APPRAISALS FOR WORKING LAND EASEMENTS:
CONSIDERATIONS IN OREGON

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The C2 Ranch near Eagle Point in Southern Oregon protected with a donated conservation easement held by the Southern Oregon Land Conservancy. Photo by Thomas Kirchen
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1 Background and Introduction

The use of conservation easements as a tool to protect habitat and agricultural lands (both farm and forest) has been widespread, both regionally and nationally. As development pressures increase in the areas surrounding larger metropolitan areas, adjacent agricultural lands are being placed within Urban Growth Boundaries or annexed to urban areas, and consequently converted to non-agricultural purposes.

In Oregon, particularly in the Willamette Valley, the pressure to convert farmland to urban levels of development is compounded by the fact that the majority of the population of Oregon lives in the Willamette Valley, and most urban areas are surrounded by high quality agricultural lands. Additionally, near urban areas, “shadow conversion” of agricultural land affects neighboring properties, making them in turn more vulnerable to conversion to non-farm use and eventual development. Despite strict regulations governing the expansion of Urban Growth Boundaries into adjacent agricultural lands, changes in zoning and an increasing number of exceptions allowed in state law have allowed for the development of agricultural land, with the expressed purpose of accommodating growing populations. As a result, since 1974 half a million acres were lost from agricultural use and 65,000 acres were removed from Exclusive Farm Use zoning.¹

Not only are farm and forest lands near urban areas vulnerable to development, but rangelands, primarily in Eastern Oregon, are threatened by partition which fragments available ranch sites into properties that are too small to support a viable ranch. For example, although most rangeland in Eastern Oregon can be divided into 160- or 320-acre parcels, ranches in Eastern Oregon must often be comprised of thousands of acres to generate enough agricultural income to support a single family.

Spurred by a speech to the legislature by Governor Tom McCall, castigating “sagebrush subdivisions, coastal condomania, and the ravenous rampages of suburbia,” the Oregon legislature began the process of developing state-wide planning goals in 1973. In May of 1973, Senate Bill 100 was approved, creating the Land Conservation and Development Commission (LCDC) and the Department of Land Conservation and Development (DLCD). LCDC’s first major task was to adopt Statewide Planning Goals that would guide the development of local comprehensive land use plans. In 1974, LCDC adopted 14 Statewide Planning goals, which have since been increased to a total of 19 goals. Of these, Goal 3 expresses the purpose of preserving and maintaining agricultural lands. All local governments were required to develop zoning ordinances that complied with the adopted goals. By 1986, all Oregon cities and counties had approved comprehensive plans that met the state-wide planning goals.

Apart from governmental regulations, habitat conservation easements have been utilized to acquire development rights on rural lands and protect sensitive habitat from conversion, while working lands easements contain both habitat protection components and a requirement that the land remains available for agricultural use in perpetuity. Payments to land owners for the conservation easement compensate them for the loss of market value of their property as the result of the easement - an attractive financial incentive. Additionally, landowners qualify for state and federal charitable income tax benefits when they donate all or part of the easement value. The financial benefits of conveying an easement can be especially beneficial to the landowner and their successors in planning their estate.

The good news in terms of farm land protection is that the rate of conversion of agricultural lands has slowed significantly after the State of Oregon and local communities adopted comprehensive land use plans in the 1980’s. The more restrictive land use ordinances adopted by the counties and cities in conformance with state-wide planning goals that protect farm and forest lands for farm and forest uses are apparently meeting the intended goals, although there are numerous groups that believe the current ordinances do not go far enough in the mandate to protect farm land from development.

Ironically, it is the apparent success of the more restrictive zoning ordinances that has made the preservation of land through the acquisition of conservation/working lands easements more difficult for easement holders. According to most publications, the financial benefit of conveying a conservation easement is the primary motivation of easement sellers. A study completed for the Coalition of Oregon Land Trusts in October 2016 stated that “insufficient value of conservation easements (because of Oregon’s strong land use system) was the largest reported deterrent for farming landowners to convey an easement” in Oregon among interviewed easement holders. As the protective language in the zoning ordinances reduced the number of alternative or potentially more profitable uses for farm/forest properties, the restrictive easement language within an easement had less of a financial impact on the value of the property, and the financial benefits became a less compelling factor in the decision making process.

In response to this reaction, land trusts, Soil and Water Conservation Districts and others are looking closely at how to maximize the potential financial benefit to property owners interested in conveying a conservation easement or, more recently, a working lands easement. Although not a new tool, working lands easements generally permit productive farming, ranching and/or forestry practices, and in some cases require active agricultural use of the property, whereas the more “traditional” conservation easement tended to prohibit active farming/forestry practices in all or portions of the property in order to protect identified conservation attributes of the property. Generally, a working lands easement contains protection provisions prohibiting certain uses over portions of the easement property, while permitting or requiring active farm/forestry practices on other parts of the property.

In order to determine which potential use restrictions would result in the highest payment to the landowner, it is necessary to have:

1. A basic understanding of the appraisal process;
2. Defined property rights existing prior to the easement;
3. Defined prohibited/altered uses contained in the easement, and:
4. An understanding of how the conveyed rights are prioritized in terms of value.

This paper discusses the above items, with the intent to provide land trusts and Soil and Water Conservation Districts thinking of starting a working lands easement program, with the tools to review or create an effective strategy for easement acquisition on Exclusive Farm Use zoned land. Where possible, some specific values will be discussed, but, given locational and physical characteristic differences between properties, an understanding of the concepts involved in the valuation of the property should provide the user with the necessary background to focus on the potential financial impact of the specific easement language.
2 The Appraisal Process: Terminology, Concepts and Methodology

2.1 USPAP vs. UASFLA

The acronyms USPAP (Uniform Standards for Professional Appraisal Practice) and UASFLA (Uniform Appraisal Standards for Federal Land Acquisition, usually referred to as the “Yellow Book”) are commonly encountered in the appraisal process and in early discussions between the appraiser and the client.

USPAP refers to a set of standards first developed in the 1980’s by a joint committee representing the major U.S. and Canadian appraisal organizations and adopted in 1989 by the Appraisal Foundation and the Appraisal Standards Board. The Foundation sets the congressionally authorized standards and qualifications for real estate appraisers, and provides guidance on recognized valuation methodology and techniques for valuation professionals. USPAP is the guiding document in the valuation industry, with the UASFLA requiring compliance with USPAP in all appraisals.

The UASFLA (Yellow Book) was first published in 1971 by the Interagency Land Acquisition Conference, and created uniformity in appraisal standards for the many federal agencies engaged in property acquisition. This set of standards was adopted to insure compliance with the Fifth Amendment of the U.S. Constitution, which states in part that private property shall not be taken for public use without just compensation. Further, federal case law holds that just compensation must reflect basic principles of fairness and justice for both the individual whose property is taken and the public which must pay for it. As federal funds are often utilized in the acquisition of conservation easements, compliance with the UASFLA is required by most funding sources.

The Yellow Book was not developed specifically for the valuation of conservation easements. In fact, the terms “conservation” or “conservation easement” appear on only 7 pages of the 206 pages in the Yellow Book. The standards are utilized in the valuation of any real property rights for federal acquisition, including properties acquired by eminent domain.

Because the Yellow Book standards are the most rigorous of the two and the standard used when federal funds or tax benefits result from the conveyance of an easement, this paper will most often refer to the Yellow Book standards for reference, guidance, and explanation.

2.2 Market Value

There are multiple definitions of market value depending on the standards utilized in the individual appraisal assignment. Two common definitions of market value are included below:

The 2016 edition of the Yellow Book defines market value as:

... the amount in cash, or on terms equivalent to cash, for which in all probability the property would have sold on the effective date of value, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property.
The definition of market value as utilized in most appraisals completed for federally insured lending institutions is as follows:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. buyer and seller are typically motivated;
2. both parties are well informed or well advised, and acting in what they consider their own best interests;
3. a reasonable time is allowed for exposure in the open market;
4. payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
5. the price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.\(^2\)

The common threads in most definitions of market value include lack of duress for both buyer and seller, knowledgeable buyers and sellers, and a cash sale or terms equivalent to cash, unaffected by special or creative financing or sales concessions granted due to relationships between the buyer and seller. Note that the Yellow Book definition does not reference a reasonable time for market exposure.

As the definition includes both a knowledgeable buyer and seller, it is clear that the estimate of market value reflects the actions and perceptions of participants in the market in general. In some cases, property owners are emotionally attached to a property due to a long family history of ownership, or believe the property has more value to them than to the overall market for a wide variety of reasons. However, the valuation of the property must reflect its position in the market for that specific type of property based on sales of similar and comparable properties. Similarly, the property can only be valued based on economic uses, and not its habitat, viewshed, or open space values unless they have a measurable economic value, which is uncommon. The Yellow Book is very clear that a "non-economic highest and best use, such as conservation, natural lands, preservation, or any use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value."

### 2.3 Bundle of Rights Theory

This concept compares property ownership to a bundle of sticks, with each stick representing a distinct and separate right of the property owner, such as the ability to lease, sell, or use for any allowed purpose, give it away, or chose to do none of the above. When all of the individual rights are bundled together, it is known as the "fee simple estate," or absolute ownership unencumbered by any other interest or estate.

A conservation/working lands easement conveys some of the sticks in the bundle of rights to the easement holder, generally by prohibiting certain uses which would be included in the fee simple

\(^2\) 12 C.F.R. Part 34.42(g); 55 Federal Register 34696, August 24, 1990, as amended at 57 Federal Register 12202, April 9, 1992; 59 Federal Register 29499, June 7, 1994.
estate. These prohibitions could include active agricultural use adjacent to identified waterways or within riparian areas, subdivision or division of the property, etc. Conservation/working lands easements may also contain affirmative obligations, requiring the owner to do identified actions, such as complete conservation activities or actively farm the property. As one of the rights in the bundle is to do nothing with the property, an affirmative obligation might also be considered as an acquisition of the right to not farm.

