Compiled Guidance

This document compiles the Land Trust Alliance’s guidance for the accreditation indicator elements in the Transactions category. With background information on and explanations for each practice element, these narratives provide guidance to help land trusts implement the practices and understand the requirements for accreditation.

<table>
<thead>
<tr>
<th>For all conservation land or conservation easement transactions:</th>
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<tr>
<td>1A3. Do not knowingly participate in transactions that are potentially fraudulent or abusive</td>
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<tr>
<td>3D1. The board reviews and approves every land and conservation easement transaction. (a) However, the board may delegate decision-making authority on transactions if: (i) It establishes written policies or has bylaws provisions that define the limits to the authority given to the delegated entity, (ii) The delegated entity provides timely notification in writing to the full board of any completed transactions</td>
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<tr>
<td>8B2. Develop and apply written project-selection criteria that are consistent with the land trust’s conservation priorities</td>
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<td>8C1. Visually inspect properties before buying or accepting donations of conservation land or conservation easements to determine and document whether: (a) There are important conservation values on the property, (b) The project meets the land trust’s project-selection criteria</td>
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<tr>
<td>9F1. Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire</td>
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<td>9F1(a). Update the title at or just prior to closing</td>
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<td>9F2. Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property’s important conservation values</td>
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<tr>
<td>9F3. Promptly record land and conservation easement transaction documents at the appropriate records office</td>
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<tr>
<td>9G2. Keep originals of all documents essential to the defense of each real property transaction in a secure manner and protected from damage or loss</td>
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<td>9G3. Create and keep copies of these documents in a manner such that both originals and copies are not destroyed in a single calamity</td>
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<tr>
<td>9H1. When buying land, conservation easements or other real property interests, obtain an independent appraisal by a qualified appraiser in advance of closing to support the purchase price. (a) However, a letter of opinion from a qualified real estate professional may be obtained in the limited circumstances when: (i) A property has a very low economic value, (ii) A full appraisal is not feasible before a public auction, (iii) Or the amount paid is significantly below market value</td>
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<tr>
<td>9H2. In limited circumstances where acquiring land, conservation easements or other real property interests above the appraised value is warranted, contemporaneously document: (a) The justification for the purchase price, (b) That there is no private inurement or impermissible private benefit</td>
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In addition, if a tax-deductible transaction:

9E2. Review, on the land trust’s own behalf, each potentially tax-deductible conservation easement for consistency with the Treasury Department regulations (U.S.C. §1.170A-14), especially the conservation purposes test of IRC §170(h).

10A1. Inform potential land or conservation easement donors who may claim a federal or state income tax deduction (or state tax credit), in writing and early in project discussions, that: (a) The project must meet the requirements of IRC §170 and the accompanying Treasury Department regulations and any other federal or state requirements, (b) The donor is responsible for any determination of the value of the donation, (c) The Treasury Department regulations require the donor to obtain a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than $5,000, (d) Prior to making the decision to sign IRS Form 8283, the land trust will request a copy of the completed appraisal, (e) The land trust is not providing individualized legal or tax advice.

10B2. Sign the Form 8283 only if the information in Section B, Part I, “Information on Donated Property,” is complete and is an accurate representation of the gift. (a) Refuse to sign the Form 8283 if the land trust believes no gift has been made or the property has not been accurately described.

10C2. Evaluate the Form 8283 and any appraisal to determine whether the land trust has substantial concerns about the appraised value or the appraisal.

10C3. Discuss substantial concerns about the appraisal, the appraised value or other terms of the transaction with legal counsel and take appropriate action, such as: (a) Documenting that the land trust has shared those concerns with the donor, (b) Seeking additional substantiation of value, (c) Withdrawing from the transaction prior to closing, (d) Or refusing to sign the Form 8283.

10C4. When engaging in transactions with pass-through entities of unrelated parties, particularly those offered or assembled by a third party or described as a syndication by the IRS: (a) Require a copy of the appraisal prior to closing, (b) Decline to participate in the transaction if the appraisal indicates an increase in value of more than 2.5 times the basis in the property within 36 months of the pass-through entity’s acquisition of the property, the value of the donation is $1 million or greater and the terms of the transaction do not satisfy the Land Trust Alliance Tax Shelter Advisory.

11B1. For each conservation easement, have a baseline documentation report, with written descriptions, maps and photographs, that documents: (a) The conservation values protected by the easement, (b) The relevant conditions of the property as necessary to monitor and enforce the easement.

11B2. Prepare the report prior to closing and have it signed by the landowner and land trust at or prior to closing (a) In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, the landowner and land trust sign a schedule for finalizing the full report and an acknowledgement of interim data [that for donations and bargain sales meets Treasury Regulation §1.170A-14(g)(5) (i) at closing]
STANDARD 1 ETHICS, MISSION AND COMMUNITY ENGAGEMENT

A. Ethics

3. Do not knowingly participate in transactions that are potentially fraudulent or abusive

Accreditation indicator elements located at www.landtrustaccreditation.org

WHY BE CONCERNED?

Practice 1A3, as is true of all of the Standards, does not merely expect strict compliance with the law; it is guidance to the higher standard of ethical behavior that all land trusts should exhibit in all of their activities. Such behavior is not only commendable, it is necessary if the federal government and, ultimately, the American people will continue to allow land trusts to administer the tax benefits that are critical to the success of voluntary conservation.

The land trust movement is filled with good people and well-respected organizations. However, public confidence in the integrity and conservation purposes of land trusts can be shaken by the actions of good land trusts whose less than diligent practices may innocently facilitate abusive or fraudulent transactions, as well as by those who knowingly facilitate abuse of the tax code for private gain.

It is easy to point to hundreds or even thousands of acres of conserved land and say that such ends justify the means. However, when the means are actual or suspected fraudulent or abusive transactions, such a view is extremely short-sighted. Such actions undermine the credibility of land trusts and the credibility of voluntary land conservation, which is dependent upon the good will of the public. If that goodwill is squandered, land trusts will experience a host of problems.
It is sometimes erroneously argued that because land trusts are in the business of land conservation, so long as a land trust is not promoting fraud or abuse, and so long as a proposed transaction provides meaningful land conservation, a land trust can disregard abusive aspects of the contribution. After all, when a land trust signs Form 8283 or provides a "goods and services" letter (the only tax documents a land trust signs that characterize a transaction), it is only acknowledging receipt of a contribution, right?

The argument continues that land trusts have no legal reason to be concerned with fraud or abuse because land trusts do not certify the value of the contribution (by the express provisions of Form 8283) or the legitimacy of the process leading to the contribution. Furthermore, land trusts are not in a position to give tax advice to prospective donors (see Practice 9B). Finally, the December 2016 IRS Notice 2017-10 making certain syndications of conservation easement deductions "listed transactions" expressly states that a land trust does not become a participant in such a transaction merely by accepting a contribution. The more recent Notice 2017-29 also makes it clear that a land trust does not become a “material advisor” to such transactions by accepting contributions resulting from them.

These arguments ignore the necessity for land trust integrity and responsibility described above. They also ignore the important fact that the federal tax code and regulations (and comparable state law provisions) invest land trusts with the responsibility for administering hundreds of millions of public dollars in tax incentives for voluntary land conservation. In considering this responsibility, land trusts should realize that whether a transaction is fraudulent or abusive is not a subjective matter; it is a determination that can and should be based on an objective review of the facts of a suspected transaction.

It may be easy to forget the intense scrutiny of, and challenge to, the federal deduction for conservation easement contributions that resulted back in 2004 from a series published in the Washington Post describing alleged abuses by The Nature Conservancy. However, the concerns about abuse raised by that series resulted in a hearing on abuse before the Senate Finance Committee and draconian proposals by the Joint Committee on Taxation that would have essentially ended meaningful tax benefits for easement contributions. All it will take is an exposé of some of the abusive conservation easement transactions involving syndications\(^1\) to reignite that concern and to make tax benefits for conservation contributions vulnerable to those looking for funds for other programs. See Practice 10C4 for information on tax shelters and abusive syndications.

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\(^1\) The conservation of land can be expensive. Sometimes individuals join together to purchase and conserve land. In these cases, the individuals jointly contribute to the purchase price and jointly share in any resulting tax benefits. These transactions are often done through the vehicle of a partnership or limited liability company and are called **syndications**.
Finally, land trusts that knowingly facilitate fraudulent or abusive transactions may themselves be subject to penalties up to and including revocation of their tax-exempt status. This possibility is discussed in more detail in Practice 10C.

**WHAT MAKES A TRANSACTION FRAUDULENT OR ABUSIVE?**

In the context of tax law, a fraudulent transaction is one involving an intentional misrepresentation of facts, or concealment of facts, for the purpose of gaining a tax benefit. An abusive transaction is one that attempts to take advantage of a tax provision in a manner not intended by the writers of the provision for the purpose of tax avoidance. A fraudulent transaction is always abusive and illegal. However, an abusive transaction may not necessarily be fraudulent.

Examples of fraudulent transactions in the conservation easement context include: a land trust signing a Form 8283 when it knows that no contribution was made (for example, the land trust paid full fair market value for an easement listed as contributed on the form); or an appraiser signing an appraisal knowing that the development potential upon which the fair market value was based did not exist.

An example of an abusive transaction that is not fraudulent is the contribution of a conservation easement on a small residential parcel that has virtually no conservation value and claiming a substantial deduction based on the development value of the parcel.

Often, land trusts are unlikely to have knowledge of the facts of an abusive, but non-fraudulent transaction, because those facts are sometimes internal to the transaction and confidential (although in the preceding example, the land trust would certainly know the facts that made the transaction abusive). However, because most fraudulent conservation transactions involve facts that are external to the transaction (for example, valuation; whether the easement was required by a governmental regulation or was granted as part of a contractual obligation by the donor), such facts are often available to a land trust.

Most of the facts that a land trust needs to know to be alerted to a potentially fraudulent transaction are contained in the appraisal, the completed Form 8283 summarizing the appraisal and the statement that is required to be attached to that form.
What Constitutes Knowingly?

If an officer, board member or staff member of a land trust has actual knowledge that a contribution or proposed contribution is or will be fraudulent or abusive, the land trust is deemed to know about the fraud or abuse. The law considers all of these people to be agents of the land trust when they are acting in their official capacities, and their knowledge is imputed to the land trust itself as a matter of law — whether or not the individual possessing knowledge of the fraud or abuse actually passes that knowledge along to other land trust personnel. For example, a board member meets with the sponsor of a syndication about a proposed contribution and learns enough to know that the transaction will be abusive, but only tells the land trust staff that the contribution will be good land conservation. The land trust itself will be imputed with the board member’s knowledge.

In addition, officers, board members and staff members have a fiduciary obligation to disclose their knowledge to the land trust, unless such disclosure would violate a legal duty to a third party, such as an attorney’s obligation to maintain the confidentiality of client matters. For example, if a landowner revealed to a staff member that tax deductions would be allocated in an abusive manner, the staff member has a fiduciary responsibility to report that information to the executive director.

A land trust with actual knowledge of fraud or abuse has a clear responsibility to avoid the transaction. However, even if actual knowledge does not exist, a land trust cannot turn a blind eye to facts that strongly suggest fraud or abuse. The most obvious example is a Form 8283 that claims a contribution value many times greater than the donor’s basis in the contributed property, particularly if the contributed property has only been held for a short time by the donor and particularly if the donor is a pass-through entity, such as a limited liability company. All of this information is available on a properly completed Form 8283 which is, of course, available to a land trust.

When circumstantial evidence, such as information provided on Form 8283, points to a fraudulent or abusive transaction, a land trust should make further inquiries about the transaction. Land trusts are not appraisers and they are not lawyers; however, they can obtain opinions from appraisers and lawyers when necessary to evaluate what appear to be potentially abusive transactions. At a minimum, such an inquiry is called for when facts point to potential fraud or abuse. For more information, see Practices 10B and 10C.
What Constitutes Participation?
As noted earlier, Practice 1A3 does not merely expect strict compliance with the law; it is guidance to the higher standard of ethical behavior. What constitutes participation must be considered in this broader context. Although merely accepting a contribution that a land trust knows is the result of a fraudulent or abusive transaction may not make the land trust a participant in, or material advisor to, the transaction as a matter of law, for purposes of Practice 1A3, the acceptance of such a contribution constitutes participation. Signing a Form 8283 when a land trust knows that the contribution reported on the form was the result of a fraudulent or abusive transaction is participation. Furthermore, if a land trust signs a form that it knows is fraudulent, it may be subject to the penalties for engaging in tax fraud.

For accreditation, a land trust board must pass a resolution agreeing to uphold high standards of ethics as part of the application process. The board must also review and approve each land and easement transaction (see Practice 3D1) and receive sufficient and timely information prior to each meeting to make informed decisions (see Practice 3C2). These steps help ensure the land trust does not knowingly participate in transactions that are potentially fraudulent or abusive.

ADDITIONAL RESOURCES

- Internal Revenue Code provisions:
  - §6111 Disclosure of Reportable Transactions
  - §6662(d)(2)(C)(ii) Definition of tax shelter
  - §7201 Attempt to evade or defeat tax
  - §7206 Fraud and false statements
  - §7207 Fraudulent return, statement, or other documents
- Tax Shelter Advisory and flowchart, Land Trust Alliance, last revised February 1, 2018
STANDARD 3. BOARD ACCOUNTABILITY

D. Board Approval of Transactions

1. The board reviews and approves every land and conservation easement transaction
   a. However, the board may delegate decision-making authority on transactions if:
      i. It establishes written policies or has bylaws provisions that define the limits to
         the authority given to the delegated entity
      ii. The delegated entity provides timely notification in writing to the full board of
          any completed transactions

Accreditation indicator elements located at www.landtrustaccreditation.org

BASIC BOARD ROLES AND LEGAL RESPONSIBILITIES

The public commonly associates a land trust with its most visible representatives—the board chair
or president, the chief staff officer, the project manager or the head of the lands committee. This
public image, however, does not reflect who has legal responsibility for how the land trust actually
operates. Only the board of the land trust, acting as a whole or through powers delegated to board
committees or staff, has the authority to set policy, enter into contracts and undertake land
transactions.

Virtually all land trusts are incorporated as nonprofit corporations or organizations in the state in
which they operate. Consequently, each board member of the land trust—as a nonprofit corporate
board director—holds the legal responsibility to oversee and direct the land trust’s overall business,
including its land transactions. Each board member owes a legal duty of care to the land trust,
especially to act in good faith and with the care that an ordinarily prudent person in a like position
would use under similar circumstances.
To meet the legal standards established for nonprofit corporation board members, if the full board of the land trust is not going to review and approve each and every land transaction undertaken by the trust, it needs, at a minimum, to set forth how land transactions will be reviewed and approved and by whom. If approval authority is delegated, in whole or in part, it must be clear under what circumstances and within what limits that authority may be exercised.

For most land trusts, this practice requires that the board not only approve a process for transaction decisions, but also actually makes decisions on each transaction. In most instances, land transactions are too important to the land trust’s mission and goals to be relegated to a small group of decision makers. The entire board must take responsibility for ensuring that transactions are carried out within legal constraints, are soundly structured, make good use of the land trust’s resources, avoid undue risk and further the organization’s mission.

Failure to adequately monitor and participate in transaction decisions may result in a variety of problems. For example:

- The land trust may buy a property at an excessive price, raising questions as to whether the land trust has violated U.S. Internal Revenue Code regulations prohibiting land trusts that hold section 501(c)(3) tax exempt status—and virtually all land trusts do—from acting in ways that create private benefits for the seller rather than acting for the public benefit.

- Laxness or haste in undertaking a land transaction may cause the land trust to skip performing a preliminary environmental assessment of the property. Should hazardous waste exist on the property, under current federal and state hazardous waste laws, the land trust could acquire a substantial financial obligation to clean up the contaminated property.

- The types of properties being protected may serve the personal agenda of one or a few of the staff or board members, veering away from the mission or strategic plan adopted by the entire board.

- Board members who are not involved in important decisions like land transactions may become uninterested and passive.

- The appearance that the land trust makes decisions on an ad hoc basis or that a transaction can be pursued by influencing one key person in the land trust may damage the land trust’s credibility in the community and raise questions about whether it is serving the community interest.

- The land trust may take on projects with stewardship obligations that exceed the organization’s capacity or financial resources, jeopardizing the financial stability of the organization.
Full board participation in transactional decision-making helps avoid such problems and serves the critical role of furthering the entire board’s understanding of and commitment to the organization’s work, minimizing the risk of bad decisions due to haste, personal preference, mistakes or abuse.

A land trust also needs to understand that its board is responsible for other types of decisions affecting its real property holdings, including amendments to conservation easements and the transfer, sale or exchange of property held by the land trust. Board action is almost always required.

**THE REVIEW AND APPROVAL PROCESS**

For most land trusts, although decisions on transactions ultimately rest on a final up or down vote by the board, transactions often occur in a lengthy process that requires different levels of decisions at different stages. A project that meets the land trust’s criteria at inception may be so revised in negotiations as to no longer be acceptable. Or the land may be highly desirable, but the terms of the transaction that emerge may not best serve the public interest. Legal or title problems may surface that present insurmountable obstacles.

Thus, a land trust makes different levels of decisions at different points in its project selection process. Early on, it makes a preliminary decision, formally or informally, to engage in negotiations. As the transaction proceeds, decision makers must review and evaluate an array of information about potential costs, benefits and risks. Decisions are made throughout to continue or to withdraw from the transaction. Eventually, a final, formal action is taken to approve or reject the transaction. If a partner organization or public agency completes some of the project due diligence steps, the land trust still needs to document how the project is consistent with its own project selection criteria and review and approve the transaction.

Land trusts vary considerably in how they approach these various decision points. Small and all-volunteer land trusts typically delegate some decisions in the project selection process to their executive or lands committees, and, in some cases, that committee may administer the project from start to finish, relying on professional advisors as appropriate. As land trusts get larger, their boards tend to delegate more decisions to staff and committees. *In most cases, however, the final decision to approve or reject a transaction should be made by the full board or by a duly empowered board committee or staff, usually followed by board ratification.*

**Preliminary Review**

The land trust should document the review of each transaction to determine that a project meets the initial test of the land trust’s selection criteria—that the project is consistent with the land
trust’s mission and goals and that the property has significant resource and public benefit values (see Practices 8A and 8B). Documentation of the review can be in meeting minutes, project tracking forms, meeting notes or other records of discussions.

Some land trusts involve the full board at the beginning of the transaction by requiring its preliminary approval to proceed. Having the board grant preliminary, conditional approval helps the transaction process in several ways.

- It signals to the parties involved that the land trust is serious about the transaction.
- It clearly authorizes the staff or volunteers to proceed with research and engage in negotiations and avoids wasting time on inappropriate or unpopular transactions.
- When the transaction comes up for final action, the board will already be familiar with the project, and most, if not, all of the board’s questions and concerns will have been addressed earlier in the process. This strategy increases board confidence that they will make the right decision.

Some land trusts delegate the preliminary review and decision to enter into negotiations to a committee or to staff using delegation policies or committee charters. This method can work well if the types of projects the land trust is interested in are clearly described in criteria and annual or strategic plans, or if the land trust is working within one particular project area (along a greenway, for example) or has identified a particular corridor or regional area in which it will consider all projects. In general, if the full board does not participate in the decision to proceed, it should at least be informed about the project.

Review as the Transaction Proceeds

As the transaction progresses through design and negotiation, the land trust needs to determine if it can manage, defend and protect the property at reasonable cost. It needs to weigh the risks or costs and benefits of the project. And it must re-evaluate whether the transaction meets its criteria and serves the public benefit. Where possible, board review of the project midway in the selection process provides an update on the status of the transaction and gives the board the opportunity to confirm its intent to proceed or to suggest adjustments that would bring the project into compliance with land trust criteria. These decisions may also be left to staff or a committee.

Final Approval

At this point, the land trust has determined the transaction meets its selection criteria and has completed all of the steps in its selection process. Representatives and legal counsel of the land trust and the landowner have developed and reviewed legal documents. For most land trusts, the project is ready for final action by the full board (or delegated entity). The board needs two kinds of information to make a final decision on a project: it needs to know whether all necessary steps
have been completed; and it needs relevant information about the project’s benefits, risks, terms and so on. The basic steps for presenting, discussing and approving the project include the following:

1. **Send advance notice and information.** Before the board meeting (preferably at least three days before), board members should receive an agenda listing all projects to be discussed. The agenda should include a brief description of each transaction and recommend action or options for the board to discuss. This process allows board members to ask for more information or reflect upon the transaction ahead of time.

2. **Provide visual depictions.** Maps and photos that adequately depict the land can be sent in advance or available at the meeting. In some cases, an advance site visit by one or more board members would be useful.

3. **Provide a fact sheet.** A standard fact sheet or report should be completed for each property, with pertinent information about the project. This information should include the project’s location, size, ownership goals, conservation values, public benefit, an analysis of how the project compares to the land trust’s project-selection criteria, monitoring and management needs, types of reserved rights retained, costs and so on. The fact sheet should also include a summary of the results of the environmental assessment, a layperson’s description of any title issues that exist and other issues that have come up during the process of bringing the transaction to fruition. The information should be sufficient for the land trust board to make an informed decision and should be provided to board members in advance of the meeting.

4. **Present the issues.** The committee or project manager should present key issues that need to be considered.

5. **Conduct a thorough discussion.** The board should thoroughly discuss the proposal focusing on key issues, and board members should request additional information or ask questions if needed. The decision should not be rushed.

6. **Take a recorded vote.** The board secretary should ensure that minutes or a board resolution document the final vote and the names of any dissenter(s) or those abstaining. The minutes should show that any conflicted parties were not present for the final vote (see Practice 4A2). Keep a copy of the minutes reviewing and approving the project or the approved resolution in the project file.

 Emblem For accreditation, a land trust must document that it provides the board with materials several days before the meeting, sufficient for the board to make informed decisions and provide adequate oversight of the organization’s operations. In advance of decision-making meetings on land or easement projects, a land trust needs to provide materials describing the project (such as project location, project size, analysis of how the project meets the project-selection criteria, number/type of reserved rights retained and so forth).
The type and amount of information needed varies with the project. Keep in mind that particularly controversial or complex elements of projects should be investigated in more detail, and the board should be provided thorough information on items that require serious deliberation.

At a minimum, the board should have sufficient information prior to the meeting to address the following questions:

- Does the property meet the organization’s project selection criteria and mission and provide significant public benefit?
- Can the land trust devote or reasonably expect to acquire the necessary resources (human and financial) to carry out the project?
- Is the land trust aware of the risks entailed in the project and can it handle them if they become actualities?
- Can the land trust take on the stewardship of the easement or responsibly manage and maintain the land?
- What commitments or understandings does the land trust have with the donor or seller and can these be met?
- Is the project a wise use of the land trust’s resources?

Having this level of information ultimately allows the board to fulfill its legal responsibilities to the land trust.

**INFORMING THE BOARD THROUGHOUT THE TRANSACTION**

To pave the way for informed decisions and to have a smooth, predictable selection and approval process, most land trust boards are kept informed of a project’s status. Doing so allows the board to identify and address issues, concerns and disagreements as they arise and either resolve them or terminate the project. Land trusts should consider informing and involving the board in the following ways:

- **Provide the board with initial notification.** All board members should be notified when the staff or lands committee starts to pursue a project. Not only is this the first logical step in keeping board members informed, but it also may generate useful information about the project, allow important issues to be raised early on or head off unpleasant surprises. For example, a board member may have an interest in a property that is under consideration by the land trust or have information about the property or landowner that could be useful in the transaction or disqualify it from consideration.
- **Have the board visit the site.** Depending on the size of the land trust, its decision-making process and the particular project, some or all of the board members may wish to visit the site of a proposed project.

- **Keep the board informed through regular status reports.** For most land trusts, the board should receive regular reports from the project manager or lands committee. These reports should be provided to the board before or at regular meetings so that they may be discussed if the board members desire. This procedure helps keep the board informed of issues as they arise.

- **Notify the board if there are substantial project changes after approval.** If the project changes substantially after final approval, then the board should be notified of these changes before closing on the project. Substantial changes can include significant modifications in project size, restrictions or number and type of reserved rights.

Some land trusts keep the board informed of the status of projects with a project tracking form, which provides a quick overview of all active projects. It should be sent with the monthly or quarterly board reports.

**THE ROLE OF COMMITTEES IN PROJECT REVIEW AND FINAL APPROVAL**

In the majority of land trusts, project approval decisions are made by the full board. In some cases, however, a land trust may delegate project review and final approval to a committee or staff. Most land trusts delegate at least some of the initial review work of a transaction and certain levels of decision-making to one of the following types of committees:

- **Lands committee.** Many land trusts have a committee—called a lands committee or project or acquisition committee—that recommends action to be taken by the board. Such a committee can allow the land trust to involve people with special expertise who are not on the board.

- **Executive committee.** Some land trusts do not have a separate lands committee, but instead assign these functions to an executive committee in addition to its other duties.

Most land trusts use a lands committee for project review and the executive committee for project approval if the full board does not make project approval decisions.

If a land trust has significant activities other than land transactions, a separate lands committee that can give projects thorough scrutiny is a good idea. This separation of responsibilities may also be a good idea if the executive committee has special authority to approve projects in emergencies or other circumstances. Be aware, however, that an overly powerful committee making decisions about the land trust’s land acquisitions can weaken the commitment and involvement of the rest of the board. Also, take care to ensure that compliance with quorum and voting requirements
established in the land trust’s bylaws are met when a committee, rather than the full board, is acting on a land transaction. (Quorum and voting requirements of course also apply to actions by the full board.)

If a land trust chooses to delegate transactional review or approval to a lands or executive committee, their powers should be defined in the bylaws, by board resolution or in written policies. These provisions should delineate whether, when and under what circumstances the committee may move forward on a project, make recommendations to the board, advise the board or act for the full board. State law may set limitations on the creation, composition, operation and authority of committees that act for the board. The board should make sure any such delegation meets state law.

To be effective, committees should heed the following advice:

- Committees should avoid operating as or being perceived as an “in” group that shuts out other board members from the core work of the land trust.
- Committees must not just report to the board, but need to evaluate options and make specific recommendations to the board.
- Committees need to back up their recommendations with sufficient facts and information and to convey the work, research and deliberations behind their recommendations.
- Committees should report in detail on controversial topics and be brief on routine matters.
- Committees need to give the full board the opportunity to discuss the proposed decision in detail. Board approval should not be a mere rubber-stamping of the committee’s decision.
- Committees that have final approval authority on transactions should have limits to that authority defined in the delegation policy or bylaws. For example, if the transaction involves a conflicted party or is above a specific dollar threshold, it may be more appropriate for the full board to have the final vote on the transaction.
- Committees should provide the board timely written notification of any completed transactions, preferably at the next meeting.

The Role of Staff in Project Approval

For those land trusts with a large professional staff and a heavy volume of annual land transactions, staff is sometimes delegated the authority to make certain decisions on land transactions. This generally happens in one of two ways:
• Through the chief staff officer, either acting through the policy governance model or through specific authority granted by the board; or

• By senior land protection project staff authorized to make decisions on specific types of transactions or those located within a defined geographical area.

Both of these approaches require careful consideration and monitoring by the board. They also require written policies (or bylaws provisions) that define the limits to the delegated authority. For example, if the transaction involves a conflicted party or is above specific dollar threshold, it may be more appropriate for the full board to have the final vote on the transaction. While delegation of approval to staff changes the nature of the board’s participation, it does not diminish the board’s ultimate fiduciary responsibility for the organization and, hence, its responsibility for each individual land transaction. Staff should document the decisions and notify the full board of any completed transactions at the next meeting.

Preauthorized Project Criteria
In some circumstances, land trusts may find it more expedient to delegate staff the authority (via written policies or bylaws provision) to make decisions on specific types of land transactions that meet certain board-specified criteria. For example, individual projects within a defined geographical area (for example, a scenic highway corridor, a large wetlands complex, a localized farming community) or those that meet other criteria established by the board can be preauthorized, allowing staff automatically to proceed through certain predetermined levels of the transaction process without additional board involvement or approvals. Potential projects that deviate from the set of preauthorized criteria would then require further board deliberation and individual action.

For accreditation, it is extremely rare for a land trust board to delegate to staff the authority to review and/or make decisions on land or easement projects. If a land trust uses this approach, it must have specific limits to the authority and must document the staff review, analysis, decision and rationale (such as in a memo to the file).

Emergency Approval Procedures
Sometimes land trusts come under pressure to act on a project quickly. A landowner may wish to complete a transaction before year-end for financial reasons, the land trust may be trying to preempt the opportunity of another potential buyer, or the landowner may be terminally ill. In such emergencies, there is often an impetus for the project manager, chief staff officer or board chair to commit the land trust to the transaction without the necessary board approval. Convening the entire board in time to make a decision may be impossible.
Many land trust boards address these project-specific situations by authorizing the executive committee to make emergency approvals of transactions. It is rare that a majority of an executive committee cannot be reached within 24 hours by phone or email. In fact, it is wise to look for executive committee members who can be found and be available on short notice. In these instances, the bylaws allow the executive committee to act for the board, and the board meeting minutes usually document that the board delegated the authority. The board may put constraints on the executive committee’s approval authority—such as limiting the dollar amount to which the committee may commit the land trust and requiring completion of a preliminary evaluation for hazardous waste. Emergency approvals by the executive committee should be reviewed and ratified by the full board at its next meeting.

Emergency procedures for approval should be reserved for true emergencies. It is exactly in such emergency situations, where information is frequently missing and deliberations are cut short, that a bad project is likely to be approved. Frequently what seems like the crisis of the year can somehow await resolution in a month. A land trust should plan to have board meetings frequently enough that the need for emergency action is rare.

**Ratification by the Full Board**

Where project approval is delegated to a committee or staff, the full board should review and consider ratifying those decisions as part of its consent agenda. By the time the board can ratify a decision, the land trust may, in fact, already be contractually committed to a project. While the full board may not be able to turn the decision around, the ratification process nevertheless helps ensure that the board stays abreast of the actions of the committee or staff and takes on the responsibility to review and revise as necessary the selection criteria, selection process or executive limitations the committee or staff uses for approving projects. This review serves as an important monitoring function for the organization. Full board action or ratification is also a legal requirement for nonprofit corporate action in many states. At the very least, all board members should receive prompt notification of each transaction completed without full board approval.

For accreditation, a land trust needs to document that
- Each project was reviewed by the board or delegated entity (such as with meeting minutes, internal memos, committee reports)
- The board or delegated entity approved each project before closing (such as with meeting minutes, board resolution)
- If a project significantly changed after approval (such as change in size, restrictions, number/type of reserved rights), then the land trust provided the board or delegated entity with notice of change before closing

If decision-making authority is delegated, a land trust must
- Have a delegation policy or provisions in its bylaws that define the limits given to the delegated entity (such as requiring full board approval if a conflicted party is involved,
requiring committee review before a final decision is made)

- Provide timely notification of completed transactions to the board (preferably at the next meeting)
POLICY TEMPLATES

Board Policy for Delegating Decision-Making Authority on Transactions

[LAND TRUST] Board Approval of Land Transactions
Policies and Procedures [Excerpt]
Approved by Board of Trustees [DATE]
Last Revised by the Board of Trustees [DATE]

Final Review by Board of Trustees
Upon receiving a recommendation from the Land Protection Committee, the Board of Trustees will formally act on approval or denial of all land transactions, transfers, sales and exchanges of properties. In addition, the board will review conservation easement amendments following its amendment policy and any other land transaction issues that it deems important to the organization. Prior to its consideration, the board will be sent a fact sheet concerning the land transaction project. The fact sheet will include a visual depiction of the property, text describing its conservation values, issues discussed and recommendations of the Easement Review Subcommittee and/or the Land Protection Committee, and other pertinent information.

