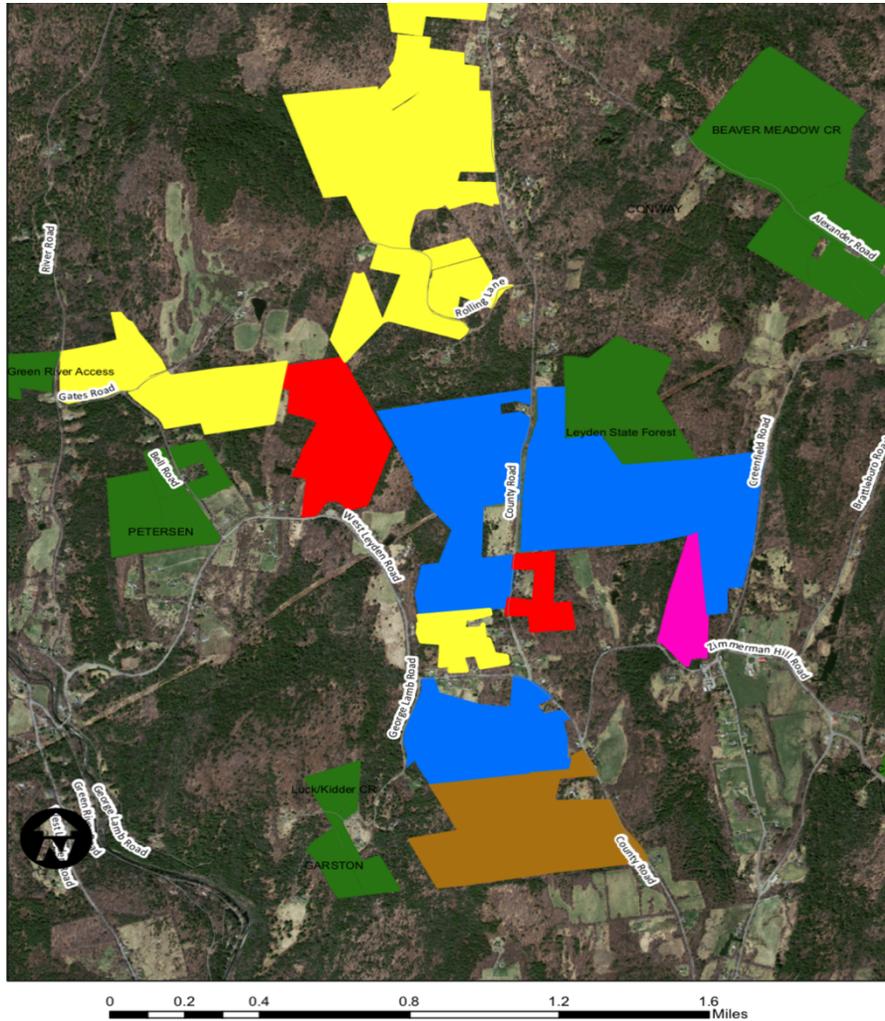
²¹⁰ *Id.* § 1.170A-17(a)(4).

²¹¹ I.R.C. § 170(f)(8)(A); *see* Treas. Reg. § 1.170A-13(f)(3) (providing the definition of “contemporaneous”).

²¹² Treas. Reg. § 1.170A-14(d).

²¹³ *Id.* § 1.170A-14(d)(4).