2.4 “Before and After” Appraisals

As easements convey only identified rights to an easement holder and impose only the specified limitations, obligations, and restrictions on use, appraisals typically utilize a “Before and After” approach, which is essentially the difference between two appraisals. The “before” value represents the value of the property before the acquisition/sale of the easement, in fee simple estate, and subject to whatever easements or conditions already encumber the property, such as utility easements, road use agreements, etc. The “after” value represents the market value of the property after the easement is in place, considering the all of the use restrictions and affirmative obligations in the easement document. The difference between the two values represents “just compensation” for the rights acquired. Technically speaking, the easement itself is not valued. Rather, the property owner is paid the difference between the before and after values.

2.5 Highest and Best Use

The determination of highest and best use is one of the most critical and important elements in the appraisal process, and doubly-so in the valuation of conservation easements utilizing the before and after approach (essentially two separate appraisals).

The definition of highest and best use in the Yellow Book is short and simple: “The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.”

It is important to recognize at this point that an easement generally changes or alters the highest and best use of a property, and it is this change or alteration in use that potentially impacts value. For example, assume an agricultural property contains 50 acres of irrigated land adjacent to a waterway. A conservation easement is placed on the property with specific language restricting any active agricultural use of the 50 acres in order to protect the conservation values of the creek and surrounding area. In the before valuation, the highest and best use would include references to 50 acres of productive agricultural land, whether or not it was actually in irrigated production; in the after valuation, the highest and best use would include reference to 50 acres of protected land that is no longer suitable for agricultural use.

This change in highest and best use has a readily determinable value. In most markets, there is adequate sales data available to determine the value of productive farmland versus non-productive farmland/riparian land, and this variation in price would be a part of the difference in values in the before and after valuation of the property. Generally speaking, this type of alteration in highest and best use would be considered as one of the bigger sticks in the bundle of rights.

Other provisions of conservation easements, when taken individually, can have virtually no impact on value. For example, some conservation easements contain language prohibiting the washing of vehicles and/or farm equipment within the easement area, prohibitions on the creation of new trails
or roads not directly related to the purpose of the easement, and similar less onerous conditions. These types of prohibitions, looked at on an individual basis, would probably not have any measurable impact on highest and best use and therefore, no measurable impact on value. However, when considered in the aggregate, these lesser prohibitions do have a measurable impact on value. For example, one Oregon property with a conservation easement in place at the time of sale, indicated an 8.4% decline in market value above and beyond the measurable conveyed rights. This loss in value is attributable to the sum of the lesser conveyed rights, as well as an apparent general market distaste for properties with use restrictions, e.g. a conservation easement. Concerns over privacy, potential changes in how certain easement conditions may be defined in the future, and the general notion that the easement essentially creates a partnership requiring approval by the easement holder for certain operations are also cited as reasons for the loss in value above and beyond the more discernable aspects such as conversion of tillable to non-tillable lands, loss of development rights, etc. In Oregon, it can be said with a relatively high degree of certainty that properties with conservation easements in place have a smaller market and generally longer exposure and marketing time when placed on the market for sale, although this may not be the case in areas where conservation easements are more commonplace. In some areas, a conservation easement restricting development on one property may be a positive attribute to an adjoining parcel, with the conservation easement seen as protection against future adjacent development that may interfere with views, increase traffic and potentially decrease privacy.

The conclusion of highest and best use by the appraiser is the result of analysis of the market and specific property characteristics. Yellow Book and USPAP define the four tests necessary to form a credible opinion of highest and best use. A qualifying use of a property must be all of these things:

i. Legally permissible,
ii. Physically possible,
iii. Financially feasible and
iv. Result in the highest value.

It may be helpful to visualize the process of analysis of highest and best use as a triangle, with all legally allowable uses forming the wide base of the triangle, with each additional consideration narrowing the list of potential highest and best uses by the process of elimination.

### 2.5.1 Legally Permissible

Legal permissibility generally focuses on the zoning regulations that dictate allowable uses of property, plus any conditions of title, such as utility easements, access easements or other recorded documents that may have an impact on use. The State of Oregon has a complex set of goals that were required to be considered in the development of the county zoning regulations, and there is some level of continuity in both farm and forest zoning statewide. Rural residential zoning regulations can be vastly different, as can rural industrial and commercial zoning. However, the majority of working lands easements involve farm or forest zoned properties. There are typically multiple permitted and allowed uses identified in County farm and forest zoning ordinances, but the actual development patterns in the area usually provide an appraiser’s basis for the most common uses. In essence, every EFU zoned property is legally allowed to be utilized for any of the permitted and conditional uses contained in the EFU zoning ordinance.

### 2.5.2 Physically Possible

Physical possibility generally focuses on the physical characteristics of the property as it relates to the allowed legal uses. Topography, location within a designated flood plain, location of designated wetlands, soil quality and other physical characteristics must be weighed against potential legal uses.
For example, if a 10-acre parcel zoned for rural residential use which allows the development of one or more dwellings contains steep slopes that exceed County standards for development, the landowner might not be permitted to construct the number of dwellings legally allowed by zoning. In other words, although the development of a dwelling is an allowed legal use in the zoning ordinance, the physical characteristics of the site may preclude that particular use.

For agricultural properties, access, soil quality, water rights (irrigation or the lack thereof), and topography are some of the considerations under physically possible uses. It would be incorrect to conclude that a site is suitable for all agricultural uses if the soils are poor, with moderate slopes and there are no water rights available to the property. The analysis and inclusion of physical characteristics in the determination of highest and best use essentially narrows down the list of legal uses to include only those uses that are physically possible as well as legally permissible.

2.5.3 Financially feasible

Financial feasibility considerations generally focus on supply and demand factors within the market area of the property at the time of the appraisal. For example, golf course development is a conditional use under ORS 215.293(2) requiring the approval of the County Planning Director in many of the farm zones in Oregon. A site may be physically capable of supporting golf course development, but the cost of development and the expected return on investment from a golf course in a rural location far from metropolitan centers may preclude golf course development as a financially feasible use: the cost of development may exceed the market value of the finished product. The same could be said for the destination resort use, which is a conditional use in the EFU zone.

After the consideration of legal and physically possible uses, the list of possible highest and best uses of a property has usually been pared down to a more workable level. A review of market activity via regional and local multiple listing services will provide the data for a determination of supply and demand. There should be listings of property available for sale within the market area with uses similar to the indicated uses from the legal and physically possible use analysis, and sales of property in that category, indicative of an active market. For example, a 200-acre agricultural property may be legally and physically suitable for a golf course or destination resort, as well as an agricultural use. If there are no local listings or sales of property with the intended use as a golf course or destination resort, it could be reasonably concluded there is no market for that use. If there are numerous listed and sold local properties under agricultural use for the purpose of a golf course, the data would support a highest and best use of agricultural use, with a demonstrated supply and demand for a golf course.

2.5.4 Results in the Highest Value

The highest value of the potential legally permissible, physically possible, and financially feasible uses can sometimes require a more detailed analysis. For example, some urban residential zoning ordinances allow both single family and duplex development on corner lots. Sales data must be reviewed to determine which of the allowed uses (single family or duplex) results in the highest value/price. For agricultural lands, the consideration of highest value is less clear cut, but is not typically a significant issue.

When the appraiser reaches a conclusion of highest and best use for any particular property, the sales data utilized in the valuation of the property should have a comparable highest and best use. The concluded highest and best use sets the foundation for the selection and analysis of sales necessary to arrive at a credible opinion of value.
The analysis of highest and best use is completed in both the before and after scenarios. The restrictions, limitations or obligations imposed by the easement typically alter the concluded highest and best use of the property determined in the before situation. It is this change in highest and best use that triggers the potential change in value as a result of the easement.

For example, assume that an easement is proposed for a 200-acre parcel of tillable irrigated land with development rights for one home site. The proposed easement language prohibits any agricultural activity over 50 acres of the property to protect habitat and further acquires all development rights to the property. The highest and best use of the property in the before situation was concluded to be as a 200-acre agricultural site with a residential home site component. In the after situation, the highest and best use be concluded as a 200-acre parcel with 150 tillable irrigated acres, 50 acres of non-tillable land and no home site component.

In determining highest and best use, some confusion has been created by the use of the term “conservation values”, which are usually identified in the easement document as those features of the property considered to have biological, ecological, social, or cultural values which are considered important on a regional or national level. However, the term “value” in appraisal guidelines and to the public in general typically connotes a monetary price and some might incorrectly conclude that conservation values are synonymous with monetary value, and that conservation, preservation, or open space is therefore an economic use of the property and suitable as a highest and best use. However, the Courts have ruled that conservation, preservation or open space is not an economic use and that appraisals completed under Yellow Book standards cannot conclude that preservation, conservation, or open space is a highest and best use. There is a lengthy discussion of this topic in the 2016 Edition of the Yellow Book in Section 4.3.2.3 on pages 105 to 107 if further justification of this concept is needed.

The requirement that a concluded highest and best use must be an economic use is a determinant in the probable conclusion that the acquisition of the right to use the property for a school, electrical transmission site or other “public” use does not result in a loss in value to the property. If a rural site is chosen for development of a school, the valuation of that property by the acquiring agency would be based on the property’s economic highest and best use, such as farm land if it is zoned EFU. There is no added value based on the desired use of the property by the acquiring agency; the land value is based on the concluded highest and best use as determined by the legally permissible, physically possible and financially feasible uses of the site in the market at the time of the valuation.

Lastly, it must be remembered that in order for an easement condition or restriction to have value, it must restrict a use or right that is actually inherent in the property and is part of its concluded highest and best use in the before situation. For example, a restriction against commercial or industrial use of an EFU zoned property has no impact; commercial and industrial uses are not allowed on EFU zoned sites, and prohibiting a use that is already prohibited does not result in a loss of value. Similarly, a restriction against a use that is legally permissible, such as a golf course or destination resort, may not have any financial impact as these potential uses may not be physically possible or financially feasible for the property in question. It is also required that the concluded highest and best use not rely on an unsupported assumption, such as the inclusion of the property within an Urban Growth Boundary (UGB) or the assumption that a property can be rezoned to a more intensive use. Reliance upon unsupported assumptions can result in a speculative value position that would not be supported by a high degree of probability. The key word is “unsupported;” it is possible that inclusion of a property into the UGB is likely based on prior governmental approval or identification of the general area as suitable for inclusion in the UGB, at which time the valuation of the property should consider this probability in the valuation assignment.
2.6 Valuation Methodologies

There are three primary valuation methodologies utilized in the appraisal of real property; the Cost Approach, Income Capitalization Approach, and the Sales Comparison Approach. Depending upon the type of property being appraised, all three approaches may be utilized, providing three value indications which are then reconciled into a final estimate of market value.