From time to time, the board may delegate its review and approval authority to the Executive Committee when situations arise between meetings, but never as a substitution for such regular meetings. The Executive Committee shall be empowered to act on behalf of the board when official action is needed on short notice and a full board meeting is deemed impractical. This delegation of authority shall follow the procedures established in the bylaws of the [LAND TRUST]. Pursuant to its bylaws, presence of a majority of the Executive Committee shall constitute a quorum and a member shall be deemed present if he/she participates through any communication by which all members of the Executive Committee may simultaneously hear each other. Vote of a majority shall be necessary for action on any land transaction and such vote shall be taken at the time of the meeting. No proxy or electronic vote shall be permitted.

All land transactions approved by the Executive Committee under this policy must meet [LAND TRUST]’s existing project selection criteria and/or follow established policies and procedures.

A member of the board or the Executive Committee deemed to have an actual or perceived conflict with regard to any land transaction, as defined by the conflict of interest policy, must disclose it in advance, and such member shall recuse himself/herself from participation in discussion and vote of the transaction. If a majority of the members of the Executive Committee have an actual or perceived conflict of interest, if a recusal causes the failure of the Executive Committee to achieve a quorum or if the land transaction involves any member of the board, the matter will be referred to and considered only by the full board and not the Executive Committee.

Minutes of the proceedings, with written documentation of the disclosure and action taken on any conflict of interest, shall be kept by the board Secretary. The board Secretary shall report to the full board at its next regularly scheduled meeting any action of the Executive Committee taken since the board’s last regularly held meeting.
During the organization’s five year strategic planning update cycle it will review all polices related to its land trusts activities to see if changes are needed. This review will be conducted prior to applying for renewal of Land Trust Accreditation.
RESOLUTION FOR THE
[LAND TRUST]
BOARD OF DIRECTORS
[Date]

Authorizing the Lands and Conservation Committee Authority for Year-end Donations

WHEREAS, because of personal tax considerations, the [LAND TRUST] often receives year-end offers for donations of real estate and conservation easements, and these typically occur in November and December; and

WHEREAS, the [LAND TRUST] Lands Department routinely submits real estate and conservation easement donation offers to the Lands and Conservation Committee and the Board of Directors prior to accepting such donations; and

WHEREAS, it is possible that the [LAND TRUST] will receive such offers from potential donors wishing to donate real estate or conservation easements to the [LAND TRUST] near year-end of [YEAR]; and

WHEREAS, the timing of year-end donations makes it difficult for the [LAND TRUST] Lands Department to prepare for the Lands and Conservation Committees and the Board of Directors’ review the detailed project information and for the board to act upon proposed resolutions regarding acceptance of such year-end real estate and conservation easement donation offers before year-end; and

WHEREAS, the [LAND TRUST] does not want to miss the opportunity to accept appropriate year-end real estate and conservation easement donations that would benefit the [LAND TRUST]; and

WHEREAS, the Board of Directors for the past five years has resolved the [LAND TRUST] Lands Department to consult with, and receive authorization from, the Lands and Conservation Committee to accept such year-end real estate and conservation easement donations without further resolution from the Board of Directors.

NOW, THEREFORE, BE IT RESOLVED, that the [LAND TRUST] Board of Directors authorizes the President and CEO, or his designees, to negotiate and execute all documents necessary to accept and hold the year-end donations of real estate and conservation easement donations, provided, however, that such acceptance will be made only after authorization by the Lands and Conservation Committee together with available Executive Committee members.

All land transactions approved by the Executive Committee under this resolution must meet [LAND TRUST]’s existing project selection criteria and follow established policies and procedures.

The full board will be notified of any completed transactions at the next board meeting and review and ratify the decision as part of its consent agenda.
The Executive Committee will review this policy on an annual basis to determine whether any changes need to be made to the process outlined herein.

This resolution was recommended by a unanimous vote of the Lands and Conservation Committee, including proxies, on [DATE].

This resolution was approved by a unanimous vote of the Board of Directors on [DATE].
STANDARD 8 EVALUATING AND SELECTING CONSERVATION PROJECTS

B. Project Selection Criteria and Public Benefit

2. Develop and apply written project-selection criteria that are consistent with the land trust’s conservation priorities.

Accreditation indicator elements located at www.landtrustaccreditation.org

THE IMPORTANCE OF PROJECT SELECTION CRITERIA

Written selection criteria are the land trust’s written description of the characteristics or minimum standards that qualify land to be considered for protection. Land trusts use selection criteria reactively, to screen properties offered to them, and proactively, to target properties to pursue. In both cases, written criteria provide a critical tool for determining which transactions are worthwhile to undertake and are consistent with the land trust’s conservation priorities. Establishing written project selection criteria is one of the most basic steps in setting up and operating a land trust. Having selection criteria yields many benefits.

- **Written criteria help the land trust be strategic and focus on important projects, promoting wise use of its limited time and money.** Criteria allow land trusts to be able to reject projects when their size or scope do not merit the organization’s efforts, have little conservation value or do not advance a land trust’s mission, goals and conservation priorities. **Written criteria also help a land trust achieve its goals and demonstrate success to supporters and the community.**
• Written criteria flag potential problems and issues that otherwise might be overlooked. Considering a property in light of a land trust’s criteria helps staff, committees and the board focus on the pros and cons of working on a particular project, and allows the land trust to make an informed decision based upon its analysis of the project’s risks and benefits.

• Written criteria communicate a land trust’s policies and priorities to landowners and to land trust personnel. Criteria help landowners see a land trust as objective and professional. They also allow initial discussions with landowners to proceed in an efficient manner because the land trust knows exactly what information it must gather to satisfy its criteria.

• Written criteria focus the evaluation of a project on its merits rather than the personalities involved. The objective nature of criteria is even more important when the landowner is closely tied to the organization (board member, donor or influential member of the community) or when the landowner is unpopular or unpleasant.

• Written criteria provide the land trust with justification for declining a project. This is the benefit most often cited by land trusts when asked why they adopted selection criteria. It helps a land trust explain to its supporters and the community why parcels are rejected, and it helps a land trust avoid feeling pressured to undertake conservation of a property that may have sentimental value to a landowner but little conservation value.

DEVELOPING PROJECT SELECTION CRITERIA
Criteria can be presented in a variety of formats, including:
• A narrative summary of the criteria for landowners or members of the public
• A checklist, questionnaire or outline that land trust personnel use during a field visit or as they see a project through its various stages
Most land trusts use selection criteria that require a qualitative judgment on behalf of land trust staff, volunteers or board members about whether a particular project should be accepted or declined. Other land trusts and, more frequently, public agencies, use a quantitative method of selecting projects by determining particular qualities that are important to the organization and the community it represents and assigning values to these qualities. Projects that score the most points in such a ranking system are the projects that the land trust decides to pursue. Some land trusts combine the two approaches by using a qualitative approach for conservation easement or fee title donations and a quantitative approach for their purchase.

Some land trusts also develop different types of criteria for different types of projects. Thus, there may be one set of criteria for fee acquisitions that addresses the costs of ownership and management and another for conservation easements that addresses perpetual stewardship considerations. The makeup of selection criteria varies widely in both level of detail and content, but generally includes a review of at least the following:

1. Consistency with mission, goals and conservation priorities
2. Conservation and public benefit values (factors weighing in favor of a project)
3. Feasibility (factors weighing against a project)
4. Significance or priority of a project

These categories move from broad to narrow, each serving as a filter narrower than the one before. Together, the first two filters – consistency with a land trust’s mission, goals and conservation priorities, and conservation and public benefit values – form the most basic eligibility criteria: is the project worth pursuing? The last two filters – feasibility and significance – are more difficult determinations, and land trusts generally consider them throughout the transaction process as they collect new information. Each of these four categories is discussed below.

**Consistency with Mission and Goals – Does It Meet Our Conservation Priorities?**

A project must be consistent with the land trust’s mission and goals so that the organization offers an effective, meaningful conservation program for its community. If the project is not consistent with organizational mission and goals, red flags should wave! Accepting projects that deviate from its mission and goals can cause a land trust to veer off course and use its resources inefficiently—at worst, betraying the people who have contributed time, money and land and undermining the land trust’s long-term mission.
Ideally, the land trust has completed an organizational strategic planning process and a strategic conservation plan. Strategic conservation plans (see Practice 8A) – and often some organizational strategic plans – define and identify by name the conservation priorities and/or priority regions in which a land trust wishes to complete projects. If the proposed project does not fit with these plans, there still may be some flexibility in deciding whether or not to pursue the project. The decision will depend upon the level of detail of the land trust’s plan(s) and whether there is any room for variance.

**Conservation and Public Benefit Values – Is It Worthy of Protection?**

This set of criteria focuses on the land’s physical features and the public benefits its protection may provide. Identifying a property’s conservation values and having land trust personnel acknowledge which conservation values are being protected are crucial first steps in the project selection process. Therefore, project criteria should include, at a minimum, a general summary of the conservation values.

Many land trusts incorporate the Internal Revenue Code’s conservation purposes test and other federal or state tax benefit requirements into their criteria to help ensure that they are making wise choices about which land to protect. Satisfying the “conservation purposes test” (see related Practice 9E2) should be one key component of the project selection process, particularly for conservation easement donations. These include significant natural, agricultural, recreational, educational, scenic or cultural resources.

In addition to considering the specific conservation values set forth in the Internal Revenue Code and Treasury regulations, land trusts generally favor projects with characteristics that fall into the following categories:

- Provides open space valuable to a community due to its proximity to developing areas or because it helps define a community’s identity
- Furthers or is consistent with government conservation plans or policies
- Buffers, adds to or otherwise helps protect or improve already protected areas
- Is under probable threat from future development or, conversely, is not under immediate development threat
- Represents a prudent financial investment in conservation
- Is of sufficient size to provide public benefit and its conservation values are likely to remain intact, even if adjacent properties are developed
- Initiates or serves as a precedent that leads to additional protection.
It is common for land trusts to decline projects that fail to meet conservation and public benefit tests. See Practice 8B3 for a more detailed discussion of public benefit.

**Feasibility Factors – Can the Resources Be Protected at a Reasonable Cost?**

Land trusts may find that a proposed project has important conservation values and meets the land trust’s mission and goals but, nonetheless, presents issues that may weigh against pursuing the project. These issues may include:

- Probable development of adjacent properties in a manner that would significantly diminish the conservation values of the property in question
- Landowner insistence on provisions in a conservation easement that would seriously diminish the property’s primary conservation values
- Inadequate access to the property for management or monitoring
- Expensive stewardship responsibilities due to the location of the property, maintenance of structures, management of resources, hazards or liability problems or the cost of property taxes
- Unusually difficult stewardship responsibilities—for example, multiple or fractured ownerships, frequent incidence of destructive trespassing, fencing restrictions, irregular configuration of the property, easement provisions that are difficult to enforce or monitor and so forth
- **Lack of staff or volunteer capacity to manage and care for the land over time**
- **Lack of financial capacity to monitor and defend the easement**
- Ethical, public image or conflict of interest problems if the land trust pursues the project
- Adverse impact on the conservation values of the planned open space from a proposed development project
- Irreparable contamination or prohibitive clean-up costs
- Excessive costs (in relation to the conservation value) required to obtain the property

Land trusts frequently turn down projects on the basis of their feasibility analyses. Sometimes circumstances are such that the conservation values cannot be reasonably protected.
Significance or Priority – Is This Where We Should Devote Our Time and Money Now?

The final factor generally addressed by selection criteria is the question of whether or not a particular project is of enough significance (or ranks high enough on a land trust’s list of priorities) to merit the expenditure of the organization’s scarce resources. At this point, the land trust may evaluate the threat of development to a particular parcel to help it make a decision. Some land trusts choose parcels that are under threat of imminent development, while others choose projects that have minimal development pressures. After analyzing a project, a land trust may still determine its significance is too low to pursue even if it otherwise meets the land trust’s goals. In such cases, the land trust may decide to decline a project or refer the project to a more suitable conservation organization.

Selection criteria should be reviewed by land trusts periodically and refined as the organization grows or adjusts its mission or its conservation priorities. A land trust may also wish to revise its checklist based upon lessons learned from applying the criteria to several different projects. It is wise to establish a timeframe (every two years, every five years, in conjunction with strategic or conservation plan updates, for example) for reviewing and/or revising the organization’s project-selection criteria.

THE BOARD’S DISCRETIONARY ROLE

Written criteria are a guide to help the land trust decide the eligibility of a project, but the land trust may use other factors in making a final acquisition decision. Even if a project meets the land trust’s criteria, the board may decide not to pursue it because of lack of public support, overall complexity, timing or other practical considerations. The board may also choose not to pursue a project if another conservation organization has been working with the landowner for some time or is in a better position to protect the property. Alternatively, in rare cases, overriding considerations may cause the board to decide to move ahead on a project that does not meet the land trust’s criteria. Generally, however, if a project falls short of the land trust’s criteria, it should be revised or declined.

To underscore the board’s discretionary role in accepting or declining projects, selection criteria often include statements such as the following:

The Board of Directors retains discretion over acquisition or disposition of land and conservation easements and will evaluate each project and proposal on its own merits after careful investigation of the property, its resources, and its public benefits. (Clear Creek Land Conservancy, Colorado)
All the preceding notwithstanding, the board of trustees retains discretion over acquisition or disposition...and will review each on a case-by-case basis. *Little Traverse Conservancy, Michigan*

For accreditation, a land trust must:

- Have written project-selection criteria that are consistent with the land trust’s conservation priorities.
- Document that each project is reviewed against the criteria, as evidenced by completed criteria worksheets or checklists, site evaluation checklists, project planning sheets, meeting minutes describing the review and conclusion and so on. If a partner organization or public agency completes some of the project due diligence steps, the land trust still needs to document how the project is consistent with its own project selection criteria.

Approved projects need to be consistent with project-selection criteria. See Practice 8C1 for more information on using site visits to help document whether a project meets the land trust’s selection criteria.

See Practice 8B1 for more information on applying the project selection criteria as part of the project selection process.
STANDARD 8 EVALUATING AND SELECTING CONSERVATION PROJECTS

C. Project Evaluation

1. Visually inspect properties before buying or accepting donations of conservation land or conservation easements to determine and document whether:
   a. There are important conservation values on the property
   b. The project meets the land trust’s project-selection criteria

Accreditation indicator elements located at www.landtrustaccreditation.org

INTRODUCTION

One of the most important aspects of the due-diligence requirements for any land transaction is the site visit and evaluation. A land trust must inspect each property before deciding whether to acquire the land or conservation easement. A site inspection is not a drive-by or windshield survey. In most instances, it is an on-the-ground, documented inspection that determines if there are any important conservation values on the property and if the property meets the land trust’s project-selection criteria, including providing a public benefit (see Practice 8B). For remote or very large properties, a site inspection may involve an aerial flyover or a detailed visual analysis of satellite photos. A site inspection should happen early in the due-diligence phase of the project in order to provide information necessary for project evaluation. The goals of a site inspection include:

- Determining whether there are important conservation values on the property that merit the land trust’s protection
- Helping to assess whether the property meets the land trust’s project selection criteria (see Practice 8B2) and whether the conservation resources and public benefit are significant enough for the land trust to pursue the property’s protection
• Identifying any management-related problems that make it impossible or infeasible for the land trust to undertake the transaction

• Identifying potential problems, such as an encroachment or evidence of environmental contamination, that must be investigated further, resolved or mitigated and carefully considered before the land trust board gives final approval to proceed with the project

For documentation purposes, at a minimum, the inspection form should include the date of the inspection, name of the property and who conducted the inspection, along with the identification of the conservation values.

Without a thorough site inspection, a land trust risks squandering its resources on projects that do not advance its mission or have minimal conservation value or public benefit.

For accreditation, a land trust must have evidence it conducted a visual inspection to document the property’s conservation values before a project closes.

PRELIMINARY STEPS

A key component of the inspection of a potential conservation site is the identification and documentation of the conservation values associated with the land. Because one of its primary purposes is to help the land trust determine if the project meets the land trust’s project selection criteria, the inspection form should align with those criteria (see Practice 8B2).

It is also necessary to distinguish between the information that a land trust must gather for a conservation easement acquisition versus a fee title acquisition; land trusts sometimes create two different site inspection forms, one for each type of acquisition. In the first instance, a land trust is acquiring a property interest in the land but not the land’s entire ownership. The organization generally does not acquire or assume the responsibility of upkeep and maintenance, public liability risks and other typical attributes of land ownership. In a fee title acquisition, a land trust acquires the land in its entirety and thus takes on all obligations of ownership, including the potential liability for hazardous waste or other threats to the property.

The creation of a site inspection form has many of the same benefits as creating a project completion or project acquisition checklist (described in Practice 8B1). These benefits include helping ensure that the land trust does not forget to secure important information about the property. Doing so makes certain that consistent types and amounts of information are collected for each potential project and enhances the land trust’s decision-making process through timely and complete site inspection data. The site inspection form also provides a record of the land trust’s visit to the property.
BACKGROUND RESEARCH

The first basic step in a site inspection is preparing for the visit. A land trust must identify which staff, volunteers or board members should be present. Those land trusts without staff often assign a particular board member to each conservation project. Others encourage board members to accompany the staff or volunteer who is charged with the site visit in order to begin to familiarize the board with the property.

It is generally important for those land trust representatives (project staff or trained volunteers) who will be responsible for negotiating, drafting and revising the conservation easement or overseeing the property’s acquisition (or working with the land trust’s attorney to accomplish these tasks) to visit the property. Other land trust staff or volunteers who may benefit from attending the site inspection are those who will be charged with the property’s stewardship.

Once the land trust identifies the parties who will attend the site inspection, they should be trained in how to:

- Research a property prior to the site visit
- Communicate with the landowner (including what not to say)
- Dress and what to carry for the visit
- Complete the site inspection form
- Determine what must be done as a follow-up to the site inspection
- Determine what records must be kept in the land trust’s project files (see Practice 9G)

The land trust representative(s) who will conduct the site inspection should research the property before the inspection, in order to be fully prepared for the visit. Such research might include:

- Understanding the property’s location relative to land trust priorities or focus areas
- Reviewing topographic or parcel maps and aerial photos to understand the property’s size and general physical features and its relationship to other land trust projects, public lands and so forth
- Reviewing U.S. Natural Resources Conservation Service soil surveys, state wildlife department maps, scenic byway master plans, historic preservation district designations and Natural Heritage Inventory data
- Reviewing local zoning and land use information, such as area master plans

Some of the information a land trust should secure before the site inspection through this research includes:

- Property location and acreage
- County in which the property is located
- Zoning and land use issues that may affect the property (limits on development potential, development in the area and so forth)
- Important natural or historic resources located on the property
It may not be possible to secure all of the above information in a timely fashion prior to a site visit, but it is advisable to do so to the extent possible. All of this information should be noted in the project file and kept pursuant to the land trust’s records policy (see Practice 9G1).

THE SITE INSPECTION PROCESS

In addition to identifying and documenting the conservation values of a property, a site inspection can help the land trust learn about property characteristics, including:

- **Property access.** Is the property accessible from a public road? If not, how does one gain legal and physical access to the property? Is the access gated? Is the property accessible year-round? If not, why and when is it accessible?

- **Property boundaries.** If feasible, the land trust inspector should walk the entire boundary of the land in order to understand any stewardship challenges associated with unclear boundaries and to look for potential problems associated with adjacent land uses. Note whether the boundaries are marked by survey monuments, fence lines or natural features or if boundaries are not possible to locate in the field.

- **Existing land use and intensity of activity.** Note all residential, agricultural, commercial, industrial, recreational and forest harvest activities (including those authorized under leases or rental agreements) and their relative intensity of activity.

- **Existing improvements and their condition.** Note the number and approximate location of all structures and improvements (roads, trails, gates, dams, fences and so forth) and their general condition. Also note any visible easements, such as utility lines, driveways, railways and ditches.

- **Potential threats to natural or historic resources.** Note activities, both on- and off-site, such as incompatible development, logging, overgrazing, off-highway vehicle use, evidence of trespass or vandalism, erosion or runoff, evidence of trash dumping or the presence of invasive species.

- **Safety hazards, natural and human-made.** Note any swimming holes, fishing sites or rock climbing areas that might attract uninvited visitors, as well as any natural hazards, such as landslides, fire hazards or steep cliffs. In addition, note any unstable bridges, roads, buildings, dams or walls.

- **Adjacent land use.** Identify the extent and intensity of adjacent residential, commercial or industrial land uses; the presence of mining, logging and road construction; and any water control or drainage issues.

- **Evidence of hazardous waste problems.** Look for dumps, evidence of underground tanks, bald spots lacking vegetation or where vegetation is dying, fumes, pipes venting from the ground, empty tanks in which chemicals, pesticides or petroleum products may have been stored or evidence of buried waste, such as disturbed soil. A more thorough inspection for hazardous materials will be needed if the land trust proceeds with the transaction (see Practice 9C), but such obvious signs of contamination provide an early warning that the property may have serious problems.
IMPORTANT CONSERVATION VALUES
The land trust must identify and document the conservation values of each property it protects for several reasons:

- **To decide whether to protect the property.** The land trust needs to determine whether the property is significant enough to deserve the land trust’s involvement.
- **To determine how to protect the property.** The nature of the property’s resources will determine what conservation methods are appropriate, what restrictions must be required in a conservation easement or what long-term management efforts will be needed.
- **To help establish a baseline.** The land trust needs to know the condition of the resources at the time of acquisition so that it can measure any changes over time. The land trust may need to repair conservation resources degraded by pollution, erosion, storm damage, overuse or other changes.
- **To defend the property over time.** A land trust may need to demonstrate that the property has substantial conservation values that deserve permanent protection to defend the property from conflicting land use activities, condemnation for other public uses or lawsuits to weaken or undo easement restrictions.
- **To build and maintain public trust.** In order to uphold the public’s trust in the land trust’s activities, it is important that the organization always be clear about the conservation values that are being protected on any given property.

Once the project is approved, the land trust will need to conduct and document a more thorough review of the property’s resources sufficient to inform a baseline documentation report for conservation easements (see Practice 11B) and a management plan for fee properties (see Practice 12B1). For purposes of project evaluation, however, particular attention should be given to determining if a property’s conservation values will meet the Internal Revenue Code’s conservation purposes test for conservation easements intended to qualify for federal tax benefits (and in some cases, state tax benefits) or to determine the public benefit of a fee land acquisition. At a minimum, the site inspection must identify and document those conservation values that will determine if a property meets the land trust’s selection criteria. The site inspection may not suffice for the baseline documentation report or full management plan.

ON-SITE INSPECTION
The property’s conservation resources should be examined in the field to identify what resources are represented and to provide basic information about their condition and significance. The level of detail needed will vary depending on the type of resources and the conservation plans for the property. In a limited development project, for example, a land trust may need a more formal inventory to ensure that construction does not damage rare plants or other significant features.
Generally, a site inspection should obtain the basic types of information about these natural and cultural resources to the extent they align with the organization’s mission and selection criteria:

- **Water resources.** Indicate kind and condition—pristine, degraded or restorable. Types might include:
  - Marsh
  - Riparian
  - River/stream
  - Open water
  - Vernal pools
  - Springs
  - Floodplain
  - Aquifer recharge area
  - Upland watershed

- **Natural habitat (plant and animal).** The inspection might identify:
  - Rare, threatened or endangered species
  - Wildlife habitats
  - Plant communities
  - Documented biotic resources
  - Whether the property connects or buffers other protected natural areas

- **Agriculture.** The inspection might identify:
  - Present and potential agricultural uses
  - Presence of prime or productive agricultural soil
  - Favorable microclimates
  - Whether the property buffers other productive agricultural land

- **Open space.** The inspection might identify:
  - Whether it connects to or buffers other protected lands
  - Whether the property is visible from public lands or waterways
  - Whether the property is visible from public roads or scenic byways

- **Aesthetic and cultural features.** The inspection might identify:
  - Archaeological sites
  - Historic sites (land and buildings)
  - Geologic features
  - Whether it is accessible to the public or could be
  - Whether it is a potential park site
POST-SITE INSPECTION MATTERS

Following the site inspection, a review of the data collected may indicate that further studies are necessary in order for the land trust to decide whether to proceed with the project. A second site inspection may be warranted to evaluate biological changes, such as the emergence of vernal pools, or to uncover occasional uses of the property or adjoining lands that may pose management or resource protection problems, such as the dumping of trash or debris, or to complete a project plan (see Practice 8D) or baseline documentation report (see Practice 11B).

A land trust may need additional information to determine if a property will meet the Internal Revenue Code’s conservation purposes test, such as a biological inventory that would identify threatened or endangered species of which the landowner is unaware or that were not visible on the site visit. Alternatively, a land trust may need additional information about agricultural or forestry resources that require an analysis by an experienced professional.

Once the inspection is completed and supplemented by any additional inventories secured, the land trust should continue with its project evaluation process. Both the inspection itself and the final evaluation should be documented in writing and kept in the land trust records in accordance with its records policy (see Practice 9G).

ADDITIONAL USES FOR SITE INSPECTION DATA

Although the information gathered in a site inspection is critical to the project selection process, it is also important to other land trust functions. Often, a land trust can use initial site inspection information in the creation of baseline documentation reports prepared for conservation easement projects.

If a conservation easement requires the preparation of a land management plan, or if the land trust acquires the land in fee and manages the property in accordance with such a plan, the data acquired in the site inspection can help identify areas that must be addressed by such plans, including:

- Safety hazards
- Resource depletion issues (overgrazing, erosion and so on)
- Public use issues
- Maintenance of existing improvements

Finally, the data acquired during a site inspection may demonstrate the need to obtain a Phase I Environmental Assessment of the property in situations in which a land trust might not routinely do so, as is often the case with donated conservation easements (see Practice 9C1).
STANDARD 9. ENSURING SOUND TRANSACTIONS

F. Title Investigation and Recording

1. Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire
   a. Update the title at or just prior to closing

Accreditation indicator elements located at www.landtrustaccreditation.org

WHY IS TITLE INVESTIGATION IMPORTANT?

Title investigation is essential to ensure that the land or conservation easement is what the land trust expects it to be.

With thorough title investigation, a land trust will know:

- Who owns the property and, therefore, who the land trust must work with to complete the donation or purchase (including, for purposes of Practice 10C4, understanding the membership of any pass-through entities, such as LLCs or corporations)
- The correct legal description of the property
- Encumbrances on the property (for example, liens, mortgages, mineral or other leases, water rights) (See Practice 9F2)
- Any matter that must be addressed before the donation or sale is completed, including matters that are of concern to funders

If a land trust accepts a deed, whether for a fee property or easement, without proper title investigation, such a deed may:
• Not be effective or valid
• Encumber the wrong property
• Encumber only a partial interest in the property
• Be subject to encumbrances that threaten the permanence of the land’s protection
• Be subject to mortgages, mineral reservations, tax liens or judgments or other restrictions that prevent deductibility or may jeopardize the property’s permanent protection
• Be subject to easements, use agreements, covenants or other encumbrances that are inconsistent with the conservation purposes of the easement
• Lead to expensive title disputes and a diversion of resources

**Definition of Title**

Title is the legal means by which someone proves they own a piece of land or an interest in land. Title can be defined as the rights of ownership of real estate recognized and protected by law. These rights include the:

• Right of possession
• Right to control the property within the framework of the law
• Right of enjoyment (that is, to use the property in any legal manner)
• Right of exclusion (to keep others from entering or using the property)
• Right of disposition (to sell, will, transfer or otherwise dispose of or encumber the property)

Traditionally, real property is described as a bundle of legal rights. A holder of the entire bundle of rights is said to own the property in *fee simple*. Some rights in the bundle may be severed from the entire bundle of rights. Examples of rights that may not run with the titleholder of the property — rights that a separate party may own or control — include:

• Easements
• Rights-of-way
• Mineral rights
• Water rights
• Timber rights
• Restrictive covenants
• Life estates
• Rights of lien holders, such as tax liens, judgments and the like
• Conservation easements
Because the rights of ownership can be separated and individually transferred, this concept is often described as a “bundle of sticks,” the sticks symbolizing individual rights that can be separated from the whole.

When someone acquires an interest in land, a document of the acquisition is usually recorded, which means placing a document on file with a designated local public official, usually the recorder of deeds, registrar or register of deeds. Recorded documents are considered to be placed on open notice to the general public. While the specific instruments used to document ownership of one of the sticks listed above may vary, they usually include deeds, mortgages (whether or not in the form of deeds of trust), leases (usually longer term varieties), easements and court orders and other instruments affecting the title to real estate.

**TITLE WORK DUE DILIGENCE**

Land trusts often use the term *title work* when talking about due diligence for title investigation. “Make sure you order the title work early.” “Land trusts must review title work.” But what does this term mean? It can mean any number of ways to investigate and review title, including through abstracts, title reports, title commitments and title insurance.

It is important to remember that while a knowledgeable land protection specialist might glean a good deal of information from searching the county records, this effort should not replace the professional investigation of a title company or an attorney. Title can be conveyed in a variety of ways; simply searching the recorded deeds at the courthouse is not an adequate investigation of title. After investigating title, it is critical that the land trust evaluate the information and address any issues accordingly. See Practice 9F2 for more information.

**Types of Title Investigation**

**Title Insurance**

*Land Trust Standards and Practices* does not require title insurance, but it is recommended, particularly for land or conservation easement purchases. Some organizations always purchase title insurance for land acquisitions and generally for conservation easements. The importance of title insurance varies depending on what interests the land trust holds and what it paid for them. If the land trust does not obtain title insurance for conservation easements, it should encourage the property owner to carry their own title insurance to protect potential title problems.

Sometimes title problems occur that could not be found in the public records or are inadvertently missed in the title search process. To help protect a land trust in these events, many obtain an
owner’s policy of title insurance to insure them against the most unforeseen problems when they acquire conservation easements or fee-owned land. Owner’s title insurance, called an owner’s policy, is usually issued in the amount of the real estate purchase (or its value, if a donation). It is purchased for a one-time fee at closing and lasts for as long as someone (or a successor) has an interest in the property. Only an owner’s policy fully protects the land trust should a covered title problem arise that was not discovered during the title search. Possible hidden title problems can include:

- Errors or omissions in deeds
- Mistakes in examining records
- Forgery
- Mortgage holder fraud, forgery or false information
- Undisclosed heirs
- Potential boundary issues if not excepted from coverage

An owner’s policy provides assurance that a title company will stand behind the land trust—monetarily and with legal defense, if needed—if a covered title problem arises after the land trust acquires land or a conservation easement. The title company will help pay valid claims and cover the costs of defending an attack on the title. Receiving an owner’s policy is not an automatic part of the closing process, and it is paid for by different parties (the buyer or seller) in different parts of the country.

**Title Commitment**

A title commitment is a temporary contract providing for the issuance of a permanent title insurance policy when certain conditions are met. The purpose of a commitment is to give the prospective insured client (for example, the purchaser, donee, lessee or lender) information and assurance that if they proceed to closing and the requirements of the commitment are met, the title company will issue a title insurance policy (containing the exceptions identified in the commitment). In short, the title company commits to insure the title of the property, as described within the commitment itself. A title commitment is also known as a *title insurance commitment, preliminary title report* or *title binder*.