Appendix 2: Leyden Working Farms and Forest Conservation Partnership Map²¹⁴



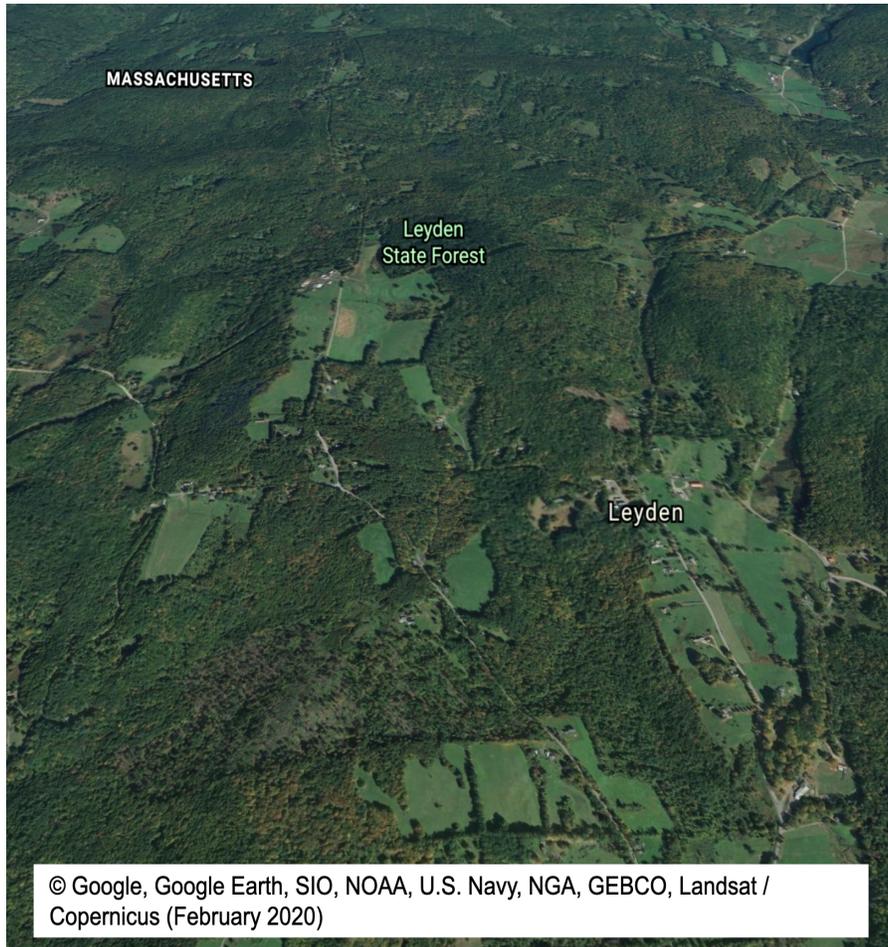
Leyden Working Farms and Forest Conservation Partnership
962 acres
 A joint project of Leyden landowners, Mount Grace Land Conservation Trust, Franklin Land Trust, the Town of Leyden, and the MA Dept. of Agricultural Resources, with support from the MA Landscape Partnership Program, Open Space Institute, The Conservation Fund, Fields Pond Foundation, and the 1772 Foundation.

Public access allowed on all properties during daylight hours.
 No ATVs permitted.
 Take nothing out, leave nothing behind.

- Hunting, snowmobiling allowed.
- Hunting, snowmobiling as posted.
- Access along trail only. Hunting, snowmobiling as posted.
- No hunting.
- Other Protected Land

²¹⁴ To see this graphic in color, please visit our online journal at https://law.lclark.edu/law_reviews/environmental_law/.

*Appendix 3: Leyden Working Farms and Forest Conservation
Partnership Aerial View²¹⁵*



²¹⁵ *Leyden State Forest*, GOOGLE EARTH, <https://perma.cc/P5BV-WAC6> (last visited Jan. 30, 2021).

Appendix 4: Leyden Working Farms and Forest Conservation Project News Article²¹⁶

THE RECORDER
 Serving the people of Franklin County and the North Quabbin Region recorder.com