2.6.1 The Cost Approach

The Cost Approach is reserved for those properties with improvements/structures. In the Cost Approach, the cost to construct the improvements as of the date of value is determined, depreciation from all sources is deducted from the estimate of "cost new," and the resulting depreciated replacement cost is added to the estimated market value of the site/land, which is usually determined via the Sales Comparison Approach within the Cost Approach.

2.6.2 The Income Capitalization Approach

The Income Capitalization Approach is commonly utilized in the valuation of income producing properties such as apartments, office buildings, industrial facilities, etc. Market rent is determined, applicable operating expenses are deducted, with the resulting net operating income (NOI) representing the amount of annual revenue generated by the property prior to the mortgage expense. Sales of similar income producing properties are analyzed to determine the relationship between NOI and sales price/value. Agricultural land can be valued via the Income Approach, using market rents for agricultural land as the measurement of income. The relationship between income and price/value is determined by sales of agricultural land in the Sales Comparison Approach.

In both of the above valuation methods, the Sales Comparison Approach is utilized within the approaches. In the Cost Approach, land value is estimated via the Sales Comparison Approach, while the measurement of the relationship between income and value in the Income Approach is based on the review of sales via the Sales Comparison Approach.

2.6.3 The Sales Comparison Approach

The Sales Comparison Approach is the most common, applicable and reliable valuation methodology for most agricultural properties where the majority of the value is primarily in the land. After determining the physical characteristics of the site, such as location, soil types and quality, availability of water rights, topography, etc., sales data is gathered, confirmed and analyzed and compared to the property being appraised. The sales data utilized is selected based on its similarity to the property being appraised. For example, if the property under analysis consists of 200 acres of irrigated Class I and Class II agricultural land, the sales search focuses on these characteristics.

Most agricultural properties are not uniform in terms of soils quality and other characteristics, and contain combinations of soils quality, tillable and non-tillable lands, irrigated and non-irrigated land, etc. Therefore, it is common to see a sales analysis that allocates value to the varying components of the sale property based on the interviews with those involved in the transaction. For example, a sale price may be allocated as price per irrigated acre, price per non-irrigated acre, price per acre of non-tillable land, or analyzed by soils type/class. Assuming there is adequate quality and quantity of sales data, there is usually a discernable value trend for each component, which can be allocated to the various components of the property being appraised.

At this point, it should be reasonably clear that the appraiser’s role is to reflect the activity and prices paid by participants in the market for the type of property being appraised. Based on the definition of
market value in an earlier section, the concluded value(s) is/are based on market transactions between knowledgeable participants in the market, under no duress or compulsion to buy or sell, with due consideration of all available economic uses of the property. In other words, the appraiser does not “create” value, but reflects the values as determined by market participants.

In a “before and after” valuation assignment on agricultural land being considered for an easement, the “before” value is usually the least complicated. All property rights are usually intact, subject to recorded easements and conditions which usually entail common utility easements, possible access easements, and so on. It is the “after” value that poses the difficulty. The terms of the easement document may prohibit or limit certain uses, place obligations on the land owner that are not common to all properties or ownership, or generally create a condition that is not common in the market. The effect of certain conditions/limitations on property is sometimes readily discernable, such as the conversion of tillable land to non-tillable land to protect identified conservation values. The sales data should be adequate to determine the price/value difference between tillable and non-tillable land, providing market evidence of the impact of the prohibition/limitation.

But what happens when the terms of the easement create a condition that is not present in the sales data? For example, assume an easement sets a building envelope size for a single-family residence not to exceed 1,000 square feet in an area where the “standard” residence size is between 2,500 and 3,500 square feet. If no sales are found that have a similar condition at the time of sale, there would therefore be no market evidence to support a specific impact in terms of price/value. The appraiser may believe this condition has a negative impact on price in the after situation, but needs supporting evidence to confirm his/her belief, which may come in the form of opinions of brokers and other active market participants, including other appraisers with relevant experience in the market.

Obviously, this type of data is inferior to actual empirical evidence derived from sales data, and any adjustments or value conclusions based on opinions is subject to a higher level of scrutiny in the appraisal review process (Yellow Book appraisals are typically reviewed by staff at the funding source or by an independent appraiser under contract to the funding source). This does not mean the adjustments or value conclusions based on the opinions of others are not allowed under Yellow Book, but there should be an acceptable level of support to confirm the appraiser’s opinion. For example, if six brokers active in the market are interviewed, and all six state they believe the market would penalize the property by 5% to 10%, a similar adjustment would be reasonably supported. However, if two brokers believe that no adjustment would be warranted, two indicate a small adjustment might be warranted and two have no opinion, the level of support would not be as convincing or compelling to warrant an adjustment.

The point is, given the number of potential limitations/prohibitions and conditions that are possible for inclusion in an easement, it is unlikely that there will be strong market support, as evidenced by sales data, of the reaction by the market to all of the specific clauses or restrictions. Appraisers, easement holders, property owners and funding sources are well aware that some easement language may create a unique property condition requiring a different level of analysis and reasoning when there is no supportive sales data. Appraisers in particular look for sales of properties that were encumbered by a conservation easement at the time of sale in hopes of gleaning market support for adjustments, but not all easements have the same restrictions and conditions, and the level of impact varies from easement to easement.
3 Defined Property Rights Existing Prior to the Easement

3.1 Subdivision Rights Inherent to EFU Zoning

Exclusive Farm Use (EFU) zoning allows for limited partitioning/dividing of a property. EFU zones are typically categorized as subsets, such as EFU-30 or EFU-40, which would allow for the creation of 30- or 40-acre parcels out of a larger parcel, assuming the remainder property meets the minimum site size. Therefore, it takes at least 60 acres to divide in the EFU-30 zone and 80 acres to divide in the EFU-40 zone. If the property subject to the conservation easement prohibiting partitioning contains 50 acres, and is in the EFU-30 zone, no partitioning is possible. Therefore, a prohibition of partitioning or dividing is a moot point: the right did not exist in the before situation and does not exist in the after situation. (Note: The property may have gained development rights via Measure 37/Measure 49, discussed below).

If the property contains say 61 acres and is zoned EFU-30, the County would allow partitioning of the property into two parcels of at least 30 acres per parcel. However, the right to partition does not carry with it the right to develop the new parcel(s) with a single family dwelling. Building approval can be granted, but, for most properties, the Planning Department must be supplied with documentation that the property has produced a defined level of gross income for two out of the last three years or three out of the last five years. For sites with high quality soils, the income threshold is $80,000 per year, reduced to $37,500 for non-high value soils. Very few properties have the ability to meet this income threshold for a 30-acre site. So, the ability to partition does not necessarily carry with it any increase in value for development potential.

As the size of the parcel increases, so does the potential for partitioning. In these instances, the location of the property takes on a bigger role in the analysis. Locations in relatively close proximity to metropolitan areas may have a demonstrated demand for smaller buildable sites, and a review of building activity and land use applications with the local planning department may provide supporting evidence. Of course, “comparables” - land sales in the area that demonstrate a higher value than non-development properties - are the real litmus test. For properties in more remote rural areas, the potential for partitioning may not be as likely or lucrative. A review of land use patterns and discussions with County planning staff and realtors that work in the area may provide the basis for any conclusion of value attributed to development rights. Again, the contention must be supported by market sales.

In the discussion of Highest and Best Use in a prior section, one of the four tests to determine highest and best use was financial feasibility. Remember that there are significant costs associated with development, including surveying, road/access development, extension of electrical service to individual sites, provisions to provide water to the planned sites, and soils that would support septic tank/drainfield systems. In more rural areas, there may be limited demand for residentially approved sites, and the ability to sell any potentially approved sites could entail extended marketing periods and a high degree of risk. The cost of development, including market risk, could potentially exceed the value of the finished product, or a conclusion that the proposed use is not financially feasible.

ORS 215.279 Farm income standard for dwelling in conjunction with farm use
A review of land use patterns in the area is a good starting point. If there is a demand for development parcels, there should be recent market evidence of larger parcels acquired and/or subdivided. The lack of this type of activity would generally indicate a lack of development rights/potential and any additional value attributed to those rights. Discussions with experienced real estate brokers in the area would also provide data for consideration. As all sales utilized in appraisal reports made to Yellow Book standards are confirmed with either the buyer, seller or real estate agents involved in the transaction, there is ample opportunity to simply ask the question “Did the potential to partition or subdivide property have an impact on the sales price/value of the property?”

If development rights exist and have value in the before situation/value, sales data would be analyzed to determine the values of properties with and without such development potential. Again, the loss in value as a result of the acquisition of development rights would be reflected in the value difference in the before (with development rights) and after (without development rights) value conclusions.

The degree of value change as a result of the acquisition of development rights is contingent on several factors. For most EFU zoned sites, development rights are fairly limited – usually restricted to one home site in conjunction with farm use, but occasionally expanded by Measure 37/49 claims. The more the development right is inherent in the property, the greater the possibility for a larger value difference between the before and after values.

The difference between the before and after values can also be affected by the level of physical development associated with development rights. In some cases, development rights have not been physically established by surveys, partitions, the construction of roads for access to the development site(s) or the installation of wells and waste disposal systems, while in other cases the physical development has occurred, awaiting only the actual sale of the partitioned property to realize the value of the development right. Physically undeveloped rights have a lower value in the market as the buyer would typically incur costs for the physical development of the right, while fully developed rights would generally have a higher value in the market as no additional costs are anticipated by the buyer prior to construction of a dwelling, and reflect the cost/value of the improvements made by the owner as of the date of the appraisal. It would be inappropriate to allocate the same value to a right to develop a home site as would be allocated to an already developed home site available for sale.