A land trust orders a title commitment to determine ownership, encumbrances, liens, easements, property description, whether property or other taxes applicable to the property are current and so on. A title commitment will also usually require that an entity take certain actions before insuring title conveyed by that entity to ensure the person acting on behalf of the entity has the legal ability to complete the transaction. Such information can be valuable to a land trust working with a
corporation, trust, limited liability company, partnership or other entity acting as grantor. Usually the land trust’s attorney will review the title commitment (or title report) as part of the due diligence for a land or conservation easement acquisition. Any questionable items, those that negatively affect the conservation values of the property or those that would prohibit the land trust from acquiring the land or easement should be addressed at this stage (see Practice 9F2). While a title report will contain much the same information as a title commitment, it may be organized differently and will not lead to title insurance. Once any title issues have been resolved, the title company will update the title commitment with a new date, time and revised commitment number and will write the title policy to accurately reflect all conditions of title at the date of closing.

Typically, the title company rolls the fee for producing a title commitment into the cost for the title insurance, which is generally based on the land’s appraised value or purchase price. Some land trusts order title commitments with no intention of ultimately securing title insurance in order to complete their title work due diligence. Because title companies generally do not charge for commitments, it will not be long before a land trust that only orders commitments finds it is no longer able to get title companies to work with the organization. Land trusts have found ways to engage title companies as partners by explaining why they may need a title commitment, but not title insurance, and have found creative ways to compensate title companies for their time in producing a commitment. Some land trusts negotiate a fixed fee for a commitment, while some agree to buy the minimum amount of title insurance offered by a company, which may be as little as a $10,000 policy at a cost of $300 to the land trust. Who pays for the title policy is largely jurisdictional and is always negotiable.

**Title Reports**

Some title companies are willing to produce a report of title for a set fee. The title company does the same background work to investigate title as they do to write a title commitment. The title report determines the name of the owner of record, liens, exceptions to title and so on. However, the report provides no commitment to insure title. Title reports are sometimes called *reference commitments* or *title searches*. Payment for a title report is usually due at the time the title company produces the report.

Title reports can serve a land trust well in the right circumstances. A land trust can order a title report to gain information on a high priority parcel of land or to obtain an early indication as to whether a potential conservation easement donor has a mortgage on the property. It is a cost-effective way to determine ownership and encumbrances. However, a title report provides no protection for errors or omissions (unless negligence of duty was involved), so if the land trust chooses to acquire the property, it should consider ordering a title commitment to obtain title
insurance. Further, a title report will not contain the requirements necessary to close and insure a transaction as a title commitment does. Therefore, a land trust will have to work with its attorney to determine what additional steps might be necessary to ensure that the grantor is authorized to sign the conveyance documents and to address any other details necessary to make sure the property interest is properly conveyed, subject only to the exceptions the land trust is willing to accept on the property.

The willingness of a title company to produce a title report varies from company to company and state to state. Developing a good relationship with title companies in your region may make them willing to help the land trust with challenging projects or tight timelines. Title companies are also usually willing to conduct additional research at the client’s request, although this additional research will add to the cost of the report. Use the title company as a partner and seek its guidance; in some cases, it is just as cost effective to obtain a title commitment as it is a title report.

**Title Opinion**

Many land trusts rely on a *title opinion*, which is the written opinion of an attorney, based on the attorney’s title search into a property. It describes the current ownership rights in the property and encumbrances, as well as the actions that must be taken to make the stated ownership rights marketable, to protect the conservation values and to ensure the easement will not be extinguished.

**Abstracts**

Abstracting is the process of making notes or abbreviating the chain of title from the public record or the *title plant* (the compilation of real property records). The purpose of an abstract is to discover, assemble and examine all documents that create a link in the chain of title. Missing links are noted, and a detective search begins to find them.

Title companies utilize abstracts to define the chain of title. Title examiners use the information in abstracts to write title insurance commitments and title insurance policies. While abstracts provide great information and can help in assurance of title, they do not provide protection for a landowner or potential owner. In addition, it is sometimes difficult to find an attorney who is willing to create a title abstract, and those who are available can be very expensive. For these reasons, title investigation in most states is conducted using title reports and title commitments.
Ownership and Encumbrance (O&E) Report

Some title companies offer a product known as an ownership and encumbrance report, which provides exactly what its name suggests: information on the owner of record of a parcel of land and any financial liens (mortgage, deed of trust, mechanic’s lien and so forth) affecting such land. An O&E report does not provide sufficient information to permit adequate title due diligence because it does not reveal any of the recorded documents that may negatively affect a land trust’s ability to protect the land’s conservation values, such as oil and gas leases, easements and rights-of-way affecting the property, reclamation orders, covenants and similar encumbrances.

For accreditation, a land trust can document title investigation with title insurance, a title commitment, a title report, a title opinion or a title abstract, so long as a title company or attorney prepares it. An O&E report is not sufficient for accreditation. The title investigation needs to identify ownership and encumbrances, such as mortgages, severed mineral rights, severed water rights, tax liens or judgements, easements, use agreements, covenants or other restrictions.

If the title investigation includes a general exception for the investigation of rights that would impact the conservation values, a land trust will need to separately document how it addressed those rights. For example, some title commitments have a general exception for the investigation of mineral rights. This exception can either mean the title company included mineral rights in its investigation but cannot guarantee them or it can mean the mineral rights were not part of the title investigation. Because of this, a land trust needs to evaluate such exceptions and assess the risk that the minerals were potentially severed. If the risk is high that the title investigation excluded mineral rights and there is a high risk of severed mineral rights, the land trust will need to take additional action to address this risk (see Practice 9F2). Similarly, if water rights are excluded from the title investigation but they are essential to maintaining the conservation values, then the land trust needs to document these water rights in a separate document, such as a due diligence report, deed or the baseline documentation report.

TIMING OF THE INVESTIGATION

Early in the process: It is important to investigate the title as early as possible in the acquisition process — often title is not vested as people (even the owners) think it is. Knowing about problems early in the acquisition can give the parties involved time to cure any defects or change in whose
name title is held. Starting the title investigation process early is particularly important when timing is tight, such as when a donor wants to close in a certain calendar year. Many transactions have been slowed down or even halted due to unresolved title issues. Inaccurate legal descriptions, mortgages or other forms of debt, mineral interests and other ownership legalities are some of the quite common issues that can delay or prevent closing of a transaction.

Update at or just prior to closing: If the land trust conducted its initial title investigation early in the transaction process, it must have a professional title company or attorney update the title at or just prior to closing (preferably within 30 days) to ensure no additional encumbrances have been placed on the property since the initial title investigation. A land trust could find itself in a difficult situation if a landowner secured a mortgage after the initial investigation and before closing, which could have been addressed if the title was updated or brought current as close to the closing as possible.

For accreditation, a land trust can provide a title update from a title company or attorney through an updated title report or title commitment, a title insurance policy, a written communication from an attorney or title examiner that the investigation was brought current at closing or written escrow or closing instructions requiring that the title investigation be brought current at closing. The title update needs to be completed within 30 days prior to closing.

PERIOD OF TIME COVERED BY THE INVESTIGATION

Ownership of land changes over time, and those acquiring land must have knowledge of who owned the land for a certain number of years in order to ensure that their acquisition is valid and cannot be contested. A history of how title passed from one owner to the next is called a chain. The chain of title for every piece of land in this country begins with ownership by some country (the United States, England, France, Spain, Mexico or Russia). The first conveyance of title from a certain nation or state to another entity (including a private individual) begins a chain of title. How far back a land trust needs to look into a chain of title depends on many factors: the nature of the transaction; the likelihood of past uses affecting the conservation values of the land; state laws governing recording and re-recording (marketable title acts); title search custom and practice for your area; the degree of risk a land trust is willing to assume; and the land trust’s general knowledge of the area. In consultation with your attorney, follow general procedures, but each deal may require more investigation.
In some areas of the country, it is common for a title company to go back a certain number of years, say 30, 40 or 50 (for example, in Michigan there is a 40-year marketable title act, so title companies tend to only go back 40 years). Furthermore, if a land trust is completing a project cooperatively with a government agency, the agency may require a complete chain of title for its review or a 50-year chain of title. For example, the US Environmental Protection Agency’s All Appropriate Inquiries (AAI) rule requires an environmental professional’s review of the chain of title, often as far back as 40 years.

Land trusts should go back as far as they deem necessary to satisfy themselves of good title, but always in compliance with state law.

**TRANSFERS FROM OTHER ORGANIZATIONS**

Land trusts should investigate title as part of their due diligence when accepting the transfer of land or conservation easements from an affiliate or other conservation entity.

- For accreditation, a land trust will need documentation of how it investigated title when accepting the transfer of land or a conservation easement. The documentation can be a full title investigation, a copy of the conservation partner’s past title investigation, along with evidence the title investigation was brought current within 30 days prior to closing, or a statement of how the land trust assessed and addressed title risks. This risk assessment can include evaluating the title information from the conservation partner or conducting additional title investigation.

- If the land trust works with partners, the land trust still needs to complete its own due diligence to safeguard the assets it will hold and meet the accreditation requirements by obtaining and reviewing the title investigation and title update before closing. If a partner completes the title investigation and/or title update, the land trust needs to receive and review the partner’s title documentation on its own behalf before closing and retain a copy of the documentation.
STANDARD 9 ENSURING SOUND TRANSACTIONS

F. Title Investigation and Recording

2. Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property’s important conservation values.

Accreditation indicator elements located at www.landtrustaccreditation.org

EVALUATING TITLE

Once the title investigation is complete (see Practice 9F1), a land trust needs to evaluate the information it received and decide on next steps, which usually includes a review by an attorney and communication with the title company about questions or changes.

Every title work due diligence review should include the following steps:

1. Land trust personnel (whether staff or a board member for all-volunteer land trusts) review and understand the title commitment or report.

2. Land trust attorney reviews and understands the title commitment or report.

3. Questions or changes regarding the title commitment or report are sent to the title company or attorney for change or clarification.
Because the land trust often orders the title work, it is best if the land trust personnel responsible for the acquisition take the first look at the title report or commitment, reading the entire document and all exceptions to title listed in the report or commitment. They can then ask the land trust attorney to answer specific questions or confusing issues raised by the results of the investigation. The land trust’s attorney will review the title work more thoroughly and should not only evaluate all exceptions to ensure that the title is good and that the land trust’s conservation goals can be accomplished, but also to ensure that the exceptions listed are accurate (they actually apply to the particular property in question) and to confirm that the land trust documents reflect the name of the record owner and legal description accurately.

LEGAL ISSUES AFFECTING TITLE

It is nearly unheard of for a parcel of real estate to be conveyed wholly, with no defect to title. A defect is any item affecting the fee title ownership of a property. So, although the term has a negative connotation in most contexts, not every title defect is problematic. Title defects are also known as exceptions. That is, the fee title being conveyed is the complete ownership of the bundle of rights, except for those defects identified in the deed, in the title policy or through the title investigation (such as a utility easement, mortgage or mining lease). Title practitioners have identified somewhere between 30 and 60 different types of potential title defects. Nevertheless, all defects are not equal and not always fatal (cause a complete loss of title to the property).

Every situation is unique, so land trusts must read the title commitment (or report) and all title documents, including all of the exceptions to title. Unless you know the details of the exception to title, you cannot make an informed decision about whether your land trust will need to address the matter. Keep the back-up documentation for each exception (they will not be reproduced in the title policy) and store these documents in accordance with your land trust’s recordkeeping policy.

Have the documents reviewed by an attorney early in the transaction — definitely before closing — so that any problems can be addressed. If you are obtaining a title insurance policy, items listed in the title commitment (such as exceptions) will be in the policy, so the time to fix any problems is during the title commitment phase (due diligence phase), before closing.
**Mortgages and Other Liens**

Examining mortgages and other liens that are exceptions to title is important for two primary reasons. First, if the land trust is purchasing or accepting a donation of the fee interest in the land or purchasing a conservation easement (whether for fair market value or at a bargain sale price), it should instruct the title company to pay off any loans, mortgages or liens from sale proceeds or from funds provided by the landowner at closing and record a release or discharge. Doing so removes the clouds from the title and releases both parties from such monetary obligations so that these encumbrances do not appear in the final title insurance policy (if the land trust acquires title insurance for the project) and, for fee interest acquisitions, ensures that the land trust is not financially liable for the debt.

Second, if a landowner is granting a conservation easement on their land, the land trust must make sure that the property is not subject to an outstanding mortgage. If there is a mortgage, the landowner must pay off the mortgage or the mortgagee must subordinate its interest in the loan to that of the conservation easement prior to closing. If the mortgage is not subordinated or released, the conservation easement may be extinguished if the lender forecloses on the property. In the case of a donated conservation easement where the donor intends to seek a charitable deduction for federal income tax purposes, subordination is *required* by federal law. Treasury regulation §1.170A-14(g)(2) states, in part, “no deduction will be permitted . . . for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.”

A mortgage subordination means that a lender can still foreclose on a property, but that the conservation easement will remain in effect. A mortgage subordination agreement can take many forms, ranging from a single paragraph to a four-page document, but it must at least contain the language set forth in the preceding paragraph as required by the Treasury regulations. Some land trusts attach the mortgage subordination as an exhibit to the conservation easement. Other land trusts record the easement and mortgage subordination simultaneously; usually the subordination is recorded immediately prior to the conservation easement document thereby effectively removing the encumbrance from record before the conveyance of the easement interest. A separate mortgage subordination document can be more attractive to the parties because a lender only has to review and sign the subordination document, rather than the entire easement, and can do so before the easement closing.
The landowner should be responsible for “cleaning” the title by paying off debts or securing the subordination agreement. It is important to start the process as early as possible because it can take some time for the lender to sign the agreement. Often, the land trust has to get involved to explain the conservation easement to a bank or its attorneys or to provide a sample subordination form for signature. Land trusts and their attorneys must review the subordination to ensure it satisfies the Treasury regulations and must ensure that the representative signing on behalf of the lender is authorized to do so. This may require the bank to provide a certificate of authority along with or within the subordination agreement. One Colorado land trust helped a landowner secure a subordination agreement by mailing the lender’s attorney a copy of the Treasury regulations and highlighting the pertinent language. Once the attorney understood that the law requires the agreement and specific language, he gave a green light to his client, the lender, to sign the document. Most lenders are willing to sign subordination agreements, as long as the appraised value of the land subject to the mortgage remains high enough to satisfy their lending requirements after the conservation easement is placed on the property.

For accreditation, a land trust needs to address mortgages by recording a mortgage subordination agreement before or contemporaneous to the conservation easement deed or having the mortgage discharged at or prior to closing.

Unpaid property taxes may result in a sale of the property by a public trustee or other local government official in order to secure money to pay the taxes, and this public sale may result in the extinguishment of a conservation easement. If your state has not addressed this situation legislatively, your land trust should refuse to accept the easement until the property taxes for the property have been paid to the closing date.

Mechanic’s liens are liens created by state law that seek to guarantee payment for contracted services rendered to a particular piece of real property. The list of service providers permitted to file mechanic’s liens against land is broad and usually includes surveyors, contractors and architects. Until the debt is paid and the lien released, the landowner does not have clear title to the land. If the landowner does not pay off the lien, the holder of the lien may foreclose on it, which may extinguish a conservation easement placed on the property after the lien. Therefore, a land trust must address any mechanic’s lien that appears in a property’s chain of title by requiring the landowner to pay off the lien and secure a satisfaction of lien or release from the lien holder, which is then recorded in the real property records prior to other transactional documentation.
Mineral Rights

Knowing the status and ownership of mineral rights is important in any acquisition. Although a title company’s willingness to investigate title and insure mineral rights ownership varies from location to location, a land trust must determine whether the surface owner holds the mineral rights or whether they have been severed from the property. Often, owners of subsurface mineral rights have the right to use the surface of the land in order to extract minerals. Such rights can pose obvious problems for conservation transactions. Title companies may charge additional fees to investigate mineral rights ownership or there may be an alternative title agency that specializes in title insurance for mineral rights, or the land trust may have to hire a qualified expert, such as an attorney specializing in mining law or a geologist to research the status of mineral rights. If some or all of the mineral rights have been severed from a property, a *surface use agreement*, which may or may not appear in the public records, may have been completed by the fee interest and mineral owners and should be reviewed by a land trust during its title work due diligence.

Although it is sometimes difficult to obtain mineral information from a title commitment or report, there are a few places to begin investigation:

- Ask the landowner about the status of minerals. Have the minerals been leased?
- Is there mining activity in the area?
- What information does a geologist have about mining in the area?

Next, you should ask the title company to provide documents from which you can determine whether minerals have been severed from the surface ownership (most of which should appear as exceptions in a title commitment or report, although leases are not always recorded), including:

- Federal and state patents
- Deeds that reserved mineral interests
- Deeds that granted mineral interests
- Oil and gas and other mineral leases

It is important that the land trust review any of these documents secured from the title company. If necessary, commission a geologist’s or mining engineer’s report to examine how likely, or unlikely, the development of the minerals might be. With this information, the land trust should be able to answer the following questions:

- Were any mineral rights reserved to the United States or the state?
• Were any mineral rights reserved or granted to a private owner? (Mineral interests can be wildly fractionated if the owner in a chain retained portions of mineral rights with each conveyance.)
• What types of minerals were reserved?
• How likely are such minerals to be found in commercially developable quantities on or under the land?
• If minerals have been severed, what is the likelihood of surface mining?
• What are the terms of any leases or surface use agreements?
• If surface mining might occur, can the mining be tailored in a manner that will limit the activity to a small area, which will not permanently damage the conservation values of the property?

There are a number of important reasons why the land trust must determine the mineral rights ownership and its specifics. In either a fee land or conservation easement acquisition, the land trust will want to know if it is in danger of having some, or all, of the conservation value of the property destroyed by a future mining operation. In a fee acquisition, if a land trust can determine that the minerals have not been severed, it can manage the property without worry. In both cases, if the minerals have been severed, a land trust must evaluate whether any mining activity can be conducted in a manner that is consistent with the preservation of the conservation values of the property. At a minimum, a land trust should document its risk assessment and rationale for actions taken or not taken.

For conservation easement acquisitions by donation or a bargain sale in which the landowner plans to seek tax benefits, evaluating mineral rights ownership is imperative because any federal income tax deduction may be in jeopardy if minerals have been severed from the property. Therefore, the landowner may have to take appropriate measures to assure the land trust that even though the minerals have been partially or wholly severed, their development by surface mining methods is “so remote as to be negligible,” as stipulated in the Treasury regulations. The land trust must also determine if the potential mineral development will be compatible with its conservation goals for the land. Usually the landowner hires a qualified geologist to analyze the potential for surface mining. Even if the result of the analysis is the desired conclusion that “the possibility of surface mining is so remote as to be negligible,” a land trust should still review this remoteness letter to assure itself that the letter addressed all issues related to the particular land in question and it is not qualified in some manner that might leave the door open to a mining operation that could harm the conservation values the land trust wishes to protect on the property.
The type of mineral exploration and extraction that may occur is also an important consideration. Are these hard rock minerals to be mined by strip mining, or gas deposits that are extracted from wells off the property? The details of each transaction will determine the course of action.

Identifying the owners of mineral rights can be cumbersome, because mineral rights are often passed from generation to generation without any real knowledge or written documentation. A mineral right may have many joint owners, some whom may have no knowledge of ownership. This fact became important to a land trust seeking to protect a large ranch when it found through its title due diligence that all of the mineral rights had been severed from the property. After further research, the land trust also found that the mineral rights were conveyed over a 50-year period to more than 350 different fractional owners. The organization tried for months, without success, to locate these owners in order to secure a subordination of their mineral interests to the conservation easement or to determine if they were willing to sell their interests. After conferring with its attorney and geologist, the land trust decided to proceed with the transaction, concluding that the risk of more than 350 people agreeing upon a single mineral development plan was remote. The state agency that provided funding for the project agreed with the land trust’s conclusion after performing its own due diligence, and the transaction proceeded.

For accreditation, a land trust needs to document how it addressed any severed mineral rights so that they do not significantly undermine the conservation values. Documentation can include a mineral remoteness report from a qualified geologist or similar professional, documentation that the severed rights have been reunited with the fee estate or a surface use agreement with the party that holds the mineral interests that has provisions to protect the conservation values.

If the title investigation includes a general exception for the investigation of mineral rights, a land trust needs to evaluate the exception and assess the risk that the minerals were potentially severed. For example, a title commitment with a general exception for the investigation of mineral rights can either mean the title company included mineral rights in its investigation but cannot guarantee them or it can mean the mineral rights were not part of the title investigation. If the risk is high that the title investigation excluded mineral rights and there is a high risk of severed mineral rights, the land trust will need to take additional action to address this risk. The land trust will need to obtain a mineral remoteness report or further investigate or address the minerals.
Other Encumbrances

Other encumbrances that the land trust will need to evaluate include the following:

- **Easements and rights-of-way.** Existing easements are often overlooked or ignored, and while they often do not affect a land trust’s ability to conserve the land, they can, at times, cause serious problems. It is not enough to acknowledge, for example, that a utility easement exists. The land trust must read the easement itself to determine where the easement is located, the extent of rights that were granted, terms of the easement, if applicable, and so on. Then, the land trust should consider the impact of the easement on the conservation values and the land trust’s goals for the project and document its findings.

- **Timber rights.** A land trust should thoroughly investigate whether a third party (such as a commercial logger or neighbor) has the right to harvest timber on a potential conservation property. Such rights do not often appear in title work except, sometimes, in the case of older deeds reserving the right to the grantor to complete a timber harvest. A conversation with the landowner about this topic is likely the best way to make this determination.

- **Water rights.** Water rights also generally do not appear in title commitments or title reports; in fact, most title insurance policies will specifically exclude coverage of water rights. So how does a land trust investigate title to water rights, if the rights are important to protecting the conservation values on a particular piece of property? Land trusts in the West can check the records of the particular state agencies tasked with overseeing water rights. In the eastern parts of the country, water rights do not (yet) rise to the same level of concern as they often do in the West, but may become more important as water resources become a limiting factor to human use of land or as climate change affects water supplies. Land trusts should analyze the impact of water rights on the conversation values of a property and document their findings appropriately. For more information, see “Land Trusts and Water: Strategies and Resources for Addressing Water in Western Land Conservation.”

- **Leases.** Recorded leases could affect ownership of property, and a land trust must consider them on a case-by-case basis. In many instances, the entire lease will not appear of record; instead, there may simply be a notice that a lease affects the property. In such cases, you need to obtain a copy of the full lease from the landowner for review.

- **Life estates.** For fee acquisitions, it is important to know the status of any life estate and evaluate how it might affect the protection of a property, its fair market value, its public use as a preserve and the general desirability of the property for acquisition. Many land trusts have successfully completed transactions by granting a landowner a life estate, thereby often lowering the property’s value and project costs.
- **Contract interests.** There may be exceptions to title from recorded contracts with other individuals, such as land contracts or rights of first refusal. The land trust should read these documents and understand their implications and potential impact on the project.

- **Covenants or restrictions.** Some exceptions to title are listed as covenants or restrictions (for example, restrictions that protect a scenic view, require a buffer or limit the size of outbuildings). While some land trusts may never see such an exception if they only deal with vacant land, land trusts in more urban or developed areas may see these exceptions more frequently.

A land trust should retain documentation that it analyzed the risks related to these encumbrances and what actions it took to ensure that the encumbrance would not affect the organization’s interest in the land or the protection of the conservation values. This is most often documented in project selection forms, project descriptions provided to committees or the board, committee or board meeting minutes, attorney correspondence or in a memo to the project file.

- For accreditation, a land trust needs to document how encumbrances are addressed so that they will not result in extinguishment of the conservation easement or significantly undermine the conservation values. Documentation can include a memo to the file with an analysis of how substantial access easements or rights-of-way could impact the project, a written release of timber rights, water rights due diligence reports or release of a right-of-first-refusal.
STANDARD 9 ENSURING SOUND TRANSACTIONS

F. Title Investigation and Recording

3. Promptly record land and conservation easement transaction documents at the appropriate records office.

Accreditation indicator elements located at www.landtrustaccreditation.org

WHY IS IT IMPORTANT?

If a document such as an option, purchase agreement, grant deed, conservation easement or survey is not recorded, there is no public notice or legal record of the transaction. Consequently, a title search of the property does not reveal the contract, conveyance or encumbrance, and the transaction can be legally entangled, even nullified, by documents subsequently recorded by other parties. For example:

- If a conservation easement is not recorded, as evidenced by a recorded deed, the new owners may not be bound by the conservation easement when the property changes hands. The recording of their deed takes precedence over the unrecorded conservation easement.
- If an option agreement is not recorded, an unscrupulous owner could sell or option the property to someone else.
- If a grant deed is not recorded, creditors of the former owner could file claims against the property.
WHAT IS RECORDING?

Recording is the process of placing a document on file with a designated local public official for public notice. Deeds are recorded in the office of the recorder of deeds, registrar or register of deeds in the county or municipality where a property is located. The recording of a deed consists of having it transcribed into the proper book and indexed. Documents filed with the recorder are considered to be placed on open notice to the general public.

Claims against property usually are given priority on the basis of the time and date they were recorded, with the most preferred claim going to the earliest one recorded, the next claim going to the next one recorded and so on. This type of notice is called constructive notice or legal notice. The effect of recording a document is to give constructive notice to all the world of the content of any instrument or document filed for the record.

RECORDING DOCUMENTS

Recording should happen immediately upon execution of the pertinent documents, but no more than one week following the date of the last signature. For land trusts that use a title company to close transactions, the title company delivers the document to the appropriate governmental office for recording. The land trust must be very clear in its written closing instructions to the title company that the property deed or conservation easement be recorded in the same year as the date signed.

If a donor of land or a conservation easement is planning to claim a tax deduction, it is important to understand when the transaction is deemed complete in order to substantiate the timing of the gift. For gifts of fee land, the conveyance is deemed complete (the gift has been made), when the donor delivers the deed to the donee for recording (without recording having yet occurred). However, in the case of conservation easements, the gift is only deemed complete when the conservation easement has actually been recorded or there is documentation of delivery to the recording office. The reasoning is that the easement must be permanent and enforceable to be a valid contribution for federal income tax purposes and it would not be enforceable if not recorded. This distinction can become important in year-end donations of conservation easements. Land trusts should be wary of waiting until the last minute to accept and record easements because they should be recorded in the same year the gift was made.

For accreditation, conservation easements and fee title deeds need to be submitted for recording within a week after the final signatures. Generally, the documentation provided in the accreditation application is the signed deed with the dated recording stamp. However, a land trust can provide documentation of when the delivery was made to the recording office if the recording office delayed the formal recording.
**Order of Recording**

Generally, the closing documents that should be recorded first represent the resolution of any title issues, such as releases, discharges or subordination of debt, clarification of ownership or other resolved issues. Next is the deed of conveyance for fee land acquisitions (whether donated or purchased) or for conservation easement transactions, the conservation easement deed. There may be exhibits to the deed or conservation easement to record, as well as any certificates of authority or legal existence (for corporate entities). The attorney or recorder should record the documents in the order dictated by the title resolution and with the knowledge of the land trust.

The original documents, with the recording stamps, should be returned to the land trust and kept as part of the permanent file (see Practice 9G2). Recording may seem like a formality, a minor step at the end of a long process. It is not. Land trusts should be sure recording is done and done immediately.

**RE-RECORDING CONSERVATION EASEMENTS**

While recording a deed of conveyance or deed of easement is considered a basic transaction step, it is also important to know if your jurisdiction requires re-recording of deeds and easements in order to ensure their perpetual status. Due to marketable title acts and recording acts adopted in some states, certain interests in land must be re-recorded at the end of a given period — usually 30 years — in order for the interest to remain valid. In these cases, recording becomes an ongoing due diligence responsibility for a land trust, and it should make sure that its calendar systems and recordkeeping provide for reminders of when easements need to be re-recorded.
STANDARD 9. ENSURING SOUND TRANSACTIONS

G. Recordkeeping

1. Keep originals of all documents essential to the defense of each real property transaction in a secure manner and protected from damage or loss.

Accreditation indicator elements located at www.landtrustaccreditation.org

IMPORTANCE OF PROTECTING ORIGINAL DOCUMENTS

Land trusts should prepare and maintain complete written documentation of all real property transactions. Because land trusts are in the business of perpetuity, they need to keep originals of key documents essential to the defense of each transaction safe from damage, tampering or inadvertent destruction. At a minimum, land trusts need to have two sets of documents:

1. Documents that are safely stored in a way that ensures that they will last and be acceptable evidence in the event of a court proceeding (permanent files).
2. Copies of all documents essential to the defense of each real property transaction. See Practice 9G3 for more information about duplicate documents, including working files.

PERMANENT FILES: ORIGINAL DOCUMENTS

The permanent file includes those documents and records that constitute the essential and irreplaceable record of a transaction and any subsequent activity related to that project. This includes easement monitoring, approval and enforcement data, as well as data related to the initial transaction.

In its permanent files, the land trust should have the following irreplaceable documents essential to the defense of each conservation easement and fee property still owned by the organization, including:

- Legal documents and agreements, including deeds, conservation easements, amendments and leases.
- Critical correspondence, including correspondence with the landowner related to project goals, tax and legal matters, notifications, approvals, enforcement and other key matters the land trust determines essential to the defense of the transaction.
- Baseline documentation reports for conservation easements.
- Title insurance policies or evidence of title investigation.
- Surveys, if any.
- Full appraisals (or summary appraisals if full appraisals are not available) used to substantiate the purchase price or used by the landowner to substantiate the tax deduction.
- Forms 8283 for projects where the landowner claimed a federal tax deduction. The land trust’s “original” can be a copy of the landowner’s signed original.
- Conservation easement monitoring reports.
- Fee property inspection records essential to the stewardship and defense of the property.
- Contracts and leases relative to long-term land management activities. The original may be retained only for as long as it and the applicable statute of limitations are in effect.

For accreditation, a land trust must retain originals (electronic or paper) of:
- Legal agreements, deeds, conservation easements, amendments
- Critical correspondence, including those related to project goals, tax and legal matters, enforcement and other matters essential to the project
- Baseline documentation reports
- Title insurance policies or evidence of title investigation
- Surveys (if any)
- Appraisals used to substantiate the purchase price or used by the landowner to substantiate the value on the Form 8283
- Conservation easement monitoring reports
- Fee inspection property reports
- Contracts and leases in effect for land management activities
- Conservation easement stewardship records, including substantive notices, approvals, denials, interpretations and exercise of reserved rights

A land trust is also expected to have the documentation requested in the application and the project documentation checklist; however, unless identified in the list above, the organization does not need to meet the storage and duplication requirements for these documents.

PERMANENT FILES: SAFE STORAGE

Original documents must be protected from daily use and reasonably secure from fire, flood and tampering by individuals. When determining where to store original files, land trusts need to ask themselves a number of key questions. What are the risks of loss, destruction or unauthorized access, and what are the consequences? Fire? Theft? Flood? Malicious mischief? Other? What can we do to limit the likelihood of loss? What will happen if we lose certain data? The list of threats may seem endless, but for each land trust, some will be more likely than others. For example, a
land trust using a storage facility with lots of sprinklers may be more concerned about water damage than fire. An urban office may have a greater risk of unauthorized entry, and additional physical security may be necessary.