ESTABLISHED 1792 FRIDAY
 January 10, 2014

75c

SAVING THE LAND



Recorder file photo

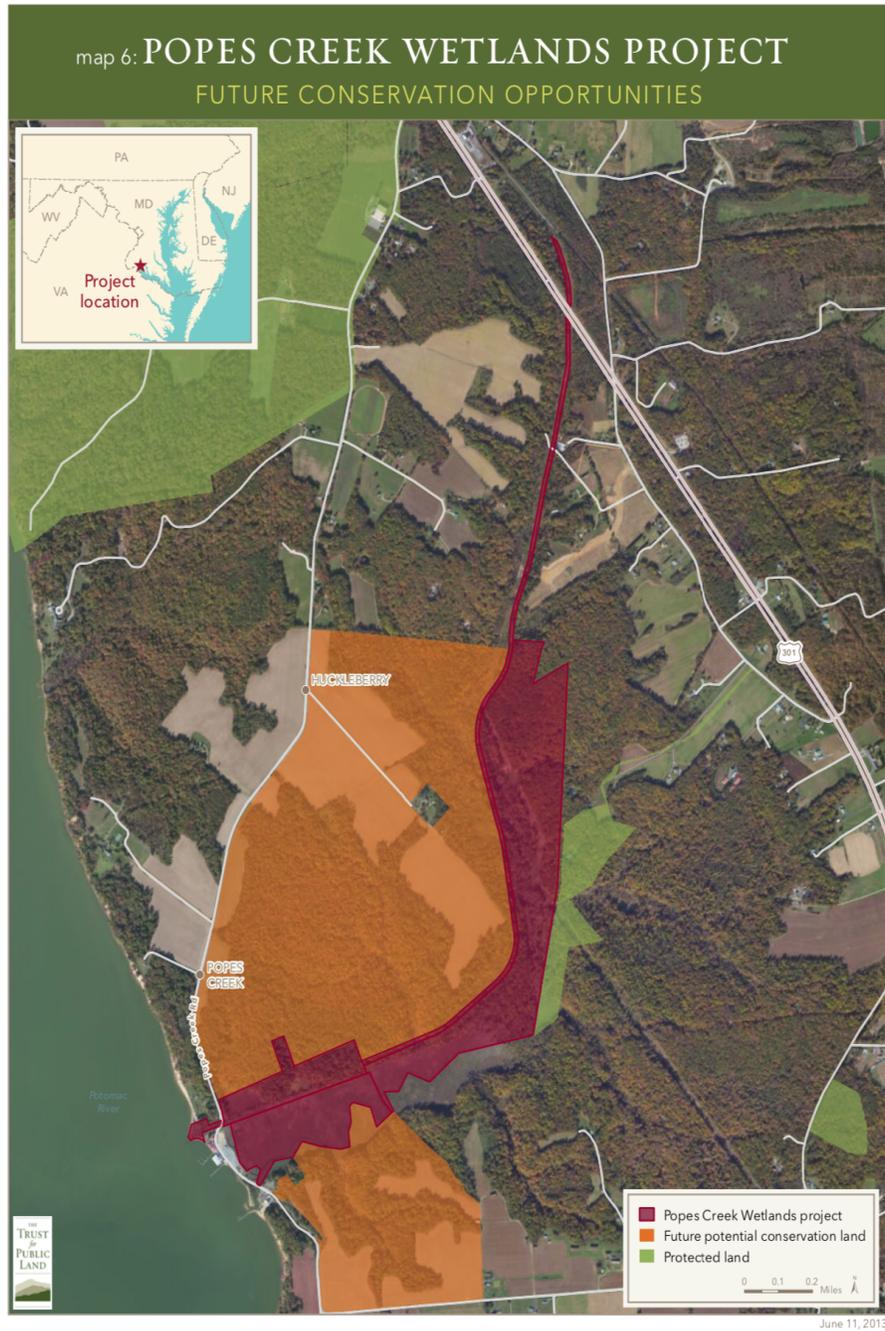
In this file photo, Warren Facey stands at his Bree-Z-Knoll Farm in Leyden. Facey's land is part of a large preservation deal that will protect 960 acres of contiguous land.