It should also be remembered the land that was suitable for development in the before situation has some value, although highly diminished, in the after situation, which off-sets a portion of the overall value loss as the result of the acquisition of development rights.

### 3.2 Permitted and Conditional Uses on EFU

The Oregon Revised Statutes (ORS 215.283) lists allowed uses in the Exclusive Farm Use (EFU) zone applicable to all counties (the EFU zone does not exist inside metropolitan boundaries). Each county developed a zoning ordinance that complies with ORS 215.283 and typically expands the statute to include specific regulations and methods for compliance with the ordinance. ORS 215.283 contains about 20 pages, whereas the EFU zoning ordinance in Lane County contains about 32 pages and the Benton County ordinance contains about 34.

Both ORS 215.283 and the individual County ordinances generally have divided allowed uses into two categories:

1. **Outright permitted uses** requiring only administrative review, and
2. **Conditional uses** subject to approval of the governing body or its designee.
Outright permitted uses are those with no requirement of notice to adjacent property owners and the public in general and without the opportunity for appeal subject to compliance with the general provisions and exceptions in each ordinance. These are generally the common, normal uses one would expect on agricultural property, including this short list:

1. Farm use (defined as the employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by feeding, breeding, management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof);
2. Propagation of forest products;
3. Buildings customarily provided in conjunction with farm use;
4. An accessory dwelling used for farm use if occupied by a relative of the farm operator who requires the assistance of the relative in farm operations;
5. A farm-related single family dwelling family residence, subject to farm income standards;
6. Winery;
7. Replacement dwelling utilized in conjunction with farm use if an existing dwelling is demolished or destroyed;
8. Farm stands under certain conditions;
9. Irrigation reservoirs, canals and delivery lines;
10. Development, maintenance and improvement of public rights-of-way;

Non-farm uses requiring approval by the governing body and subject to additional standards with notification and rights of appeal include (short list):

1. Commercial activities that are in conjunction with farm use, including processing of farm crops to bio fuels;
2. Mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources;
3. Private parks, playgrounds, hunting and fishing preserves and campgrounds;
4. Community centers;
5. Personal use airports;
6. Home occupations;
7. Golf courses;
8. Manufactured home or recreational vehicle, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or relative;
9. Commercial dog boarding kennels;
10. Destination resort;
11. Living history museum;
12. Schools (elementary through grade 12);
13. Agri-tourism facilities

A cursory review of the uses in the two categories reveals a common thread; the outright permitted uses are common uses for agricultural land and typical of what is most often seen when driving around the rural areas of the Willamette Valley and Central/Eastern Oregon. They are not only more prevalent currently, but also more likely to occur in the future. The uses requiring governmental approval are less frequent, occurring only sporadically throughout the rural areas. Generally speaking, restrictions or prohibitions on the outright permitted uses are likely to have a greater impact on value than restrictions or prohibitions on the uses requiring governing body approval.
It should also be noted that the allowed uses include such things as utility facilities necessary for public service (e.g., electric transmission facilities) climbing and passing lanes within existing rights-of-way, reconstruction or modification of public roads and highways, temporary public roads and highway detours, and minor betterment of existing public road and related highway facilities. Regardless of the property’s zoning, it may be used for public purposes and subject to eminent domain. It is therefore highly unlikely that any restrictions on these uses would have any impact on the after value of the property.

3.3 Single Family Residence

The ability to develop a single-family residence on EFU zoned land is limited to two methods;

1: Compliance with the local zoning ordinance and, by reference, ORS 215, and

2. An approved Measure 37/49 claim

3.3.1 Dwellings Allowed under ORS 215/Local Zoning Ordinances

Various types of dwellings are allowed on EFU zoned land, each with a specific standard. These are:

1. **Accessory dwellings** (sometimes referred to as “farm help dwellings”) for a relative of the farm operator. The farm operator must need the assistance of the relative in the farm operation. An approved accessory dwelling does not create an additional building site and cannot be partitioned from the remaining property as a separate home site.

2. **Dwelling on high-value farm land for farm use.** High value farm land is defined in ORS 215.710 as Class I and II soils as well as a group of defined soil types in Class III and IV. There is a distinction between the soils types for those properties east and west of the summit of the Coast Range defined as high value farmland. In either area (east or west), if the soils are rated as high value soils, the owner must show the property has generated gross farm income from the sale of farm products of $80,000 per year for the last two years, or three of the last five years or an average of three of the last five years in order to qualify for a dwelling on high value soil.

3. **Dwelling on non-high value farm land for farm use.** Those soils not identified as high value soils are classified as non-high value soils. To qualify for a dwelling on non-high value soils, the owner must show the property has produced gross farm income of $32,500 – $40,000 per year (varies by County) for the prior two years or three of the last five years or an average of three of the last five years.

5. **Hardship dwelling** One manufactured home or recreational vehicle in conjunction with an existing dwelling is permitted as a temporary use for the term of a medical hardship or hardship due to age or infirmity. These temporary dwelling permits are not permanent and the dwelling must be removed within 90 days of the end of the hardship situation. Similar to an accessory dwelling, approval of a hardship dwelling does not create a separate buildable parcel that can be partitioned and sold separate from the farm operation.

4. **Non-farm dwelling** These allowed dwellings are only allowed under a strict set of standards, requiring the property owner to provide evidence that the dwelling will not materially alter the stability of the overall land use pattern of the area, and a study of the cumulative impact of possible new non-farm dwellings and parcels on other lots in the area. To address this standard, a
study area of at least 2,000 acres is created, and the farm uses within the study area are identified as well as development trends since 1993. The uses in the study area are identified by the applicant in terms of the broad types of farm uses (irrigated and non-irrigated crops, pasture or grazing land), the number, location and type of existing dwellings in the area, and a determination of whether the approval of the proposed non-farm dwelling will alter the stability of the land use pattern in the area, including the cumulative impact of any new potential dwellings that will make it more difficult for the existing types of farms in the area to continue operations due to diminished opportunities to expand, or to acquire water rights. Needless to say, this method of establishing a dwelling is rarely used.

6. **Large Tract Dwelling:** Dwellings associated with farm use are allowed on sites of at least 160 acres in some counties, subject to continued use of the property for farm use.

7. **Replacement Dwelling:** This provision allows for the replacement of a prior dwelling if destroyed by natural causes or demolished. The home to be replaced must have had indoor plumbing, intact walls and roof, interior wiring for interior lights, and a heating system. This method does not create a “new” home site, but allows for the replacement of an older home or manufactured home with a new dwelling.

The most common method of developing a home on EFU zoned land is the dwelling associated with farm use on either high-value or non-high value soils (Items 2 and 3 above). Homes built prior to the adoption of the current zoning ordinance in the individual counties are grandfathered uses. Accessory and hardship dwelling do not create a home site that can be partitioned from the parent property.

### 3.3.2 Ballot Measure 37/49 Claims

Ballot Measure 37 was a land use ballot initiative passed by Oregon voters in 2004. M 37 was a fairly unworkable law, fraught with problems, and was replaced by Ballot Measure 49 in 2007. M 49 provided two options for re-establishing property rights, primarily the ability to construct a dwelling(s) on EFU zoned lands that had lost development rights with the more restrictive EFU zoning ordinances. The most common election for those with vested timely Measure 37/49 claims granted a maximum of three home sites per claim property, with approvals allowing development of 2-acre parcels on high value farm land with the possibility of 5-acre sites on non-high value farm land. M 49 requires that new home sites be clustered so that, for example, a 50-acre parcel of high value soils with three approved claims would have 2 adjacent 2-acre parcels, and a remainder parcel of 46 acres. Dwellings can be constructed in any area of the larger remainder parcel. The development rights granted under Measure 37/49 run with the land in perpetuity for the original claimant, but are only valid for 10 years once the property had been sold by the original claimant.

A 2014 study in Lane County regarding the contributory value of multiple Measure 49 claims on a single site found that the market was interested in and would pay accordingly for the development rights for one home, but was less enthusiastic about the ability to create two additional home sites, with additional value ranging from $0 to $10,000 for each additional home site.

A review was recently conducted of five sales (four in Clackamas County, and one in Jackson County), ranging in size from 12 to 76 acres, all with an existing dwelling and approved M 49 claims for two additional home sites (approved but not partitioned or developed) of two acres per site. In that review, brokers indicated that the approvals on the Clackamas County sites contributed about 50% of the retail value of a finished 2-acre building site, or between $100,000 and $150,000 in price/value per site in those areas where 2-acre home sites were selling for $200,000 to $300,000. The Jackson County property brought an estimated $40,000 for each additional BM 49 site, in areas where the finished two-acre parcels were selling in the $110,000 to $125,000 price range.
4 Defined Prohibited/Altered Uses Defined within the Easement and Method of Measurement for Potential Impact on Value

The easement language defines the property rights that are conveyed by the landowner to the easement holder. In order to have an impact on the “after” value, the rights conveyed must have a direct relationship to the concluded highest and best use of the property as determined in the “before” valuation. For example, most easements contain some standard language prohibiting any commercial or industrial use of the property. However, if commercial or industrial use was not part of the concluded highest and best use of the property in the before situation, restricting commercial or industrial use does not have any negative impact on the property and therefore does not cause/contribute to any change in the value of the property in the after situation. Conversely, prohibiting development of a single-family residence on agricultural land that qualifies for a residence, where residential use is an element of highest and best in the before situation, has a negative impact on value and would be reflected in a diminished after value.

Working lands easements usually contain both a conservation/habitat protection component and working lands or forest component. The easements typically impose a combination of negative limitations (things you cannot do) and affirmative obligations (things you will do). In general, most negative limitations refer to the conservation/habitat protection components of the easement, and most affirmative obligations aimed at the working landscape provisions of the easement.

The following list of restrictions/limitations and affirmative obligations is based on language contained in prior easement documents. These items are listed in order of their typical potential impact on value, from highest to lowest, with a discussion of the method of measurement of the specific language in the “after” value. It is impossible to state a specific value impact that would be applicable to all properties given potential variations in location and physical characteristics; however, the discussion should provide some insight into the valuation methodology. Simplified examples are presented to give a clearer picture of the measurement methodology.