A land trust’s records policy (Practice 9G1) will guide overall records retention and storage, including which documents a land trust considers part of the permanent record for a transaction. Land trusts use several approaches for safe storage of records, including:

- **Fireproof file cabinet or safe in another location.** Some land trusts keep their permanent files in a fireproof cabinet or safe in a separate location, such as an attorney’s office or town hall. If originals are stored in another location, the land trust must have control over the retention of these documents. If they are stored in a private home (such as of a board member of a small, all-volunteer land trust) the land trust should secure a written agreement with the homeowner that guarantees that other representatives of the organization (such as officers or key employees) can access the records.

- **Safe deposit box.** Other land trusts choose to keep their files in a bank safe deposit box.

- **Formal archive facility.** Several land trusts choose the convenience and safety of a formal archival facility.

- **Registry of deeds.** Originals of property deeds, conservation easements, surveys and sometimes baseline documentation, may be kept at the county or municipal register.

- **Digital systems.** Land trusts increasingly digitize information and documents. They also use a variety of systems to protect that data, including off-site storage of discs or backup data and online backup systems.

At a minimum, these locations must protect the originals from daily use and be reasonably secure from fire, floods or other foreseeable hazards.

For accreditation, a land trust must keep originals (electronic or paper) secure (such as in a locked cabinet with limited access or in an archive facility with permission needed for access) and protected from damage or loss (such as in a fireproof safe, bank vault or archive facility with sprinklers).

A land trust must store copies in locations that could not be destroyed in a single calamity (such as paper originals and duplicates stored in separate locations or electronic duplicates backed up on a remote server or on the cloud).

**PAPER VERSUS ELECTRONIC FILES**

Many land trusts now use both paper files and electronic systems to manage and maintain project data; each has its own advantages and disadvantages.
Computer-based systems provide for relatively easy access (even from remote locations) and can easily accommodate changing or updating files and data. They also require consistent, rigid protocols for greatest efficiencies and credibility. What is easily created can also be easily lost. While creating an entire system can seem overwhelming and expensive, there are relatively inexpensive off-the-shelf products available. Keep in mind that if the land trust stores its originals in an electronic format, the originals must meet the requirements of applicable federal and state law with respect to rules of evidence regarding electronic originals. They must also be replicas of signed originals and include all exhibits and attachments in a format that cannot be altered. Some land trusts maintain their electronic originals in a PDF format that is more difficult to alter than those stored as word processing documents. Safeguards for ensuring the originals do not get erased or written over include using non-rewritable discs and limiting access to cloud-based original records as read only or only to those with permission. The approach a land trust uses should be based on managing the risk of the land trust not having the documentation needed to steward and enforce its conservation easements and properties. If electronic originals are stored on portable devices (discs or external hard drives), they should be maintained separate from duplicates, protected from daily use and reasonably secure from fire, flood and tampering by individuals.

**Tips for Cloud-Based Storage**

Choosing a vendor to work with to store documents in the cloud is not unlike choosing a vendor to store paper documents. Considerations such as security controls, access and contracting all carry through into the virtual world. Storing documents in the cloud does present some additional benefits, such as ease of access, protection against physical damage and integration into online or searchable database systems. While storing documents in the cloud carries many benefits, it does add some additional concerns and complexity.

1. Choose a cloud-based storage service or provider with care. Things to look for:
   
a. Choose a vendor with a good service level agreement (SLA). The SLA describes the performance of the system and what you should expect as a customer. If the service is down frequently, it won’t be useful to you.

   b. Choose a well-established vendor. If your vendor goes out of business or can’t invest in good cloud infrastructure, your files are at risk.

   c. Understand what type or format of files the vendor uses to store files. The most common is PDF for scanned or saved documents. PDF documents should be in the

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1 Thanks to CommunityIT Innovators for providing guidance on cloud-based storage.
PDF/A format, which includes some additional benefits for long-term archiving of digital content.

d. Decide how to organize documents. There are several different ways to store and manage data. Some systems are organized in a traditional file and folder structure. Other cloud-based storage systems may have additional features, such as tags so that a document could be assigned multiple attributes. If you need to switch vendors, it is important to understand how you can remove your data from a system. Is there a way to export all your files easily in the event you need to move your files to an alternate storage solution?

e. A service should provide encryption “at rest” (when the files are stored on the cloud service servers) and “in transit” (when you are uploading or downloading the files to your local computer). Even if documents are in the public record, ensuring the correct method of access is important.

2. Limit access to your cloud-based storage files. A good storage service will provide granular security settings. Restrict access to the degree you can without compromising operations. Only give access to personnel that need it and limit that access to “read only” when that will suffice. Require complex passwords and consider setting up multifactor authentication (to login, user must provide several separate pieces of evidence that is authenticated by the system).

3. Employ a third-party backup solution for your cloud-based storage. A good cloud storage service provider will perform regular backups of their customer’s data to protect their own liability, but you should have your own backups in place independent of that. That third-party backup solution could be a backup to local on-premises storage or to an alternate cloud solution. Having a separate backup repository of data is an extra layer of protection against the loss of data through a crypto attack, vendor disruption or intentional or unintentional data destruction by staff.

4. Check the status of your cloud-based storage service and third-party backup service regularly. Are credit card autopayments working properly? Are there customer notifications regarding service interruptions or concerns?

**Tips for Paper Storage**

Paper, however, is still a trusted and essential part of almost all land trusts’ recordkeeping systems. It is still the most common format in which to create most documents and records. In fact, paper
documents are required to complete most real estate transactions. Paper files and filing systems are often easier to change or expand than computer systems and may be less expensive to create and maintain than sophisticated databases. However, paper takes up a lot of space and, if not properly selected and stored, can be damaged by water, mildew, pests and time itself.

The Library of Congress provides very detailed specifications for paper they will accept for their archive, which is summarized below.

- **Fiber.** The stock must be made from rag or other high alpha-cellulose content pulp, minimum of 87 percent. It must not contain any post-consumer waste-recycled pulp.

- **Lignin.** The stock must not contain lignin.

- **Impurities.** The stock must be free of metal particles, waxes, plasticizers, residual bleach, peroxide, sulfur and other components that could lead to the degradation of the paper sheet itself. Iron must not exceed 150 ppm and copper shall not exceed 6 ppm.

- **Optical brighteners.** The stock must be free of optical brightening agents.

- **pH.** The stock must have a pH value within a range of 8.0 - 9.5

- **Alkaline reserve.** The stock must contain an alkaline reserve with a minimum of 2 percent and a maximum of 5 percent.

If you choose not to store your photos digitally, you may want to check with a local museum as to what type of paper they use or will accept. At a minimum, print photographs on acid-free photographic paper.

Most land trusts inevitably use a combination of recordkeeping processes. Your land trust should decide what approach best meets your informational needs.
- *Optical brighteners.* The stock must be free of optical brightening agents.

- *pH.* The stock must have a pH value within a range of 8.0 - 9.5

- *Alkaline reserve.* The stock must contain an alkaline reserve with a minimum of 2 percent and a maximum of 5 percent.

If you choose not to store your photos digitally, you may want to check with a local museum as to what type of paper they use or will accept. At a minimum, print photographs on acid-free photographic paper.

Most land trusts inevitably use a combination of recordkeeping processes. Your land trust should decide what approach best meets your informational needs.
STANDARD 9. ENSURING SOUND TRANSACTIONS

G. Recordkeeping

3. Create and keep copies of these documents in a manner such that both originals and copies are not destroyed in a single calamity

Accreditation indicator elements located at www.landtrustaccreditation.org

IMPORTANT OF GOOD RECORDKEEPING STORAGE

Land trusts need to maintain and store copies of all original documents essential to the defense of a land or easement transaction in places where they can easily access them, and they will be safe from harm. For additional protection, copies and working files should be kept in one location and original documents and permanent files should be kept in a separate location. Land trusts need to prepare for the worst because it can happen. Just ask the Land Trust for the Mississippi Coastal Plain. Three sets of records in three different counties were lost or badly damaged in Hurricane Katrina, and the land trust subsequently spent hundreds of hours and thousands of dollars rebuilding their files.

For information on storage of original documents, see Practice 9G2. Practice 9G1 addresses recordkeeping policies.

WHAT DOCUMENTS NEED DUPLICATION?

A land trust should prepare and maintain complete written documentation of transactions. At a minimum, it needs to have two sets of documents:

1. Documents that are safely stored in a way that ensures that they will last and be acceptable evidence in the event of a court proceeding (permanent files)
2. Copies of all documents essential to the defense of each real property transaction
DUPLICATE DOCUMENTS

The permanent file includes those documents and records that constitute the essential and irreplaceable record of a transaction and any subsequent activity related to that project. This includes easement monitoring, approval and enforcement data, as well as data related to the initial transaction. For more information on original document storage and a full list of documents to keep, see Practice 9G2.

At a minimum, the land trust should have duplicates of the following irreplaceable documents essential to the defense of each conservation easement and fee property still owned by the organization:

- Legal documents and agreements, including deeds, conservation easements, amendments and leases
- Critical correspondence, such as correspondence with the landowner related to project goals, tax and legal matters, notifications, approvals, enforcement and other key matters the land trust determines essential to the defense of the transaction
- Baseline documentation reports for conservation easements
- Title insurance policies or evidence of title investigation
- Surveys, if any

For accreditation, a land trust must retain copies of these records:

- Critical correspondence, including those related to project goals, tax and legal matters, enforcement and other matters essential to the project
- Baseline documentation reports
- Title insurance policies (if any)
- Unrecorded surveys (if any)

Copies must be replicas of signed originals with all exhibits and attachments.

DOCUMENT STORAGE

Records policies and procedures should address how and where the land trust stores the copies of all original files. Practice 9G2 addresses storage of originals in more detail.

When considering storage options for duplicates, land trusts should consider the following issues:

- **Who needs access to records** — board, staff, volunteers, the public? Which records? How quickly? How often?

- **Confidentiality**. When should access be limited? How should access be limited?
Safety and security. What are the risks of loss, destruction or unauthorized access, and what are the consequences? Fire? Theft? Flood? Malicious mischief? Other? What can you do to limit the likelihood of loss? What will happen if you lose certain data?

Options abound for storage of both original records and duplicates: a storage facility, bank safe deposit box, office of the land trust’s attorney, local historical society, another location where the land trust has control over the retention of documents, electronic file storage, cloud-based electronic file storage and so forth. Duplicates may be kept in the land trust office either in fireproof filing cabinets or electronically (on a server or in the cloud). Every filing and recordkeeping option has a cost. Costs of various options must be balanced against their benefits. Land trusts should carefully evaluate different recordkeeping systems.

No matter what format your files take, the duplicates of irreplaceable documents should be stored in a separate location from the originals.

ELECTRONIC DUPLICATES

Many land trusts are increasingly using computer scanning as part of their document storage process. PDFs or other file formats that do not allow documents to be altered are created and stored offsite (or in a fireproof safe) on non-rewriteable discs or with an online archiving service. This technique saves space but requires time to scan documents.

If a land trust stores its duplicates in an electronic format, it should ensure that the copies are exact replicas of the signed originals, with all exhibits and attachments in a format that cannot be altered. Avoid draft or unsigned versions of documents.

It’s important to remember that digital technology is changing all the time. Keep abreast of new advances in the use and storage of digital documentation and records. Additionally, be aware of any changes in state law or court rulings regarding the admissibility of digital records as evidence in court proceedings. Such changes may alter the land trust’s current records policy and operational procedures. See Tips for Cloud-Based Storage in Practice 9G2.

For accreditation, a land trust must store originals and copies in locations that could not be destroyed in a single calamity (such as paper originals and duplicates stored in separate locations or electronic duplicates being backed up on a remote server or in the cloud). Originals can be electronic or paper.
WORKING FILES
Some land trusts have copies of certain documents that can be used for monitoring or as problems or issues arise (working files).

These files should be accessible to land trust personnel who are responsible for completing the transaction or conducting ongoing stewardship activities, such as annual monitoring or responding to landowner inquiries.

Contents of the working file may include duplicates of the documents needed to implement the project’s management or monitoring plan in the field. The file may also have a document summary or checklist that serves as a transaction chronology and an index of what is in the permanent file. Many land trusts summarize key information for the working file rather than include entire documents. It is common, for example, to prepare an easement abstract that includes key information on location, restrictions and reserved rights—the kind of information needed for monitoring—and to have the easement itself on file elsewhere.

Working files typically include:

- Completed document summary or checklist
- Site evaluation data or summary
- Recorded deed or conservation easement or summary
- Active contracts (such as leases) or summaries
- Maps (parcel, GPS or topo)
- Photos
- Baseline documentation report or summary
- Updated resource data or summary
- Management/monitoring plan or summary
- Annual monitoring reports or summary of monitoring visits made

Originals of important documents, like the recorded deed or baseline documentation report, should not be kept in the working file but in a separate, secure location.
STANDARD 9. ENSURING SOUND TRANSACTIONS

H. Purchasing Land or Conservation Easements

1. When buying land, conservation easements or other real property interests, obtain an independent appraisal by a qualified appraiser in advance of closing to support the purchase price.

   a. However, a letter of opinion from a qualified real estate professional may be obtained in the limited circumstances when:

      i. A property has a very low economic value

      ii. A full appraisal is not feasible before a public auction

      iii. Or the amount paid is significantly below market value

IMPORTANCE OF ESTABLISHING VALUE

Purchasing land or easements means spending hard-earned money. Prior to acquisition, a land trust must establish the value of the property in order to justify the price paid. Whether fee land or a conservation easement, the land trust is charged with exercising its mission in such a way as to protect the public interest. As a nonprofit conservation organization, the land trust’s expenditures must be shown to be mission-centric. The land trust’s board, likewise, is charged with approving all land and conservation easement transactions and, thus, must be able to justify such expenditures with accurate valuation, usually in the form of appraisals. Paying in excess of fair market value can leave a land trust vulnerable to charges of conferring impermissible private benefit or private inurement and threaten its charitable status. Every purchase made by a land trust influences the real estate market, so land trusts must also be careful about possibly inflating market value.

Determining the correct value of an acquisition demonstrates that the land trust has:

   • Shown fiscal responsibility
Avoided private inurement or impermissible private benefit
Substantiated prices paid in a changing market
Avoided inflating market value
Avoided losing money on resale

**APPRAISALS**

In nearly every purchase conservation transaction, the land trust will need to establish the value of the land or easement. The best way to determine value is through an independent appraisal of the property conducted by a qualified appraiser. An independent appraisal is one prepared in compliance with *Uniform Standards of Professional Appraisal Practice* (USPAP) by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real estate experience.

An appraisal is not a guess, a hunch or a number that is determined by a party to the transaction, but rather an unbiased opinion of value or an estimate of value based on market-supported facts. An opinion provided by a qualified appraiser should be objective and impartial. USPAP defines an *appraisal* this way:

> An appraisal is numerically expressed as a specific amount, as a range of numbers, or as a relationship (e.g., not more than, not less than) to a previous value opinion or numerical benchmark (e.g., assessed value, collateral value).

USPAP provides a detailed description and professional standards for development and reporting of appraisals. The 2020-2021 USPAP recognizes only two reporting formats, the *appraisal report* and the *restricted appraisal report*.

The essential difference between these two options is in the content and level of information provided. In an appraisal report, the appraiser must summarize specified parts of the research and development; in a restricted appraisal report, those same parts need only be stated. An appraisal report also requires the appraiser to summarize the information analyzed and the reasoning that supports the analyses, opinions and conclusions while a restricted appraisal report does not have this requirement.

An appraisal report is the type of report delivered to a client for submission with a federal income tax return to the IRS or to a funding agency, such as the U.S. Department of Agriculture.
A restricted appraisal report does not contain all the data and analysis found in an appraisal report. It may be an appropriate selection for a land trust with a history of buying undeveloped properties in a particular area, when the organization is considering a new purchase of an undeveloped tract in the same area. This reporting option likely would not be appropriate for a land trust making its first fee interest conservation purchase. A restricted appraisal report would not be appropriate for use in substantiating the value of a conservation easement.

When Are Appraisals Absolutely Necessary?

While it is good business practice to always obtain an appraisal prior to the purchase of real estate and Land Trust Standards and Practices requires land trusts to do so except in limited circumstances, there are certain times when an appraisal is absolutely necessary. These situations include:

- When the parties contractually agree to rely on an appraisal to set the purchase price.
- When a transaction includes a donation or bargain sale and a landowner is required to secure a qualified appraisal (as defined by the IRS) to justify the value of the donated portion of the transaction. (The donor’s appraisal to substantiate a gift is separate from the land trust’s appraisal to determine fair market value. These are not two different types of appraisals; rather, they differ because the client for whom the appraisal is prepared is different — donor versus land trust — and the stated purpose of the appraisal is different for each client.)
- When a land trust obtains grant funding for the acquisition contingent upon an appraisal.
- When a buyer is financing the acquisition and their bank requires an appraisal prior to approving the loan.
- When, as a matter of policy, a land trust requires an appraisal as part of its normal acquisition activity.

When a landowner donates land or a conservation easement, the process and the land trust’s responsibilities are different. In such situations, the landowner is responsible for securing an appraisal to substantiate the value of the gift for federal income tax purposes or for state tax credits, where applicable (see Practice 10A1c).

For accreditation, a land trust needs to obtain an independent appraisal (Appraisal Report or Restricted Use Appraisal) by a qualified appraiser prior to closing when it buys land, conservation easements or other real property interests (including bargain sales), unless a letter of opinion is acceptable, as outlined below. This appraisal can include one of the following:
• An appraisal commissioned by the land trust, a public agency or a nonprofit public partner
• An appraisal commissioned jointly by the land trust and landowner
• A review appraisal of the appraisal commissioned by the landowner
• An appraisal commissioned by the landowner with the land trust listed as an intended user

Timeline for Ordering an Appraisal

For purchases of land or a conservation easement, the land trust can order an appraisal before or after a contract price is set. The appraisal can either help catalyze price negotiations or substantiate the agreed upon price. In circumstances where a price is negotiated before an appraisal, contract provisions usually provide for price adjustments if the appraised value comes in lower than the contracted purchase price. Keep in mind that a land trust must be able to justify the price paid for land and conservation easements for a number of reasons, perhaps most importantly to demonstrate that no private inurement or excess private benefit resulted from the transaction (see Practice 9H2).

A land trust policy to secure appraisals for projects should have some flexibility in terms of timing. Appraisal reports, especially for conservation easements, can be expensive. Thus, a land trust may want to be flexible as to when it commissions appraisals. Complex or sizeable transactions may justify an early appraisal or consultation with an appraiser to gather information critical to negotiations, but appraisals for other types of transactions should be timed carefully to ensure this large expenditure is not a waste of its resources, especially if the project’s completion is uncertain.

For accreditation, a land trust needs to document the purchase price. Documentation can include a purchase and sale agreement, engagement letter or closing statement.

Alternatives to Appraisals for Use in Negotiations

There are several alternatives to establish value that may be useful in early negotiations, including reviewing property tax assessments, reviewing comparable sales provided by a real estate agent or using a qualified real estate professional to provide an estimate of value.

Researching the assessed value of a property in the local assessor’s office is a useful place to start, provided, however, the researcher understands how properties are assessed, how recent the assessment is and whether the assessed value is an accurate indicator of value. In many jurisdictions, assessments have no real relationship to current fair market value because the
assessor has not updated assessment rolls in years or the market is moving at such a rapid rate that it is impossible to keep up. While tax assessments are no substitute for an independent appraisal, they can provide some indication of value that can be helpful in determining whether and how to proceed with further negotiations.

In some instances, it may be appropriate for a land trust to rely upon an appraisal commissioned by a public agency or another nonprofit partner, so long as the land trust examines the appraisal and determines it meets acceptable standards. It may also be acceptable for a land trust to jointly commission an appraisal with a landowner, provided that the land trust is one of the clients for whom the appraisal is prepared (an intended user) and that it evaluates and approves a draft of the appraisal. If the land trust has questions about an appraisal provided to it by a third party, the organization should consider hiring a qualified appraiser to perform a review of the appraisal and advise the land trust about its contents and methodology. Similarly, in circumstances where the seller has secured an appraisal to set the sales price, a land trust could commission a review appraisal to confirm the value rather than obtaining an entirely new appraisal. In some instances, land trusts have commissioned area-wide appraisals for uniform, low-value properties (for example, small in-holdings in a national park), but this approach should only be used only when the properties generally have the same characteristics because, as some appraisers note, every parcel of land is unique and thus an area-wide appraisal may not accurately account for the differences among properties.

**Valuation in Lieu of a Complete Appraisal**

Although the majority of land and easement purchases by land trusts warrant an appraisal, there are occasions where it is reasonable to forego a complete appraisal, but the land trust must still establish value and justify its purchase price. A letter of opinion from a qualified real estate professional can be used when (a) the economic value of the property is so low as to negate concerns about private inurement or private benefit, (b) when a full appraisal is not feasible before a public auction or (c) when the amount paid is significantly below market value.

A letter of opinion (sometimes called a windshield or drive-by appraisal) is a short written estimate of what a property or interest in a property may be worth. It is usually solicited from a practiced real estate professional who can create an estimate from experience, background knowledge and recent data already in hand without doing a great deal of research. It is often used for fairly standard units of real estate, such as lots in a subdivision or certain types of timber acreage. A land trust may also rely on a letter of opinion when it purchases land or conservation easements from another nonprofit or governmental agency at a price below the tax-assessment value. A letter of
opinion is never sufficient in the case of transactions with insiders, however, and it is not much use for a property of any complexity.

If the land trust cannot obtain a letter of opinion before a public auction due to timing considerations, it can base the purchase price on an analysis of tax assessment values as long as the land trust can be sure that the assessed value reflects the current market value of the property (for example, the property was recently assessed or the assessed value is comparable to recent sales data).

Other alternatives to a complete appraisal report include:

- **Value analysis.** A qualified real estate professional, such as a state-licensed broker, but not a state-licensed appraiser, performs research and prepares a brief summary, verbal or written, of value findings for the client. State laws vary concerning the ability of non-appraiser practitioners to prepare value opinions.

- **Consulting report.** Subject to state law, it may be possible to retain an appraiser to assemble a list of, for example, all sales in a geographic area for a specific period of time. If an appraiser is asked to assemble “comparable” sales, the resulting work product is, by definition, an appraisal, as it involves professional judgment as to what is comparable.

For accreditation, a letter of opinion from a qualified real estate professional needs to be provided in writing. Land trusts can use a letter of opinion if (a) the property has a very low economic value, (b) a full appraisal is not feasible before a public auction, or (c) the amount paid is significantly below market value. The Commission may ask a land trust to provide an explanation of how it determined that a property had a very low economic value or the amount paid was significantly below market value.

In addition, a land trust may use an area-wide report to support the purchase price. An area-wide report contains all sales of certain types of property within a specific area compiled by an independent appraiser or qualified real estate professional. An area-wide appraisal report can only be used in an area where the parcels are generally uniform in size and/or characteristics and the properties have a low economic value. For example, an area-wide report could be used to purchase in-holdings or properties adjacent to a national park that are generally uniform and within a defined geographic area.
**Unacceptable Value Documentation**

Certain types of documentation of value are clearly unacceptable for land trusts to use in determining a purchase price for a conservation property because they lack substantiation by an expert with knowledge of the real estate market. For example:

- Relying on a price for land or an interest in land set by the landowner or set by a public agency when not derived from an appraisal is unacceptable because such prices may bear no relation to the actual fair market value of the land.

- Relying on an appraisal commissioned solely by a landowner is also unacceptable because it may be based upon information that is incomplete or that may be inaccurate, or the appraisal may not have been performed by a suitably qualified appraiser. At a minimum, the latter will require a review appraisal commissioned by the land trust.

- Relying on an appraisal of an adjacent property to determine value is also unacceptable because every parcel of land is unique, with different physical and other characteristics and, therefore, cannot be compared as if identical (except in very limited circumstances, such as with respect to lots in a subdivision).

- Relying on tax assessments is also unacceptable because tax assessors generally do not value properties every year, and thus such assessments may be out of date with respect to current fair market value.

- Finally, relying upon summaries of comparable sales or experience with similar sales compiled by land trust staff, volunteers or others are also unacceptable because these individuals are not trained to properly value land and are thus not qualified to appraise its value.

By determining the purchase price through unacceptable documentation of value by someone not qualified to value real estate, a land trust may violate state or federal laws, confer impermissible private benefit or private inurement, potentially inflate market value and face risks related to public perception.

**Hiring a Qualified Appraiser**

When purchasing land or easements, care must be taken to ensure that the land trust hires an experienced, independent appraiser to produce an appraisal or report that meets industry standards. If an appraiser holds a state license or certification, however, that appraiser is subject to USPAP at all times. This means that a licensed appraiser may only provide an opinion of value or appraisal in one of two forms:
1. Restricted use report
2. Complete appraisal report

Many appraisers consider any opinion of value an appraisal. In most states, a licensed or certified appraiser generally cannot render an opinion of value (that is, perform an appraisal) in regards to a property without relevant data to support that opinion of value. Producing an opinion of value without the relevant and appropriate research can be a violation of USPAP, as well as the ethical regulations of some of the professional appraisal organizations.

**BARGAIN SALES**

Sometimes, a land trust may be in a position to pay below fair market value through a bargain sale transaction. That is, a landowner agrees to sell land or an interest in land for substantially less than fair market value to a land trust, making a charitable donation of the difference between the sales price and fair market value. When negotiating bargain sale transactions, a land trust should take care to be honest and forthright in its communications with the landowner. Unless the purchase price is significantly below market value – a small fraction of the value substantiated by the landowner’s appraisal – an independent appraisal commissioned by the land trust is still necessary to establish the fair market value of the property. When paying significantly below market value, the land trust should still obtain a letter of opinion.

**EVALUATING THE APPRAISAL**

Evaluating the appraisal report before purchasing land or a conservation easement is critical. Assess the draft appraisal to ensure that it:

- Correctly describes the property and any conservation restrictions (in the case of a conservation easement appraisal using the before-and-after method of valuation)
- Correctly considers any other restrictions or conditions placed on the property by the seller (for example, limits on structures, retention of mineral rights, deed restrictions and so on)
- Correctly identifies the landowner
- Correctly identifies the client
- Correctly identifies the purpose of the appraisal (what appraisers call the *appraisal problem*)
- Cites the appraiser’s qualifications
- Addresses access to the land
• Addresses all three forms of approach to valuation (sales comparison approach, income approach and cost approach)

In addition, a land trust should examine the limiting conditions (the conditions that define the parameters of an appraiser’s work) to determine that:

• You both have the same understanding of the conditions
• Conditions have not been added to make the appraisal suspect
• The appraiser has not made an unrealistic assumption that negatively impacts the appraisal

For example, an appraiser could state in the conditions that they presumed legal access to the property. If access was an exception to title (that is, there was no legal or physical access), the appraisal outcome would be incorrect with the stated condition that access is presumed.

Finally, a land trust should examine the final value determination to make sure it is clear how the appraiser arrived at their conclusions.
STANDARD 9. ENSURING SOUND TRANSACTIONS

H. Purchasing Land or Conservation Easements

2. In limited circumstances where acquiring land, conservation easements or other real property interests above the appraised value is warranted, contemporaneously document:
   
   a. The justification for the purchase price
   
   b. That there is no private inurement or impermissible private benefit

Paying Above Appraisal Value

As a nonprofit organization, a land trust must be fiscally responsible with its funds. In addition, it is legally obligated to ensure its transactions do not unduly inure to the benefit of any individual. Paying in excess of fair market value can leave a land trust vulnerable to charges of conferring impermissible private benefit or private inurement upon the seller. Although analysis may not be easy, careful deliberation is key when choosing to pay more than fair market value. Sound analysis includes obtaining qualified legal advice and carefully reviewing the costs and benefits of the transaction. While paying a premium of 5 to 10 percent may be acceptable, paying much more than that makes the transaction more suspect, may not be in the best interest of the mission of the land trust, and may be harder to justify to land trust supporters, the general public and the government. Every purchase made by a land trust influences the real estate market, so land trusts must also be careful about possibly inflating market value.
In deciding whether to pay above fair market value, the land trust should consider the following:

- The risk of a successful IRS challenge—and public image problems—is far greater if the purchase is from a staff or board member
- The greater the percentage over the appraised value, the more suspect the transaction

**JUSTIFICATION OF PURCHASE PRICE**

If a land trust decides to proceed with paying above fair market value, it should thoroughly document the property’s unique conservation values, its importance to the land trust and the public interest the property serves. Documentation may include:

- Appraisals by those capable of quantifying the premium price (for example, appraisers with specific expertise in the type of property under consideration)
- Expert opinions of biologists, architects or other experts
- Well-documented deliberations by the land trust’s board validating its willingness to pay a premium because of the property’s special attributes
- Documentation of negotiations and the land trust’s inability to obtain a lower price
- Documentation of a land trust’s policy/practice on paying more than fair market value
- Documentation of the extraordinary nature of this particular transaction

**NO PRIVATE INUREMENT OR IMPERMISSIBLE PRIVATE BENEFIT**

In the event the land trust opts to pay more than the fair market value for a fee land transaction or a conservation easement interest, it must also ensure that neither impermissible private benefit nor private inurement will result from the transaction. Private benefit occurs when a tax-exempt organization provides more than an “incidental” benefit to a non-insider. Although charitable organizations such as land trusts may provide benefits to private individuals, federal tax-exempt law prohibits more than an “incidental” benefit. Private inurement occurs when a person who is an insider to the tax-exempt organization, such as a director or an officer, derives a benefit from the organization without giving something of at least equal value in return. The IRS prohibition on private inurement is absolute.

The amount and type of documentation a land trust needs should be scaled to the risk of private inurement or impermissible private benefit. Documentation for purchases above the appraised market value might include trend data for market appreciation, a range of values for similar purchases or market factors not covered in the appraisal.
For accreditation, paying above appraised value should be a rare occurrence, and a land trust must avoid impermissible private benefit. *(A land trust must never engage in private inurement, and above-value transactions with insiders must be avoided.)* The higher the amount paid above appraised value, the more detailed the documentation and supporting evidence from external parties must be.

1. When paying any amount over appraised value, a land trust will need documentation of the following:
   a) The property’s unique conservation values and the public interest the property serves
   b) An analysis of the risk of conferring impermissible private benefit

2. As the price over appraised value increases (in overall value and/or percentage of value), the risk to the land trust and the risk of providing impermissible private benefit increases. For accreditation, as the value and/or percentage of value increases, the land trust will need, in addition to 1(a) and 1(b):
   a) A written legal analysis of the risk of the purchase price conferring impermissible private benefit
   b) Evidence of the board’s deliberation of the risk of providing impermissible private benefit and of the rationale for its decision to pay a premium *(such as because of the property’s documented special market factors and/or documented conservation attributes)*
   c) When the price is significantly above the appraised value, a combination of the following:
      i. Additional appraisals or other quantification of financial factors not considered in the original appraisal by individuals or companies capable of quantifying the premium price *(for example, appraisers with specific expertise in the type of property under consideration)*
      ii. Additional market evidence of value, or trends in value, that support a higher value conclusion
      iii. Expert opinions of biologists, architects or other experts
      iv. Documentation of the land trust’s inability to negotiate a lower price
STANDARD 9. ENSURING SOUND TRANSACTIONS

E. Conservation Easement Drafting

2. Review, on the land trust’s own behalf, each potentially tax-deductible conservation easement for consistency with the Treasury Department regulations (U.S.C. §1.170A-14), especially the conservation purposes test of IRC §170(h).