'Landscape Partnership' protects nearly 1,000 Leyden acres

By **RICHIE DAVIS**
 Recorder Staff

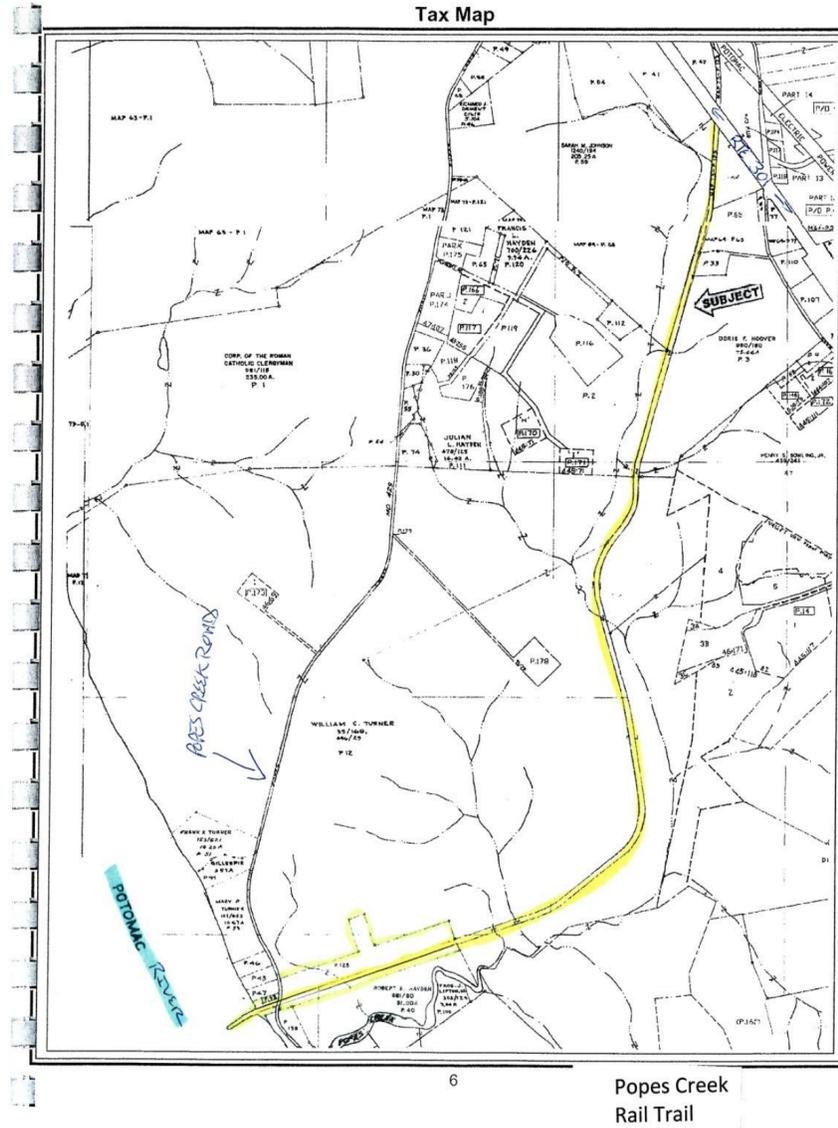
Trust and Franklin Land Trust of this picturesque town. The Landscape Partnership announced Thursday their 1½-year "All of the land is within Program requires a partnership long effort to place conservation Greenfield's water sunnily" said of land trust with a town or state

²¹⁶ Richie Davis, 'Landscape Partnership' Protects Nearly 1,000 Leyden Acres, RECORDER, Jan. 10, 2014, at A1, A8.

Appendix 5: Popes Creek Project Map²¹⁷

²¹⁷ The orange area was protected in a second, subsequent conservation project. MD. DEP'T OF NAT. RES., *supra* note 186, at map 6. To see this graphic in color, please visit our online journal at https://law.lclark.edu/law_reviews/environmental_law/.

Appendix 6: Popes Creek Wetlands Project Aerial View²¹⁸



218 CHARLES CTY., MD., REQUEST FOR PROPOSALS: POPES CREEK RAIL TRAIL DESIGN RFP NUMBER 16-02, APP. 2 (2015). To see this graphic in color, please visit our online journal at https://law.lclark.edu/law_reviews/environmental_law/.

Appendix 7: Popes Creek Chesapeake Bay Watershed Regional Map²¹⁹

²¹⁹ MD. DEPT OF NAT. RES., *supra* note 186, at map 4. To see this graphic in color, please visit our online journal at https://law.lclark.edu/law_reviews/environmental_law/.

Appendix 8: Recreation Enhancement Plan Map²²⁰



²²⁰ *Id.* at map 1. To see this graphic in color, please visit our online journal at https://law.lclark.edu/law_reviews/environmental_law/.

Appendix 9: Popes Creek Area Map²²¹

²²¹ *Id.* at map 3. To see this graphic in color, please visit our online journal at https://law.lclark.edu/law_reviews/environmental_law/.