4.1 Restrictions on Development Rights

If the site is vacant but has development rights, e.g. one home site under the local zoning ordinance, the measurement of impact on value would be based on the analysis of sales with and without the ability to develop a single-family residence.

For example, if sales of property with and without home site potential show a $150,000 variation in price allocated to the home site, the after value for this item would show a value of $150,000 less than the before value to reflect this restriction.

Development rights acquired by an approved Measure 37/49 claim would be valued in a similar fashion. Sales of property with additional M 37/49 claims would be analyzed to determine the contributory value of the M 37/49 claims, with the before value reflecting the contributory value of the claims. The after value would have no M 37/49 claim value. The earlier discussion of the impact of M 37/49 claims indicated the market in Clackamas County allocated about 50% of the finished
value of a two-acre parcel to the M 37/49 claim, and about a 30%-40% benefit in the Jackson County sale.

It should be noted that the approval of three home sites under M 37/49 is the maximum number of home sites allowed on the property. If the site has an existing dwelling, only two additional sites are allowed. The number of existing dwellings is deducted from the maximum of three dwellings to calculate the number of potential new sites/dwellings.

### 4.2 Limitation on Residential Improvement Size

This restriction would probably not be specifically supported by sales data, as few if any sales have a similar restriction. In all likelihood, this restriction would only appear on a property with a conservation easement already in place.

In order to have a negative impact in the after situation, the property must have development rights (if vacant) in the before situation, and retain any existing improvements/development rights that existed in the before situation in the after situation. If development rights are acquired by the easement, additional easement language relative to limitations on the size of residential improvements is unnecessary; if a property is not buildable in the after situation due to acquisition of development rights by the easement, there can be no residential buildings that would be subjected to size limitations.

Limitations on expanding existing improvements or the size of a replacement dwelling could have an impact on the after value if the maximum building size is substantially below the standard size range of homes in the area. For example, if a review of the County records and a survey of the neighborhood shows existing and new improvements in the 2,500 to 3,500 square foot range, and the size limitation for the easement property is 3,000 square feet, there is no probable negative effect on the after value as the limit on size is within the neighborhood standard. However, if the limitation is 1,000 square feet, substantially below the neighborhood standard, there would likely be a negative market response, leading to interviews with other appraisers and brokers active in the area to develop an opinion of the level of impact. If the size limitation is so severe that the market would not consider the site for residential use, the maximum change in value would be equal to the value of the home site development right, essentially converting from a buildable parcel in the before valuation to a non-buildable parcel in the after situation.

### 4.3 Conversion of Tillable Lands to Non-tillable Lands

This restriction/limitation is generally associated with habitat protection/conservation. The measurement is based on the analysis of sales of tillable and non-tillable lands. Many agricultural properties contain combinations of tillable land and non-tillable lands associated with riparian areas or topographical issues, and the sales confirmation/verification process would generally result in an allocation of value to the separate components.

For example, if the sales verification process indicates Class II irrigated soils sell for $8,000 per acre and non-tillable areas contributed a value of $500 per acre, and 20 acres of tillable Class II irrigated soils are protected, with no allowed agricultural use, the after value would reflect a loss of $7,500 ($8,000 in the before valuation minus $500 in the after valuation) per acre for the 20 acres converted to non-tillable land.
Limitations on grazing to protect water quality can have a similar impact. Protecting water quality sometimes results in buffers surrounding the streams to lessen the potential negative impact of grazing on the land and plants. Such prohibitions would need to be examined to determine if there is an alternative water source for livestock, as well as the amended highest and best use that would be created by the grazing restrictions.

4.4 Restrictions on Mineral Resource Excavation

While resource extraction, primarily sand and gravel operations, are a conditional use in EFU, very few properties would actually be impacted by this restriction. Unless the property has been approved for an extraction permit, the probability that any particular EFU zoned site could be approved for an extraction permit is highly speculative. Neighborhood opposition is virtually guaranteed to the creation of new sand and gravel operations, and in some instances, the expansion of existing operations. In Lane County, for example, opposition has been successful in stopping new sand and gravel operations on EFU zoned land. There is a specific zoning for sand and gravel operations (SG in Lane County) which defines areas suitable for extraction operations, as well as a Quarry and Mining Operations zone. However, if an EFU zoned site has a history of gravel extraction with associated extraction permits, or a quarry site with similar permits, the value can be very high. This restriction is listed at the upper end of the value scale due to the potential for a significant value impact, although this would be a fairly rare occurrence. Obviously, if a property does not have aggregate resources, a restriction on mining would have no impact.

4.5 Defined Agricultural/Residential Building Envelope

This limitation/restriction requires that all buildings, either residential or agricultural in nature, be located within a specified area or areas (the building envelope), but usually containing some language allowing development outside of the envelope with the approval of the easement holder. Similar to the discussion of limits on residential building size above, the impact of this restriction is dependent on the size of the allowed building envelope relative and its relationship to the highest and best use of the property. Livestock and nursery operations, depending on acreage, require fairly extensive improvements, usually spread out over various portions of the site, and therefore require a large building envelope or multiple designated areas. Restricting the property to a small building envelope could result in the property being unsuitable for certain types of agricultural operations, and potentially limit the flexibility of the property/owner to adapt to new farming practices that might be available in the future. A very limited building envelope, depending on the physical characteristics of the property and variety of specific uses to which the property is suitable in the before situation, could have an unintended consequence of reducing the production capacity of the property, potentially at odds with the concept of a working lands easement.

The common language allowing structures outside of the building envelope only with permission of the easement holder is an example of the “gray areas” within an easement which pose difficulties for both property owners and appraisers, and probably to easement holder staff charged with negotiating the terms of the easement. The language does not prohibit additional buildings outside of the envelope, but requires prior approval of the easement holder. How likely is approval and what type of information would be necessary for a favorable determination? Is it more prudent to remove some areas of the property from the easement to ensure flexibility for potential future users? How can a property owner be assured that in the future, the easement holder would have the same standards as the person who negotiated the language at the time the easement was initially discussed? Unless there is a very specific reason to establish a building envelope, easement holders may consider...
excluding a portion of the property from the easement. There are no restrictions on use within the excluded portions of the property, allowing the freedom to develop other structures within the non-easement area without the need for agreement and consultation with the easement holder. The less ambiguous the language, the better for all parties to the easement.

The real estate industry in general is averse to unknowns. Questions about potential future uses, even if limited to a narrower field of agricultural uses, can have a negative impact on value. Establishing a maximum building envelope that could potentially impact future agricultural uses would require either sales data to support the contention of a negative impact, or rely on the opinions of participants in the market, a less compelling but still relevant argument.

It seems that establishing a building envelope must walk a fine line between preserving land for farming and limiting productivity. Agricultural buildings are an integral part of the economic capabilities and financial opportunities of agricultural properties. This might be the case for some agricultural activities that do not require prime soils or even soils at all, such as cannabis or hothouse operations. In the final analysis, the appraiser must determine if the building envelope limitation reduces the options available to the owner to a limited number of uses that are adverse to the highest and best use of the property in the before situation. If the answer is yes, there is a reason to conclude a change in value in the after situation. If the building envelope is of adequate size to meet the most likely uses of the property, there is probably no change in highest and best use and no impact on value.

4.6 Maximum Impervious Surface Coverage Limitation

Impervious surfaces are generally defined as any surface in the landscape that cannot effectively absorb or infiltrate rainfall. Examples include driveways, roads, parking lots, rooftops, sidewalks and patios, although some of the examples can be designed and constructed to be permeable.

This is a related topic to building size limitations, but also extends to the creation of larger parking/storage areas. Some agricultural operations, such as larger farms with significant equipment storage and maneuvering/turn-around areas, require a larger area of impervious surface than a small operation with smaller equipment. The impact of an impervious surface limitation is directly related to the type of farm operation and the necessary area needed to operate efficiently.

It is probably feasible to determine if an impervious surface limitation is adequate for a developed property, but more difficult if the site is vacant, but suitable for an agricultural use that would require a large storage yard area or large buildings. Aerial photography and GIS measurements would allow a reasonable analysis of the area needed/utilized for various types of operations, which could be compared to the impervious surface limitation imposed by the easement to determine if the limitation is at or below typical market conditions.

It must also be determined if there is an adequate market for other uses that would not require a larger impervious surface area. For example, a vacant site suitable for a greenhouse nursery in the before situation but with impervious surface limitations imposed by an easement, may not be suitable for a greenhouse nursery in the after situation. The sales data would be analyzed to determine if land suitable for a greenhouse nursery is more valuable than comparable quality land utilized for row crops or other agricultural uses. If there is an adequate active market for both uses at comparable prices, the elimination of a nursery requiring greenhouses or graveled beds as a possible highest and best use would not result in a conclusion of loss of value due to the impervious surface limitation.
Impervious surface limitations include portions of the property other than just structures. Large agricultural operations utilizing large equipment require extensive gravel surfaced storage and turnaround areas for movement of equipment to and through the site. To protect productivity, impervious surface area restrictions should be utilized with care.

4.7 Limitations on the Type of Agricultural Operation

The potential easement holder may consider prohibitions against certain agricultural uses that “strip the soils”, such as sod farms, ball and burlap nursery operations, etc. These uses fall under the general heading of farm use in ORS 215.283, along with a multitude of other types of agricultural use (grazing, row crops, orchards, wineries, vineyards, etc.

Similar to the discussion in Item e above, the limitations on certain types of uses must be viewed in terms the overall demand and prices for land suitable for the remaining uses (those not specifically prohibited). If the market data shows that farm land prices are not impacted by the specific agricultural use but by soil quality, irrigation rights, topography and other physical characteristics, a limitation on a small percentage of the allowed uses would probably have no impact on value.

As always, there may be exceptions. In areas where ball and burlap operations are the dominant use, the appraiser must determine if there is a balanced market in terms of supply and demand for other uses. It is possible, particularly if the property is surrounded by prohibited uses on all sides, that demand for other uses would be limited and a potential loss in value would be a greater concern.