Accreditation indicator elements located at www.landtrustaccreditation.org

INTRODUCTION

Land trusts have a special interest in trying to make sure that tax-deductible gifts of land and conservation easements meet IRS requirements. Gifts of conservation easements in particular tend to be complex, are generally unfamiliar to most landowners and their advisors and are subject to more scrutiny by the IRS than gifts of fee interests. The land trust should educate potential land and easement donors and their counsel about the IRS requirements, providing information both verbally and in writing (see Practice 10A). A land trust should also review every conservation easement gift for which a tax deduction will be claimed against the IRS requirements in order to satisfy itself that there are no obvious errors. While the land trust does not bear legal responsibility for seeing that IRS requirements are met, it benefits the land trust and the larger land conservation community to see that they are.

UNDERSTANDING THE TAX CODE AND IRS REQUIREMENTS

Every individual who represents the land trust in dealings with potential easement donors should have a basic understanding of the law and regulations pertaining to the tax deductibility of
conservation easements. The basic elements to understand include Internal Revenue Code §170(h) and the corresponding US Treasury Department regulations (Treas. Reg. §1.170A-14).

Conservation easements must meet the requirements of the IRC and the Treasury regulations in order for a landowner to claim federal income tax benefits for the donation of a conservation easement. Not all conservation easements will qualify for federal tax benefits — only those that meet the specific requirements of the IRC and the regulations will qualify. If a land trust purchases a conservation easement at less than its fair market value (referred to as a bargain sale of the easement by the landowner), and the landowner wishes to take advantage of any tax benefits associated with the part of the easement donated rather than purchased, the easement must meet all aspects of the IRC and the regulations to qualify for those tax benefits.

**TAX CODE REQUIREMENTS**

In order to qualify for tax benefits, a conservation easement must meet three basic tests:

1. The easement must be a qualified real property interest (the easement must be perpetual in duration)

2. The easement must be granted to a qualified organization (a government agency or public charity with the commitment and resources to enforce the easement’s restrictions)

3. The easement must be granted exclusively for conservation purposes

**Conservation Purposes**

The conservation purposes test is set forth in IRC Section 170(h)(4)(A) and further described in the regulations (Treas. Reg. §1.170A-14(d)). The test is met if an easement is donated exclusively for one or more of the following reasons:

i) The preservation of land areas for outdoor recreation by, or the education of, the general public

ii) The protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem
iii) The preservation of open space (including farmland and forest land) where such preservation is

I. For the scenic enjoyment of the general public, or

II. Pursuant to a clearly delineated federal, state or local governmental conservation policy

and will yield a significant public benefit, or

iv) The preservation of an historically important land area or a certified historic structure

By adopting these conservation goals, Congress has, in effect, identified lands that are of national interest for preservation. In other words, the conservation of land that fits these categories will provide a public benefit. Although easement holders do occasionally accept conservation easements that do not meet the conservation purposes test, the failure to meet this test should be a red flag of warning. A land trust should make a special effort to define exactly what public benefit is served by acquiring such an easement.

So how does a land trust determine whether a particular property meets the conservation purposes test? The regulations provide some guidance and examples in §1.170A-14(d) that all land trusts should review, some of which are summarized here:

- **Recreation or education.** Examples of the types of projects that will meet this conservation purpose include preservation of a water area for boating or fishing, or a hiking trail that is open to the public. In order to meet this test, substantial and regular use of the property must be available to the general public.

- **Protection of an environmental system.** Projects may meet this test even if there has been some alteration of the habitat or environment by human activity, so long as the fish, wildlife or plants continue to exist in a relatively natural state. Therefore, conservation of a reservoir may meet this test if it became a feeding area for a wildlife community that included rare, endangered or threatened native species.

- **Significant habitat or ecosystem.** Examples of projects that may meet this test include the conservation of high-quality terrestrial or aquatic communities, such as relatively intact coastal ecosystems or natural areas that are included in or that contribute to the ecological viability of a local, state or national park, nature preserve, wildlife refuge, wilderness area or other similar conservation area. When protecting relatively natural habitat or ecosystems, public access is not required to meet the conservation purposes test in recognition that such access may need to be limited or forbidden to protect the conservation values.
• **Scenic open space.** Projects may meet this test if they provide for the scenic enjoyment of the general public. Examples of such projects include lands whose development would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed from a park, nature preserve, road, water body, trail or historic structure or land area, when such area or transportation way is open to or utilized by the public. The regulations contain a list of eight different factors that may be considered by the federal government with respect to whether a particular project meets the scenic requirements of the Code, which land trusts should refer to when considering a project under this provision of the Code. To meet this test, visual, rather than physical, access is required, and the entire property need not be visible for this test to be satisfied, so long as a large enough portion of the property is visible to the public to justify tax benefits. All easements intended to protect open space must also provide a significant public benefit.

• **Open space identified by governmental conservation policy.** Projects will meet this test if the land is identified by representatives of the general public as worthy of preservation or conservation; however, a general declaration of conservation goals is not sufficient, although the policy does not need to identify specific parcels of land. Examples of projects that may meet this test include the preservation of a wild and scenic river, preservation of land within a state or local landmark district that is significant to that district or the protection of the scenic, ecological or historic character of land that is contiguous to or an integral part of the surroundings of existing recreation or conservation sites. All easements intended to protect open space must also provide a significant public benefit.

• **Historic preservation.** Historically important land areas include land within a registered historic district and land areas adjacent to a property listed in the National Register of Historic Places. Historic structures include those listed in the National Register or a structure located in a registered historic district that has been certified by the Secretary of the Interior as being of historic significance to the district.

**Significant Public Benefit**

A conservation purpose based on the preservation of open space, whether for scenic enjoyment or pursuant to a governmental conservation policy, must yield a significant public benefit (IRC §170(h)(4)(A)(iii)).
A determination of whether a conservation easement provides a significant public benefit must be made based on all facts and circumstances. Treas. Reg. §1.170A-14(d)(4)(iv) lists a number of factors that may be considered:

- Uniqueness of the property to the area
- Intensity of land development in the area
- Consistency of the proposed open space use with public and private conservation programs
- Likelihood the property would be developed in the absence of the easement
- Opportunity for the public to appreciate the property’s scenic values
- Importance of the property to preservation, tourism or commerce
- Likelihood of the donee acquiring substitute property or property rights
- Cost of enforcing the terms of the conservation restrictions
- Population density in the area
- Consistency of open space use with a legislatively mandated program identifying particular parcels of land for future protection

The preservation of an ordinary tract of land would not, in and of itself, yield a significant public benefit (Treas. Reg. §1.170A 14(d)(4)(iv)(B)).

**Mineral Rights**

A conservation easement will not qualify under IRC §170(h)(5) and the conservation purposes test of Treas. Regs. §§ 1.170(A)-14(e) and (g)4 if “any person” retains a “qualified mineral interest” – defined in the regulations at §1.170A-14(b)(1)(i) – and if at any time there may be extractions or removal of minerals by any surface mining method. An exception is provided for property where the mineral rights are severed from the surface rights and the probability of extraction or removal of minerals by any surface mining method is so remote as to be negligible. If the mineral rights have not been severed from the property, a blanket prohibition against surface mining in the easement deed should be adequate to meet this requirement. Where mineral rights have been severed (that is, are owned, in whole or in part, by a third party) the donor can secure a report examining the mineral rights and concluding that the likelihood of surface mining is “so remote as to be negligible.” Such a conclusion may be reached through an analysis of the types and quality of minerals existing on the property and/or their economic value, and the potential to commercially extract those minerals.
The regulations state that “certain methods of mining” may not cause an easement to fail to qualify for federal tax benefits, so long as these methods of mining have “limited, localized impact on the real property but are not irremediably destructive of significant conservation interests” (Treas. Reg. §1.170A-14(g)(4)(i)). If a landowner retains the right to mine surface minerals on their land (such as sand and gravel), the easement should carefully restrict the location and the amount of the surface that can be disturbed by such mining activities and include the “limited, localized” requirements set forth in §1.170A-14(g)(4)(i) of the regulations in the easement itself. Restoration of the site after any surface mining should also be required. See Practice 9F2 for more information on mineral rights.

Assignment Limitation

The Treasury regulations state that an easement holder must, as a “condition” of transfer, require that a transferee continue to carry out the conservation purposes of the grant. This provision should be tailored to assure qualification under applicable state law. Some donors ask to be given veto power over an assignment or to somehow control the choice of a successor holder, but circumstances might arise that could make such a requirement challenging – if not with the original grantor, then with subsequent owners. Land trusts should therefore avoid giving landowners absolute power to control or veto the choice of an easement assignee. To avoid problems, the easement should allow the land trust to assign freely to any qualified organization, which, as defined by the IRS, includes governmental agencies.

Extinguishment Provisions

The IRS regulations require that a tax-deductible easement must provide for a division of sales proceeds between the landowner and land trust in the event of a sale of the property after the complete or partial extinguishment of an easement. The easement must contain the following provisions (Treas. Reg. §1.170A-14(g)(6)(ii)):

- The land trust’s interest in the easement must be a vested property interest (\textit{vested} essentially means that the easement is owned by the holder)

- The fair market value of the land trust’s interest must be at least equal to the proportionate value that the easement at the time of contribution bears to the value of the unrestricted property as whole at the time of contribution

- The proportionate value of the easement must remain constant
In the event that the easement is extinguished, the proceeds of any subsequent sale, exchange or involuntary conversion of the easement property shall be divided between the owner of the easement property and the easement holder based on that proportionate value.

Those provisions must not subtract out the value of permitted improvements since the time of the gift or the satisfaction of any and all prior claims.

For accreditation, tax-deductible conservation easements must be compliant with Treasury regulation §1.170A-14 and Tax Court decisions by containing the following (in addition to the contents outlined in Practice 9E1):

- Identification of conservation purposes.
- Prohibition on surface mining.
- Limitation on assignment.
- Approval provisions that do not allow a lack of the land trust’s response to a landowner’s request to be automatic approval of the activity.
- Provisions that, when there are unexpected changes that make impossible or impractical the continued use of the property for conservation purposes, extinguishment can only be accomplished by judicial proceedings.
- Provisions that, in the event of extinguishment or condemnation, the land trust is entitled to proceeds at least in proportion to the value of the conservation easement at the time of the gift and must use those proceeds in a manner consistent with the conservation purposes of the original easement. Those provisions must not subtract out the value of permitted improvements since the time of the gift or the satisfaction of any and all prior claims.
STANDARD 10. TAX BENEFITS AND APPRAISALS

A. Landowner Notification

1. Inform potential land or conservation easement donors who may claim a federal or state income tax deduction (or state tax credit), in writing and early in project discussions, that:

   a. The project must meet the requirements of IRC §170 and the accompanying Treasury Department regulations and any other federal or state requirements

   b. The donor is responsible for any determination of the value of the donation

   c. The Treasury Department regulations require the donor to obtain a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than $5,000

   d. Prior to making the decision to sign IRS Form 8283, the land trust will request a copy of the completed appraisal

   e. The land trust is not providing individualized legal or tax advice

Accreditation indicator elements located at www.landtrustaccreditation.org

IMPORTANCE OF THIS PRACTICE

Notifying landowners of the legal requirements for claiming federal or state income tax deductions or state tax credits is essential to protect landowners and to protect land trusts. Doing so before the prospective donor or land trust has invested significant time or money in a project is important. Understandably, donors who incur legal fees or other expenses preparing for a contribution only to learn of facts that significantly change or prevent their project will not be happy. Such a situation
damages a land trust's reputation. Obviously, it is also wasteful for land trusts to work on projects that fail because prospective donors were not informed of fundamental legal requirements at the outset of a project.

Although there are important reasons for notifying prospective donors of legal requirements, the responsibility for compliance with applicable law is entirely the donor's. Donors need competent counsel in making charitable contributions of land or conservation easements. This responsibility does not disappear simply because a land trust fails to notify a donor of the legal requirements for tax benefits.

It is very important that land trusts and their staffs make it clear to donors that neither a land trust nor its staff can ethically or (in many states) legally provide legal advice or counsel. This information should be included in any communications with prospective donors describing legal requirements, whether the communication is spoken or written.

**Informing the Donor and Requesting the Appraisal**

The five elements of this practice need to be stated in writing, simply and as briefly as possible, to help ensure that they will be read. When land trust personnel have a reasonable doubt that a prospective donor will either take the time to read a notification or understand it, they should review the document personally with the donor. It is also important for a land trust to have a written record of having made these points to donors.

- For accreditation, a land trust needs to provide the notification to potential land or conservation easement donors in writing and prior to closing. It is not sufficient to only include the notification as part of the gift acknowledgement letter. The notification needs to include the following:
  - The project must meet the requirements of IRC §170 and the accompanying Treasury Department regulations and any other federal or state requirements
  - The regulations require the donor to obtain a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than $5,000
  - The land trust will request a copy of the completed appraisal

Land trusts may include information about these requirements in fact sheets, landowner’s guides or other materials. In addition, it is advisable to remind the landowner of the substantiation requirements in writing at or near the conclusion of the gift transaction. *Failure to comply with any aspect of the substantiation regulations could cause the deduction to be disallowed entirely.*
Many land trusts now require that prospective donors or their advisors sign the notification acknowledging that they have received it and understand it. This provides added protection by having evidence of receipt and acceptance of the notification.

In addition, the prospective donor needs to know that the land trust reserves the right to refuse to sign Form 8283 if it believes that (1) no contribution has been made (2) that the property is inaccurately described on the form or (3) if it has substantial concerns about the appraisal, appraised value or other terms of the transaction (see Practice 10C). Failure to clearly provide such information to a prospective donor is not only unfair to the donor, it deprives a land trust of important protection in the event of a legal challenge by a donor unhappy that they lack a signed Form 8283 to submit to the IRS.

Helping the Donor Get a Competent Appraisal

Appraisals of land, especially land with subdivision potential, are substantially different from typical residential property appraisals. Appraisals of conservation easements are even more highly specialized. Many land trusts take steps to help ensure the landowner gets a competent appraisal. A competent, well-substantiated appraisal is valuable to head off IRS challenges, and, in the face of an IRS challenge to a claimed deduction, the best defense is the testimony of a well-informed, experienced appraiser. However, the land trust needs to emphasize to the landowner that the appraisal is the donor’s responsibility, not the land trust’s.

Recommend ing Appraisers

The key to a good appraisal is the hiring of a competent appraiser. Some land trusts provide donors with a list of appraisers who are experienced in the type of appraisal in question and whom the land trust believes to be competent. Many land trusts avoid recommending one particular individual, which can give the landowner the impression that the land trust chose the appraiser. Sometimes, however, the land trust may feel one appraiser is clearly best for the job, or there may be only one appraiser in the area experienced with conservation easements. The land trust should evaluate the circumstances and decide how far it should go in guiding a donor to a particular appraiser. In all cases, the land trust should emphasize that by recommending appraisers, it is not guaranteeing the quality of the work nor assuming responsibility for the appraisal.

The land trust should advise the landowner to use an appraiser that is licensed or certified by the state in which they practice, is qualified and one who follows the Uniform Standards of Professional Appraisal Practice (USPAP).
May the Land Trust Pay for the Appraisal?

Because the donor is required to obtain the appraisal to qualify for a charitable deduction, paying for the appraisal is the donor’s responsibility. But appraisals can be expensive. In some cases, the landowner may feel unable or unwilling to pay for the appraisal, and the land trust may wonder whether it should cover this cost.

Most land trusts do not pay for or contract for donors’ appraisals because the appraisal and its conclusions are entirely the donor’s responsibility. But if the land trust does pay for the appraisal, it must take into account the following considerations:

- **Paying for the appraisal may create a bargain sale.** The payment of the donor’s appraisal costs (or other costs) by the donee may convert an otherwise outright charitable gift into a bargain sale, offsetting part of the deduction with sale proceeds. Because the donor is obligated to obtain a qualified appraisal as part of obtaining a charitable deduction, paying the fee is part of the cost to the donor of making the contribution. In effect, if the land trust pays for the appraisal, it pays part of the total transaction cost. This may require the donor to allocate part of the basis to the sale, which adds to the complexity of reporting. When this situation comes up, landowners should be made aware of this potential tax result and advised to consult with their own tax advisors as to the correct tax treatment of the transaction. The amount will also need to be disclosed as a bargain sale in the gift acknowledgment letter (see Practice 5B2).

- For accreditation, if the land trust pays for the landowner’s appraisal, this payment needs to be acknowledged to the landowner. The acknowledgement can be on the IRS Form 8283, in the gift acknowledgement letter or on other tax forms. The acknowledgement of the payment needs to be provided even if the land trust also uses the appraisal to justify a bargain sale purchase.

- **Repeated use of the same appraiser could raise questions about the appraiser’s independence.** The Internal Revenue Code and Treasury substantiation regulations list a variety of people who are not considered qualified appraisers, including anyone related to or employed by the land trust or the donor. An appraiser who regularly carries out work for the land trust and does not perform a substantial number of appraisals for other organizations or individuals would not be a qualified appraiser.

REFRAIN FROM PROVIDING INDIVIDUALIZED LEGAL OR TAX ADVICE TO LANDOWNERS

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4 Land Trust Alliance · Land Trust Standards and Practices · Practice 10A1 Landowner Notification

Accreditation indicator element

Last revised February 25, 2019
It is very important that a land trust emphasize that the notification described in this practice is not legal advice but only information and that the land trust cannot provide legal advice. Furthermore, the notification should urge prospective donors to obtain legal counsel knowledgeable about conservation easements in the state where the contribution will be made. It would be helpful for the notification to point out that millions of dollars in deductions have been lost for failing to strictly comply with the tax law pertaining to conservation easements, so competent counsel is essential.

For accreditation, the land trust needs to not provide individualized legal or tax advice.

**IRC §170(H) AND TREASURY REGULATIONS**

Every individual who represents the land trust in dealings with potential easement donors should have a basic understanding of the law and regulations pertaining to the tax deductibility of conservation easements. From the first landowner contact, the land trust should be sure it is giving out accurate information. The basic elements to understand include Internal Revenue Code §170(h), the corresponding U.S. Treasury Department regulations (Treas. Reg. §1.170A-14) and the potential gift tax implications of easement donations that do not meet these requirements.

**INTERNAL REVENUE CODE §170(H)**

Internal Revenue Code §170(h) is the federal statute governing the requirements that a conservation easement and certain other partial interests in land must meet to qualify for a federal income tax deduction. The legal term for these qualifying partial interests is *qualified conservation contribution*. The statute outlines three basic tests a donation must meet to be considered a qualified conservation contribution. It must be:

1. A qualified real property interest (which includes perpetual conservation easements)
2. Granted to a qualified organization (generally a government agency or public charity)
3. Granted exclusively for conservation purposes, of which there are four categories:
   a. Provides outdoor recreation or educational use for the general public
   b. Protects a relatively natural habitat of fish, wildlife, plants or similar ecosystem
   c. Preserves open space (including farmland and forestland) where such preservation
      i. Provides for the scenic enjoyment of the general public or
ii. Is pursuant to a clearly delineated federal, state or local governmental conservation policy

and yields a significant public benefit

d. Preserves an historically important land area or a certified historic structure

Section 170(h) of the Internal Revenue Code defines a *qualified real property interest* as any one of the following:

1. The entire interest of the donor other than a qualified mineral interest

2. A remainder interest

3. A restriction (granted in perpetuity) on the use which may be made of the real property

A conservation easement is the third of these qualified real property interests. It is a perpetual conservation restriction, which is granted in perpetuity on the use that may be made of real property.

**Treasury Regulations §1.170A-14**

Section 1.170A-14 of the Treasury Department regulations fleshes out the requirements of IRC §170(h). The Treasury regulations define each of the basic terms in the statute: What is a qualified organization? What circumstances must be shown to meet the conservation purposes test and what circumstances would not meet the test? What must be shown to ensure that the conservation easement is granted exclusively for conservation purposes? These are commonly referred to as the IRS criteria for deductible conservation easements.

The most essential and complex part of determining whether a conservation easement qualifies for a tax deduction is whether it meets the IRS definition of conservation purposes. The Treasury regulations define conservation purposes at substantial length and provide specific examples of conservation plans and types of properties that do and do not qualify. Any land trust representative talking to potential easement donors should be well versed in the IRS requirements regarding conservation purposes. The IRS requirements can provide an early, initial screen of whether the conservation resources on a property are significant enough—and whether the types of restrictions the landowner will agree to are sufficient—to qualify the donation as a tax-deductible easement.

The Treasury regulations include a number of other requirements, including specific provisions that must be included in the conservation easement deed or document. These requirements become particularly important as the easement document is drafted (see Practice 9E for more information).
UNDERSTANDING OTHER LEGAL REQUIREMENTS

In addition to specific income and gift tax deductibility requirements, qualified conservation contributions must meet other requirements of state and charitable gift law. These are discussed briefly below. A land trust representative should not try to provide definitive answers on these matters; however, it is important to have an idea of special issues or pitfalls that might arise. The land trust will want to be able to notify the landowner of potential deductibility problems early on, but should recommend that the landowner consult with their advisor as to how to proceed. The law in this area can be very complex.

Some donors may wish to make contributions and claim no tax benefits, and some conveyances may not qualify for tax benefits. The latter would include conveyances required to satisfy contractual or regulatory obligations, conservation easements that are not perpetual or sales of land or conservation easements for full fair market value. In such cases landowners and land trusts may assume that compliance with federal tax law is not necessary. However, this would be a false assumption. If a landowner gives a conservation easement or land to a land trust that is not a qualified conservation contribution within the meaning of section 170(h) of the Internal Revenue Code, the landowner may be treated by the Internal Revenue Service as having made a taxable gift. In these cases, therefore, land trusts should still inform landowners of the need for compliance with tax law and regulations and the importance of consulting competent, knowledgeable legal counsel.

State Conservation Easement Law

All conservation easements, whether donated as a tax-deductible gift or not, must meet the requirements of state law. While most states have a specific statute guiding conservation easements, some rely on the common law of real property. State law may differ from the IRS requirements regarding what is a valid conservation purpose, who is qualified to hold the conservation easement and so forth. The most restrictive rule among conflicting laws must be met to assure validity of an easement and deductibility.

Charitable Gift Law

Land trust representatives need to have a general understanding of what is a charitable gift and what is not. Two key general principles of charitable gift law are that the gift must be a true gift for which no bargained-for benefit is anticipated (an easement given to a land trust by a developer in exchange for government subdivision approval is not a gift, for example) and the gift generally must be complete and irrevocable, without strings or contingencies.
Special Rules for Gifts of Appreciated Property

Gifts of appreciated property have some special limitations. For example, a landowner must hold appreciated property for at least one year or a gift of the property or an easement is limited to the donor’s basis in the property (that is, the appreciated portion of the value may not be deducted). In addition, dealers in land—such as developers—may only be able to deduct their basis in donated appreciated property. Percentage limitations on deductions of charitable gifts of appreciated property differ from those for cash gifts and depend on the type of owner, type of donee and the donee’s tax situation.

Appraisal and Substantiation Requirements

The regulations pertaining to substantiation of charitable gifts of property for which the claimed deduction is in excess of $5,000 are outlined in Treasury Department regulations (Treas. Reg. §1.170A-13(c)). Gifts of property in excess of $5,000 must meet the following requirements:

- **The donor must obtain a written qualified appraisal.** The Treasury regulations outline specific information that must be included in the appraisal. The timing of the appraisal is essential: it cannot be made earlier than 60 days before the date of the gift and must state the fair market value of the gift as of the “valuation effective date,” which is usually the date of the contribution. The entire written appraisal and Appraisal Summary (IRS Form 8283) must be received by the donor on or before the due date (including extensions) of the tax return on which the deduction is claimed.

- **A qualified appraiser must prepare the appraisal.** Generally, a qualified appraiser cannot be the donor, donee, a party to the transaction in which the donor acquired the property, an employee of or related to any of the forgoing persons or any person whose relationship to the taxpayer would cause a reasonable person to question the appraiser’s independence. An appraiser who is regularly retained by any of the above and who does not perform a majority of their yearly appraisals for other people is not a qualified appraiser. The appraisal fee must not be based on a percentage of the appraised value of the property.

- **An Appraisal Summary (IRS Form 8283), signed by the appraiser and the donee, must be attached to the federal income tax return on which the deduction for the contribution is first claimed.** The form, provided by the IRS, asks for information required by Treasury Department regulations.
• The donor must maintain records containing certain information required for property contributions in general, including the complete written appraisal.

• For charitable donations of property valued at more than $500,000, the donor must include the full, unabridged appraisal with their tax return for the year of the gift and for any carryover years in which the donor will claim the deduction.

There are specific Treasury regulations governing the determination of the value of conservation easements (Treas. Reg. §1.170A-14(h)(3)), including that an easement appraisal consider the economic effect of a conservation easement contribution on other property owned by the donor, the donor’s family and the donor’s business associates.

• The contiguous property rule. When a donor contributes a conservation easement over only a portion of contiguous property owned by the donor or the donor’s family, the regulations require that the value of the easement be determined by appraising the entire contiguous property, both the portion subject to the easement and the portion that is not subject to the easement, to determine the value of the easement.

• The enhancement rule. The regulations also require that an appraiser take into account any enhancement in the value of property owned by a related party as a result of an easement contribution, whether or not that property is contiguous with the easement property.

ADDITIONAL RESOURCES

• A Tax Guide to Conservation Easements, 2nd ed., by Tim Lindstrom

IRS Resources

• Internal Revenue Code §170(h)
• IRS Form 8283
• Treasury Regulations §1.170A-13(c)
• Treasury Regulations §1.170A-14
• Treasury Regulations §1.170A-16, -17
The donor must maintain records containing certain information required for property contributions in general, including the complete written appraisal.

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ADDITIONAL RESOURCES


IRS Resources

Internal Revenue Code §170(h)

IRS Form 8283

Treasury Regulations §1.170A-13(c)

Treasury Regulations §1.170A-14
STANDARD 10. TAX BENEFITS AND APPRAISALS

B. Legal Requirements: Land Trust Responsibilities

1. Sign the Form 8283 only if the information in Section B, Part I, “Information on Donated Property,” is complete and is an accurate representation of the gift.

   a. Refuse to sign the Form 8283 if the land trust believes no gift has been made or the property has not been accurately described.

Accreditation indicator elements located at www.landtrustaccreditation.org

BACKGROUND

The land trust should understand its responsibilities with regard to signing Form 8283, both legally and in the court of public opinion. While the IRS does not hold land trusts responsible for the values claimed by a landowner on a Form 8283, the public’s impression of land trusts is affected by their perception of the integrity of conservation transactions, including the validity of a donor’s appraised value for a donation. For these reasons, the land trust should refrain from signing a Form 8283 that does not have Section B, Part I “Information on the Donated Property” and Part IV “Declaration of Appraiser” fully completed. Section B is used to report donations of property for which the donor claimed a deduction of more than $5,000.

In 2018, the IRS issued final regulations entitled “Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions,” codified as Treasury Regulations §1.170A-15 (cash), -16 (noncash), -17 (qualified appraisals and appraisers) and -18 (clothing and household items). The regulations include a specific statement that Form 8283 does not need to be completed before the donee signs it. The following information may be excluded: appraiser information, manner and date of acquisition, cost basis in the property, appraised fair market value of the property, and so forth.
property and amount of charitable contribution. See §170A-16(d)(5). Regardless, given the land trust’s role in protecting the credibility of conservation donations, it is prudent for the land trust to request that both Parts I and IV be completed before signing.

**SIGNING THE APPRAISAL SUMMARY – IRS FORM 8283**

Form 8283 is the appraisal summary required by section 1.170A-13(c)(4) of the Treasury Regulations. It must be completed and signed by the appraiser (including all appraisers who signed the actual appraisal) and by the land trust receiving the donation described on the form. The donor does not sign the form.

In signing the Form 8283, the land trust acknowledges:

1. That it is a qualified organization within the meaning of section 170(c)(3) of the Internal Revenue Code

2. That it received the donated property as described in Section B, Part I of the form

3. That the donation was received on the date inserted by the land trust on the form

The land trust also agrees to notify the IRS if it disposes of the property within three years. Signing the form does not constitute an endorsement of the claimed deduction; the form specifically states: “This acknowledgment does not represent agreement with the claimed fair market value.”

**Practice 10C2** requires a land trust to evaluate Form 8283 and any appraisal to determine whether the land trust has substantial concerns about the appraised value or the appraisal. Clearly, if the form has not been completed, and if the land trust has not seen the appraisal, a land trust cannot evaluate it and, therefore, should not sign Form 8283 until the form is complete and the appraisal has been reviewed in accordance with **Practice 10C2**.

The Internal Revenue Service requires that all Forms 8283 summarizing the appraisal of a conservation easement be accompanied by a written statement provided (but not signed) by the donor. The matters to be covered by the statement are listed in the Instructions for Form 8283:

1. Identification of the conservation purposes furthered by the donation

2. If the before and after method is used to value the easement, state the appraised value of the underlying property before and after the easement
3. Whether the donation was made to obtain a permit or other approval from a local or other governing authority

4. Whether the donation was required by a contract

5. Whether the donor or any related person has any interest in property near the easement property and, if so, describe that interest

A land trust should not sign Form 8283 if a statement covering these matters is not attached. A land trust should know what conservation purposes were furthered by the donation. However, a land trust might not necessarily know if the donation was made to obtain a governmental permit or approval or if the donation was required by a contract. The existence of either of these circumstances calls into question whether a tax-deductible contribution has actually been made and, therefore, whether the land trust should sign the Form 8283 that acknowledges receipt of a gift.

**Describing the Gift**

The land trust should take care to see that the gift it has received is accurately described on the Form 8283. Key items to look for on the form include:

- Name of the donor
- Description of the donated property [3(a)]
- That the fair market value of the donation claimed in 3(c) matches the appraised value of any appraisal received by the land trust
- That 3(g) reflects any bargain sale payments
- Donor’s cost or adjusted basis [3(f)]
- That the date of the gift is accurate (3(i), if completed)

There are land trusts that have experienced cases where the gift was not accurately described. In such situations, the land trust should not sign the form until corrections have been made to accurately describe the gift.

What are some problems that might occur?
• **Describing the wrong property or parcel.** In a complex transaction or one where there are many changes during the project negotiations, the Form 8283 may refer to the wrong parcel or the incorrect part of the property that was actually covered by the transaction. It has happened!

• **The gift described was not really a gift.** If the easement or land transaction was required as part of a governmental permitting or mitigation process, it is possible that the transaction would be considered a quid pro quo and not meet the donative intent requirements for a gift.

If the land trust encounters these problems, it should work with the landowner and their tax advisors to correct the description of the gift before it signs the Form 8283.

Finally, Form 8283 must be signed by a person authorized to sign tax returns for the land trust or someone expressly authorized to sign the form. Such authorization should come from the governing board of the land trust.

The instructions to Form 8283 explicitly acknowledge that, in some cases, it may be impossible to get the donee’s signature on Form 8283. “The deduction will not be disallowed for that reason if you attach a detailed explanation of why it was impossible.”

See **Practice 10C3d** for when a land trust should refuse to sign Form 8283 for reasons other than the fact that no contribution has been made or the contributed property is inaccurately described.

For accreditation, a land trust needs to evaluate the Form 8283 before signing it to make sure it includes the following information in order to confirm the Form is an accurate representation of the gift and that the land trust meets the requirements of Practices **10C2, 10C3 and 10C4**:

- Name of landowner(s) that matches landowner(s) in the title investigation (see Practice 9F1)
- Detailed gift description (or supplemental statement)
- Appraised fair market value of the donation that matches the value(s) in the appraisal
- Amount received in a bargain sale, if any
- Donor’s cost or adjusted basis
- Date of gift (for conservation easements, the year of the gift needs to match the year the conservation easement was recorded)

The land trust must not sign the Form if it did not receive a gift.

ADDITIONAL RESOURCES

- IRS Form 8283
- Instructions for Form 8283
STANDARD 10. TAX BENEFITS AND APPRAISALS

C. Avoiding Fraudulent or Abusive Transactions

2. Evaluate the Form 8283 and any appraisal to determine whether the land trust has substantial concerns about the appraised value or the appraisal

Accreditation indicator elements located at www.landtrustaccreditation.org

IMPORTANCE OF THIS PRACTICE

In signing the Form 8283, the land trust acknowledges receipt of the gift and agrees to notify the IRS if it disposes of the property within three years. Signing the form does not constitute an endorsement of the claimed deduction; IRS regulations specifically state: “This acknowledgment does not represent agreement with the claimed fair market value.”

While signing the Form 8283 is not a technical endorsement of the value, the public may not take such a nuanced view. The public’s view of land trusts (good or bad) is contingent on whether they believe in the integrity of conservation transactions – including the validity of a donor’s appraised value for a donation – and the land trust itself. Land trusts should have a practice of requesting a copy of the landowner’s appraisal – even if they may not always receive it. This does not mean the land trust must determine or concur with the value of the donation, but it does require land trust personnel to use their general knowledge and common sense to make a general assessment about whether the appraised value is credible.

There are a number of other good reasons why a land trust will want to know the value and have a completed copy of the appraisal and Form 8283, including:
• **Public relations.** Knowing the appraised value of the land it holds allows the land trust to describe the total dollar value of its holdings, which is often a compelling statement. Of course, the land trust should never publicly reveal the value of an individual gift of property, except with the approval of the donor or as required by regulators.

• **Helping the landowner.** The land trust can help landowners identify issues in meeting the IRS requirements and, hence, reduce the likelihood of an IRS audit.

• **Public support test.** Land trusts need to know the value of the property in order to calculate public support for maintaining charitable status. (This may not be true for conservation easements if the land trust values its easements at zero.)

• **Easement extinguishment.** Knowing the value of a conservation easement, as well as the value of the land without the easement, is important in the event the easement is eventually extinguished and the land is sold because “division of proceeds” clauses in the IRS easement regulations entitle the land trust to a percentage of the sales price based on those values.

• **Completing the transaction file.** The completed 8283 and any appraisal is an important record of the nature of the transaction and should be part of the permanent file.

### REQUIREMENTS OF THE PRACTICE

Land trusts should take some responsibility for valuation of land and easement contributions. The practice does not ask land trusts to perform an appraisal or even provide a technical review of an appraisal. Land trusts are qualified to do neither. However, land trusts can and should evaluate appraisals to determine whether the land trust has substantial concerns about the appraisal or the appraisal’s valuation. This is an internal check to determine whether additional steps (described in Practice 10C3) should be taken before signing Form 8283. This practice expects a land trust to go beyond the strict requirements of Form 8283 because the Standards expect land trusts to go beyond mere compliance with the law to follow the highest ethical principles.

Some land trust practitioners fear that requesting and evaluating appraisals exposes land trusts to liability in the event that values are overturned by the Internal Revenue Service or state tax agencies. However, this exposure can be minimized if a land trust provides prospective donors with the appropriate disclosures at the outset of a transaction (see Practice 10A1) and even requires prospective donors to formally acknowledge receipt of the disclosure. If the land trust is unable to obtain the appraisal from the landowner, it should document its request.

Tax rules, both state and federal, establish many requirements for the appraisal of easements for purposes of substantiating easement deductions. The Uniform Standards of Professional Appraisal Practice establish additional standards for appraisals. This practice does not expect land trusts to be
responsible for compliance with all these technical and complex rules. Rather, a land trust should exercise its reasonable judgement (that is, the collective judgement of staff and board) regarding the need to take the additional steps described in Practice 10C3.

APPRAISAL ISSUES

Many appraisal infirmities, while not fatal, highlight appraisers’ lack of familiarity with the Treasury Regulations. These are relatively easy to correct. Others are considered to be more serious technical flaws. Still others may relate to egregiously inflated valuations. Knowledge of these mistakes can help a land trust evaluate easement appraisals accurately.

In many cases, prospective donors will obtain preliminary appraisals. Land trusts should obtain copies of preliminary appraisals when they are available. Checking a preliminary appraisal can do much to head off trouble and save time and money for everyone concerned. In fact, obtaining copies of preliminary appraisals might be provided for as part of a land trust's initial understanding with prospective donors.

Lack of Familiarity with the Treasury Regulations

Appraisal errors that occur because of the appraiser’s lack of familiarity with the Treasury Regulations include:

- Using the wrong definition of market value. Per Treasury regulation §1.170A-1(c)(2), the definition of market value is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.”
- Failure to state that the appraisal was prepared for the income tax purposes of the donor.
- Appraisals dated more than 60 days before the date of the contribution.

Other items a land trust should check when evaluating appraisals include:

- That the appraisal does not indicate that the appraiser’s fee was based on a percentage of the value of the property or property interest
- That the appraisal includes the terms of the conservation easement or any other agreement or understanding that relates to the use, sale or other disposition of the property
- That the method of valuation used to determine fair market value, such as the comparable sales approach or income approach, is described
For a complete checklist of what constitutes a qualified appraisal for income tax purposes, see the Additional Resources section.

**Serious Technical Issues**

- **Appraising the wrong property.** Land trusts and appraisers should take care that the appraisal’s legal description reflects the area covered by the easement. It is not uncommon for the legal description of the property and the number of reserved rights retained by the donor to fluctuate as the landowner and land trust finalize a transaction. An appraisal must reflect the final transaction. Too often there is a last-minute revision that does not get reflected in the appraisal.

- **Not valuing all interests as required by the IRS regulations.** There are instances when the appraiser neither values all of the property owned by the donor and their family before and after imposition of the easement (the contiguous property rule), nor takes into consideration the impact of the easement on the value of “other property” owned by a family member or a related person (the enhancement rule).

- **Exclusive use of the subdivision development valuation technique.** Some appraisers rely entirely on the subdivision development valuation technique, which bases the easement’s “before” value on potential revenues generated by the hypothetical development of the property. In order for this valuation technique to be credible, the subdivision development plan that is appraised must have been approved and be a permitted use (or be a use that could be approved) under local land use regulations. It must be technically feasible and must be a likely and financially feasible form of development, given the local market. Common signs of a poor subdivision development analysis are:
  - Inadequate land use plan without engineering input and lacking substantiated development costs
  - Poorly supported forecasts of lot sale prices
  - Poorly supported lot absorption forecasts
  - Poorly supported discount rates
  - Inadequate profit allocation

- **Wrongly appraising phased conservation easements.** Appraisals of second or third-phase easements sometimes improperly account for the impact of the earlier easements. Even though a portion of the property has been protected by a prior conservation easement, the issues of contiguous parcels and enhancement still apply. This is one of the most common problems associated with the phasing of easements (placing an easement on only a portion of the property, with the intention of doing additional easements in the coming years).
Ignoring other restrictions. Ignoring or omitting existing zoning or property restrictions — such as covenants, deed restrictions, rights-of-way or other preexisting limitations on use of the property — is a common problem. A conservation easement (or fee property) may have little or no charitable value if, for example, the property is already subject to an enforceable restriction or covenant that limits development to only one dwelling unit. Similarly, a donated easement may have little or no value on a property that is covered by wetlands already restricted from development by existing regulations or on a property with topography so severe that no development can occur.

Valuation Issues
Land trusts should also be alert to extreme valuation problems. Land trust practitioners are in a unique position to judge land values. They are, for the most part, local or have local or regional boards; they are people concerned and knowledgeable about land in their area. This local knowledge should be used to identify deviations from fair market value that are abusive using subjective judgment. There are no bright lines. However, when a value shows up on a Form 8283 or in an appraisal that causes a member of a land trust’s staff or board to raise an eyebrow, it is time to look more closely.

Land trusts should not attempt to set thresholds for the consideration of valuations. Such standards impose unreasonable constraints on land trust personnel and require a formal knowledge of appraisal practices and values that is unfair to expect of someone who isn’t an appraiser. However, examples of extreme valuation problems might include: (1) where the value of the easement or fee property appears to be greater than double the value that would have been expected based on a land trust’s ordinary experience; (2) where the percentage reduction for a conservation easement is claimed to remove 80 or 90 percent of the property’s value in an area where there is no significant development pressure; and (3) where the value shown for the conservation easement or fee interest is multiples of the basis shown on the 8283, and the basis is from a recent sale of not more than two or three years old.

For accreditation, a land trust needs to evaluate the Form 8283 prior to signing it to make sure it includes the following information:
- Name of landowner(s) that matches landowner(s) in the title investigation
- Detailed gift description [Section B, Part I, Line 3(a)] (or supplemental statement)
- Appraised fair market value of the donation/gift that matches the value in the appraisal [Section B, Part I, Line 3(c)]
- Amount received in a bargain sale, if any [Section B, Part I, Line 3(g)]
- Donor’s cost or adjusted basis [Section B, Part I, Line 3(f)]
- Date of gift (Section B, Part V) (for conservation easements, the year the land trust received the gift needs to match the year the conservation easement was recorded)
In the rare event that the landowner changes during the closing process, the land trust will need to document that it confirmed the final deed was granted by the legal owner and that the ownership change did not include any additional encumbrances (see also Practices 9F1 and 9F2). That documentation could be used to show how the land trust met the requirement for the name of the landowner on Form 8283 to match the landowner in the title investigation.

For accreditation, the land trust needs to evaluate the landowner’s qualified appraisal to make sure it includes the following information:

- Property description for the gift that was donated (the property description should reflect the terms of any agreement or understanding entered into [or expected to be entered into] that relates to the use, sale or other disposition of the donated property)
- Effective date not more than 60 days before the donation
- Value for the entire contiguous parcel, if there are clearly contiguous parcels (for conservation easements)
- Consideration of enhancement, if enhancement would clearly apply (for conservation easements)

In order to evaluate that the landowner’s appraisal is a qualified appraisal that would meet the basic Treasury Department regulations, the land trust should look to see that the appraiser stated the appraisal was prepared for income tax purposes.

For accreditation, the land trust needs to evaluate the Form 8283 and the landowner’s appraisal (as described above) and have its documents show the following (see also Practices 10C3 and 10C4):

- That the land trust did not knowingly participate in potentially fraudulent or abusive transactions
- That the land trust involved legal counsel, as appropriate
- That the land trust took appropriate action to resolve substantial concerns with the appraisal, appraised value or other terms of the transaction
  - **Appropriate actions** include actions such as documenting the land trust shared its concerns with the donor; seeking an independent substantiation of value; withdrawing from the transaction prior to closing; asking to see the landowner’s appraisal prior to closing; documenting the board’s decision to proceed with the transaction and/or with signing the Form 8283; refusing to sign the Form 8283
  - **Substantial concerns** include issues such as if the title investigation or other documentation shows the property has been held for a short period; the landowner appears to have inflated expectations for the value of the
 donation; the appraised valued does not appear defensible in light of the land trust’s knowledge of local land values; the appraisal appears to contain unjustified extraordinary assumptions; the appraised value is significantly in excess of the donor’s cost or adjusted basis (if recent)

- That the land trust signed the Form 8283 only when it received a gift

If the landowner refuses to provide a copy of the appraisal, a land trust should retain a copy of its request for the appraisal and the landowner’s refusal, as well as documentation showing how the land trust confirmed it did not have concerns with the appraised value. This exception does not apply when the transaction triggers the terms of the Tax Shelter Advisory and Practice 10C4.

**Establish an Evaluation Process**

Even though bright-line thresholds should be avoided in evaluating appraisals, every land trust should establish a formal process governing the evaluation of appraisals and how to respond to values subjectively identified as out of line or other substantial concerns with the appraisal.

It is most likely that an appraisal will be checked first, or only, by land trust staff. If the person’s reaction is that the value is out of line, that concern and some explanation for the concern, should be presented to someone in a supervisory position or a board member. If, once more widely considered, the concern remains, the issue may become subject to full board review. If, after this consideration, concern remains, then the land trust should follow the steps outlined in Practice 10C3.

Evaluating appraisals of contributions is challenging for all land trusts and unsettling to many. While such evaluations go beyond the strict requirements of the law, the credibility and public trust of the land trust community is at stake. If land trusts sincerely seek to avoid fraudulent or abusive conservation transactions, evaluating appraisals is a challenge they must be willing to accept.

**STRATEGIES FOR REVIEWING APPRAISALS**

To avoid feeling the necessity to comment on the specifics of an appraisal, land trusts can think about the appraisal in terms of a three-tier system. You can rank appraisals as follows:

1. **The good.** The appraisal seems generally in line with the expected value of the conservation easement donation and is not missing any essential elements required by the IRS. In this circumstance, Form 8283 should be signed by the land trust without reservation.
2. *The (slightly) bad.* The appraisal is aggressive in its conclusion of value or the appraisal does not adequately address a key element. For example, the appraisal identifies the issue of enhancement as required by the Treasury Regulations, concludes there is no enhancement value to the donor’s other nearby property, but provides no basis for this conclusion. In these circumstances, the land trust can sign Form 8283 but it should share its concerns regarding the appraisal in writing with the donor (see Practice 10C3).

3. *The ugly.* The appraisal is indefensible as to its conclusion of value in light of local land values, or the land trust believes that no gift has been made, or the gift described in the appraisal is not the gift received. For example, if a landowner grants a conservation easement in exchange for zoning approval, no gift has been made. If a recorded conservation easement reserves two additional home sites, but the appraisal values the conservation easement on the basis that the property will have only one additional home site, it is an example of appraising something other than the gift received. Any of these problems result in an appraisal that is or borders on being fraudulent, and the land trust should refuse to sign Form 8283 unless these issues are satisfactorily addressed (see Practice 10C3).

**ADDITIONAL RESOURCES**

- Practical Pointers: Form 8283 and Appraisal Review
- Practical Pointers: Qualified Appraisal Checklist
C. Avoiding Fraudulent or Abusive Transactions

3. Discuss substantial concerns about the appraisal, the appraised value or other terms of the transaction with legal counsel and take appropriate action, such as:

- a. Documenting that the land trust has shared those concerns with the donor
- b. Seeking additional substantiation of value
- c. Withdrawing from the transaction prior to closing
- d. Or refusing to sign the Form 8283

Accreditation indicator elements located at www.landtrustaccreditation.org

IMPORTANCE OF THIS PRACTICE

The Alliance and its members are committed to operating with the highest ethical principles, and the vast majority of conservation donations are made by generous landowners with true philanthropic intent. The public recognizes this intent and has generously supported private land conservation through tax incentives. However, if the public believes that land trusts or landowners are not acting in the public interest, that support and the conservation it enables will cease. Land trusts have a public duty to minimize misuse of the tax policies that have so effectively led to the voluntary protection of millions of acres of U.S. land.

Requesting a copy of the landowner’s appraisal (even if the land trust may not always receive it) helps curb misuse of tax policies. While land trusts are not appraisers, they do have an interest in helping to see that a donor’s appraisal will meet the IRS requirements and that the appraised value
does not appear unreasonably high and thus likely to attract an IRS challenge or diminish public support.

**BACKGROUND**

This practice presumes that the land trust made the proper preliminary disclosures to the donor (see Practice 10A1) and that the land trust reviewed Form 8283 and the related appraisal (see Practice 10C2). Of course, even if a land trust did not provide the preliminary disclosures to a donor as described in Practice 10A1, it should still evaluate any appraisal and take appropriate action if it has substantial concerns about the appraisal, the appraised value or other terms of the transaction.

Some land trusts have been reluctant to get involved in any discussion of the quality of the appraisal or the value determined by the donor’s appraiser. It is certainly not the land trust’s legal responsibility to do so; however, given the increased scrutiny by the IRS, it can provide a valuable service to the landowner if the land trust speaks up when there are obvious concerns about the appraisal that are readily apparent to anyone.

Most appraisers who accept assignments to value donated land or conservation easements intend to produce credible reports. However, lack of experience or a desire to satisfy a donor’s valuation goals may result in problems. Many appraisal infirmities, while not fatal, may highlight an appraiser’s lack of familiarity with the Treasury regulations or may be just an oversight. Some are minor and easy to correct. Others may be more serious technical flaws or relate to significant valuation issues. See Practice 10C2 for more specifics about appraisal concerns. Depending on the nature and extent of these issues, some may be resolved directly by land trust personnel with the donor without prior consultation with legal counsel.

For substantial concerns about the appraised value (such as an egregiously inflated appraisal valuation, based on a land trust’s knowledge of local real estate markets) or serious technical issues affecting the appraisal (such as the exclusive use of the subdivision valuation technique), land trusts should always consult with legal counsel for advice on how best to proceed. In these circumstances, experienced legal counsel is indispensable in guiding land trusts to take the appropriate action.

- For accreditation, a land trust needs to evaluate each transaction and take action to resolve substantial concerns with the landowner’s appraisal, appraised value (see Practice 10B2) or other terms of the transaction to ensure the land trust did not knowingly participate in potentially fraudulent or abusive transactions (see also Practice 10C4). Its documents should show the following:
  - That the land trust involved legal counsel, as appropriate
  - That the land trust took appropriate action to resolve substantial concerns
• **Appropriate actions** include steps such as documenting the land trust shared its concerns with the donor; seeking an independent substantiation of value; withdrawing from the transaction prior to closing; asking to see the landowner’s appraisal prior to closing; documenting the board’s decision to proceed with the transaction and/or with signing the Form 8283; refusing to sign the Form 8283

• **Substantial concerns** include issues such as if the title investigation or other documentation shows the property has been held for a short period; the landowner appears to have inflated expectations for the value of the donation; the appraised valued does not appear defensible in light of the land trust’s knowledge of local land values; the appraisal appears to contain unjustified extraordinary assumptions; the appraised value is significantly in excess of the donor’s cost or adjusted basis (if recent)
  - That the land trust signed the Form 8283 only when it received a gift

**TAKE THE APPROPRIATE ACTION**

If the land trust believes the appraised value is significantly overstated or the project does not conform in some other way with the tax law, the land trust should share its concerns with the donor and decide whether to proceed with the transaction. The danger of appearing to be a party in a transaction that unfairly benefits a private individual—or, worse, potentially perpetrates tax fraud—is a serious risk. It could jeopardize not only the credibility and tax status of the land trust, but also the credibility of donations to all land trusts.

  a. **Document that the land trust has shared those concerns with the donor**

The first step is for the land trust to simply document its communications with the donor or prospective donor so that it has a written record of those communications. In general, most concerns that a land trust has should be expressed in writing. For minor issues that are easy to correct, such as oversights or mistakes (for example, citing the wrong property address, failure to include a statement that the appraisal is for income tax purposes and similar technical errors), a phone conversation with the donor or their advisors, followed by a memo to the file may suffice. For more substantive issues, and certainly those related to valuation, legal counsel should assist in drafting any communications with the donor and should review the final draft of any communication.

Write your comments very carefully and thoughtfully. Concerns should be expressed in generalities, not specifics. Providing specific, rather than general, criticism of an appraisal or other aspects of a
transaction implies expertise a land trust does not have. The land trust should let the landowner know that – in the land trust’s experience – the valuation seems out of line with similar properties or easements or that the appraisal procedures do not seem to follow accepted best practices. The land trust is not acting as an appraiser in this capacity. Land trust personnel can make it clear to the landowner that, while they are not professionals in the field of appraisal, their experience in this area suggests that the information is not consistent with similar projects.

The role of the land trust should not be as an editor of the appraisal. That will create the impression that if the appraiser makes all of the changes requested by the land trust, then the land trust has approved the appraisal and therefore the appraisal should be valid and accurate. This approach exposes a land trust to significant risk if there are other failings in the appraisal that it has not identified. Your written comments should be cautionary, or direct landowners or their appraisers to an issue for them to resolve, and should include the caveat that the donor must rely on their advisors and not rely on the land trust regarding these matters and that all issues may not have been identified.

Examples of how not to comment on an appraisal would be to say: “Your appraisal has to have the question of enhancement addressed for it to be valid.” And: “We believe your comparables, particularly 2 and 3, are not relevant to your property and should be disregarded.”

Rather, you might say: “Have you and your advisors reviewed under the Treasury regulations whether the appraisal needs to address the issue of enhancement?” (A land trust might even provide direction to a specific Treasury regulation or a resource for the donor’s advisors to figure out the answer to the question that the land trust has posed.) And: “We believe your value does not reflect our experience of the local market and may be too high,” or “We believe this appraisal is significantly aggressive based on our experience, and we believe that it might attract scrutiny by the IRS.”

This communication should be the first step in addressing land trust concerns about an appraisal. Most landowners will appreciate the land trust’s review and suggestions. In many cases, the communication will generate further dialogue with the donor.

b. Seek additional substantiation of value
A land trust may decide that it needs to do more than merely share its concerns about an appraisal with a donor. This is an optional approach. The most reliable way for a land trust to address significant concerns about an appraisal is to obtain a review by another appraiser. Obtaining such
an opinion can supplement the land trust’s internal evaluation of an appraisal and might be undertaken before any communication with a donor or prospective donor takes place.

The land trust might also recommend that the landowner consider getting a second appraisal or a review appraisal, and may want to remind the donor of overvaluation penalties.

If a land trust or landowner seeks additional substantiation of value for an easement donation, the appraiser should meet the Treasury Regulation’s criteria for a qualified appraiser [Treasury regulations §1.170A-13(c)(5)] and have knowledge of the local real estate market.

If a land trust or landowner pursues a second opinion of value, there are two alternative forms for that opinion: (1) a new appraisal of the contribution; (2) a review of the donor’s appraisal. If a land trust chooses the second approach (likely to be quicker and less expensive), it should make sure that the opinion is based upon a substantive review of the determined value, including an evaluation of the methodology and comparables. A pro forma "check-the-box" review that merely confirms compliance with technical requirements of the Uniform Standards of Professional Appraisal Practice (USPAP) may not be sufficient to assess the donor’s appraisal.

Obtaining a second opinion requires both time and money. It is unlikely that a donor will agree to reimburse a land trust for obtaining a second opinion. It is also unlikely that a donor who has provided an appraisal and Form 8283 toward the end of the year will be willing to wait for a second opinion. Although a land trust cannot force a donor to reimburse it for a second appraisal (unless it has a contract with the donor that requires such reimbursement), it can refuse to sign Form 8283 until it has obtained a second appraisal (see Practice 10C3d below). A land trust will want to consult legal counsel first to understand what may happen if a second full appraisal is subpoenaed by the IRS in an audit of the taxpayer.

If a credible, complete, second opinion supports the donor’s appraisal, the land trust's concerns are presumably satisfied and it can sign Form 8283. If a second opinion sustains the land trust's concerns, then the land trust should share the second opinion and its concerns with the donor or prospective donor. Once that step has been taken, and if the donor or prospective donor chooses to disregard this additional information, the land trust may elect to simply document its communications, as the practice requires, and proceed with the transaction. Or the land trust may choose to terminate a transaction that has not closed or refuse to sign Form 8283 in completed transactions. These alternatives are discussed in more detail below.

A donor has good reason to heed a land trust's concerns about its appraisal, particularly if those concerns are backed up by the opinion of another appraiser. Although it may cost a donor or prospective donor time and money to start the appraisal process over, a donor whose deduction is
reduced or disallowed will be faced with possible repayment of the tax saved due to an overvaluation, as well as a penalty of as much as 40 percent of any overvaluation, plus interest on the entire amount due.

A second opinion may also disagree with a landowner's appraisal, but not find a significant overvaluation. It may even conclude that the original appraisal undervalued the donation, which is unlikely. If a second opinion finds that the donor's appraisal overvalued the donation but not significantly, what should a land trust do?

The first issue to resolve in answering such a question is: What constitutes a significant overvaluation justifying continued land trust concern? There is no bright-line test for a land trust's initial review of appraisals. However, examples of extreme valuation problems might include: (1) where the value of the easement or fee property looks to be greater than double the value that would have been expected based on your ordinary experience; (2) where the percentage reduction for a conservation easement is claimed to remove 80 or 90 percent of the property's value in an area where there is no significant development pressure; (3) where the appraisal is based upon a subdivision analysis that has indefensible assumptions; or (4) where the value shown for the conservation easement or fee interest is multiples of the basis shown on the 8283, and the basis is from a recent sale of not more than two or three years old.

When a land trust obtains a second opinion from its own appraiser, it is prudent to define significant overvaluation by looking to the standards established by the Internal Revenue Code for overvaluation penalties.

Code §6662(e)(1)(A) provides that a substantial overvaluation is one that is 150 percent over actual value. Code §6662(h)(2)(A)(i) provides that a gross overvaluation is one that is 200 percent over actual value. A substantial overvaluation is subject to a penalty equal to 20 percent of the amount of the overvaluation; a gross overvaluation is subject to a 40 percent penalty on the amount of the overvaluation.

c. Withdraw from the transaction prior to closing

If a land trust has significant concerns about a donor's appraisal or other aspects of a transaction, and if the donor refuses to adequately address those concerns, the land trust can withdraw as the potential grantee prior to closing, thereby terminating the transaction. This is a drastic remedy and should only be resorted to after (1) consultation with legal counsel; (2) adequate communication of the land trust's concerns to the prospective donor (including sharing any second opinion obtained by the land trust); and (3) allowing the prospective donor a reasonable time to respond to those concerns. This course of action is, of course, only possible if the land trust received a preliminary
appraisal or received the final appraisal prior to closing. See Practice 10C4 for more information about when an appraisal must be required prior to closing.

Because withdrawing from a transaction, particularly one that is well advanced, is likely to be both annoying and costly to a prospective donor, legal counsel should be consulted prior to withdrawal to ensure that the land trust is in as strong a position as possible to justify its actions and defend them if necessary.

d. Refuse to sign Form 8283

The option of withdrawing from a transaction prior to closing is far preferable to allowing a transaction to close and then refusing to sign Form 8283. However, if the donor does not provide the appraisal prior to recordation of the easement or property deed, preemptive termination of the transaction by a land trust isn’t an alternative. In many cases, appraisals are not completed – some not even begun – prior to closing. On the other hand, many prospective donors obtain preliminary appraisals before proceeding with the final steps of a contribution. Land trusts should require, or at least request, copies of preliminary appraisals when they are available. A preliminary appraisal can forewarn a land trust of potential valuation problems, often well in advance of closing.

When a donor presents a land trust with an appraisal and Form 8283 after closing, it is too late to withdraw from the transaction. In such cases, the contribution is completed and is perpetual. At this point, a land trust can decide to document its communications of concern with the donor and close the file or, depending upon the gravity of its concerns with the transaction, refuse to sign Form 8283. This approach should not be elected without a very thorough examination of all of the other options and an equally thorough examination of the valuation (or other aspect of the transaction causing concern) in question. Land trusts should consult closely with legal counsel and actively involve them in such a decision and its implementation.

A strong and clear written record of land trust communications of its concerns to the donor prior to the refusal to sign is also essential. Finally, a land trust electing to refuse to sign Form 8283 should be willing and able to defend the refusal in court if necessary.

Other Concerns

A land trust may have significant concerns about other aspects of a transaction that justify one or more of the foregoing actions. Non-valuation concerns would include identifying that the contribution is not really a contribution but was required as part of a contractual arrangement or governmental regulation. In these cases, it is highly unlikely (although technically possible) that a contribution for which tax benefits are allowed has occurred. There are also cases in which the prospective donor seeks to reserve uses that the land trust believes are fundamentally inconsistent
with protection of the conservation values or where no publicly significant conservation is proposed. In each of these cases a land trust may have justifiably significant concerns about the transaction.

For accreditation, as part of the application process, a land trust board must pass a resolution agreeing to uphold high standards of ethics. The board must also review and approve each land and easement transaction (see Practice 3D1) and receive sufficient and timely information prior to each meeting to make informed decisions (see Practice 3C2). These steps help ensure the land trust does not knowingly participate in transactions that are potentially fraudulent or abusive (see Practice 1A3).
C. Avoiding Fraudulent or Abusive Transactions

4. When engaging in transactions with pass-through entities of unrelated parties, particularly those offered or assembled by a third party or described as a syndication by the IRS,

   a. Require a copy of the appraisal prior to closing
   b. Decline to participate in the transaction if the appraisal indicates an increase in value of more than 2.5 times the basis in the property within 36 months of the pass-through entity’s acquisition of the property, the value of the donation is $1 million or greater and the terms of the transaction do not satisfy the Land Trust Alliance Tax Shelter Advisory

Accreditation indicator elements located at www.landtrustaccreditation.org
IMPORTANCE OF AVOIDING FRAUDULENT OR ABUSIVE TRANSACTIONS

The land trust movement is filled with good people and well-respected organizations. However, public confidence in the integrity and conservation purposes of land trusts can be shaken by the actions of good land trusts whose practices may innocently facilitate abusive or fraudulent transactions, as well as by those who knowingly facilitate abuse of the tax code for private gain.

It is easy to point to hundreds or even thousands of acres of conserved land and say that such ends justify the means. However, when the means are actual or suspected fraudulent or abusive transactions, such a view is extremely short-sighted. Such actions undermine the credibility of land trusts and the credibility of voluntary land conservation, which is dependent upon the good will of the public. If that goodwill is squandered, land trusts will experience a host of problems.

The federal tax code and regulations (and comparable state law provisions) invest land trusts with the responsibility for administering hundreds of millions of public dollars in tax incentives for voluntary land conservation. In considering this responsibility, land trusts should realize that whether a transaction is fraudulent or abusive is not a subjective matter; it is a determination that can and should be based on an objective review of the facts of a suspected transaction.

Also, land trusts that knowingly facilitate fraudulent or abusive transactions may themselves be subject to penalties up to and including revocation of their tax-exempt status.

For accreditation, as part of the application process, a land trust board must pass a resolution agreeing to uphold high standards of ethics. The board must also review and approve each land and easement transaction (see Practice 3D1) and receive sufficient and timely information prior to each meeting to make informed decisions (see Practice 3C2). These steps help ensure the land trust does not knowingly participate in transactions that are potentially fraudulent or abusive (see Practice 1A3).

DESCRIPTION OF A FOR-PROFIT SYNDICATION

The conservation of land can be expensive. Sometimes individuals join together to purchase and conserve land. In these cases, the individuals jointly contribute to the purchase price and jointly share in any resulting tax benefits. These transactions are often done through the vehicle of a partnership or limited liability company and are called *syndications*. 
Practice 10C4 is intended to help land trusts avoid participation in one particular type of syndication, those involving fraudulent or abusive tax deductions. A tax deduction syndication, for purposes of Practice 10C4, is the syndication – for profit – of the tax benefits arising from the donation of a conservation easement or land for conservation purposes. For-profit syndications are more likely than most conservation transactions to result in fraud or abuse of tax laws.