4.8 Affirmative Obligations

Unlike a limitation or prohibition which states what a property owner cannot do, an affirmative obligation states what the property owner will do. Most conservation easements, working lands or otherwise, require the landowner to abide by a conservation management plan for farm practices and habitat protection/restoration. Working land easements sometimes contain an affirmative obligation to actively farm the property or keep the property available and ready for agricultural uses by seasonal mowing/clearing.

In order to result in a loss in value, the affirmative obligation must require the owner to undertake an activity or incur a cost that would not be a standard practice in the general market. If a property has a long-term history of agricultural use under multiple ownerships over an extended period of time, it is probably a given that the property has been actively farmed, or kept in a condition that would allow the property to be farmed. If the property is purchased for agricultural use in accordance with its concluded highest and best use, a requirement to actively farm the property is likely to mirror the intended use of the property by future potential purchasers and the affirmative obligation would impose no actions that would not normally be completed by a responsible owner or imposed on a tenant farmer by the owner, and therefore have no or minimal effect on the after value.

It is possible to identify minimum productivity requirements within the easement, requiring some sort of remedial action if the minimum is not met. If this type of language is anticipated, the minimums must not be so aggressive as to dissuade the landowner from entering into the easement agreement, and contain provisions for unforeseen events that would require portions of the site to lie fallow or converted to another use that would preclude production for a period of time.
A condition that requires organic farming is an affirmative obligation that could potentially impact value. The size of the property is an important factor, as most of the organic farms generally fall on the smaller end of the size spectrum due to the level of hand work necessary to control weeds and maintain organic status. In some areas, smaller parcels that have organic certification bring a higher price than sites without organic certification, as organic produce brings a higher market price than produce grown under more conventional farming practices. Further research is necessary on this topic before any specific value impacts can be concluded.

The possible impact on value as a result of an obligation to farm could potentially be greater on a smaller rural parcel, say 5-10 acres, with a concluded highest and best use as a rural residential site, where the primary motivation for purchase would be residential use rather than agricultural use. The incentive to the owner to continue some sort of agricultural use of the property is the ability to qualify for the Specially Assessed Value (SAV) for EFU zoned land, where property taxes are based on assessed value significantly lower than would be placed on the property if not utilized for farm use. To qualify, land in an EFU zone must be used primarily to make a profit by farming, requiring only that the property is employed in one of the many identified farm uses in ORS308A.050 to 308A.128; there is no income requirement if the site is zoned EFU.

Land not zoned EFU can also qualify for the SAV by meeting certain gross income requirements (currently $100 per acre per year for properties under 30 acres, with a minimum of $3,000 per year for properties larger than 30 acres).

The larger the parcel, the more likely it is that the site will be utilized for agricultural use outside of the home site. Why would someone buy a 500-acre farm if not for the intent of farming? The affirmative obligation might only warrant serious consideration when a small parcel is involved and where there is evidence of non-farm use on similar properties in the area.

### 4.9 Water Rights

While water rights are not granted via the land use planning program, they are sometimes restricted in the terms of an easement. Some conservation easements acquire in-stream water rights outright. However, a working lands easement might be more likely to require that the water rights not be lost to non-use, and could potentially require unused water rights to be transferred to in-stream rights. If water rights are forfeited, and the land may still be utilized for agricultural purposes, it would be converted from irrigated land to non-irrigated land in the highest and best use analysis. Again, sales data is gathered and analyzed to determine the variation in price/value between irrigated and non-irrigated lands. For example, if the sales data indicates a value of $4,000 per acre for irrigated land and $1,500 for non-irrigated land, the change in value is $2,500 per affected acre.

### 4.10 Option to Purchase at Agricultural Value (OPAV)

Although a relatively new tool in the western states, the OPAV has been utilized for approximately 30 years in the northeast, particularly in Vermont, Massachusetts and New York. The purpose of an OPAV is to ensure that agricultural lands remain affordable and available to individuals who are engaged in commercial agriculture, and that the value of the land is reflected by sales of agricultural land unaffected by non-agricultural influences, such as high demand/high prices for estate-quality properties.
At the time the OPAV is acquired, an appraisal is completed that estimates the unrestricted value of the property (before value) and the restricted value subject to the OPAV (after value). Although many easements contain additional limitations and obligations in addition to the OPAV, such as development rights, protective covenants and affirmative obligations, this discussion is addressing only the impact of the OPAV.

A simplified example of the impact of an OPAV is as follows:

Land Trust A is interested in acquiring an OPAV on a 50-acre parcel of agricultural property owned by Farmer A. There are no buildings on the property, however the site is approved for development of one home under the current zoning of the property. An appraisal of the property in the before situation concludes the highest and best use of the property is for agricultural use in conjunction with rural residential use, where there is a high demand for rural properties for the development of large estate-type homes. The concluded estimate of market value is $500,000.

The after value complies with the conditions set forth in the OPAV, where “farmer to farmer” sales must be utilized, reflecting the agricultural value of the property, excluding any market value component associated with the demand for estate-quality sites. After the analysis of agricultural land sales, the estimate of market value is $400,000 in the after situation (subject to the conditions of the OPAV).

The property owner receives a payment equal to the difference between the before and after value, or $100,000 ($500,000 - $400,000 = $100,000).

Five years later, Farmer A retires and places the property on the market, receiving an offer of $650,000. The OPAV requires Farmer A to notify the easement holder in writing of the pending sale. The written notice must include copies of the following: the offer to purchase; purchase and sale agreement and amendments; any appraisal prepared for proposed sale, and any appraisal prepared for sale at which owner acquired the parcel; other relevant documents pertaining to the proposed sale. Notice shall also include a letter from the owner requesting a waiver, and in the case of an OPAV, an offer to sell the parcel to the easement holder pursuant to the terms of the OPAV. A summary of the buyer’s agricultural experience and farm plan for immediate and future agricultural use of the parcel will also be included.

Land Trust A is concerned the offered price of $650,000 is higher than the agricultural value of the property and completes an appraisal of the property. The appraisal, made subject to the conditions of the OPAV, concludes an agricultural value of $500,000. The potential buyers indicated they were not farmers, had no farming experience and were buying the property to establish a new estate-quality home. Under the OPAV agreement, the easement holder can exercise the option to purchase the property at agricultural value ($500,000).

It is noted that an OPAV contains language which exempts sales to family members from the affordability option. The purchaser, if not a family member, must be a qualified farmer with a business plan and the experience to operate a commercial farming operation on the property.

While the OPAV is a good tool to keep agricultural land in agricultural production, it does not necessarily make farm land affordable. Agricultural land values are subject to appreciation, and, even if the offered prices meet the requirement of agricultural land value, the price may not be affordable to beginning farmers.
Jim Waterhouse, an appraiser with years of experience in OPAV valuation in New York and elsewhere, has identified some key elements for consideration when considering a discount to the unrestricted value of a property as a result of OPAV agreements. These include:

- The degree of competition for land in the subject area. If the area is purely agricultural in nature, with no development pressure from nearby urban areas for high quality rural homes, the level of discount would be at the lower end of the scale. Conversely, close-in rural areas adjacent to major metropolitan area may have limited demand for agricultural properties and a high demand for residential use, which would tend to increase the level of discount to the upper end of the range. Data from sales in Massachusetts, Vermont and New York have indicated a range of discounts from a low of about 7% to a high of about 90%.

- The quality of the land for agricultural uses. This would be for various factors, such as soil quality, topography/slope, drainage, irrigation water availability, etc.

- Whether or not a farmstead is permitted on the property and if there is, is it in a desirable location and what structures are permitted.

- The intent and administration of the easement holder. Is the intent of the easement for farmland preservation, affordable farmland, or perhaps a gateway for attracting new, young, or beginning farmers.

- The ability to finance the property, encumbered by traditional conservation easements and now Covenant to Farm and OPAV agreements. Many banks are reluctant to finance or subordinate their position to these additional rights.

It is difficult to utilize the experience in the East Coast markets to a direct comparison to the West Coast, although the concepts are the same. As with most value impacts associated with conservation easements, the degree of discount or loss is commensurate the ability of the property to benefit from the unrestricted uses. As discussed earlier, the loss of a right or use that was not beneficial to the property in the before situation is not likely to result in any significant variation in the after situation.

### 4.11 Impact of Less Significant Prohibitions and Market Resistance

As mentioned earlier during the discussion of the Bundle of Rights Theory, some of the sticks in the bundle are larger than others. Taken individually, these smaller restrictions have no discernable value/impact, but, in the aggregate, are more imposing.

The following list of prohibited uses was copied from a conservation easement granted on a parcel of timber land, but the prohibited uses for agricultural land are usually very similar:

a) **The placement or construction of any additional buildings or building-like structures on the Property.**

b) **The construction of new structures or improvements that impair the Conservation Values of the Property, including, but not limited to, any fences, dikes, berms, water storage areas, channels, roads, and the like except with the written consent of the Grantee whose consent shall not be unreasonably withheld.**

c) **Placement of any cellular phone or other communications infrastructure on the Property.**

d) **Creation or expansion of rights of way including utilities, driveways, and roads except as is reasonably required to provide vehicular access to areas of the Property where**
maintenance, restoration, enhancement, or forestry activities are occurring and subject to the Reserved Rights in Section 8. Existing trails, rights of way, and access easements, including driveways identified in the Baseline Documentation Report on file with Grantee, are unaffected.

e) Altering or removing soil or water, including any excavation, mining, removal of topsoil, rock, minerals, hydrocarbons, sand, gravel, or similar materials, or changing the topography of the Property, unless consistent with the Purpose of this Conservation Easement.

f) No oil, gas, or mineral exploration or extraction.

g) Altering current watercourses for any purpose, except for reasons of enhancement of stream condition and with the consent of the Grantee.

h) Off-driveway or off-trail operation of machinery or vehicles, except where consistent with the Conservation Easement’s Purpose, terms and conditions, or in cases of emergency.

i) Dumping or disposal of waste, refuse, and debris on the Property except that which is generated by activities permitted herein, provided that any such dumping or disposal shall be in accordance with applicable laws.