The hallmark of a for-profit syndication is that the primary goal of the transaction is generating a profit to investors through the allocation of tax benefits resulting from conservation easement or land donations. An essential feature of such a transaction is that the donor is a pass-through entity. Pass-through entities typically take the form of limited liability companies and, less typically, partnerships and limited partnerships. Such entities allow charitable deductions to pass through to their members or partners, which allow one donation deduction to be allocated among a number of different taxpayers.

In a typical for-profit syndication, a pass-through entity owns land and sells memberships in the entity to investors. After a sufficient number of investors have joined (the number varies from transaction to transaction), the entity contributes a conservation easement and allocates the resulting deduction among the investors according to the amount of their investment. There is nothing inherently abusive or fraudulent about such a syndication. In fact, syndications in which the primary purpose is land conservation and in which investors do not expect a positive return from tax benefits alone can result in important conservation.

What distinguishes for-profit syndications in general from conservation syndications is the deliberate strategy of generating net profits to investors entirely from the allocation of tax benefits. Keep in mind that a donor can never recover the value of a donation from resulting tax benefits alone because income tax benefits are never more than a percentage of the value of the donation. For-profit syndications deal with this fact by relying upon inflated appraisals of donations. These appraisals claim a value that is many times more than the amount actually paid by investors for their interests in the entity making the donation.

In order for an investor to realize a positive return on their investment from tax benefits alone, it is necessary that the appraised value of the donation exceed the amount of the investment by at least 2.5 times (250 percent), the break-even line if the investor’s tax rate is 40 percent. The fact that the value of the donation must exceed the value of the investment by at least 250 percent (really by much more in order for investors to realize a significant profit) makes it likely that the appraisal of the donation is unjustifiably inflated. This is what makes for-profit syndications prone to abuse or fraud. Of course, unjustifiably inflated appraisals are not limited to for-profit syndications; they are just more likely in such syndications.
FOR-PROFIT SYNDICATIONS CLASSIFIED AS LISTED TRANSACTIONS

In December 2016, the Internal Revenue Service issued Notice 2017-10, making for-profit syndications "listed transactions" and requiring participants in, and material advisors to, such transactions to file disclosures of their involvement.

By the terms of the Notice and a subsequent notice (Notice 2017-29), the IRS has ruled that the donee of a conservation easement resulting from a for-profit syndication is neither a participant in, nor a material advisor to, the syndication and has no obligation to file a disclosure.

Therefore, land trusts have no responsibility for filing disclosures with the IRS with respect to any form of participation in a for-profit syndication. This fact does not relieve land trusts of the need to avoid participating in abusive or fraudulent transactions involving for-profit syndications.

PASS-THROUGH ENTITIES: KNOW THE PEOPLE INVOLVED

Practice 10C4 focuses on transactions involving pass-through entities. Pass-through entities include sole proprietorships, partnerships, LLCs and S corporations. For purposes of this practice, sole proprietorships consisting by definition of only one person are not included in this definition and, therefore, cannot be syndicated.

If the donor entity has only one member, and if that member is a person, there can be no allocation and, therefore, no syndication. However, if there is only one member, but that member is itself a pass-through entity, the potential for a syndication exists, so inquiries about the membership of the member that is a pass-through entity will be necessary.

A syndication of any sort is not possible without the donor’s ability to allocate tax benefits resulting from a donation. Whether a prospective donor is a pass-through entity will be evident to a land trust early in the transaction, assuming that the land trust obtains a title report (see Practice 9F). The Land Trust Alliance’s Tax Shelter Advisory asks land trusts to require prospective donors to disclose whether the donation will be made by a pass-through entity at the outset of any transaction.
Although it is easy to determine if a prospective donor is a pass-through entity, it is not as easy to determine the membership of the entity. Such information is typically not public and is likely to only be available from a representative of the entity who has no obligation to disclose it. Nevertheless, it is important to learn the make-up of the entity to properly judge whether the proposed donation is part of a for-profit syndication. Once again, the Advisory asks land trusts to require a pass-through entity to reveal the make-up of its membership at the outset of any transaction. **If a prospective donor refuses to share information with a land trust about its membership, the best course for the land trust is to decline to proceed with the transaction.**

Much difficulty and dissention can be avoided in the earliest part of the potential conservation proposal if the land trust immediately insists on meeting and talking with all the people involved in any entity that will be involved in the transaction. Tactfully inquire early about the individual people’s history with the land and value expectations. If the history is short and value expectations are high, use caution and additional care. *Land Trust Standards and Practices* does not require land trust to determine the correct value of a donation, but it does ask that land trusts generally assess whether the claimed value is credible before signing Form 8283. Read the appraisal and ask commonsense questions based on the land trust’s general knowledge of land values in its region. Diplomatically avoid transactions with individuals with unrealistic value expectations or those whose sole purpose is to obtain a tax benefit.

If the donor entity shares the information requested about its membership and the members are all related parties (a family) or if there is only one member that is a living person, then a land trust can proceed with the transaction as with any other donation. Of course, the land trust must still avoid fraud, abuse and improper appraisals; these are obligations of a land trust in all transactions. On the other hand, if the disclosure reveals unrelated members or another entity as a member, the land trust should act cautiously, increase its scrutiny of the transaction and involve external land trust legal counsel (not a board or staff member) early in the process. Keep in mind that merely because the transaction will result in the syndication (allocation) of tax benefits **does not necessarily mean that it is abusive or fraudulent.** However, it does necessitate further investigation before continuing to participate in the transaction.

The Advisory requires that land trusts dealing with pass-through entities of unrelated parties ask the donor entity to certify in writing:

- Whether a promoter or third party played a role in facilitating the proposed contribution or otherwise promoted, organized or secured the transaction.
• Whether the promoter has produced or disseminated any promotional materials about the transaction, oral or written, including an advertisement, solicitation, prospectus, offering memorandum or similar document, presentation or communication. Ask the donor to provide a copy of the promotional materials. (This information may reveal that the transaction is likely a listed transaction under the Notice because of the potential return on investment that is asserted [often measured in federal tax deductions possibly available to investors] or because the promotional materials disclose that the transaction may qualify as a listed transaction. Such a disclosure means that the transaction is a prohibited tax shelter transaction for purposes of Practice 10C4 and the Advisory.)

• The date the donor entity acquired the property to be conserved.

• The original purchase price or basis of the property to be conserved.

• Whether the donor entity intends to claim a federal tax deduction based on the donation of a conservation easement or land. (The donation of a conservation easement or land is often listed as one of a number of options for how the donor entity might use aggregated investor funds [for example, often described as the “Conservation Option” or “Green Option”], which would be sufficient evidence of such intent).

• Whether the donor entity's expectations for value of the land or easement to be donated compared to the purchase price approach or exceed an increase in value of more than 2.5 times the basis in the property.

• Whether the appraisal reveals a value that meets or exceeds the thresholds stated in Practice 10C4 or the Notice, regardless of any justifications in the appraisal or elsewhere in the transaction documentation.

**REQUIRE A COPY OF THE APPRAISAL PRIOR TO CLOSING**

If a prospective donor is a pass-through entity whose members are entirely or partially unrelated, or is another entity, land trusts need to obtain a copy of the appraisal of the proposed donation prior to closing. As discussed in an earlier section, inflated appraisals reporting values for donations that are at least 250 percent greater than investments are essential to generate profits to investors in such syndications.
Although it is typical for individual donors to obtain appraisals only after the donation has been made, that is never the case with for-profit syndications. The reason for this unusual pattern is that such syndications are promoted based upon anticipated returns to investors from tax benefits. The amount of such tax benefits cannot be determined without a preliminary appraisal of the proposed donation. If a land trust decides to accept a donation resulting from a syndication, it must insist on obtaining a copy of the appraisal prior to accepting the donation. This should be a pre-condition to proceeding with any donation involving a syndication and should be included in a written agreement with the prospective donor at the earliest possible point in the transaction.

*If the prospective donor refuses to provide such an appraisal, the land trust should decline to participate further in the transaction.* Because possessing an appraisal prior to closing is a hallmark of for-profit syndication, land trusts should insist on being provided a copy. Note that in some cases, it may be necessary for a land trust to be named as an authorized recipient of the appraisal. However, the donor who has contracted for the appraisal is in a position to grant that authorization.

Obtaining a copy of the appraisal prior to accepting the donation is essential if the land trust wants to avoid the prospect of having to refuse to sign Form 8283 for a donation that has already been accepted. Refusing to sign Form 8283 after a donation has been accepted increases the risks of adverse results for the land trust.

For accreditation, a land trust must evaluate the appraisal and the Form 8283 for each donated conservation property or easement (see Practices 10B2, 10C2 and 10C3). A land trust must not participate in a transaction with a pass-through entity of unrelated parties when (a) the appraisal indicates an increase in value of more than 2.5 times the basis in the property within 36 months of the pass-through entity’s acquisition of the property and (b) the value of the donation was greater than $1 million. A land trust must report on the list of conservation projects it submits with its application if any transaction it completed since 2016 meets these criteria.
DECLINE TO PARTICIPATE IF...

Decline to participate in the transaction if the appraisal indicates an increase in value of more than 2.5 times the basis in the property within 36 months of the pass-through entity’s acquisition of the property, the value of the donation is $1 million or greater and the terms of the transaction do not satisfy the Land Trust Alliance Tax Shelter Advisory.

There are a number of questions a land trust should ask in any transaction involving a syndication. It is essential for a land trust to ask these questions as early in the process as possible and definitely before it accepts the donation.

1. Has there been an increase in value of the property of more than 2.5 times the basis in the property?

The answer to this question will reveal whether the syndication is, in fact, a for-profit syndication. As discussed, it is necessary for a tax deduction to exceed the amount of an investor's investment by 250 percent for the investor to realize any profit solely from the deduction.

This criterion varies somewhat from that recited in Notice 2017-10. The Notice states that an element of a transaction listed in the Notice is that investors are promised a charitable donation deduction equal to, or exceeding, 2.5 times (250 percent) of the investor's investment in the syndication. This practice flags syndications in which the appraised value of the proposed donation exceeds the donor's basis in the property by more than 250 percent. The basis is what the donor paid for the underlying property plus the cost of any improvements made to the property.

The reason for the difference is that determining the amount invested by investors in a for-profit syndication may be very difficult for a land trust because this information is likely to be confidential. Therefore, this practice requires measuring the appreciation in the donation over the basis in the donated property because the basis in the donated property (or the property underlying a donated easement) is available from the Form 8283 and, in many cases, from the appraisal itself.
For conservation easement donations, there are two possible bases that can be used for determining whether the 250 percent threshold has been met. One is the donor’s basis in the property underlying the easement; the second is the donor’s basis in the easement itself. The Form 8283 allows easement donors to report their basis in either one. A land trust should rely on whatever form of basis the donor reports on the Form 8283, rather than trying to determine basis on its own.

Basis is reported on Form 8283, Section B, Part I, Line 5, column (f). In the case of the donation of a conservation easement, the Form 8283 instructions require the donor to explain in a separate statement whether the information provided in columns (d) through (f) are for the easement or the property underlying the easement. Regardless of the type of basis reported, a properly completed Form 8283 should provide a land trust with all of the information about the donor’s basis necessary to determine whether the value of the donation exceeds the donor’s basis by more than 250 percent.

Although the Form 8283 cannot be finalized prior to the actual donation, nothing precludes a prospective donor from providing a draft Form 8283 to a land trust. If the donor refuses or there simply is no information for completing a draft prior to the donation, then a land trust should require the prospective donor to provide information about basis and the expected value of the donation independent of the form.

If a land trust concludes that the 250 percent threshold has not been met, it should, nevertheless, warn the donor in writing that any substantial change in values in the final Form 8283 from those shown in the preliminary form, or independently of the form, could result in refusal by the land trust to sign the form.

If a prospective donor refuses to share a preliminary Form 8283 containing sufficient information to allow the land trust to determine whether the 250 percent threshold has been met, and otherwise refuses to provide such information, and if the other elements of a for-profit syndication exist, the land trust should withdraw from the transaction.

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1 Because the Form 8283 is a summary of the appraisal of the contributed property (for example, the conservation easement), the more logical approach is to report the donor’s basis in the easement itself because it is the easement that is being contributed. Of course, if the donation is of a fee interest, then the basis will always be the basis in the fee.
2. **Did the 250 percent (or more) increase over basis occur within 36 months of the pass-through entity’s acquisition of the property?**

This element of the practice does not appear in Notice 2017-10 but reflects the fact that property may increase substantially over time simply due to market inflation and that merely because values have increased by 250 percent or more does not mean the transaction is abusive or fraudulent.

Although the 36-month period isn’t relevant to the Notice, it is relevant to a land trust's decision about proceeding with a transaction. In effect, this element recognizes that there may be justifications for dramatic increases in property values other than aggressive or abusive appraisals. One factor for a land trust to consider is, as reflected in this practice, the amount of time the prospective donor has owned the property. Other relevant factors that may justify significant increases in value in a short period of time include rezonings, obtaining formerly absent utility or road access, clearing of clouds on title such as liens, restrictions on use, third-party ownership of mineral or water rights and so forth.

The length of time a donor has held donated property is reported on Form 8283, Section B.1.5, column (d), where the donor is required to state the month and year they acquired the donated property. Obviously, this kind of information is only relevant to the acquisition of the property underlying the easement, not the easement itself, which has no holding period. Regardless of whether a land trust used the donor’s basis in the underlying property or the basis in the easement, it can rely on the holding period reflected by the date on which the donor acquired the underlying property.

An appraisal may also include the date upon which the property was acquired. However, if that date was more than three years prior to the date of valuation, the Uniform Standards of Professional Appraisal Practice, applicable to easement appraisals, do not require it to be reported.

Other information that may justify dramatic increases in value are most likely to be found in the appraisal (and must be explained in the appraisal, if it is to pass muster in an audit). Other sources are public records and verifiable statements made by prospective donors.

3. **Is the value of the donation $1 million or greater?**

The third part of this practice reflects the fact that it is highly unlikely that any for-profit syndication will involve donations of less than $1 million. This criterion, like the one described immediately above, is also absent from Notice 2017-10. Nevertheless, the fact that a transaction may involve a donation of less than $1 million does not excuse participation in an abusive or fraudulent transaction.
4. *Do the terms of the transaction otherwise satisfy the requirements of the Advisory?*

The Advisory provides comprehensive guidance to land trusts for evaluating transactions and taking steps to address concerns resulting from evaluations. Much of this guidance is also incorporated in various practices in *Land Trust Standards and Practices*. However, a review of the Advisory is essential for any land trust dealing with a pass-through entity as a prospective donor.

Among the important points included in the Advisory that bear repetition here are the following:

- Land trusts must decline to participate in tax shelter transactions even when the donation would lead to extraordinary conservation.

- Promoters of syndications may offer extraordinary stewardship donations to land trusts willing to participate in for-profit syndications; however, no amount of money can justify a land trust's participation in fraudulent or abusive transactions.

- Tax abuse and tax fraud are illegal, and even the most significant conservation benefit does not justify participation in a tax shelter transaction.

- A written policy will help guide land trusts in avoiding tax shelters, in decisions and actions on signing Forms 8283 and in communicating with donors.

- Seek the advice of the land trust’s external legal and tax advisers (not a board member or staff) and any qualified in-house legal and tax counsel to evaluate your existing acquisition policies and procedures.

*For accreditation, a land trust must follow the version of the Tax Shelter Advisory in place at the time of the transaction. It must document that it conducted the comprehensive due diligence and analysis of transactions with pass-through entities of unrelated parties (particularly those offered or assembled by a third party) outlined in the Advisory before closing to determine if a transaction meets the terms of the Advisory or is otherwise potentially fraudulent or abusive.*

**ADDITIONAL RESOURCES**

- “Do you need to use the tax shelter advisory?” flowchart
- *Land Trust Alliance Tax Shelter Advisory*, last revised March 1, 2018
• *A Tax Guide to Conservation Easements*, by Timothy Lindstrom (2nd Ed., 2016, Land Trust Alliance), Chapter 5, Section V

**IRS Resources**

- IRS Form 8283
- IRS Form 8283 Instructions
- IRS Notice 2017-10
- IRS Notice 2017-29
D. Determining Property Boundaries

2. If a conservation easement contains restrictions or permitted rights that are specific to certain zones or areas within the property, include the locations of these areas in the easement document so that they can be identified in the field.

Accreditation indicator elements located at www.landtrustaccreditation.org

OVERVIEW

It is important for a land trust to know the boundaries of its conservation easements, including special use areas or zones within the easement area. The best way to secure this information is through a survey, but this is not always practical and often expensive. In all instances, a good property description is essential. Accurate descriptions of any special use areas or zones within a conservation easement are also essential. These may be building envelopes, natural areas, riparian corridors or other restricted zones. The ability to identify these areas in the field is necessary for the future enforcement of activities in these zones. The easement and supporting documentation should provide enough detail so that these areas can be clearly identified on the ground by the landowner and easement monitors.
RESERVED RIGHTS: BUILDINGS

Those rights that permit a landowner to develop new residential structures on a property (commercial and industrial structures are usually, but not always, prohibited or greatly restricted by conservation easements) should be an area of big concern for the land trust. For any new structures, it is advisable to work with the landowner to determine where they can construct such buildings or, at least, to determine where they cannot be constructed and include that language within the conservation easement. Additional information, like maps showing the future building locations, can often be attached as an exhibit and should correspond with the information in the baseline documentation report.

Easement holders use several methods to locate new buildings, including:

1. **Building envelopes.** They are limited areas on a piece of land where new development is permitted. Generally, this method is considered the easiest for a landowner to understand and for a land trust to monitor and enforce. However, it requires a landowner to make some important decisions during the easement negotiations that not all are willing or able to make at that time. This method also requires the land trust to identify building envelopes, preferably through a surveyed legal description, and placement on the easement map, both of which may mean an additional cost to the landowner for completing the easement.

2. **Exclusion zones.** They are areas where new development is prohibited. This method is often viewed as the least preferable way of locating new development, because it leaves larger portions of a protected property open to disturbance than might occur using one of the other three methods. This method works best when there are readily identifiable conservation values on a piece of land that would be impaired by development, such as riparian areas, wildlife migration corridors or easily identifiable view corridors. Again, if this method is employed, the zones should be included within the conservation easement document via language and/or exhibits.

3. **Development zones.** They are areas identified as appropriate for development within which a building envelope or envelopes of a maximum specific size can be placed when a landowner is ready to specify the envelope location. This method is useful for landowners who are not sure what size building envelope they will need and are not prepared to identify the specific location of such envelopes at the time of easement drafting. The land trust should identify the larger development zones in the easement and then allot additional time to review and approve the location of the envelopes when the landowner is prepared to initiate development.
4. *Floating building envelopes.* These are envelopes that are not fixed until so designated by a landowner and that “float” within an area of land acceptable for development (not across the entire easement property, which is not advisable). This method is similar to development zones, except that the number, size and shape of the building envelope(s) is generally established at the time of the easement closing, but it is agreed the final location will be specified at some point in the future, sometimes through an amendment to the easement or a land trust review and approval process.

Some land trusts will simply exclude development areas from an easement entirely, in order to avoid the need to monitor and enforce development restrictions.

**SPECIAL USE AREAS**

When crafting restrictions, the land trust should use special use area designations when applicable. Special use area designations identify places of particular conservation value, and thus there may be greater restrictions within those areas than on other areas of a protected property. These designations can be used to protect wetland and riparian areas, wildlife migration corridors, designated scenic corridors or particularly high quality soils on agricultural lands. If an easement is crafted to incorporate special use areas, these areas should be identified on an easement map and in the baseline documentation and should be easily identifiable on the ground by both landowners and easement monitors. Topographic maps and/or aerial photos can be helpful in identifying special use designations, as can survey descriptions or Global Positioning Systems.

_for accreditation, the conservation easement deed itself must contain the locations of specific zones or areas, if restrictions or permitted rights are specific to such areas. These zones or areas include building envelopes, building exclusion zones or restricted zones. For example, if a conservation easement allows a building envelope, then the conservation easement deed needs to include the location of that building envelope using a description or map. It is not acceptable to only have information about the building envelope in an unrecorded baseline documentation report._
STANDARD 9. ENSURING SOUND TRANSACTIONS

E. Conservation Easement Drafting

1. For every conservation easement,
   a. Individually tailor it to the specific property
   b. Identify the conservation values being protected
   c. Allow only uses and permitted rights that are not inconsistent with the conservation purposes and that will not significantly impair the protected conservation values
   d. Avoid restrictions and permitted rights that the land trust cannot monitor and enforce
   e. Include all necessary and appropriate provisions to ensure it is legally enforceable

Accreditation indicator elements located at www.landtrustaccreditation.org

INTRODUCTION

This practice is integrally linked with Practice 8D, project planning, and reflects the integration between easement planning, drafting and enforceability. The actual drafting of a conservation easement should implement the project plan. Restrictions should be drafted to ensure that important conservation values are not significantly impaired and in a way that ensures public benefit and maintains the credibility of the land trust. A conservation easement’s restrictions must be monitorable and enforceable, and a clear statement of the easement’s purpose must support them. Future interpretation of an easement rests on how clearly the document explains the restrictions and their intent, as well as on how enforceable the restrictions are.
DEFINING CONSERVATION EASEMENT

A conservation easement is a legal agreement between a landowner and a qualified organization that restricts future activities on the land to protect its conservation values. A conservation easement may be known as a conservation servitude or conservation restriction, depending on state law. Every conservation easement is unique; each is tailored to meet the mission and goals of the land trust for a particular property, as exemplified through the organization’s project selection criteria, while meeting the needs and interests of the owner for appropriate use of the land. Conservation easements are creations of statute, and every state except North Dakota has enacted some form of perpetual conservation easement enabling statute.

There are essentially two types of conservation easements: those that are intended to qualify for federal tax benefits and those that are not. Both types must meet all requirements established by state law for conservation easements in the state in which the land to be protected is located and both must provide a public benefit. Easements intended to qualify for federal tax benefits must also meet all requirements set forth in Internal Revenue Code §170(h) and in the Treasury Regulations §1.170A-14. See Practice 9E2 for more information.

Finally, conservation easement holders must monitor and defend, in perpetuity or for the duration of the easement if it is less than perpetual, all of the terms contained in the document. Thus, only those restrictions that can be reasonably monitored and enforced should be placed in a conservation easement. Some states permit conservation easements that are of less than perpetual duration; however, these easements will not qualify for federal tax benefits under current laws. Some easement holders, notably some public agencies, accept conservation easements of less than perpetual duration in order to accomplish short-term goals, such as habitat restoration. As a general rule and practice within the conservation industry, land trusts usually only hold conservation easements that are perpetual in duration.

HOW TO DRAFT A CONSERVATION EASEMENT

Land trusts use two methods to create a conservation easement:

1. Every easement is created as a unique document
2. Every easement is based upon a standard conservation easement template

In general, most land trusts start the process with their standard template, which is then modified to reflect the uniqueness of a property, its conservation values and the objectives of the land trust and landowner. It is preferable for the land trust to “be in the driver’s seat” and produce the first
draft of the conservation easement. This approach ensures that the easement contains all necessary legal elements and that it reflects the organization's and the conservation profession's highest standards with respect to drafting. It also provides some uniformity of language from one easement to the next, ensures the conservation purposes are clearly outlined and restrictions crafted appropriately, and lessens the time that the land trust and its attorney must spend reviewing the second, and any subsequent, drafts of the document. As in any transaction, the land trust must try to ensure that the landowner has legal counsel. Good communication with the landowner’s attorney is critical to reaching an agreement on a final document.

If it is not possible for the land trust to take charge of the easement-drafting process, it should at least communicate to the landowner, preferably in writing, the importance of choosing an attorney who is familiar with conservation law, the tax law of conservation easements and best conservation easement drafting practices. Finally, land trusts should have a legal review of every easement transaction; see Practice 9A1.

Adopting and using a conservation easement template can save both the land trust and landowner time and money in creating the first draft of an easement. In addition, by using a template, the land trust notifies the landowner of the provisions in an easement that must be present, and both parties know that essential provisions will not be overlooked. Although it takes time to develop a template easement and, once adopted, a template will need to be revisited regularly and revised periodically to reflect current practices or new interpretations of laws, most land trusts that have gone through this process find that an easement template saves resources over the long term. By using a template easement with consistent terms, a land trust will find it easier to interpret its clauses. Further, the consistency of these terms yields stewardship benefits for the land trust by reducing the number of unique provisions found in each of the land trust’s easements. When a particular organization accumulates a number of easements, such ease of interpretation becomes even more important, because the land trust will develop a body of interpretations for its standard clauses, thus avoiding the necessity of constantly interpreting unique provisions over time.

So how does an organization draft a model conservation easement template? Many land trusts start with a review of other organizations’ model easements and adopt one as a starting point for their own document. Others adopt (or adapt) templates created by state associations or groups of land trusts. While this strategy is a good way to avoid reinventing the wheel, it is critical to remember that every easement must be tailored to the specifics of the organization, including its mission and goals, its capacity to monitor and defend the easement restrictions and reserved rights in perpetuity, the state in which the land trust is located and the community it serves. Thus land trusts should never simply adopt another organization’s easement form without revising it to meet their own unique situation. Some land trusts hire a qualified attorney or consultant to prepare the
first draft. Before putting pen to paper, the attorney or consultant should first spend time working with the land trust to learn about its needs, its capacity to steward easement restrictions, its mission and goals and the community and landowners it serves. Finally, it is important that the land trust commit to a regular review (preferably annually) and revision, when appropriate, of its template easement to ensure that it works as intended, meets current accepted best practices, reflects changes to the standards of practice within the industry and reflects the latest legal thinking about enforceable conservation easements.

Once adopted, the land trust generally modifies a template easement to create the unique restrictions and reserved rights applicable to a particular conservation project. These changes are then reviewed by the land trust’s attorney. In general, the land trust should not change any of the established boilerplate provisions (administrative or mandatory substantive provisions or restrictions) without the assistance and advice of qualified legal counsel. Some land trusts have their attorney assume the lead role in drafting an easement or, at a minimum, their legal counsel functions as an integral member of the drafting team, rather than simply reviewing the work of other land trust personnel.

Some land trusts follow a slightly different process. Rather than initiating the first easement draft, the land trust provides a copy of their template easement to the landowner’s attorney as a basis for the first draft. Land trusts must be careful to educate the landowner’s attorney about which provisions they may change and those that are nonnegotiable. Generally, such nonnegotiable provisions are those that relate to matters of state and/or federal laws governing conservation easements and those specifically identified by the land trust as necessary elements of each of its easements (such as provisions related to easement amendments or the content of recitals clauses).

**BASIC ELEMENTS OF A CONSERVATION EASEMENT**

The following is a list of the different sections or elements of a conservation easement document.

- *Form of conveyance.* The form of conveyance a conservation easement must take will be dependent upon the conservation easement enabling statute in your state. The technical form may be different from state to state (a restriction, a covenant, a deed, an indenture or a servitude, for example), but other aspects of the introductory material that is first found in a conservation easement should be standard from easement to easement.

- *Purposes clause.* The purposes clause of a conservation easement is often referred to as the heart of an easement, and for good reason. This clause is likely the most important clause in the entire document, because it is this section that sets forth:
o Why the easement was granted
o What conservation values the landowner and land trust want to protect
o Why the landowner and the land trust want to protect these conservation values

In addition, many stewardship activities will be based on the purposes clause, including interpretations, enforcement actions, amendments, approvals and so on.

- **Recital clauses.** The recital (or “whereas”) clauses may or may not be considered an operative part of a conservation easement by your state’s laws, but they are still an important part of every conservation transaction. These clauses tell the story of the project in detail, providing a perpetual record of the project, a description of the land at the date the easement was completed and a description of why the land trust believed the project important enough to complete.

- **Reserved rights.** This term refers to all of the rights to use a protected property that the landowner retains after conveying a conservation easement on their land.

- **Restrictions.** Drafting the restrictions section of a conservation easement is likely the most challenging part of any project development and is probably where the easement drafter and the landowner will spend the most time in negotiations. The restrictions that should be placed in a conservation easement are entirely dependent upon the facts surrounding the conservation project, including:
  o The conservation values identified for protection
  o The land trust’s goal for the future of the property (as it relates to the organization’s mission)
  o Uses the landowner wishes to make of the land in the future
  o Provisions that must be made to satisfy any funders if the easement is being purchased
  o Restrictions the land trust has the capacity to monitor and enforce over time

- **Easement holder’s rights.** In addition to restrictions on the use of land, some land trusts include affirmative rights and/or obligations in their easements. Typical affirmative rights found in most conservation easements include a land trust’s right to enter the property to monitor the easement and the right to enforce the terms of the easement.

- **State and federal law requirements.** There are a number of state and federal law requirements that land trusts must (due to the laws’ provisions) include in every conservation easement, including:
• Compliance with conservation purposes and state law requirements
• Demonstration of public benefit
• Qualification of the land trust
• Reference to the baseline documentation
• Required notices
• Inspection rights
• Assignment limitations
• Termination and proceeds

• Third-party Interests. For various reasons, some conservation easements contain what are commonly referred to as third-party interests. When drafting an easement that contains such third-party interests, a drafter must be sure to include information regarding the third party and its rights and/or obligations under the easement and to have the third party execute the easement when appropriate.

• Amendment clause. An amendment clause in the conservation easement declares what powers the land trust has to modify the terms of the easement and what restrictions or requirements apply. Land trusts should include an amendment provision in conservation easements to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws.

• General boilerplate provisions. All conservation easements contain general provisions relating to the interpretation of an easement and other legal matters. These are the provisions most commonly referred to as boilerplate provisions, because they are standard in every easement and are generally understood not to be negotiable because of their importance to the perpetuity of the instrument. These include:
  • Controlling law and interpretation
  • Owner’s responsibility
  • Subsequent transfers
  • Compliance/estoppel certificates
  • Economic hardship
  • Waiver of certain defenses

• Habendum and signatures. The habendum clause (“To have and to hold . . .”) is the traditional language found at the end of an easement immediately preceding the signatures of the parties. Because a conservation easement is not only a transfer of a partial interest in
real property, but is also often a contract, both parties (the grantor and grantee) should sign the document, as well as any third-party interest holders.

- **Exhibits.** Exhibits to a conservation easement often include the legal description of the conserved property, the easement map, legal description or map of the location of specific zones or areas (see Practice 9D2), water rights descriptions and, depending upon the land trust, the mortgage subordination and/or baseline documentation report.

### Identifying Conservation Values

The easement statement of purpose lays the foundation for the easement by identifying the conservation values of the property and the rationale for protecting them. It should describe each resource on the property that is specifically protected by the easement (such as natural, scenic, historical or cultural resources). The recitals, which follow the easement purpose statement, describe more specifically the importance of the property’s protected conservation values. It is important that they describe the public benefit provided and recite governmental policies that support protection of the resources and facts that qualify the easement under government funding programs or IRS regulations.

If the easement protects multiple purposes, such as agricultural lands and wildlife habitat, the purposes section may either give them equal emphasis or prioritize them if the purposes are conflicting. The approach depends on the property, the land trust’s mission and the landowner’s interests.

- For accreditation, each conservation easement needs to be perpetual and tailored to the individual property. The conservation easement needs to include the following:
  - Names of the grantor and the grantee
  - Legal description of the property to be conserved (often an exhibit)
  - Identification of the protected conservation values
  - Location of specific zones or areas, if restrictions or permitted rights are specific to such areas (see Practice 9D2)
  - Control over the future exercise of significant permitted rights
    - *For example, if the easement allows the landowner the ability to construct agricultural structures anywhere on the property, the conservation easement should give the land trust some control over the exercise of that permitted right so that the land trust can ensure the activity is consistent with the easement’s conservation values. The conservation easement could require land trust review and approval prior to construction or include other size and location limits.*
  - Designation of when grantee review or approval is required and a process for obtaining review or approval (such as timing of notice or requests, mailing address and so forth)
Right of entry that does not unduly limit access to monitor
  - For example, requiring prior written notice or landowner approval is acceptable only if there is another provision allowing immediate access in the event of a suspected violation.

Right to enforce and to take immediate action

Extinguishment and proceeds provisions (see Practice 9E2 for the specific requirements for tax-deductible easements)

Reference to the baseline documentation report

If a land trust is working on a mitigation project or with government partners, it may not have the ability to modify the agency’s standard conservation easement template (such as including a termination and proceeds clause or reference to the baseline report). In that situation, the land trust needs to document its attempt to have the agency include the specific elements in the easement deed.

**RESERVED RIGHTS AND PERMITTED USES**

The term reserved rights refers to all of the rights to use a protected property that the landowner retains after conveying a conservation easement on their land. Reserved rights are frequently described as all rights not specifically prohibited by the easement, so long as the exercise of those rights is consistent with the purpose and terms of the easement. The definition of reserved rights can go further, however, by specifically permitting a landowner to exercise certain rights that may adversely impact the conservation values and, thus, are permitted only so long as they conform to the provisions of the conservation easement and not inconsistent with the conservation purposes. Reserved rights to build additional homes or other buildings on a property, the right to harvest timber and the right to subdivide are all examples of the types of rights a landowner may wish expressly to reserve under a conservation easement. A land trust must carefully consider these types of reserved rights, however, and ensure that the easement permits these rights to be exercised only in a manner that does not significantly impair the protected conservation values on the property.

Federal law will not permit a conservation easement to qualify for federal tax benefits if uses are reserved to a landowner that, when exercised, would permit the destruction of significant conservation interests [Treas. Reg. §1.170A-14(e)]. The regulations state that if an easement permits such uses, the donation will not meet the requirement that it be “exclusively for conservation purposes.” The regulations do provide, however, that a conservation easement may qualify for federal tax benefits even if it permits such things as “selective timber harvesting or selective farming,” so long as such uses do not impair significant conservation interests. Although ensuring that a landowner’s reserved rights/permitted uses do not impair the property’s...
conservation values is enshrined in the federal tax laws, every conservation easement should adhere to this principle whether or not the easement is intended to qualify for such tax benefits. See Practice 9E2 for more information on what needs to be included in tax-deductible easements to be consistent with the Treasury regulations.

**THE RELATIONSHIP BETWEEN CONSERVATION EASEMENT DRAFTING AND STEWARDSHIP**

When negotiating and drafting a conservation easement, the land trust must take stock of its organizational capacity to steward the easement in perpetuity. The restrictions and reserved rights/permitted uses in the easement must be evaluated to ensure that the land trust has the ability to monitor and enforce these rights and restrictions in perpetuity. We can draft anything — the question is: should we?

Each conservation easement restriction should be evaluated with respect to four basic questions:

1. Is the restriction necessary to protect the property’s conservation values? For example, if the conservation easement is intended to meet the conservation purposes test for scenic values, is a prohibition on the ownership of domestic animals necessary?

2. Is the restriction necessary, given the land trust’s mission and goals for the property? For example, if the easement is intended to further the organization’s mission of conserving important habitat for rare, threatened or endangered species, is a prohibition on home occupations necessary?

3. Is the restriction capable of being monitored? Could a site inspection or scientific analysis determine if the restriction has been violated? For example, restrictions in an easement that prohibit hunting or the use of off-highway vehicles on a protected property are difficult to monitor.

4. Is the easement holder willing to go to court to enforce the restriction?

It is imperative that the land trust not overextend itself by including restrictions within the conservation easement that it cannot monitor or enforce. It is very common, for example, for easements to include language prohibiting motorized vehicles. Can the land trust actually monitor that activity? Is the landowner willing to abide by that restriction and thereby prevent others from using motorized vehicles? Is the land trust able and willing to defend the provision should there be damage resulting from such use on the property? The terms and conditions of the conservation easement document form a contractual obligation between the landowner and the land trust and
thus must be exercised with due care and responsibility in perpetuity. Therefore, if the land trust cannot fulfill its obligation as to the restrictions within the easement, it should consider not including such language during the drafting stage.

- For accreditation, a land trust needs to ensure that the permitted rights in its conservation easements
  - Are consistent with the conservation purposes (such as agricultural, mitigation, scenic, open space and so forth)
  - Do not significantly impair protected conservation values
  - Are not so broad that they negate other conservation easement provisions
    - For example, a conservation easement should not have provisions that allow the land trust broad discretion to approve specifically prohibited activities (such as “all structures are prohibited, except if approved by the land trust.”)

A land trust needs to be able to monitor and enforce the restrictions and permitted rights listed in the conservation easement. For example, it is difficult to enforce a restriction that dogs must be leashed on a property’s trails. In addition, detailed provisions for forestry or agricultural uses (like specific required amounts of dry residual matter) may be difficult for a land trust to enforce if it lacks expertise in those areas.

**LEGAL ENFORCEABILITY**

During the drafting process, it is important that the land trust ensure that the conservation easement adheres to local, state and federal law. Local law addresses issues of zoning and public policy. State law dictates language of conveyance and specific requirements necessary to the legality of the easement document, both according to property law and the conservation easement statutes of each state. Federal law, as reflected by the Internal Revenue Code and accompanying Treasury regulations, enumerates the specific requirements for charitable deductions of a conservation easement (see Practice 9E2). Consequently, there is specific language that must be included in the easement document to ensure legal compliance and enforceability.

In general, the covenants section of the easement document contains the standard and necessary language required for each transaction. Clauses pertaining to costs, liabilities, taxes, indemnity and other contractual terms, as well as language regarding amendments, merger of title and assignment (to name but a few), are integral to the efficacy and legality of the easement document. Most of this language is very specific in nature; therefore, legal expertise in conservation easement drafting is mandatory. Land trust personnel can play an important role in the development of the land trust’s standard template and the language of specific easement projects, but legal review is critical to ensure compliance with laws and ultimate enforceability of the conservation easement (see Practice 9A1).
ADDITIONAL RESOURCES

• Conservation Easement Diagram

• A Guided Tour of the Conservation Easement Enabling Statutes, Robert H. Levin, updated January 2014
B. Baseline Documentation Report

1. For each conservation easement, have a baseline documentation report (■), with written descriptions, maps and photographs, that documents:

   a. The conservation values protected by the easement
   b. The relevant conditions of the property as necessary to monitor and enforce the easement

Accreditation indicator elements located at www.landtrustaccreditation.org

OVERVIEW OF BASELINE DOCUMENTATION

Baseline documentation reports may be called by different names — baselines, BDRs, baseline inventories, baseline data, baseline study, baseline packet or easement documentation reports. Whatever the name, their purpose is the same: to record the condition of the property at the time a conservation easement is granted to form the basis for future monitoring and enforcement, if necessary, of the easement over time. Baseline documentation establishes the initial conditions against which performance under the conservation easement is measured and against which changes (both manmade and natural) to the land are evaluated. A well-prepared baseline report substantiates assumptions set forth in the conservation easement document and provides support for the easement’s qualification under the Internal Revenue Code conservation purposes test and evidence of the public benefit the easement provides.
A baseline documentation report is not necessarily the same as the document biologists refer to as a baseline inventory. A biological baseline inventory is a thorough scientific evaluation and listing of the flora, fauna and sometimes other natural and geographic features of a piece of land. If a conservation easement is intended to protect biological resources on a property, aspects of a biological baseline inventory may be incorporated into a baseline documentation report, but not all easements will require this level of scientific assessment of a property’s biological resources.

Well-prepared baselines can serve a valuable role in ensuring the perpetuity of the conservation easement it describes. A baseline should always ensure that its contents are specific to the property in question and the terms of the easement encumbering the land. The contents of the baseline should be limited to the subject and terms of the easement. The contents should be specific and measurable. In other words, simple conclusions, such as the property provides “good habitat” or protects “scenic views” is not sufficient; additional data should be included so that these conclusions are fully substantiated. For example, you might write: “The property contains habitat for elk and bear with two miles of scenic vistas visible from Route 2,” and then provide photos, maps, wildlife habitat studies and so forth to support your statement. Maps and photo reference points should be easily related to conditions on the ground, and photo points should be replicable over time. The baseline should be understandable and clear, so that a new landowner will easily comprehend why their property was conserved.

The baseline documentation report is a distinct document that represents the condition of the property at the time the conservation easement is granted and should be clearly identified as such. While the original baseline documentation report should not be altered, the land trust should update or supplement the report over time to reflect relevant changes that occur on the land (see Practice 11B3). Baselines must be created, maintained and stored according to established recordkeeping policies and procedures.

See Practice 11B2 for more information on how and when to create baseline documentation reports.

**REASONS FOR BASELINE DOCUMENTATION REPORTS**

There are a number of reasons a baseline documentation report should be prepared for every conservation easement transaction.
Complying with the Law

For those easements that seek to qualify for federal tax benefits, the Treasury regulations require baselines in some instances. The easements for which the regulations require a baseline are those in which “the donor [landowner] reserves rights the exercise of which may impair the conservation interests associated with the property” [Treas. Reg. §1.170A-14(g)(5)(i)]. Further, the regulations require that, for any natural resource protected by the easement’s restrictions, the condition of that resource at or near the time of the gift must be established [Treas. Reg. §1.170A-14(g)(5)(i)(D)]. The Treasury regulations define a baseline documentation report as “documentation sufficient to establish the condition of the property at the time of the gift” [Treas. Reg. §1.170A-14(g)(5)(i)].

Because the regulations only require a baseline documentation report in certain circumstances, a technical reading of the law may lead one to conclude that if an easement was created in which the landowner reserved no rights that might impair the conservation interests, a baseline is unnecessary. Although this may be a technically accurate reading of the regulations, best practices require a baseline for every easement, regardless of its terms.

Effective Monitoring and Enforcement

Baselines are critical to a land trust’s ability to monitor and defend an easement. The aerial and onsite photographs of the improvements located on a piece of land and the natural qualities of the land as of the date of the easement are vital to effective easement monitoring. The baseline report is an important tool because it establishes the condition of the property at the time the landowner granted the easement and provides a point of comparison from which to evaluate change. It forms the basis from which land trusts can monitor and enforce the permitted rights, restrictions and reserved rights contained in the conservation easement document.
Baseline documentation reports are also important because they provide evidence of the conservation values identified on a particular piece of property. Information about the specific values protected by the easement makes it easier for a monitor to determine if the easement terms are effective in protecting those values and may be helpful in interpreting vague or ambiguous easement terms. Baselines use several methods to provide such evidence, such as specific reports from experts (for example, biologists explaining the significance of the habitat on the property), data from statewide or regional studies about the land (for example, Natural Heritage Program data), maps from state or federal wildlife agencies, historic preservation designations, scenic designations and soils studies from the Natural Resources Conservation Service or local extension offices. Baselines also use maps and photographs to document the values and often include references to publications that offer support for the preservation of identified conservation values.

**Communicating with Landowners, Successor Owners and Future Land Trust Personnel**

Finally, many land trusts have found that one of the most important reasons to create baselines is as a tool for communicating with landowners. Sometimes land trusts learn that landowners may not be fully aware of the conservation values associated with their property or they are simply not used to seeing their land through “conservation eyes.” Reviewing the baseline, with its supporting documentation of the values and maps and photographs, can help educate a landowner about the special qualities of their land of which they might not otherwise be aware. Baselines have also been useful in educating successor generation landowners about the land they acquired, its particular conservation values and how the easement restrictions apply to their use of the land (what reserved rights remain, where certain activities are restricted and so on).

In addition, baselines are very useful in educating new land trust personnel in charge of monitoring and enforcing conservation easements in the future. As those who drafted and completed the easements leave the organization or retire, baselines increasingly fill an important educational function.

> For accreditation, a land trust must have a baseline documentation report for every conservation easement it holds (or a current conditions report for older conservation easements). This applies to every conservation easement, not just those conservation easements for which a landowner took a tax deduction. If the conservation easement includes mitigation elements where the planned restoration is still pending or is in process, a land trust still needs to have a baseline documentation report to document the conditions of the property; the baseline documentation report can then be updated once the mitigation work is complete.
BASELINE INFORMATION

Required Information

At a minimum, every baseline should include the following:

- **Date of completion.** Every baseline should contain the completion date and the date of the conveyance of the conservation easement. The acknowledgment statement must affirm that the baseline accurately reflects the condition of the property as of the date the landowner granted the conservation easement.

- **Landowner contact information.** Phone, email address, mailing address and off-season mailing address will make contact with the landowner easier.

- **Information on the location of the conservation easement or directions to the property.** This item may surprise some people until they realize that a conservation easement often contains no street address for a conserved property (only the landowner’s mailing address) and that in some parts of the country, a property’s legal description will often not include such information either. The only place that future monitors might be able to find such information is in the baseline documentation report or in a separate stewardship project file.

- **Property description and background information.** An overall description of the property and background information describing the conservation project can be extremely valuable in helping subsequent generations understand the easement. A well-prepared baseline will provide a context for the easement by including a section describing how the property fits within a larger conservation objective, or how it was funded using public and/or private dollars, or how the project may have been referred from another conservation organization or governmental entity, for example. If there are tenants on the property or it is leased for grazing or timber harvesting, this information should also be included in this section.

- **Documentation of the conservation values and public benefits.** A baseline must include data relating to the natural, historic or cultural resources that are protected by the easement and their condition at the time of closing. These include written descriptions, studies (for example, biological inventories or other natural resource studies, scenic inventories, evidence of historic designation), along with related maps (for example, soils maps) and photos.
• Documentation of existing conditions that relate to the easement’s restrictions and reserved rights. Thorough documentation of all man-made improvements that exist on the property is also necessary, and should include a narrative description of the improvements, their location on a map and photographs of their condition. The status of any reserved rights and prohibited uses contained in the conservation easement should also be documented (for example, if the easement permits a total of two single-family homes on the protected land, it is important that the baseline documents how many homes exist on the land as of the date of the easement), as well as other pre-existing conditions or features that may threaten the property’s conservation values.

• Dated signatures of the landowner and land trust, acknowledging that both attest to the accuracy of the information contained in the report. For tax-deductible easements, the acknowledgment must be compliant with the Treasury regulations [§1.170A-14(g)(5)(i)]. See Practice 11B2a for more information about timing and signatures.

• The authorship and qualifications or experience of the baseline preparer. Every baseline should indicate who prepared the document and should be signed by the preparer. Further, the qualifications of the party that prepared the baseline documentation report should also be stated.

• Other acknowledgements or information that would make the material admissible as a business record in court, such as an indication that the record was created at or near the time of the event rather than later in anticipation of litigation, that the record was created by someone with direct knowledge or who was given the information by someone knowledgeable, that the record was created and kept in the course of the land trust’s regularly conducted business and that it is the organization’s regular practice to create or maintain such records.

• Baseline or easement map. An easement or baseline map is critical to the understanding and interpretation of conservation easement terms in the future. Many land trusts also include such a map as an exhibit to their conservation easements. An easement or baseline map or collection of maps, must, at a minimum:

  o Clearly show the property, such as by containing property boundaries, north arrow, scale, date the map was created and signature block and contact information for the preparer

  o Contain features relevant to the enforcement of the conservation easement, such as
- Existing manmade improvements or incursions, such as roads, buildings, fences or gravel pits
- Vegetation and identification of flora and fauna, such as rare species locations, natural habitat, animal breeding and roosting areas and migration routes
- Land use history, including present uses and recent past disturbances
- Distinct natural features, such as large trees and aquatic areas
- Special use areas, such as building envelopes, protected riparian zones and forest management zones

**Tax-Deductible Conservation Easements**

Baseline documentation reports for tax-deductible conservation easements must contain documentation sufficient to meet the Treasury regulations. The Treasury regulations do not give us much information about what must be included in a baseline for an easement intended to qualify for federal tax benefits, but simply state that the items discussed in this section “may” be included in a baseline [§1.170A-14(g)(5)(i)]. However, best practices oblige land trusts to treat this list of inclusions as required baseline contents rather than as optional contents. The regulations suggest the following items be included in a baseline:

- The appropriate survey maps from the US Geological Survey, showing the property line and other contiguous or nearby protected areas.

- A map of the area drawn to scale, showing all existing man-made improvements or incursions (such as roads, buildings, fences or gravel pits), vegetation and identification of flora and fauna (including, for example, rare species’ locations, animal breeding and roosting areas and migration routes), land use history (including present uses and recent past disturbances) and distinct natural features (such as large trees and aquatic areas).

- An aerial photograph of the property at an appropriate scale, taken as close as possible to the date the easement is granted.

- Onsite photographs taken at appropriate locations on the property. If the terms of the easement contain restrictions with regard to a particular natural resource to be protected, such as water quality or air quality, the condition of the resource at or near the time of the easement grant must be established.
• A statement, signed by the landowner and land trust, that clearly references the baseline documentation report (including the maps and photographs) and that says in substance: “This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer [grant of easement].”

Conservation Purposes Test

The baseline should also include documentation sufficient to explain fully how the easement satisfies the IRS conservation purposes test, addresses the land trust’s mission and goals and provides a public benefit. Such documentation can include copies of relevant governmental policies, references to other projects the land trust completed in the area, descriptions of public funding received for the project, letters from qualified individuals attesting to the importance of the project and so forth.

Photo Point Map

As noted above, the regulations provide that onsite photographs should be taken at appropriate locations on the property. Such locations will be different for every project, but are generally those necessary to document the conservation values and existing man-made improvements. In order for a land trust to be able to monitor its easement terms adequately, it must be able to return to the place where such photographs were taken to monitor natural and man-made changes to the land. In order to do so, a photo point map must be created, indicating the location at which every photo in the baseline was taken. This map may be as simple as a topographic map with photo point locations noted, or it may use compass headings to locate the photo point, or GPS data to provide the photo point location. Whatever system is used, the preparer must be sure to note in what direction the camera was pointed when the picture was taken.
**Additional Information**

When land trusts consider how they will ensure that the conservation easements they hold will meet the promise of perpetuity, they realize that recordkeeping is key. Communicating specific details about a conservation project to those who will be responsible for monitoring and enforcing the easement 50, 100 or 1,000 years from now is critical, and a baseline is an excellent way of communicating. For this reason, some land trusts include more information in their baseline reports than might otherwise be necessary in order to communicate such details to future landowners and land trust representatives. Alternatively, the information listed below can be kept in a project or stewardship file, so long as the land trust’s recordkeeping policy and practices ensure that such documents will be available to use, if necessary, to enforce an easement in the future. Such additional materials might include the following:

- **Zoning of property.** Making note in the baseline about what zoning restrictions (if any) applied to a particular property at the time of its conservation can assist future parties to understand whether easement amendments might be appropriate or not. For example, if an easement was negotiated to reserve to the landowner the ability to construct a residence on the ridgeline of a property and the county in which the land was located later adopted ridgeline regulations that prohibited building in such a location, knowing the facts that existed at the time of the easement can help a land trust understand that a landowner who requests an amendment to relocate such a building envelope to another, buildable location may be fully justified in that request.

- **Tax or parcel map and assessment information.** Information on the property obtained from the local property tax assessment office can also provide valuable information on the property and its uses.

- **Names and contact information of adjacent property owners.** Some land trusts include the names and contact information of adjacent property owners for several reasons. For example, if these owners undertake activities that have spread onto the conserved property or identify a violation on a conserved property, the land trust may need to follow up with the neighbors. In addition, some land trusts include this information as part of an effort to protect additional lands in the vicinity of the original conserved property.

- **Copies of minutes or resolutions regarding conservation easement.** Documents showing organizational approval of the transaction may be attached as part of the project history.
• **Easement summary or copy of conservation easement.** If an easement summary is placed in a baseline, the baseline should contain a statement that the baseline is subordinate to the complete easement. Such language ensures that in the event there is a difference between the terms of the two documents, the easement language will control the interpretation of the terms.

• **Legal information.** Certain types of legal information could be placed in a baseline documentation report and are generally attached as exhibits to such reports. This type of information might include a copy of the title work the land trust acquired for the project and copies of any title exceptions (see Practice 9F1). If a land trust requests or requires that the landowner provide it with a copy of the landowner’s conservation easement appraisal, a copy of the appraisal could be placed in the baseline, as could a copy of IRS Form 8283, which the land trust will execute to verify it received a donation of a conservation easement. For easement purchases, the appraisal the land trust commissioned for the property could be placed in the baseline, as well as a copy of IRS Form 8283 (if the land trust purchased the easement at a bargain sale value). Other similar types of information, such as funding agreements, subordination agreements, leases and so forth, can also be placed in the baseline in order to ensure that important information relating to the project is maintained.

For accreditation, baseline documentation reports and/or current conditions reports must contain the following.

• Date of completion

• Written descriptions, maps and photographs that document the protected conservation values
  
  o *For example, if the purpose of an easement is to protect wetlands, the baseline should describe the wetlands, including the type, size and location through written descriptions, maps and photographs*

• Written descriptions, maps and photographs that document the relevant conditions of the property as necessary to monitor and enforce the terms of the conservation easement
  
  o *The relevant conditions include items such as the location and condition of any manmade improvements, data that would influence the exercise of reserved rights, pre-existing conditions that are otherwise prohibited by the conservation easement and other features that may threaten the conservation values*
  
  o *For example, if an easement permits a building to be enlarged by 20 percent and replaced in its current location, the baseline should contain the current size and location of the existing building*
- Acknowledgement attesting to the accuracy of the report signed by the land trust and the landowner (see Practice 11B2 for more information on signatures)
  - The landowner signature (or a documented attempt to obtain the signature) is needed on all baseline documentation reports for conservation easements completed in 2004 or later

- For accreditation, baseline documentation reports (or current conditions reports) must be distinct documents that represent the property’s condition at a specific point in time. A loose assemblage of documents that are added to over time do not constitute a distinct document.

COMPLETING BASELINE DOCUMENTATION FOR EASEMENTS WITHOUT BASELINE REPORTS

Land trusts should complete baselines so that they can be executed at the same time the landowner grants the conservation easement. However, some older easements do not have baselines because the critical importance of baselines to the perpetuity of an easement was not recognized at the time. Because we now understand the importance of this documentation, all land trusts should complete baselines for all easements, even those that may be several years old. Some land trusts may find this task daunting because of financial or capacity constraints, but addressing the challenge is worth the cost because of the value baselines bring to land trusts. The best way to manage this task is to create a plan for how these baselines can be completed and a timeline for completion.

Any baseline documentation report prepared to support an older easement, regardless of when the easement was granted, needs to document the property in its current condition, because it would be extremely difficult to document a property in its past condition. Another reason for preparing the baseline to reflect the current condition of the property is that attorneys who have examined this issue believe it is questionable whether a baseline that tried to document past conditions could be used as evidence in court. These baselines should be prepared using the same procedures the land trust uses to create all of its baselines and should be subject to the same standards.

If possible, landowners should sign baselines prepared for older easements just as those prepared for current easements. Land trusts who have worked on completing a backlog of baselines have had some success in securing landowners’ signatures on the documents, but rarely find that every landowner is willing to sign the baseline. Nevertheless, creating the document is still important, and when signed by the land trust as accurately representing the current condition of the property, the baseline provides great benefits to the stewardship of the easement over time.
For accreditation, if a first-time applicant has a baseline documentation report for each conservation easement but one or more are missing some of the required content, the land trust will need a feasible plan with strategies and a timeline to upgrade them before its first renewal.

ADDITIONAL RESOURCES

- Baseline Documentation Report Policy Template
- Baseline Documentation Reports, Practical Pointer Series
STANDARD 11 CONSERVATION EASEMENT STEWARDSHIP

B. Baseline Documentation Report

2. Prepare the report prior to closing and have it signed by the landowner and land trust at or prior to closing

   a. In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, the landowner and land trust sign a schedule for finalizing the full report and an acknowledgement of interim data [that for donations and bargain sales meets Treasury Regulation Sec. 1.170A-14(g)(5)(i)] at closing.

Accreditation indicator elements located at www.landtrustaccreditation.org

PREPARING BASELINE DOCUMENTATION REPORTS

Author

Land trusts will often create the baseline for each easement they hold, sometimes at their own cost and sometimes for a fee paid by the landowner. Although the Treasury Regulations require that a landowner “make available to the donee [easement holder], prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift [grant of easement],” the land trust should take the lead on creating the baseline in order to ensure that the document contains all the information that needs to be in a baseline (and no extraneous materials), that the report is prepared to the land trust’s standards and is consistent with other land trust reports and that the document is prepared within the requisite timeframe (prior to closing and executed at closing). If a land trust does not have the capacity to prepare baseline documentation, it should, at a minimum, adopt a policy that states that the land trust:
Landowners will sometimes ask if they can prepare the baseline, and some may be qualified to do so. Again, the land trust should take the lead on the project and ask for assistance from the landowner in the form of securing any maps, studies or other information about the property. However, if the landowner insists on preparing the baseline, the land trust must provide the landowner with plenty of notice, in the form of written guidelines, of what it requires in its baselines, as well as advice about completing the documentation on time. The land trust should educate the landowner about how easement holders use baseline documentation reports and the importance of the reports to the perpetuity of the conservation easement. In addition, some landowners do not realize that the baseline is as important to them as it is to the land trust, because a baseline can be used by a landowner to prove they did not act in opposition to the easement terms, or to demonstrate that certain land use activities are consistent with preservation of the conservation values identified on their land. Educating landowners about the importance of baselines can be helpful in securing full landowner cooperation in their preparation and execution.

If not directly completed by land trust personnel, a growing number of private contractors provide baseline documentation report creation services and may be hired by either the land trust or the landowner to prepare the reports. Many of the issues that apply to landowners preparing baselines also apply to private contractors. A land trust should adopt policies to ensure that regardless of who hires the contractor, the baseline preparer must:

- Be qualified to prepare the documentation
- Meet all standards in preparation of the report
- Prepare a report that is consistent with the land trust’s other baselines
- Prepare the report with sufficient time for the landowner and land trust to review and approve its contents and make any changes in time to execute the baseline at the closing of the easement

Finally, the land trust must determine who will pay the contractor to prepare the baseline. Will the land trust provide this service or is the landowner required to pay the cost of the baseline preparation?
Given the fact that there are several ways to create a baseline, a land trust is strongly advised to adopt a baseline policy or procedure that will guide the preparation of the report. Such a policy should address, at a minimum, the following issues:

1. Timeline for creating and finalizing the report
2. Process for preparing the report (site inspection, interviews, research, acquisition of maps, aerial and onsite photographs and so on)
3. Required and optional contents
4. Reserved right to land trust to review and require changes
5. Qualifications of those preparing report
6. Required signatories on the report, including the landowner, land trust and baseline documentation report preparer
7. Acknowledgment of signatures by sworn statement before a notary public

See Practice 11B1 for more information on baseline documentation reports and their content.

**Timing**

One of the greatest challenges in preparing a baseline documentation report is ensuring that it is prepared and completed on time. The question of when a baseline must be completed is answered in part by the Treasury Regulations, which require that the baseline document the condition of the property as of the date of the grant of the easement (the closing date). Baselines that fail to demonstrate that they accurately reflect the condition of the property at closing may endanger any federal tax benefits for which the easement might otherwise qualify.
Because it can take a good deal of time to prepare a baseline, meeting the requirement that the baseline reflect the condition of the land at the date of the closing of the easement can be a challenge. Land trusts must establish a system that provides a complete baseline by closing that reflects the condition of the property at closing, while understanding that the site work, research and document preparation that is required to complete a baseline must be commenced sometime before closing. Many land trusts prepare their baselines weeks, if not months, before an easement closes and, consequently, adopt procedures to ensure that the conclusions about the condition of the property are still accurate as of the date of closing. Land trusts often schedule a site visit to the property sufficiently close in time to the closing date that they can be sure the conditions reflected in the baseline will remain the same by closing, yet with enough time to make changes to the baseline if the site visit indicates changes are necessary to reflect the property’s condition at closing accurately.

Conservation easements not intended to qualify for federal tax benefits must still have a baseline, and these baselines should also be prepared so they reflect the condition of the property as of the date of the easement and can be executed at closing. Some land trusts have found that once an easement is closed, they have little luck securing a landowner’s signature on the baseline (which is rather curious, because the baseline benefits the landowner as well as the land trust), and thus have learned that they have the most leverage to secure the landowner’s signature if execution of the baseline is a condition of the conservation easement closing. Other land trusts secure a letter agreement from the landowner in which the landowner promises to sign the baseline and any supplement or place this language in the easement itself. Some land trusts will take the baseline to a landowner’s home in order to explain the baseline contents and its importance and to make it easy for the landowner to sign the report. Many land trusts insist that the signatures on their baselines be notarized (through a sworn statement before a notary public), in some cases for legal reasons by virtue of state law or to ensure that the document may be introduced as an exception to hearsay rules, and other times in order to impress upon the landowner the importance of the baseline report. Land trusts should have baseline signatures notarized for these reasons.

As a general rule, land trusts should prepare three original copies of every baseline documentation report. One should be treated as the original and stored securely in accordance with the land trust’s recordkeeping policy. The land trust should send one to the landowner, and the third (or a copy) should be kept in the offices of the land trust so that it can be referred to on a regular basis as necessary. If the conservation easement is co-held with another entity or creates any third-party rights, such as a right of enforcement, or if it identifies a backup grantee, the land trust should provide an original of the baseline to these parties. All original baselines should be signed by all the parties to the transaction – landowner, land trust and any co-holding entity.
For accreditation, a baseline documentation report must include an acknowledgement attesting to the accuracy of the report signed and dated by the land trust and landowner at or before closing. If a land trust has older baseline reports that are not signed or creates current conditions reports for older easements, it should attempt to obtain the landowner signature for all easements competed in 2004 or later. If a land trust cannot obtain the signatures of the landowner on these reports, it should retain documentation that it attempted to get the reports signed.

Seasonal Conditions and Finalizing the Report

In some parts of the country, land may be inaccessible or the land cannot be thoroughly analyzed at particular times of year, due to snow cover or the fact that the growing season has not yet begun or has ended. In such situations, the land trust should prepare and execute a baseline at closing with all information that is possible to collect at that particular time of year. In addition, the land trust must establish a schedule for completing the baseline when conditions permit and secure an agreement from the landowner (in writing) that the landowner will permit the baseline preparer entry to the property to complete the documentation and that the landowner will execute the final report with the supplementary information. In this manner, an interim baseline report is prepared and executed at closing and is supplemented with material sufficient to create a complete baseline when weather or growing conditions permit.

Although not preferable – because the Treasury regulations clearly state that the baseline should be a representation of the property at closing – interim data that meets Treasury regulation §1.170A-14(g)(5)(i) is acceptable, as long as the land trust has a schedule for finalizing the full report. Doing so may prevent an IRS query into the deductibility of the conservation easement transaction.

If seasonal conditions prevent the baseline documentation report from being completed prior to closing, a land trust must have interim data and a schedule for finalizing the full report that are signed by the land trust and landowner at or before closing.
ADDITIONAL RESOURCES

- Baseline Documentation Report Policy Template