j) The treatment of the soils or surfaces of the Property with petroleum products or biologically toxic substances, including, but not limited to, pesticides and herbicides, which may run into the water, ground or surface areas of the site, unless approved by the Grantee.

k) The use of poison, traps, or other such devices for reasons other than those expressly permitted herein or with Grantee’s approval.

l) Commercial hunting activities occurring on the Property. This might apply primarily to duck hunting clubs, but could also be applied to more rural properties and prohibit the leasing of hunting rights for big game, such as seer and elk. This provision is not intended to prohibit the Grantor and Grantor’s invited guests or future resident-owners and their invited guests from engaging in occasional recreational hunting. A prohibition against commercial hunting could potentially have an impact on value if there is a demonstrated demand for such use in the area of the property being considered for the easement. Smaller rural properties with no obvious hunting opportunities would most likely not be impacted by the prohibition against commercial hunting. Conversely, a large property in an area known for good deer and elk hunting might be negatively impacted, but there must be evidence in the market that fee-based hunting rights add value to the property.

m) The permanent storage of vehicles or equipment on the property.

n) The maintenance of vehicles, including changing of oils, repair and rebuilding of machinery and tools on the Property. This provision is not intended to keep the Grantor from doing on-the-spot repairs in the event of a breakdown.
o) The permanent storage of petroleum products, herbicides, pesticides, or other substances, which, if accidentally released, would pose a danger to clean water or fish or wildlife habitat.

p) Placement of any signs or billboards, except signs stating the conditions of access to the Property, property identification signs, boundary markers, directional signs, signs posting the Property against trespass and hunting, memorial plaques, political signs, and temporary signs indicating that the Property is for sale.

q) The granting of any property interest or rights in the Property, including easements, permits, licenses, liens and leases, without the prior written consent of the Grantee.

r) Any use of the Property that is inconsistent with the purposes of this Easement.

Easements typically define the rights of the public to access the property. In most cases, access to the general public is not included in the easement, protecting the privacy of the land owner. The easement does allow access by easement holder staff for monitoring and other actions allowed by the easements (enhancement or restoration programs), but only with advance notice. Allowing full public access would require further analysis, but would likely result in a reduction in the after value to reflect the loss of privacy, especially if the property has an existing residence occupied by the owner.

It is noted that conservation easements also contain a section or references to “Permitted Uses”. These permitted uses often describe in detail exceptions or limitations to the Prohibited Uses and define exactly what the owner can do. However, you can see that sum of the smaller prohibited uses could have an impact on value, which, is a fact and not a generalization. I have analyzed a recent sale of the property which sold after a conservation easement was in place, measuring the impact of the larger sticks in the bundle on value, and determining that there was an additional decline in value that could be attributed to two factors: 1) the aggregate of the lesser prohibited uses, 2) and resistance by a large percentage of potential buyers to acquire a property with a conservation easement in place. The broker involved in the sale indicated that a large percentage of potential buyers who inquired about the site withdrew upon learning that the site had a conservation easement, citing privacy concerns in relation to the annual monitoring requirement of the easement holder and a general distaste for the perceived intrusion on their property rights. The property did sell, but after an extended marketing period that exceeded the marketing time for similar properties without conservation easements. This particular sale, located near Prineville in Central Oregon, indicated a loss of about 8.4 percent of the unencumbered fee value after consideration of the impact of primary prohibited uses.

The above list is not all inclusive. Depending on the conservation values to be protected, other restrictions could be put in place within the conservation easement. Some conservation easements allow farming of a portion of the easement property, with a right to terminate the farming activity if the easement holder wanted to complete a restoration project on adjacent wetlands that would require use of the farmed area in the restoration project. As such, the list is potentially endless, but the valuation concepts are the same; if the restrictions or limitations on use result in a change or amendment to the highest and best use of the property in the after situation, there is a high likelihood that the restriction or limitation will result in a change in value in the after situation.
5 Common Forest Land Restrictions

Similar to easements on farm land, the purpose of a conservation of forest land is to ensure that the property described will be retained, maintained and managed forever in its natural, scenic, and forested condition, and to prevent any use of the property that will impair or interfere with the identified and documented conservation values of the property. The identified conservation values are usually different, citing upland prairie habitat, oak savanna, scenic and open space, habitat for wildlife listed as a Species of Concern under the Endangered Species Act, etc.

A property does not have to be 100% timber land to have a conservation easement with timber related prohibitions. Many farm and ranch properties have a timber land component, with easements containing both agricultural and timber operation restrictions.

The valuation issues vary, mostly depending on the zoning of the property and the presence of improvements. Therefore, I have divided this portion of the paper into forestland with no development potential and forest with developmental potential.

5.1 Common Restrictions for Non-developable Forest Land

Similar to Goal 3 of the Oregon Statewide Planning goals and Guidelines protecting farm land, Goal 4 was developed to “conserve forest lands by maintaining the forest land base and to protect the state’s forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use of forestland consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.” Every county has established forest land zoning ordinances that reflect this goal. Typically, there are several forest land ordinances, some that prohibit any residential use of the property and some that allow residential use under a strict set of guidelines. The approaches utilized to establish the value of forest land conservation easements usually vary depending on the ability to establish a dwelling on the site or if the site has an existing dwelling.

Easements on forest land are established for a variety of reasons:

- To provide a buffer and protections from logging adjacent to environmentally sensitive areas such as tidal influenced marsh lands or other waterways
- Protection and restoration of historic oak savannas
- Establishment of management plans for sustainable forestry operations to protect habitat and viewsheds in areas of popular recreational activities, such as adjacent to the Pacific Crest Trail

Protection usually involves restrictions on timber harvesting within a defined area. The Oregon Forest Protection Act provides for buffers along fish bearing streams, ranging from 50’ to 100’ in width, and the forest industry generally views these buffers as unusable timber lands. The same is true of lands that contain electrical transmission lines that have height limitations on any timber within the utility easement. There are also buffers established along scenic highways, however harvesting is allowed within the scenic buffers under certain guidelines. If a proposed easement on forestland contains buffer widths in excess of those established by the Forest Practices Act, it is probable that only the area exceeding the FPA buffers would be impacted by the easement. For example, if a proposed easement creates a 200-foot-wide no harvest buffer along an existing fish bearing stream with an FPA required 100 foot wide buffer, only the land and timber within the additional 100 foot buffer would be considered for a loss in value as a result of the easement.
5.1.1 Protective Buffer Zone Easements

Almost all valuation assignments for timber land conservation easements require the use of professional foresters to evaluate the volume, species and value of the timber within the easement area. Merchantable timber, of an age suitable for immediate harvest, is valued by determining the volume and quality of the timber, with volume usually expressed in terms of thousand board feet (MBF), establishing the market price per MBF paid by lumber mills in the area, and deducting all logging, road development, and hauling costs necessary to get the timber to the mill. The resulting value represents net merchantable timber value. Remember that the price paid by the mill is the price delivered to the mill (emphasis added). In order to get the market price, the timber must be cut and hauled to the mill. Therefore, all costs associated with the cutting and hauling of timber to the mill are deducted from the market price at the mill to determine net timber value.

Pre-merchantable or reproduction timber (young timber not ready for harvest) is valued by using present value calculations or via the sales of timber land with comparable timber of age and species.

Assume a conservation easement is developed for a 200’ wide strip adjacent to a waterway. The easement restricts any harvest operation within the buffer. The forester will cruise and value the timber within the harvestable area, excluding any timber in non-harvestable buffer zones defined by the Forest Practices Act or in other non-harvest areas, and provide a net value for the timber. The land is valued by the analysis of sales data, to arrive at a “before” value for the land and timber within the proposed easement.

In the after valuation, the net timber value is reduced to $0 to reflect the harvest restriction, as is the land value to reflect its conversion from productive timber land to non-productive timber land. In many cases, where the value of the land and timber is reduced to near $0 by the easement, the easement area is acquired in fee title by the acquiring agency. For land with a highest and best use as commercial timberland, un-harvestable land is usually assigned a $0 figure by buyers and sellers in the market. This usually applies to lands under powerline easements which have height restrictions on timber, lands adjacent to fish bearing streams which have harvest restrictions, and other types of land identified in the Forest Practices Act as having harvest restrictions.

In some cases, the conservation easement may restrict harvesting to a percentage of the timber volume, say 50% of the volume. In those instances, the change in value in the before and after value would be about 50%, but would require an analysis of logging costs which may increase when a select harvest is required, as the time and work necessary to protect the remaining trees from damage could have a negative impact on net timber value above and beyond strictly mathematical percentage deduction.

5.1.2 Protection and Restoration of Oak Savannas

An oak savanna is generally defined as a lightly forested grassland where oaks are the dominant trees. Oak savannas were historically maintained through wildfires set by lightning or human activity, grazing, low precipitation and/or poor soils. Many savannas have disappeared over the decades, mostly by the introduction of tree species that have a higher economic value, mostly fir. The canopy of the fir trees is thick, and oaks are shade intolerant and are unable to maintain populations under the shade of maples and other shade tolerant trees. Oak savanna management and commercial logging operations are generally incompatible activities.

For example, a conservation easement developed for the protection and restoration of oak savannas might rely on an adopted management plan that actively reduces the more marketable tree species in and around the savanna. A professional forester will review the adopted management plan and
identify the acreage that will be removed from profitable timber production and any existing merchantable or pre-merchantable timber that may be removed from the easement area to meet the goals of the management plan. In the before valuation, land and timber is valued to reflect the current use; in the after value, the loss of potentially productive timber land to a lower economic use is considered, and any timber to be removed from the easement area to meet the requirements of the easement is removed in the valuation.

5.1.3 Management Plans for Sustainable Forestry Operations

In areas of high habitat, recreational and scenic value, conservation easement may be established to prevent the clear-cut operations that are prevalent in commercial forestry operations. Although there are benefits to large commercial timber operations for a clear-cut strategy, such as creating new stands of uniform age and species, achieving high stocking rates for replanted areas, etc., smaller sites are generally considered to be more manageable and attractive when limitations are placed on the size of clear-cuts, retention of trees for wildlife habitat and recognition of wildlife travel corridors, and protections are placed in sensitive environmental areas, etc.

Easements for this purpose rely on a developed and approved management plan that will meet the goals of the easement. Management plans are encouraged to be updated every ten years or so to reflect changes in the property and the forest industry. The easements also include language regarding prohibitions of off-road vehicles except to established trails, the development of any structures on the site, alteration of the land by excavation or building of roads, partitioning of the site, etc. These prohibitions are very similar to the restrictions found in agricultural easements and detailed in a prior section.

Again, the use of a professional forester is necessary to analyze the impacts of the easement conditions of timber value. Potentially higher logging costs, the removal of lands from commercial timber production and other factors could lead to a change in land and timber value as a result of the easement, and would be reflected in the before and after valuation scenario.

5.2 Impacts on forest land with existing dwellings

It is not uncommon to find forested sites with existing dwellings or the ability to develop a dwelling. In these instances, if a conservation easement is planned for the site that impacts timber harvesting, the appraiser must weigh the benefits of the timber from a purely economic view to the benefits of the timber from an aesthetic view.

It must be remembered that assigning a value to merchantable timber assumes that the timber will or can be cut and sold. However, when dwellings are present, removal of all the timber may have a negative impact on the value of the property as a wooded development site, and it could be that only a percentage of the total timber volume could be harvested without damaging the remainder values of the property.

There is no hard and fast rule in this type of valuation assignment due to the degree of variables. Each property must be viewed independently and take into consideration the terms of the easement and impact on value. The point of the discussion is to bring to light that the valuation of easements on timberlands with a residential component may be treated differently than commercial timberlands with no residential component.
6 Common Problems in Easement Transactions

The process of acquiring a conservation easement can be long and stressful, and, depending on the complexity of easement, can require significant patience on the part of the land owner. Any glitches or unexpected issues in the process can potentially lead to a negative result or an overall bad experience. The following comments are simply my observations on various topics that led to problems, but could be potentially avoided. I am sure that those of you with years of experience in the acquisition of conservation easements could expand this list exponentially.

6.1 Delivery of Appraisal to the Land Owner Prior to Review

The majority of appraisals submitted for funding are subject to a formal review to ensure the appraisal meets the applicable standards (either Yellow Book and/or USPAP). It is possible the review process will discover errors, mathematical or otherwise, that require correction before approval, and may result in a change in the estimated value(s). In the worst case, appraisals are flatly rejected.

Delivery of the appraisal to the property owner before review approval, without an absolute understanding by the property owner of the potential for a change in value, or an outright rejection of the appraisal, can lead to an element of mistrust. If possible, my preference would be to withhold delivery of the appraisal until after the review process is complete.

6.2 IRS Regulations

All or part of the value of a conservation easement can be donated by the landowner, known as a Bargain Sale. The value of the donation can be utilized as a tax deduction upon approval by the IRS. However, the appraisal completed for the acquisition/funding is not acceptable to the IRS in its original format.

There is a long list of requirements to successfully qualify for a noncash charitable contribution of a conservation easement, primarily in Treasury Regulation 1.170. The IRS must be listed as an intended user of the report, with the purpose of the appraisal specifically stated “for income tax purposes”. The original report will not contain these items.

IRS regulations also require that the appraisal must include an appraisal of all “contiguous family owned property”, regardless of whether they are included in the conservation easement. Family is defined as wife, husband, parents, grandparents, children and siblings of the donor. If the property subject to the easement is not contiguous to family owned property, the original appraisal would not need to be expanded. However, if there are one or more adjacent family owned properties, each property must be appraised with a determination of any effect of the conservation easement on the adjacent property. The concept is that a property adjacent to a property with a conservation easement may have an enhanced value due to view protection or other factors, and any increase in the value of the adjacent family owned properties is deducted from the value of the donation. For example, if the difference between the before and after appraisal of the land is $500,000, but contiguous family owned property's value is increased by $100,00 as a result of the easement, the resulting easement value will be $400,000.
The regulations also require that any potentially enhanced non-contiguous property in family ownership or in a partnership, LLC or corporation in which the family has more than a 50% interest must be **considered** for enhancement and, if determined to be enhanced, that property must also be appraised.

If considering a donation of all or part of the value of the conservation easement, be aware that it could take considerable time and money to amend the appraisal to IRS standards, particularly if there are numerous contiguous family owned properties. The agency acquiring the easement is not responsible for these costs. Discuss the implications of the donation with the appraiser and tax accountant to get a clearer picture of these costs. Easement holders might refer to the Land Trust Alliance recommendations around IRS regulated appraisals, e.g. that the easement holder must maintain a distance between hiring an appraiser for the landowner, and follow recommendations around IRS form 8283.

6.3 Clarity of Language in the Easement Document

Portions of the language in the prohibited uses and retained rights within the easement document is usually a collaborative effort between the acquiring agency and the landowner, and there may be a clear understanding between the parties negotiating the language as to the intent of the phrasing. But, since these easements run in perpetuity, it is possible that any subsequent disagreements between the parties about specific terms will involve future owners and staff that were not involved in the original negotiations. If the language leaves room for interpretation, an adversarial situation could arise.

I am aware of a conservation easement covering a property that contained a large basalt rock cliff that was utilized by the property owner and friends for technical rock climbing, and the owner wanted to ensure that the easement allowed that use to continue, which was agreed to in the negotiations. However, the language in the easement regarding this permitted use was apparently vague, and when a nesting site for some potentially endangered bird was found in close proximity to the rock formation, the owner's use of the site was terminated leading to formal litigation. Property owners and agency staff should be aware of these types of issues when developing the easement language. If it looks controversial, it may be advantageous/possible to remove that portion of the property from the easement.

6.4 Value Discussions Prior to Appraisal

Property owners and easement holder staff are at a distinct disadvantage when negotiating conservation easements. An owner could reasonably expect that talks would include a statement of value or value range to help in the decision-making process, but staff cannot provide the value until the appraisal is complete and accepted in the review process. Furthermore, the easement holder should be aware that the appraisal will not place an economic value on the conservation values on the property that the easement holder might still be willing to pay for. Appraisers can be of limited help, as providing value opinions of property before an appraisal is completed is a violation of USPAP. Real estate brokers, if willing, can be helpful as they are not bound by the rules and regulations in USPAP and can provide a value opinion based on their experience and knowledge. Developing relationships with brokers and real estate agents in your area of interest is a valuable tool.
In some instances, an easement holder will contract with an appraiser to provide just the “before” value of a property to at least set a value or value range that could be used in future discussions about the change in value that might occur as a result of the conservation easement. If the before value is significantly lower that the owner’s expectation, it is probable/possible the after value will be below expectations.

7 Summary

Working lands easements, as well as habitat protection easements, generally include limitations and prohibitions that can be classified into two or more categories. The first category, and potentially the most impactful from a valuation standpoint, involves the acquisition of development rights and the conversion of tillable lands to non-tillable land.

The acquisition of development rights only has value if development rights are present or probable in the foreseeable future, either by compliance with local County regulations, probable inclusion into an urban growth boundary or city limit, or by an approved Ballot Measure 37/49 claim. Many EFU zoned sites with an existing dwelling have no additional development rights other than the existing home site.

The conversion of farmable land to non-farmable land produces a decline in value in the after situation, with the level of decline dependent on the difference between the before value and the after value. The decline cannot be expressed in terms of a percentage that would be applicable to all properties, but rather as a specific value for that particular property. For example, if tillable land value is concluded at $8,000 per acre and non-tillable land concluded at $500 per acre, the decline is $7,500 or a decline of about 93.75%. If tillable land values are $5,000 per acre and non-tillable land value concluded at $500 per acre, the decline is $4,500 or 90%.

The second category includes limitations and/or restrictions on use that have a less discernable impact on value. Items in this category could include residential building size limitations, building envelope size limitations, impervious surface area limitations, prohibitions against creating additional roads or trails, prohibitions for commercial hunting but allowing the owner and invited guest to hunt on an unrestricted basis, etc. Depending on the specific size limitations, the language may have an impact on value, but research is required to determine if the designated size limitations are outside of the market standards for the area. If residential building size limitations are far below market standards for the area, the impact could be similar to acquiring the development rights to the site if the conclusion is that the limited home size would make the property unacceptable to the market for residential development. Highly restrictive building envelope and impervious surface size restrictions could also have a negative impact, but need to be analyzed on a case by case basis; there is no standard for a conclusion of diminished value without a comparison the stated limitations with the size of the building envelope and impervious surface area of competing properties on the market and/or in the area of the property being appraised.

A third category that may impact value would include any affirmative obligations in the conservation easement. Again, there is no specific loss in value based solely on the term “affirmative obligation”. Each obligation must be reviewed relative to how the obligation compares to standard uses for similar properties. If the obligation requires a cost or activity beyond what would be considered normal in the market, there may be a value loss associated with the specific obligation.

Given the almost unlimited variety of potential limitations and obligations that can be imposed by an easement, the potential easement holder must be careful that the combined terms do not so limit the
available uses of the property to a level that would preclude the utilization of the property for agricultural purposes commensurate with the capabilities of the property to grow agricultural products. The easement could create such limited uses, or uses that are not probable in the area due to soils types, topography, climate, etc., that the end result would be averse to the goal of protecting farm land for farm uses.

A conservation easements is an excellent tool to protect habitat, preserve ecologically sensitive areas and reduce development pressure. With the additional of affordability options such as an OPAV and affirmative obligations to require the property be put to farm use, easements can help in the preservation of farm land for farm use and insuring that future prices will reflect the agricultural value of the property, excluding the upward price pressure from residential users. However, in areas where agricultural land values reach the $10,000 to $15,000 per acre range, it is unlikely that beginning farmers would consider this “affordable”.
8 Appendices

Resources, such as best practices and sample easements can be found on the website of the Land Trust Alliance: https://www.landtrustalliance.org/

ORS 215.283 Uses permitted in exclusive farm use zones in nonmarginal lands counties can be found at: https://www.oregonlaws.org/ors/215.283